

DOUBLE SIDED

Decision No. C 179 /2003

IN THE MATTER of the Resource Management Act 1991 (the Act)

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN PIGEON BAY AQUACULTURE LIMITED

(RMA 528/02)

Appellant

AND

CANTERBURY REGIONAL COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)

Environment Commissioner W R Howie

HEARING at CHRISTCHURCH on 3 to 6 March 2003 and 11, 12 March 2003

APPEARANCES

Mr D J Clark for Pigeon Bay Aquaculture Limited (the applicant)

Ms M Perpick and Ms A M Douglas for the Canterbury Regional Council (CRC)

Mr P G Rogers and F D Brunton for Earthsea Double Bay Limited (Earthsea)

Mr E T Alty for the Department of Conservation (the DOC)

DECISION

[1] The applicant seeks a resource consent to establish a mussel farm at Big Bay on the northern side of Banks Peninsula.

[2] That application was refused by the CRC and appealed to this Court. Both Earthsea and the DOC support the CRC decision at first instance.



[3] The essential task for this Court relates to whether a consent should be granted for the discretionary activity and the application of the various criteria under section 104 and Part II of the Act.

[4] The proposed marine farm would farm green lipped mussels, using the long line method. The original application sought some 11 hectares but four alternative configurations were proposed to this Court on appeal. In closing the applicant has abandoned the original application area with the three other options promoted being between some 5.65 hectares and 6.16 hectares or a little over half the original application size.

[5] The application is opposed by CRC, Earthsea and DOC. Concerns are wide ranging but include natural character and visual issues in particular.

Resource consents

[6] Section 12(1) and 12(2) set out four types of consents which are required, namely:

- (a) To construct and place structures. In this case this would consist of anchors, anchor lines, backbone ropes, droppers and floats (section 12(1)(b) of the Act);
- (b) To occupy the area (or part thereof) with structures (section 12(2)(a) of the Act);
- (c) To disturb the sea bed (section 12(1)(c) or (e) of the Act); and
- (d) To provide for the deposition of shell and other by-products of the marine farming on the seabed of the site (section 12(1)(e) of the Act).

The status of the application

[7] Parties are agreed that the proposed regional coastal environment plan (PRCEP) has now progressed through the planning process to a stage where decisions have been made on submissions and references filed. Variations have been introduced affecting relevant portions of this plan, but those too have reached the point where references



have been filed. Any references that were relevant to this appeal are now resolved and the relevant aspects of the plan are beyond reference. The parties are agreed that it can be treated as being operative for the purposes of this hearing.

[8] The application does not involve restricted coastal activities because:

- (a) Pursuant to section 372(3)(c) of the Act the proposed plan has been notified and any prior notices from the minister of conservation cease to have effect;
- (b) Under section 68(4) of the Act the activity would be a restricted coastal activity only if the plan required it to be restricted and that provision had the concurrence of the Minister of Conservation on certain stated grounds. In this case the issue does not arise as the plan does not state the activities the subject of this application to be restricted coastal activities. Section 68(A) does not apply as there are no aquacultural management areas under the PRCEP at this time.

[9] The plan does have differing activity status for the various activities which we have previously identified, although none are identified as restricted coastal activity. They are as follows:

- (a) In respect of structures these are discretionary pursuant to clause 8.3 of the PRCEP;
- (b) In respect of occupation this is a permitted activity if a consent is granted for the structures (paragraph 8.23 of the PRCEP);
- (c) Disturbance or removal is permitted if directly related to a structure consent (clause 8.7(c)(i));
- (d) Deposition is permitted if it is contemporaneous with the exercise of construction of the structures (clause 8.12(a)(i)) or is discretionary in relation to the use of structures under 8.13.

[10] As we understand it the activities of occupation and disturbance of the seabed would therefore constitute activities which are allowed as that word is used both in section 12(1) and (2). We repeat the concern of the Environment Court in *Pigeon Bay*



*Aquacultural Limited v Canterbury Regional Council*¹ where the Court in that case noted that the CRC's use of such a mechanism is fraught with difficulties. The basic problem arising, which we will discuss in some more detail a little latter in this decision, is that it is difficult to see how the effects of occupation and/or disturbance of the sea bed can be taken into account where that activity becomes a permitted activity if the consent to the structures and deposition from shellfish is granted. Can the occupation by the structures of the water area properly be a consideration for the Court if the occupation itself is a permitted activity? In short the classification of these activities as permitted does not appear to be based upon the exercise of any of the Council's direct powers under section 30 but rather on the exercise by the Council of a discretion in respect of other resource consent decisions relating to the same site. We have a continuing concern as to this bundling and out of caution consider that we should examine the effects of all four activities (under section 104(1)(i) at least).

[11] This leads us to the conclusion that we should consider the grant of consents for all four activities. It was suggested by one expert that there may also be a question as to whether a consent is required for discharge to water, particularly of the shell and pseudofaeces during the normal farm operation and at harvesting. Tentatively we see that such permissions must be included within the discharges already sought i.e. deposition on the seabed can only occur by the medium of the water. However the matter was not fully argued before us and we reach no final view on this issue.

[12] We also note that although the status of these activities was agreed between the parties, marine farms are not dealt with separately within the plan and are dealt with as general structures. Accordingly the PRCEP does not provide explicitly for the areas in which marine farming may occur or provide any specific criteria for marine farms. We note that to fulfill the requirements of chapter 3.2 of the New Zealand Coastal Policy Statement policy 3.2.1:

Policy statements and plans should define what form of subdivision, use and development would be appropriate in the coastal environment, and where it would be appropriate.

¹ [1999] NZRMA 211 at 217, para 15



We have concluded that to meet this mandatory requirement we must read the PRCEP as indicating that marine farming is generally not inappropriate in the areas in which it is provided for as a discretionary activity as to the structure. If it is not provided for in this zone, there is no other zone suggested to us by any witness in which such provision could be made. Similarly it cannot be argued that on reasonable reading of the PRCEP it does not provide for marine farms as an appropriate development in the coastal environment as we shall discuss in more detail in due course.

The Context of the PRCEP

[13] Much of the argument put to this Court related to how the provisions of sections 6 and 7 of the Act and the New Zealand Coastal Policy Statement (NZCPS) bore upon this application. This appeal does not relate to a reference under the plan and the provisions of the PRCEP are not in dispute. No party suggested to this Court that the relevant provisions of the PRCEP are inconsistent with either Part II of the Act or the NZCPS or the Regional Policy Statement (RPS). To that extent we assume that for the purpose of this appeal hearing those provisions are subsumed within the PRCEP which has been explicitly prepared in accordance with all three of those superior documents. The Court is explicitly required under section 104 to consider part II of the Act and the NZCPS and RPS: Accordingly that assumption could be rebutted. However we did not understand the CRC case to be that the PRCEP did not meet the obligations under any of those superior documents nor did we understand that to be the position of any witnesses who gave evidence to this Court.

[14] The expert witnesses accepted that the provision for this activity as discretionary in this area meant that the activity was generally appropriate within that area but not at every site. The importance of this issue will become clearer as we begin to examine the relevant plan and provisions of the superior documents.

[15] In particular the parties are agreed the PRCEP provides for structures as non-complying activities at most bays around Banks Peninsula between Lyttelton and Akaroa Harbours. This site is one of very few bays including relevantly Double Bay, Little Pigeon Bay, Scrubby Bay, Manuka Bay, Squally Bay and Raupo Bay which are



not included within the non-complying zone. The relevance of the CRC granting a resource consent recently for a mussel farm in Squally Bay will also need to be considered in due course.

The Proposal

[16] The applicant Pigeon Bay Aquaculture has two existing farms in Pigeon Bay subject of a previous decision of the Environment Court². There has also been an application for extension to those farms, the subject of appeal to this Court, which has been resolved by consent order. Mr Aitken is a director in the applicant company and owns the land to the eastern side of Double Bay through to Pigeon Bay.

[17] The applicant seeks to establish a Mussel Farm for the growth of green lipped mussels parallel to the eastern coast of Double Bay approximately 60 metres offshore from mean low water mark near the eastern headland to that Bay. The size of the farm varies from the original proposal of around 11 hectares. The three proposals now currently before the Court are between 5.625 hectares and 6.16 hectares. The three options being pursued are attached to this decision as **Appendices 3, 4 and 5**. For the sake of clarity, Appendix 3 is also sometimes referred to as the Rackham option and on each of the diagrams the original application site is shown by a dotted outline.

[18] It is intended that there will be long lines (back bones) anchored to the seabed by virtue of ropes (warps) attached to end buoys which line will run parallel to the coast. The anchor warps will be some 32 metres long with a ratio (scope) to the seabed of 5:1.

[19] Screw anchors will be used to fix the warps to the seabed. The warps will attach to the backbone rope which will then run parallel to the Coast to the next end buoy and anchor warp. Depending on the configuration these will be either a single line or two lines. From the backbone are suspended the droppers in a continuous line tethered at intervals to the backbone to form a snake like line when viewed horizontally. Mussel spat is attached to the droppers originally in stockings and eventually by the attachment action of the mussels themselves. As the crop grows on the dropper lines there is a need

² [1999] NZRMA 211



for more floats increases. The floats to be used are around two-thirds of the size of the industry standard and are intended to be semi submerged at all times. The maximum number of floats will be required just prior to harvesting when there is the densest concentration of mussels. At this stage the floats will be no closer than 6 metres spacing on the backbone. The dropper lines are tethered to the backbone by a line (usually made of rope).

[20] We are not aware that there is any proposal for there to be buoy tether areas (spare buoys). We understand all servicing of the farm will be from barge with no land-based activities or materials at Double Bay.

[21] Navigation lights are required on each corner of the farm and navigational buoys which are usually orange in colour. All harvesting is to be by barge and boat with no shore based activities at Double Bay. We also understand that the farm will be maintained in tidy condition at all times with no spare buoys, lines or other items attached to the farm.

[22] For harvesting the tethers attaching the dropper to the backbone are cut and a harvesting barge strips the mussels from the line and droppers. These are sorted by staff into sacks with breakage etc being put over the side. As the mussels are stripped from the droppers there is a release of detritus to the water. Harvesting occurs approximately once every 18 months.

[23] The evidence for the applicant was that this farm is significantly over designed compared with Pigeon Bay in recognition that it will be subject to greater forces than the Pigeon Bay site. The site is subject to heavy seas particularly in northerly or northwesterly conditions. In part the small buoys are utilised to allow waves to pass more freely through the farms giving less resistance to wave action. It is accepted by the applicant that only recently does the industry believe that the technology is now available to build farms in these more exposed sites. This site is more protected than the so called mid bay or open sea sites which are proposed elsewhere in New Zealand and in the middle of Pegasus Bay.



The application's relationship to Double Bay

[24] The proposed options Appendices 3, 4 and 5 are all near the eastern headland but inside Double Bay. All proposals are also outside the inner headland between Big Bay and Blind Bay and finish well before the east west parallel line which touches the tip of the inner headland between Big Bay to the east and Blind Bay to the west.

[25] There are three properties touching on Double Bay. These are the Chamberlain property which owns the western part of Blind Bay, the Earthsea property which occupies the inner headland and most of Big Bay and the Aitken property which occupies the western side of Big Bay and the hinterland behind Big Bay.

[26] Within Double Bay there is only one house situated at Big Bay around 200 to 300 metres from Big Bay beach. This property is over 1 kilometre from nearest of the three continuing options (Appendix 4).

[27] There are a number of macrocarpa trees on the beach which Earthsea are in the process of removing. There is a wool shed approximately 100 metres from the beach, a boat shed just behind the shoreline of the beach and a remnant jetty in the eastern inner part of the harbour of Big Bay. There is some tracking around the eastern side of Big Bay which terminates prior to the jetty.

[28] Double Bay is surrounded by steep land forms, similar to that around the balance of Banks Peninsula. Ms Lucas for the CRC indicated that the geological formation of this area is distinctive from either the Lyttelton or Akaroa caldera. From our site inspection we accept that upon careful examination one can see slightly softer land forms at Double Bay. The difference however is not so pronounced that it would be noticeable to anyone other than an expert. Nor is the experience dissimilar from that of the coastal area between Lyttelton Harbour and Pigeon Bay.

[29] There was clear evidence of cut over stumps during our site visit which satisfied us that the ridge line area has previously been in podocarp forest and has been cleared since European occupation. Earlier forestation is not so clear in respect of the shoreline areas round Big Bay and Blind Bay and on the fingers extending into the ocean. We



accept however that there is likely to have been a cover of tussock grasses, at least on the lowest portion of these areas, for a considerable period of time.

[30] We think that the general nature of this area is encapsulated in the comment of the Environment Court in *Rutherford Family Trust v Christchurch City Council*³. Although commenting on the Port Hills the comment is equally as apposite for the area of Double Bay:

[12] *We find that the Port Hills of Christchurch are the outer slopes of one of the two main drowned volcanoes - Lyttelton and Akaroa Harbours - which make up Banks Peninsula. The radial nature of the ridges - solidified lava flows - falling away from the craters is clearly visible in aerial photographs. Other volcanic materials deposited on the volcanoes' sides were ash and scoria. Much of the Port Hills basaltic base-rock is now covered both by soils derived from these rocks, and by a thick layer of loess - fine glacial dust blown from the Southern Alps.*

[13] *Prior to human arrival much of the Port Hills, and indeed of Banks Peninsula, was covered with podocarp forest. However, after the arrival of Maori, burning converted significant areas to tussock grasslands, and successional forest.*

This particular area is largely the result of volcanic action of Mt Herbert but otherwise fits within the general description given.

[31] At the current time the Aitken property both on the eastern side of Big Bay and in the hinterland behind it is farmed for cattle and sheep. The areas higher on the ridges have more intensive exotic pasture with the areas on the fingers to the headland consisting of more of a mix of tussock, some underlying native scrub and exotic pastures.

³

C26/2003 at paragraphs [12] and [13]



[32] The area occupied by Earthsea has tussock and exotic pasture grasses with some native scrub and planted exotic areas. There is a plantation of *pinus radiata* on the western side of the Earthsea Double Bay part of Big Bay and a small *macrocarpa* lot to the east of the house and behind it. There is also some exotic and native planting throughout the Big Bay area itself of relatively recent origin. There appears to be tussock and pastoral grass available for grazing although the exact limits of that were not clear from our site inspection. On the Chamberlain property the area again seems to be largely in tussock and pastoral grass with grazing of both sheep and cattle evident. On the ridges behind Double Bay there is evidence of cut over forest with a small remnant of podocarp or sucessional forest on the ridge behind Blind Bay (the Chamberlian property). This is, we understand, a voluntary reserve. The experts were unable to tell us, nor could we ascertain, whether there had ever been forestry to the sea edge at Blind or Big Bay.

[33] Along the coast between Double Bay and Port Levy are rugged headlands showing clear wave cut action and caves. To the east of Double Bay towards Pigeon Bay there are similarly areas of wave cut headlands. Within Double Bay itself it can generally be said that the western side of Double Bay exhibits more evidence of wave cut action, rock, bird life and the like than the eastern side which has little evidence of such features. From our observation of the other bays in the area this can generally be said of areas which are oriented in a north south direction when comparing the western side of the bay with the eastern side.

The Court's approach

[34] The parties have agreed the status of the activity is discretionary and this leads to the application of section 104 and section 105(1)(b) of the Act. The determination of the Court under section 105(1)(b) of the Act turns on the application of the principles of Part II and in particular section 5. In informing that decision section 104 directs our attention to a number of criteria. It is our intention to deal with the criteria in the following manner:

- (a) Part II matters particularly section 6(a) natural character of coastal environment;



- (b) Whether this is an outstanding natural landscape under section 6(b) of the Act and the effect of this;
- (c) Amenity issues under section 7(c). This will include not only views from Earthsea but also boating visitors, kayaks, walking visitors, general effects under section 104 to the extent not already addressed. This will particularly identify visual matters mostly covered under section 7(c);
- (d) Access, navigational and public space issues under section 60 of the Act;
- (e) Ecological matters including benthic and hectors dolphin;
- (f) Cumulative effects, positive effects and precedent effects;
- (g) Policy statements particularly the New Zealand Coastal Policy Statement and Canterbury Regional Policy Statement;
- (h) The objectives, policies and rules of the PRCEP and relevant district plans;
- (i) Other matters under section 104(1)(i) particularly precedent, common operation with farms in Pigeon Bay, and open bay farms.
- (j) The Court will then turn to exercise its discretion under section 105(1)(b) and section 5 of the Act.

Preservation of the natural character of the coastal environment - section 6(a)

[35] Section 6 of the Act provides relevantly

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall 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) ... and the protection of them from inappropriate subdivision, use, and development ...; and*
- (b) *the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;*
- ...
- (d) *the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.*



[36] Mr A M Rackham a landscape architect was called on summons by the applicant. Mr Rackham provided the original section 42 report to the Council. Mr Rackham's report had been favourable to the application whereas the decision of the CRC committee had been to decline the application. Mr Rackham was therefore called to produce his original report provided to the Council and gave further evidence to the Court in respect of this matter.

[37] Four expert witnesses were called on landscape and visual matters and these were Mr A M Rackham, Mr P Rough for the applicant, Ms D J Lucas instructed for this appeal by the CRC, and Mr C R Glasson for Earthsea. A large measure of agreement existed between the experts.

[38] Mr Rackham's firm, Boffa Miskell, has been involved and retained by the CRC over a number of years and undertaken both regional and specific assessments for the CRC. Furthermore they prepared the background document relied on to differing degrees by all of the experts dated March 2001 which is entitled *Assessment of Coastal Suitability for Marine Farms on Banks Peninsula* which report is subtitled *Natural Character, Natural Features/Landscape and Amenity Values*. Furthermore we are satisfied that Mr Rackham in preparing his report to the Council for this case assessed this site in the context of that report and accordingly in the context of the whole of Banks Peninsula.

[39] In respect of the natural character of the coastal environment Mr Rackham put to us a definition developed recently by a consultative group with the Ministry of the Environment as follows:

Natural character is the term used to describe the natural elements of all coastal environments. The degree or level within an area depends on:

- (1) *The extent which natural elements, patterns and processes occur;*
- (2) *The nature, and extent of modifications to the eco systems and landscape/seascape;*



- (3) *The highest degree of natural character (greatest naturalness) occurs where there is least modification;*
- (4) *The effect of different types of modification upon natural character varies with context and may be perceived differently by different parts of the community.*

[40] Mr Rackham adopted this as a definition of natural character for the purposes of this case. We have reached a similar conclusion as to the meaning of section 6(a) namely:

1. All coastal environments have natural elements;
2. It is important to identify those natural elements, patterns and processes;
3. That section 6(a) seeks to preserve those natural elements to protect them from:
 - (i) inappropriate development; but
 - (ii) subject to the overriding constraints of section 5.

[41] In short we have concluded that the preservation envisaged in the first part of section 6(a) is subject to the qualification as to inappropriate development in the latter part of that subsection. In *New Zealand Rail v Marlborough District Council*⁴ the High Court discussed section 6(a) in some detail. Because of the centrality of this argument in this case it is worth quoting at some length from this case. The Court discussed the question of 'inappropriate' under section 6(a) and noted⁵:

"Inappropriate" subdivision use and development has, I think, a wider connotation than the former adjective 'unnecessary'. ... "Inappropriate" has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the

⁴ NZRMA 70 at 85
⁵ 70 at 85



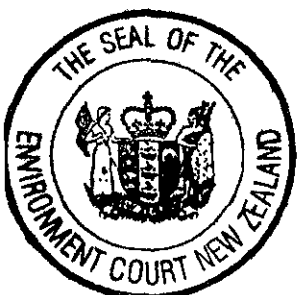
promotion of sustainable management if the matter is of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement that is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and promote the objectives and policies and the principles under the Act.

In the end I believe that the tenor of the appellant's submissions was to restrict the application of this principle of national importance, with the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the Act or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the Act and had regard to the various matters to which it is directed. It is the Tribunal which is entrusted to construe and to apply those principles, given the weight that it thinks appropriate.

Furthermore the Court discussed section 6(a) in relation to section 5 and said:

That the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.



[42] In this case marine farming is only provided for as a discretionary activity in certain coastal areas. That includes the subject site. It could therefore be argued that the activity is not inappropriate because it is provided for in this area in the PRCEP. In *Golden Bay Marine Farmers and Ors v Tasman District Council*⁶ the Court was particularly concerned with references in respect of a coastal plan. Accordingly, in that case the Court was concerned as to what content the plan should have to reflect the various elements of the Act and policy statements. At paragraph 727 of that decision the Court noted:

Mr Rackham considered that the closer the development is to the non-modified coastal margins the more weight should be given to s.6(a) values. He considered that the more one moves landwards in that assessment, the greater will be the dilution of the natural character of the CMA. He was not prepared to discuss natural character issues for offshore locations - because that was not his brief. But Mr Rackham also said this:

In my opinion the major concern falls back on the appearance of natural character as determined by the nature and scale of modification.

A surface marine farm will introduce a significant modification in the water surface wherever it occurs in the bay (apart from alongside existing farms) ... There is some justification in favouring sites adjacent to a more modified coastline ...

And later, in relation to modified areas, the Court noted at paragraph 730:

In doing so, we note the natural character of the coastal environment is not required to be preserved or protected at all costs: NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 at 85 and Trio Holdings Ltd v Marlborough District Council [1997] NZRMA 97 at 116. Just because an area contains a natural character worth preserving does not mean the development is automatically inappropriate. No party sought to prevent additional marine

⁶

W42/2001.



farms in these references, so they may be considered "appropriate" in terms of s.6(a). Their location and scale will determine whether the development in both bays is inappropriate or otherwise.

And in the decision *Kuku Mara Partnership v Marlborough District Council*⁷ the Court said at paragraph 570:

The location and scale of the development in the CMA will assist in determining the appropriateness or otherwise of a development on any given site because marine farming is an activity which may only be carried out in that location.

[43] The issues are:

- Is the area in question already affected by the loss of natural character?
- Is the natural character of the environment preserved and protected in terms of section 6(a) notwithstanding the development?
- Is the location and scale of the proposal on this site inappropriate?

[44] We conclude that section 6(a) envisages that regional coastal plans may indicate an activity is not inappropriate by providing for it as either a permitted or a controlled activity or, depending on the site and location, as a discretionary activity. In this case we accept that marine farms are generally not inappropriate within this area as they are provided for as a discretionary activity. However, this does not mean that every site within the area and every farm proposed will not be inappropriate. Inappropriateness in respect of an individual marine farm will depend on a number of factors, including particularly location and scale of the marine farm in question.

[45] We accept Mr Rackham's evidence to us that inappropriateness in this case must be context sensitive. In other words, a farm which might not be inappropriate in respect of the natural character of Pigeon Bay may be inappropriate elsewhere around Banks Peninsula. We also recognise that in assessing the natural character of the coastal environment we are very much concerned with the particular catchment area that we are



⁷ W25/02.

including for the purposes of assessing that coastal environment. For example, the actual area covered by mussel lines represents a significant change to the natural coastal environment for that particular area and/or water column occupied by the structure. On the other hand, in the context of a large coastal environment catchment (for example Pigeon Bay), the degree of change of that natural character may be minimal.

[46] We have concluded that the major parties opposing this application have conflated the provisions of section 6(a) and 6(b). The consideration of natural character of the coastal environment by the opponents' witnesses has been combined with the case law relating to outstanding natural landscapes to constitute an argument very close to that identified in the *NZ Rail* case. In other words it appears that we were being faced with an argument that, taken together, sections 6(a) and 6(b) dominate the consideration under section 5 militating only one outcome.

[47] However, counsel accepted that section 6(a) and (b) either separately or combined cannot create a veto over an application being considered under section 5, but merely inform the essential decision making process required under section 5. That position must be further strengthened by the Privy Council decision in *McGuire v Hastings District Council*⁸ which has clarified that the Act has a single broad purpose as defined under section 5. Accordingly the primary task of the Court must be (in a discretionary application) to take into account the various matters under section 104 and integrate these in a decision under section 5. Each case may require a different application of the various elements of sections 6, 7 and 8 and the other provisions of section 104 depending on the evidence before the Court and its assessment of the many legal and value judgments which are required as a result. The weight to be given to each element will contribute to the integrated assessment for each case required by section 5.

Outstanding natural landscapes – section 6(b)

[48] The Court was faced with a considerable amount of evidence that this site constituted part of an outstanding natural landscape. The argument followed that

⁸ [2002] 2 NZLR 577.



because the Regional Plan had identified the whole of Banks Peninsula as a regionally outstanding landscape, then each element, including Double Bay must be outstanding.

In the *Rutherford* case which we have just mentioned there does not appear to be any dispute that the Port Hills are identified as outstanding. The Christchurch City plan in that case said so and this was confirmed by the Court.

[49] In this case the parties did not point to any provisions of either the district or the PRCEP which provided for this area or Double Bay as an outstanding landscape. Rather, they referred to an assessment undertaken some time ago (1993) and the provisions of the regional policy statement in relation to Banks Peninsula as a whole. This very issue was discussed by the Court in the *Rutherford* decision and in particular the limits of the outstanding natural landscape in built up areas. Mr Rackham himself said the grain of the study which identified Banks Peninsula as an outstanding regional landscape was particularly coarse. He accepts that such an assessment does not mean that every element of Banks Peninsula is an outstanding natural landscape. There are significant built areas throughout Banks Peninsula, including a major port. There are structures and elements both within the coastal environment and on land which are the antithesis of an outstanding natural landscape.

[50] If the intention was that every element of the landscape was outstanding then this argument would mean that the PRCEP is inconsistent with the regional policy statement because it does not provide for every coastal area as outstanding. On the contrary, the PRCEP does identify a number of outstanding landscapes around the coastline. We conclude that this must constitute CRC's compliance with its obligations in terms of the regional policy statement and section 6(b) in the preparation of this regional coastal plan.

[51] Accordingly the fact that this site was not identified as being an outstanding natural landscape means that the Council has concluded in preparing the plan that the obligations under section 6(b) do not apply to this site. To fail to do so would breach their obligations to recognise and provide for outstanding natural landscapes under section 6(b) of the Act.



[52] Further, our discussion in relation to the word inappropriate in the context of section 6(a) is equally applicable to section 6(b). In short, there is no evidence before us to establish that there is a fault in the PRCEP in identifying outstanding natural landscapes in this area or that Double Bay is an outstanding natural landscape.

[53] Mr Rackham repeatedly said, in answer to cross-examination, this does not mean that the area does not have high natural values. We conclude that high natural values are recognised and provided for in terms of section 6(a). In *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*⁹ the Court noted that outstanding natural landscapes would be obvious in general terms. Here the PRCEP has recognised and provided for natural character and outstanding natural landscapes through a comprehensive set of provisions. It has excluded certain bays from discretionary consents for man made structures and made that activity a non-complying one in those areas. It has not identified Double Bay as an area where such restrictions generally apply or where there are outstanding natural landscapes.

[54] In terms of the application of sections 6(a) and (b) to the circumstances of this case, the major impact identified by the parties was the potential for the man-made structures (essentially the floats) to interfere with the visual or aesthetic elements of the coastal environment and/or landscape. There was some evidence that there may be a modification of the benthic elements in this area. It was suggested that there may be mussel reefs established below the mussel farm, or that there may be an alteration to the phytoplankton and therefore benthic communities in the area. We found this evidence less than compelling. Green-lipped mussels are endemic in this area, although sea conditions may be such that the area is particularly sparsely populated. The area under the site is mud bottomed as is much of the surrounding area. There seems to be relatively low levels of benthic community or fish life. The growth of green-lipped mussels is in itself an entirely natural process and does not require any inputs, excepting the structures themselves and the regular harvesting.

[55] Accordingly the only derogation from the natural character of the coastal environment that we are able to see is the intrusion of man-made structures (essentially

⁹ [2000] NZRMA 59 at pp 95 and 96.



floats) where there are currently none. It therefore does not amount to a derogation of any natural elements or processes but does intrude into an entirely natural pattern. Again we can only conclude that the level of derogation is a factor of location and size. Such an assessment is best made as part of the overall assessment under section 5.

Amenity issues – section 7(c)

[56] The Court clearly needs to take into account the potential visual effect of this activity, both in terms of the coastal environment and in respect of its context. This in itself involves a series of value judgments. This case is a clear example of how experienced and well informed experts may still not be able to agree in respect of the value judgments to be exercised in such cases. Mr Rackham and Mr Rough concluded that, although there was a significant visual effect both within the farm and up to 500 metres from it, in the context of the bay as a whole and the potential viewing audiences the effects were less than minor. Mr Glasson and Ms Lucas reached contrary conclusions. To some degree we accept this was influenced by three factors:

- (a) A difference between the parties as to whether or not the viewing audience included people standing on the coastline adjacent to the Aitken property to the east of Big Bay;
- (b) The catchment area for significant visual effect of the farm. In particular whether this was 500 metres or some greater measure, say over 1 kilometre; and
- (c) The qualitative assessment of the natural character of the coastal environment and the hinterland (visual catchment area).

[57] The conclusions of the parties were significantly different. We prefer the evidence of Mr Rackham for the following reasons:

- (1) Mr Rackham was independent of the parties' position in this matter;
- (2) His firm had undertaken a large number of assessments for the CRC;
- (3) That they had specifically prepared a report in March 2001 on the subject of marine farms around Banks Peninsula;



- (4) That Mr Rackham's evidence looked at this site in the context of Banks Peninsula as a whole and in the context of various elements which made up the PRCEP and its provisions for this activity as discretionary;
- (5) The Court's site inspection reached similar conclusions to these of Mr Rackham in respect of visibility of the marine farm, the likelihood of a viewing audience on the eastern headland, and the qualities of the visual catchment.

[58] Essentially those conclusions were:

- (1) That the coast in this area is still predominantly natural;
- (2) That the adjacent land retains a natural character, though it is far from pristine;
- (3) That an area of open water in the outer bay will lose a large measure of its present naturalness;
- (4) The proposed modifications to marine processes are unlikely to affect the shoreline or land based ecology;
- (5) Where the proposed farm is adjacent to the shore the existing natural character of the coastline will be adversely affected to some extent;
- (6) That much of Double Bay, and particularly Big Bay, with its less impressive cliffs and coastline does not match the very high quality of several other parts of the outer north-eastern coast;
- (7) That there would be significant potential visual landscape effects up to 500 metres;
- (8) That there will be an impact on views from the headland between Big and Blind Bay. This view will now be something over 1 kilometre distant.

[59] We agree largely with the conclusion Mr Rackham reached in this regard. Mr Rackham concluded that the Rackham option, Appendix 4, would be such that:

There will be no significant adverse effects, beyond the immediate area of the farm, on natural character, landscape or amenity values, so long as the farm is reduced to its northern block with dimensions of 300 x 200 metres.



[60] We go further and conclude that any of the three options would be such that there is no significant adverse effect on natural character, landscape or amenity values. What is clear from this is that we accept that there is some effect and the question then turns upon the core evaluation that must be undertaken by the Court in integrating all of the various elements identified.

Access - section 6(d)

[61] We have dealt with the issue of amenity under section 7(c) because of its linkage with items under section 6(a) and section 6(b)). The access issue is separately raised and in turn this has three sub-elements in the context of this case:

- (a) Navigation issues;
- (b) Access to and along the foreshore of the eastern side of Big Bay;
- (c) Issues of alienation of public space.

[62] These issues are addressed in the New Zealand Coastal Policy Statement, particularly policies 3.5.1, 3.5.2, 3.5.3, the Regional Policy Statement Chapter 11, Issue 2, Objective 2, policy 3 and of course in terms of the PRCEP. Again it was not argued before us that the PRCEP failed to provide for the matters under each of the superior documents, namely the RPS, and the NZCPS. Evidence was given by Master Mariner Captain W W Wood, that the siting of this marine farm (in the original larger configuration) did not impose any impediment to shipping or vessels travelling around Banks Peninsula. Even in respect of sailing and motor vessels within Double Bay, Captain Wood was of the view that there was no impediment to the safe passage of vessels. He was further of the view that this area of coast was only likely to be subject to passage by recreational vessels in times of fine weather when the marine farm would impose no impediment whatsoever and vessels at that time could safely travel between the 20 metre spacing of the lines. His view was that there was minimal restriction on vessel movements within the Bay.

[63] In respect of smaller vessels, such as kayaks, his view was that the farm may provide some attenuation of wave action and it would impose no navigational or access impediments. Although there were various suggestions by counsel in cross-examination

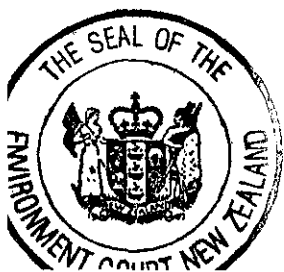


that there may be some impediment to yachts in particular, we conclude that Captain Wood's evidence is uncontroverted, at least so far as motor vessels and yachts are concerned.

[64] In respect of kayaks, Mr A Kirk-Anderson gave evidence on behalf of the Kayak Association. Mr Kirk-Anderson is one of the most frequent users of this area of northern Banks Peninsula for kayaking purposes and is familiar with Double Bay. We did not understand it to be disputed that kayaks are able to travel closer to the coast and there is the potential for them to travel within the area of the site. Mr Kirk-Anderson himself accepted that there was little to particularly attract kayakers in the area of this site. We have concluded that there is likely to be no navigational or access impediment to kayakers on the reduced site for the following reasons:

- (a) There is little of attraction on the foreshore or on the site itself to attract or retain the interest of kayakers;
- (b) There is adequate room between the foreshore and the marine farms for kayakers to travel safely in lighter swells;
- (c) In slightly heavier swells we conclude that kayakers would be likely to travel either between the lines in the marine farm or seaward to avoid risk of wave rebound off the cliffs and the potential benefits of wave attenuation through the farm;
- (d) There is no impediment to kayakers using the western side of the bay, which is of significantly higher natural interest, in accessing both Blind and Big Bay in the more reasonable weather conditions that would be suitable for a kayaker.

[65] Finally, in respect of recreational fishing we accept that there is the potential for recreational boating to utilise the marine farm as a line to moor their vessels while they are fishing. We have concluded that there is little of interest to attract recreational fishers to this part of the bay and we conclude that recreational fishermen are either likely to fish within the inner bays (to avoid wave swell from the more open coast) or fish off the open coast in lighter conditions.



[66] We have concluded that there is adequate room between the shore and the farm to permit ready access to the foreshore. In practical terms such access is unlikely because of swell and lack of benthic or fish life. However at its reduced scale the impediment to boat access would be minimal.

[67] This leaves the issue of alienation of public space. It is quite clear that the application does not involve the exclusive occupation of the entire site area. As a matter of practicality it must involve the exclusive occupation of the water column occupied by the anchors, warps, backbone, droppers and floats. In our view the extent of that occupation does not significantly impact upon the occupation and use of the area by any other persons likely to use it. Recreational set netting is already not permitted within the mammal sanctuary of Banks Peninsula and fishing would not be prevented by the existence of the marine farm.

[68] The more real concern raised by the witnesses was the apparent occupation of the area and the reluctance of members of the public to use the area. We accept from the evidence that has been given to us that there is a general reluctance by members of the public to go into marine farms. The uncertainty as to what lies beneath the water and the apparent occupation of the area by the delineated lines is sufficient to dissuade many people from entering marine farms. That effect is inevitable with a marine farm wherever it is placed. In the context of this case the question is what level of alienation is likely to occur as a result of this marine farm being put in place. We conclude that the prospect of this area displacing recreational users is far lower than that on the Pigeon Bay sites.

[69] However, for both of these sites the recreational use of the area is at such a low level that it could be regarded as minimal, certainly in comparison with areas such as Pelorus Sounds. Again, the question becomes one of balance. We recognise the national importance of maintaining and enhancing public access to the coastal marine area. That of course is a question of degree which must be reached as a result of integrating the various criteria under section 5 of the Act.



[70] Having regard to the three remaining site areas shown in Appendices 3, 4 and 5, we are satisfied that there is minimal interference with navigation, access or recreation use.

Effects – section 104(1)(a)

[71] Some of the issues relating to visual effects have already been raised in our consideration of the Part II matters and we will not repeat that discussion. Further effects not already identified include:

- (a) Positive effects;
- (b) General visual effects – there is clear overlap with the discussion under section 7(c);
- (c) Ecological effects;
- (d) Potential effects on Hector's dolphins;
- (e) Cumulative effects; and
- (f) Precedent effect – although we consider this matter is better dealt with under section 104(1)(i) and we will leave discussion until that stage of our decision.

Positive effects

[72] It is acknowledged that there are economic benefits from the operation of the marine farm, not only in terms of employment and potential employment in both the farm and processing, but also in terms of export income. Another positive benefit identified by Mr Aitken is that marine farming does not require any inputs to achieve the outputs. In his view marine farming is a sustainable activity and natural, in that it exploits a natural product (green-lipped mussels) from their natural environment (the coastal waters of New Zealand). We understand that Mr Aitken was suggesting that a movement to marine farming may be more sustainable for the New Zealand ecology and economy than the reliance on traditional land-based farming. In part Mr Aitken indicated that his ability to diversify into marine farming may make farming generally on the Banks Peninsula more sustainable in the long-term and avoid the need to sell the property for other purposes such as lifestyle blocks or subdivision.



[73] On the other hand Ms Perpick for the CRC pointed out that the private benefit in this case came at the cost of alienation of a public resource, namely coastal waters. We also recognise that in terms of the proposed reduction in the farm size the economic benefits are less from a 6 hectare farm than they are from an 11 hectare farm but so is the degree of reduction of public space.

[74] We have concluded that one of the important benefits of marine farming is that it is not a permanent alteration of the environment, at least in terms of the man-made structures. The licence period sought in this case is some 15 years and at the end of this period all structures could be removed. Although there may be some ecological changes which are irreversible (which we will discuss later), the major visible effects of the activity are non-permanent. We see this as a positive benefit of this activity.

Visual

[75] There is no doubt that there is some visual effect from the structures intended as a result of this marine farm. We accept Mr Aitken's evidence that the major dominant effect would be to persons either at or immediately adjacent to the farm to a distance of 500 metres. We accept that the effect would be significant for people on the water up to a distance at the most of 500 metres, although we are unable to conclude that it would be a dominant visual element. In our view the vertical scale of the hills and Peninsula significantly detracts from any horizontal elements and would dominate the view even at this relatively short range.

[76] We accept that to any persons who may be on the eastern headland within 500 metres the farm may dominate the near view. As Mr Aitken owns most of this land and has provided a written consent under section 104(6) we are unable to take any potential effect of views from his property into account. We reject Ms Perpick's suggestion that such a consent only applies for the owner personally and not for any persons who may be on his property by permission or licence. We accept that if there were persons holding legal occupation of the property at this time then the comments in *Queenstown*



*Property Holdings Ltd v Queenstown Lakes District Council*¹⁰ may apply. However, that is not so here.

[77] We accept that there is a very limited potential for persons to use the public unformed road (paper road) around the coastline. This road is in common with most of Canterbury, large portions of which are nearly impassable. In a practical sense, we doubt that it is possible for a person to easily come within 500 metres of the proposed mussel farm in terms of its reduced configurations. For a walker to do so they would be aware of the mussel farm and would be walking towards it deliberately. In our view the prospect of that being an adverse effect is minimal.

[78] There is also a potential wider viewing audience beyond 500 metres, including recreational boaters, shipping, people standing on the inner headland between Blind Bay and Big Bay, and of course any users of the house or environs of Big Bay itself. We prefer Mr Rackham's evidence that the effect at this distance (around 1 kilometre) is not significant. In fact, from our site inspection and our viewing of the Pigeon Bay site, we doubt that the existence of the farm would be immediately noticeable to persons in Big Bay.

[79] We accept that it would be clearly visible to people on the headland. However, this headland is owned by Earthsea and the best visibility of the farm would occur to persons who were travelling to the house at Big Bay. The road is particularly perilous and steep, and a vehicle would need to be stopped safely before any person would be particularly concerned with the outlook. There are better positions for a general overview seawards further up the ridge towards the public road, and closer to the Big Bay house. On this basis we see that there is little realistic prospect of any substantial impact visually of the marine farm. Beyond 1 kilometre we have concluded that the overall scale of Banks Peninsula and the three seaward headlands in Double Bay would make the marine farm inconsequential.

[80] In respect of vessels that may be transiting either around Banks Peninsula or to sea (in the shipping lane), we doubt that the marine farm would be noticeable at all or

¹⁰ [1998] NZRMA 145 at 170.



would be clearly distinguishable from the general coastline. We accept however, that the larger the farm the more that impact may be. In our view that impact is largely the result of how far from the shoreline the farm protrudes rather than its length along that shoreline. This would be particularly so for vessels that may be travelling to the west towards Port Levy and Lyttelton which would only have an oblique view into Double Bay until past the entrance.

[81] We have concluded that the visual effects of this are very much a result of scale and the positioning of the marine farm and will need to be assessed as part of the exercise of the Court's discretion.

Ecological matters

[82] There was some suggestion of an adverse effect on the benthic community. We have concluded that the benthic community in this area is in common with much of Banks Peninsula, which is muddy bottomed with sparse communities. There is nothing we were able to note about this case which would differentiate it from much of Banks Peninsula, at least between Port Levy and Pigeon Bay. We recognise the concerns, particularly of Dr M S Barker, that there is the potential for mussel drop and the establishment of reefs beneath the lines which will not only change the benthic communities but may smother those existing and create adverse effects. Having regard to the significant wave action in this area we accept that there is the potential for mussel drop from the lines. We also accept in the course of harvesting a significant amount of mussels and pseudofaeces would be deposited to the bottom of the site. Dr Barker also suggested that based on studies in the Sounds there may be the potential for build-up of faeces and pseudo-faeces and the creation of anaerobic activity beneath the site.

[83] We have concluded there is little prospect of these types of effects in this area. In our view the significant swells around Banks Peninsula and the wave rebound from the rock faces and apparent currents are sufficient to avoid the type of negative activities that Dr Barker has identified. However, we consider that there is some merit in considering whether a further benthic survey should be undertaken several years after the establishment to establish what effects the activity is having on the benthic



community and whether there should be a revision of the conditions of consent accordingly.

[84] In short, to the extent that there is a potential effect, it is our view that this could properly be dealt with by a condition of consent if the activity is otherwise appropriate.

Hector's Dolphins

[85] Evidence was given by Dr Slooten for the CRC about the potential effect of mussel farming on Hector's dolphins. The concern appears to be that this marine farm may decrease the area available for Hector's dolphin and impose a risk to them.

[86] There is no doubt that Hector's dolphins are an important element of Banks Peninsula and that significant steps need to be taken to ensure that the species is sustainable. At the current time Dr Slooten says that notwithstanding the ban on set netting, there is still a loss of dolphins in this area greater than their replacement rate. Those risks are unrelated to mussel farms at the present time and comprise essentially netting, commercial fishing offshore, general recreational fishing, and boats (particularly propeller strike). Dr Slooten was also cautious about the effect of tourism and accepted that that too may pose a low risk to dolphins.

[87] It was difficult for the Court to understand from Dr Slooten's evidence what particular risks she saw mussel farms as posing for dolphins. Under direct questioning from the Court she indicated it would need to be some form of knotted noose of a size sufficient to ensnare and drown a dolphin. A dolphin is not able to swim backwards and, once caught, often further entangles and drowns itself. She accepted that dolphins were particularly sleek and not easily ensnared and the examples she gave when dolphins had been caught related to gillnetting or set nets. She also indicated that dolphins' detection systems were sufficiently sophisticated that they generally were aware of nets, could "see" nets in the water, so that mussel lines, backbones and buoys themselves were unlikely to cause an obstruction to a dolphin.

[88] In the Squally Bay decision the Commissioners appointed by the CRC considered evidence from Dr Slooten. That referred to a report prepared in November



2000 on the potential effects of mussel farming on Hector's dolphin and Banks Peninsula. That report was also produced to us and indicated that mussel farming could, as a compromise option, be considered only on the northern side of Banks Peninsula. It identified the area between Sumner and Little Akaloa Bay as being appropriate. Dr Slooten was concerned that at Squally Bay there was a farm of some 35 hectares more offshore than she had previously considered.

[89] It is difficult for this Court to see how Dr Slooten differentiates this site from the contents of her report in November 2000. There does not appear to be any new evidence on which Dr Slooten based her current opinion, although she did produce further sighting evidence (which had not been circulated to the parties) at the hearing itself. The recent sighting information indicated one sighting in the western part of Double Bay (around the western heads) but no sightings on the eastern side of Double Bay. Because these sightings are taken over a relatively short period, this is not to say that the eastern side of Double Bay does not form part of the Hector's dolphins range. We are able to conclude that the eastern side of Big Bay is not a critical part of the Hector's dolphin range and that a marine farm at 6 hectares would have an inconsequential effect on their habitat.

[90] The only question that remains to be considered is whether in fact there is any potential danger to Hector's dolphins from this marine farm. Dr Slooten urged on the Court that we should adopt a precautionary approach on the basis that although there was a very small risk, it could have very large effects on the dolphin population.

[91] We have concluded however, that there must be some evidence of risk on which to base such an assertion. It must be a risk capable of measurement in scientific terms and assessment. We find the prospect of a loose rope floating adjacent to a marine farm in such a way that it can ensnare a dolphin to be so remote as to be fanciful. Quite simply, there should be no such ropes on a marine farm and if necessary the Court can impose a condition to require this to be the case.

[92] None of the other expert witnesses were even able to understand how such a circumstance could arise. We must confess, with deference to Dr Slooten, neither can we. In our view the everyday transit of vessels around Banks Peninsula poses an



exponentially greater threat to dolphins than does the existence of a 6 hectare marine farm. This particular farm has backbone lines lying parallel with the shore which would be the natural direction in which any pod of dolphins would be moving in any event, with large fairways between the lines.

[93] In conclusion we find the risk of the type of incident described by Dr Slooten is minimal. Furthermore, it is our view that any potential impact can be addressed by a general condition in the consents requiring that there be no loose lines in relation to the marine farm (at any time) or words to that effect. In our view, this would obviate any such risk in the event that the Court otherwise concluded that consent should be granted.

Cumulative effects

[94] It is clear from the evidence of the CRC witnesses, including Dr Slooten, that the major concern is the prospect of proliferation of marine farms, not only through the few remaining bays on the Banks Peninsula, but also offshore. In our view that concern is simply addressed by the fact that the Government has imposed a moratorium on the grant of further marine farm licences and given the CRC the opportunity to consider appropriate marine farm management for the Banks Peninsula. In particular, section 68A of the Act now provides for the use of aquaculture management areas which approach is, essentially, an area allocation device.

[95] The issue is whether the grant of an application in this case would create a cumulative effect, together with the farms already existing. Concern over marine farm proliferation are issues of precedent and future effects, rather than cumulative effects as a result of granting this application.

[96] Although we acknowledge that the grant of consent for Squally Bay is not insignificant at 35 hectares, that consent has been granted by the CRC after a full consideration of evidence. We are not satisfied that the number of marine farms at this stage is such that either individually or cumulatively the addition of a 6 hectare farm at Double Bay would change the level of effects. Again this would depend entirely upon size and location of the farm. There is a significant distance between this site and the nearest marine farm site and there is no visual connection between the two. We accept



that with the addition of any new farm, the prospect of cumulative effect grows. In our view the PRCEP has particularly sought to avoid potential cumulative effect on bays around Banks Peninsula by making the activity non-complying in most bays. Any cumulative effect as a result of this application is minimal.

Policy statements - section 104(1)(b)

[97] There are two relevant policy statements, namely the NZCPS and the RPS. We will consider each of these in turn.

The New Zealand Coastal Policy Statement

[98] That is explicitly prepared in order to achieve the purpose of the Resource Management Act in relation to the coastal environment of New Zealand. We have concluded, having regard to the introduction to the Coastal Policy Statement, that it is subservient to, and intended to inform, the criteria of Part II of the Act and particularly section 5. In addition, the Coastal Policy Statement states a number of other further general principles and in our view those having particular relevance are:

- (1) *Some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to 'the social, economic and cultural well-being' of 'people and communities'. Functionally, certain activities can only be located on the coast or in the coastal marine area.*
- (2) *The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places.*
- ...
- (5) *People and communities expect that lands of the Crown in the coastal marine area shall generally be available for free public use and enjoyment.*
- ...
- (10) *It is important to maintain biological and physical processes in the coastal environment in as natural a condition as possible, and to recognise their dynamic, complex and interdependent nature.*
- ...



- (12) *The ability to manage activities in the coastal environment sustainably is hindered by the lack of understanding about coastal processes and the effects of activities. Therefore, an approach which is precautionary but responsive to increased knowledge is required for coastal management.*
- (13) *A function of sustainable management of the coastal environment is to identify the parameters within which persons and communities are free to exercise choices.*

[99] Chapter 1 Policy 1.1.1 adds to section 6(a) in discussing the natural character of the coastal environment. In particular it states:

It is a national priority to preserve the natural character of the coastal environment by:

- (a) *encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;*
- (b) *taking into account the potential effects of subdivision, use, or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and*
- (c) *avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.*

[100] Chapter 1 Policy 1.1.3 discusses elements of the natural character of the coastal environment:

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

- (a) *landscapes, seascapes and landforms, including:*
 - (i) *significant representative examples of each landform which provide the variety in each region;*
 - (ii) *visually or scientifically significant geological features; and*



- (iii) *the collective characteristics which give the coastal environment its natural character including wild and scenic areas;*
- (b) *characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and*
- (c) *significant places or areas of historic or cultural significance.*

[101] Chapter 1 Policy 1.1.4 identifies further elements of the coastal environment as follows:

It is a national priority for the preservation of natural character of the coastal environment to protect the integrity, functioning, and resilience of the coastal environment in terms of:

- (a) *the dynamic processes and features arising from the natural movement of sediments, water and air;*
- (b) *natural movement of biota;*
- (c) *natural substrate composition;*
- (d) *natural water and air quality;*
- (e) *natural bio diversity, productivity and biotic patterns; and*
- (f) *intrinsic values of ecosystems.*

[102] Chapter 1 Policy 1.1.5 states:

It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.

[103] The national priority discussed, to preserve and protect identified elements by adopting particular methods must be subject to the general requirements of the RMA and Part II.

[104] We have concluded that all of these policies can be seen as repeating and, to some extent, amplifying the criteria of Part II of the Act. As such, we have discussed these general criteria. We conclude that Double Bay is not a significant representative example of landform or significant geological feature. As was mentioned by a number



of witnesses it reflects landscape and features which are in common with much of Banks Peninsula. Although the site has natural character this is in common with most Banks Peninsula coastlines. It has no distinguishing or remarkable features and is viewed in the context of a working landscape.

[105] Chapter 3 of the NZCPS particularly deals with subdivision use or development of the coastal environment. We note in particular that policy 3.1.2 requires that a policy statement and plans should identify:

scenic, recreational and historic areas, ... scientific and landscape features, which are important to the region or district and which should therefore be given special protection; and that policy statements and plans should give them appropriate protection.

[106] This appears to be a directory requirement and accordingly both the RPS and the PRCEP should properly identify and take steps to protect aspects which require such special protection. Similarly, policy 3.1.3 requires policy statements and plans to maintain and enhance open space values by appropriate protection.

[107] Finally, 3.2.1 requires policy statements and plans to define subdivision use and development that is appropriate in the coastal environment and where it is appropriate.

[108] Similarly, 3.2.4 requires provision should be made to ensure that cumulative effects of activities collectively in the coastal environment are not adverse to a significant degree.

[109] In short, all of the requirements of 3.1 and 3.2 relate to the content of policy statements and plans. The policy statement and plan as prepared, if not inconsistent with the NZCPS, should reflect those elements. Importantly in this case no party suggested that either the PRCEP or the RPS did not achieve the objectives of these NZCPS policies.

[110] Policy 3.3.1 provides:



Because there is a relative lack of understanding about coastal processes and the effects of activities on coastal processes, a precautionary approach should be adopted towards proposed activities, particularly those whose effects are as yet unknown or little understood. The provisions of the Act which authorise the classification of activities into those that are permitted, controlled, discretionary, noncomplying or prohibited allow for that approach.

[111] We can but conclude that this policy is also directed to Councils in the preparation of their various plans (or to the Court on a reference from those plans). In this case the CRC has adopted the classification approach to make the activity discretionary. We conclude this approach fulfills policy 3.3.1.

[112] Policy 3.5 particularly addresses the question of public access and notes that a restriction depriving the public of such access should only be imposed in limited circumstances. This policy contemplates exclusive occupation of an entire area, rather than some limits upon the scope of activities that can occur within an area. We do not understand the provision for a marine farm as either a permitted, controlled or discretionary activity would offend against this policy.

The Canterbury Regional Policy Statement

[113] This RPS is expressed in general terms. On its face it appears to encapsulate the provisions of Part II of the Act and the New Zealand Coastal Policy Statement, among other matters. Chapter 11 of the plan does not explicitly discuss marine farms as the subject of any of its issues, objectives or policies. Under 11.2(b) it appears that Banks Peninsula as a whole is recognised as an outstanding landscape and/or natural feature. It appears indirectly that Issue 1(viii) structures may include marine farms, although the example given is jetties. Objective 1 however, states: .

Provide for appropriate use and development of the coastal environment while protecting and where appropriate enhancing:

(a) *life-supporting capacity of coastal ecosystems including:*

...

(b) *outstanding landscapes and natural features including:*

...



(ii) *coastal landforms and landscapes, submerged platforms and seascapes that are regionally, nationally or internationally representative or unique;*

...

(d) *areas of significant amenity value, including recreational attributes;*

(e) *natural character (including associated natural processes) of the coastal environment;*

...

[114] Policy 1 reads:

To avoid, remedy or mitigate, to an extent not inconsistent with the New Zealand Coastal Policy Statement, the direct and indirect adverse effects of land uses or activities and new or additional uses, development or protection inland of or within the coastal marine area where, either singly or cumulatively they would significantly affect:

(a) *the life-supporting capacity of coastal ecosystems and the natural processes which sustain them;*

...

(c) *natural character (including associated natural processes), outstanding natural features and landscapes;*

(d) *amenity and recreational attributes;*

...

[115] In the explanation it notes in particular:

... Activities such as marine farming and ports can have direct effects by occupying a specific area and reducing recreation opportunities and access to sheltered waters. They can also adversely affect areas of high conservation and cultural values (e.g. marine farming can reduce mahinga kai by restricting access). Adverse effects within the coastal environment may also arise from the following:

(i) *discharges of contaminants or waste;*

(ii) *siltation;*



- (iii) *alterations to water flows or levels or sediment supply;*
- (iv) *activities generating odour or noise;*
- (v) *recreational activities on land and water;*
- (vi) *modification of landform or clearance, modification or disturbance of indigenous vegetation or habitat ...*

[116] Methods to policy 1, page 174, are listed as:

1. *The methods used or to be used by the Regional Council are:*
 - (a) *Regional Coastal Environment Plan*
 - (b) *Other Regional plans*
 - (c) *Encourage the preparation of iwi management plans*
 - (d) *Resource consents*
 - (sic)
 - (f) *Information provision*
 - (g) *Investigations*
2. *District/city councils in the preparation, variation, change or review of their district plans, through the exercise of their functions outside the coastal marine area should consider:*
 - (a) *including provisions in their district plans to give effect to Policy 1.*

[117] On this basis it appears clear to us that the RPS requires a regional coastal environment plan and other regional plans to achieve policy 1, whereas it requires district and city councils merely to take the policy into account. That being the case, it appears that the RPS anticipates that the PRCEP will avoid, remedy or mitigate direct and indirect adverse effects of marine farms within the coastal marine area. Again it was not suggested by any party, particularly by the CRC, that the PRCEP failed to do this.

[118] Under Issue 2, Objective 2, Policy 3 the CRC addresses the issue of access. Interestingly Issue 2(c) notes adverse effects caused by the public on ecological values, sites of cultural significance, sand dune stability, amenity value, other recreationalists and natural character. Again, the methods to this issue appear to be mandatory in respect of the CRC, particularly the PRCEP, while requiring district and city councils to



consider them only. 11.3 Methods 1(a) recognises the PRCEP as including provisions for:

(a) *The identification of:*

...

(ii) *parts of the coastal marine area including heritage areas, for protection and use.*

[119] We conclude the RPS is consistent with the superior documents. It also is directory to the CRC in the preparation of its PRCEP, to provide for the control of marine farming and to identify parts of the coastal marine area for protection and use. In this regard, as can be seen shortly, we must conclude that the plan anticipates that the PRCEP will identify areas for marine farming and areas for protection from marine farming.

The PRCEP, objectives, policies and rules

[120] The PRCEP contains several chapters of interest in respect of this application. Chapter 6 relates to the natural character and appropriate use of the coastal environment. Chapter 7 relates to coastal water quality. Chapter 8 to activities and occupation in the coastal marine area, with two particular schedules of interest being S5.5 – Areas of Significant Natural Value – and the schedule to 5.13 – Areas of Banks Peninsula to be maintained in their present natural states free of additional structures. Double Bay is not listed as an area of significant natural value in Schedule 1 to objective 6.1 but is included under Schedule 2 as an area of high natural physical heritage or cultural value because of its inclusion within the Banks Peninsula Marine Mammal Sanctuary. That sanctuary covers most of Banks Peninsula.

[121] Policy 6.1 provides:

(a) *Within the coastal marine area, the Canterbury Regional Council, and the Minister of Conservation in relation to restricted coastal activities, will:*

(i) *control activities which have or are likely to have an adverse affect on the identified values of Areas of Significant Natural Value and areas of high natural, physical, heritage or cultural value;*



- (ii) *adopt a precautionary approach when considering applications for resource consents where the effects are as yet unknown or little understood or where the functioning of marine ecosystems is poorly understood;*
- (b) *The Canterbury Regional Council will undertake a process of investigation and public consultation to:*
 - (i) *identify additional areas of high natural, physical, heritage, or cultural value, including wahi tapu, urupa, tauranga waka and mahinga kai; and*
 - (ii) *identify areas of where access to and along the Coastal Marine Area needs to be enhanced or controlled.*

[122] Objective 6.2 seeks to enable people to undertake commercial and recreational activities in the coastal environment and provides:

Enable people to undertake commercial and recreational activities in the coastal environment while:

- (a) *avoiding conflicts between those activities; and*
- (b) *avoiding, remedying or mitigating the adverse effects of those activities on the natural character of the coastal environment.*

[123] Policy 6.3 assigns priority to existing commercial and recreational uses within the CMA. It also accepts that the CRC will undertake a process of identifying areas of the CMA for development of commercial or recreational activities.

[124] The explanation adds:

The principal areas for commercial and recreational activities such as those involving port operation, marine farming, swing and pile moorings, boat launching and storage facilities are to be identified. The activities associated with such areas are to be protected from the adverse effects of other activities that could preclude the appropriate use of the area to make the use efficient. Provision is to be made for appropriate transfer and network utility infrastructure. [emphasis added]



[125] What is not clear from the words *to be identified* is whether the plan is accepting it has not undertaken the process of identifying suitable areas for marine farms or that it recognises that this policy is fulfilled later in the rules. Because of the direct nature of the requirement under the RPS and under the NZCPS we have concluded that the latter interpretation must be correct, namely that the rules should achieve and implement the requirement to identify suitable places for marine farming.

[126] In this context the relevant portion of the plan is Chapter 8 which relates to activities and occupation of the marine coastal area. Issues, objectives and policies are contained in 8.1 – 8.3 with rules following in 8.4. Objective 8.1 reads:

To enable people to use the coastal marine area and its resources while avoiding, remedying or mitigating the adverse effects of that use on the environment, including avoiding, remedying or mitigating the adverse effects:

- (a) *Of conflict between these uses and people's wellbeing, health, safety and amenity; and*
- (b) *On natural character, and other (natural), ecological, amenity, tangata whenua, historic and cultural (values of the coastal environment).*

[127] Policy 8.1 reflects this allowing for permitted activities including certain structures. 8.2 includes the regulation of activities. 8.3 sets out various criteria in considering applications for resource consent.

Policy 8.5 is attached as part of **Appendix 6**. The explanation adds the following:

...

Activities that require the allocation of space, such as marine farms, compete with other uses of the area. Consideration should be given to the effects of occupation on existing uses and values for the area, including effects on the local community and the cumulative effects of displacing existing uses and values.



This provision is in itself somewhat curious, as we shall see in a moment, when it is compared with 8.2.3 which provides for occupation as a permitted activity where the structure, i.e. marine farm, obtains a resource consent.

[128] Policy 8.15 identifies there are areas of Banks Peninsula that should be maintained in their present natural states. This establishes the schedule that we have discussed, and essentially requires that an activity in those areas the structures and their use will have no more than minor adverse affects on:

- (a) The natural character of the area including its overall landscape and seascape;
- (b) The marine foreshore and seabed ecology;
- (c) The water quality;
- (d) The use or enjoyment of the area by recreational tourists or other users in a marine environment who do not require authorisations for exclusive occupancy; and
- (e) The habitat of Hector's dolphins.

[129] Policy 8.15.2(c) provides an explicit exception for marine farm operations which were in existence at a set date. That date has been changed as a result of references to the plan. In Chapter 8.4, rule 8.1 provides for permitted activities. This does not apply to this application.

[130] Rule 8.3, page 8-32 provides:

Except as provided for by Rules 8.1, 8.2, 8.4, 8.5, or 8.6; the erection, reconstruction, placement, alteration, extension, removal or demolition of any structure, or part of any structure, fixed in, on, under, or over any foreshore or seabed; is a Discretionary Activity.

[131] 8.5 provides for non-complying activities. As already indicated, this includes any structure within the area listed in Schedule 5.13.



[132] Rule 8.7 provides for permitted activities in respect of the disturbance of the foreshore seabed – (c)(1) provides:

*The disturbance or removal [is permitted provided] it occurs contemporaneously with and is directly associated with the erection, reconstruction, placement, alteration, extension, removal or demolition of a structure authorised as a Permitted Activity in accordance with Rule 8.1; or by a resource consent in accordance with Rules 8.2, 8.3, 8.4, 8.5 or 8.6; and
[a series of conditions which appear to be met in this application]*

[133] Chapter 8.6, rule 8.12, deals with deposition and again provides for such deposition to be a permitted activity if it occurs contemporaneously with and is directly associated with any disturbance of the foreshore or seabed which is occurring as a result of implementing a resource consent – see 8.12(a)(i). Otherwise, the application is discretionary under 8.13 which reads:

Except as provided for in Rules 8.12, 8.14, 8.15 or 8.16; the deposition by any person of any substance on the foreshore or seabed in a manner that has, or is likely to have, an adverse effect on the foreshore or seabed is a Discretionary Activity.

[134] Chapter 8.10 deals with occupation of the coastal marine area, and rule 8.23 defining permitted activities provides:

(a) *The occupation of the Coastal Marine Area that occurs contemporaneously with and is directly associated with any erection, reconstruction, placement, alteration, extension, removal or demolition of a structure that is authorised as a Permitted Activity in accordance with Rule 8.1, or by a resource consent; provided that Environment Canterbury is informed in writing of the nature of the structure and its occupation at least ten working days before the occupation of the Coastal Marine Area by any new structure commences.*



[135] As already indicated, Banks Peninsula Marine Mammal Sanctuary is listed under Schedule 2. The following bays are listed under 5.13, making the erection or placement of certain structures within those areas non-complying. These are:

Port Levy, Pigeon Bay, Menzies Bay, Decanter Bay and Little Akaloa Bay, Okains Bay, Lavericks Bay, Le Bons Bay, Hickory Bay, Goughs Bay, Fishermans Bay, Shell Bay and Red Bay, and Otanerito Bay and Sleepy Bay, Stony Bay, Akaroa Harbour, Island Bay, Long Bay, Peraki Bay, Robin Hood Bay, Te Oka Bay, Tumbledown Bay, Tokoroa Bay and Hikuraki Bay.

[136] In general terms we conclude that the plan has provided for marine farms in two ways. Firstly, by providing for them as discretionary activities offshore and in a limited number of bays. Secondly, it has indicated areas where marine farms (and other structures) are non-complying activities by identifying a series of bays in 5.13. The general discretion under section 104 does not appear to be limited but policies 8.3 and 8.5 provide further criteria. The criteria under 8.5 are dependant on whether or not one can say that the permitted activity of occupation still falls to be considered as part of the application to install structures.

[137] Policy 8.3 sets out criteria on consideration of all resource consents. No particular distinction is drawn between discretionary and non complying applications. We conclude that the application of each criteria will turn on the classification of the activity and the extent to which the plan has dealt with each issue.

[138] We deal with each relevant criteria as it appears in Policy 8.3 set out in Appendix 6:

- (a) Existing level of use and development and natural character. This criteria has two links:
 - (i) identifying the existing level of use and development.
 - (ii) considering the national priority of the NZCPS to preserve the natural character of the coastal environment.



We have already identified the existing use and development. We conclude that the site has a natural character within a working landscape. The second link is more problematical. It restates the NZCPS Chapter 1 as an absolute requirement to preserve a more restrictive requirement than that expressly used in section 6(a) RMA which requires preservation and protection from inappropriate use and development. On its face this might give rise to a vires issue as to policy 8.3. By specifically referring to the NZCPS we have concluded that Policy 8.3(a) is not intending to add to the NZCPS but refer to it. The extent to which NZCPS 1.1.1, 1.1.3 and 1.1.4 are met in the case is a core issue under S5. It will be influenced by the scale of the activity, its siting and the context of the effects.

(b) ...

(c) Effects on the public use and enjoyment of the coast.

We have identified this as being particularly limited in the circumstances of this case, there being no special features of the eastern coast of this bay to warrant special attention of a limited number of recreational users. The public can only access the coast with some difficulty by paper road, along the coastline or by water.

(d) Cumulative effects.

We have addressed this issue already and conclude there is minimal effect.

(a) Existing agriculture and other use.

We have identified this but have not sought to give any particular consideration to the impacts of the application on such uses. The land in the vicinity of the property is working pastoral land, although still retaining natural character and with more tussock and natural features than farm land further inland. On the other hand Big Bay itself has been subject to extensive modification over the years with buildings, planting and installation of the road. Overall, these issues balance one another and are relatively neutral in terms of the existing agriculture and other use. It is difficult to see any way in which the marine farm could impact on the existing agricultural use. An effect on the home in Big Bay is possible primarily in a visual sense but also from flotsom and jetsam from the farm.



[139] In respect of policy 8.5 we have already considered questions of navigational channels and public recreation. There is no existing commercial use of the area. Accordingly sub-paragraph 8.5(d) does not apply. In relation to Policy 8.5(e) we have discussed the question of adverse effects on the natural character. This case raises the issue of what is *within and outside the immediate location*. Again we reiterate that the catchment is particularly important in this case to understanding the influence of this marine farm. In the context of its wider catchment, the adverse effects on the values of the natural character relate mainly to visual effects and are minimal. In the context of the site and its immediate catchment, say up to 500 metres, the effect is more significant.

[140] 8.5(g) raises the question of available alternative sites. In this regard we accept Mr Rackham's evidence that there are few alternative sites available within bays which are:

- (a) not covered by Schedule 5.13;
- (b) suitable for marine farms;
- (c) have sufficient weather protection for marine farms.

This is limited to a few bays on the northern side of Banks Peninsula. The reasons that the applicants have chosen this site relates to the shelter and positioning, the proximity to the Aitken property, and their conclusion that it will not impose an unreasonable impact in terms of the criteria under the plan and the Act.

[141] Policy 8.5(h) has regard to the existing use and development of the area, and the extent to which the natural character has already been compromised. There was a great deal of evidence given by the landscape witnesses as to whether or not the natural character of this area had already been significantly compromised. This in turn turned on arguments as to whether or not the land was pastoral and whether 'natural' meant 'unmodified by the hand of man'. This led to arguments as to whether or not the natural character was that which existed prior to the arrival of Maori, or prior to the arrival of the Europeans, and whether exotic forestry and grasses etc were part of the natural character. It also led to issues as to whether or not the waters of the bay were pristine in general, and finely grained arguments as to the natural state of the various elements within the bay and its environs.



[142] We have concluded that the term 'natural character' is not used with this degree of precision. There is no doubt that the catchment has natural character, as indeed in our view do all coastal environments. The question is whether the application will adversely affect its natural character, and if so to what extent. It appears to us that 8.5(h) is an attempt to link into the New Zealand Coastal Policy Statement Policy 1.1.1 in relation to preference for development in areas that have already been subject to modification. There is no doubt there has been some modification of this environment. The jetty remnant and the buildings are clear examples of that. There are also less obvious examples in the exotic plantings, macrocarpas and pine trees. However, the argument becomes more difficult to assess when one comes to assess the natural character relating to the exotic plant elements as opposed to the man-made elements.

[143] We have concluded that the discussion we have already had about natural character in the context of 6(a) better approaches this matter than does the wording of 8.5(h). It is intended that the period of occupation, as we have indicated, is for some 15 years and the farm will occupy only the water column which is necessary for the purposes of the structure of the farm itself. All Counsel in this case accepted that the provision for this activity as discretionary led to the conclusion that it was generally acceptable within the zone but not at every site or at every scale. Overall we have concluded that the plan provides for the general approach we have taken under section 104 with consideration of specific criteria under the plan as relevant.

District plans

[144] There are some three relevant district plans, being the transitional Mt Herbert district plan, the transitional Akaroa district plan and the proposed Banks Peninsula district plan. That proposed plan is subject to variation no. 2 as to the Rural zone. It would be fair to say that no witness or counsel to this Court was able to be authoritative as to the effect of these various plans. However, the following appears to be clear:

- (1) That there is no outstanding natural area in Double Bay;



- (2) That variation 2 has reduced the coastal protection area around Double Bay to approximately a 40 metre wide strip of land above the mean high water springs.

[145] This variation has just closed for submissions and has not been heard yet by Council. The parties have subsequently agreed the permitted activities within this area under the various plans. This is annexed and marked as **Appendix 7**. It seems to be accepted that the variation 2 policies relating to the coastal environment are reflective of section 6(b) of the RMA, the NZCPS and the RPS and the PRCEP. It would be fair to say that whether or not these provisions achieve the purposes of the Act has yet to be addressed, and at this stage little particular weight can be given to the variation because of its early stage in the process.

[146] Big Bay is the division point for the transitional district plan between the Akaroa section and the Mt Herbert section. The Akaroa section takes in the eastern part of Big Bay and covers the land adjacent to the proposed marine farm. Under the Akaroa section of the transitional district plan, the land is zoned Rural 1. This permits farming and woodlot forestry. The placement of existing dwellings is permitted but all new dwellings are a discretionary activity. There are some design and colour criteria applying except to accessory buildings. Clearance of bush remnants are also a discretionary activity. There is an objective relating to the outer bays, of which Double Bay forms part:

To preserve and enhance features of the outer bay area which make an attractive place to live and to visit.

[147] Policy 1 discourages development that would detract from the dominance of natural landscape features, open pastoral ridges and tops and wooded gullies. Policy 8 seeks to preserve the coast and land immediately behind it from private development. Policy 7 deals with management of water and seeks to manage the water so it remains available and attractive for a whole range of uses, for enjoyment of views of water and protection of wildlife habitat, through to commercial fishing. There is an express recognition that this involves balancing the uses which compete for space, controlling the erection of structures in or on the water, ensuring safe navigation and maintaining



water quality. We accept Mr Dewe's summation of this that, when considered overall, the transitional district plan encourages farming on land and permits structures accessory to farming, but when it comes to the coastal environment discourages sporadic visually dominant development of other buildings and structures along the coast.

[148] The permitted baseline as a result is one which would allow continuing modification of the land based activities for farming purposes even in the coastal protection area. Buildings are permitted on a limited basis beyond the coastal protection area and discrete wood lots setback over 100 metres inland.

[149] One could therefore anticipate the erection of new homes in the area as is proposed on the Earthsea and Chamberlain properties. One could also envisage the renewal or oversowing of the headlands with higher productive grasses. Our inspection revealed good pasture land for cattle and sheep. We therefore conclude that higher pastoral production is not fanciful in this area. It seems to be argued that the jetty could be restored as of right but we are unclear as to whether this will occur.

[150] Overall these changes represent the sort of continuum of change that is part of this environment. The continual adaptation and reuse of the land is an essential feature of a working landscape and Big Bay is no exception. The recent planting of both exotic and native trees, the removal of the macrocarpas and the plan for a new home all fit within this context of continuous change.

Other matters - section 104(1)(i)

[151] Both the applicant and the CRC raised issues of precedent but in different contexts. The CRC was concerned that the granting of this application may lead to a plethora of further applications to develop the remaining bays and even applications for non-complying activities within the bays covered under 5.13. We understood Ms Perpick to subsequently accept that the granting of a discretionary activity consent outside the scheduled areas could not be a precedent for granting a non-complying consent in those areas.



[152] It was clearly at the heart of the concerns of the CRC witnesses that there was the potential for further farms to be erected, not only in the bays not listed under the Schedule 5.13 but also off the various headlands and offshore. The concern arose from the fact that at the time the plan was prepared it was not contemplated that such offshore marine farms would be technically feasible. We repeat again that we believe the answer to this concern is clearly recognised in the current moratorium over processing applications for consent in this area and the provisions of section 68(A) which allow regional coastal plans to provide for aquaculture and management areas (as well as the other methods which are already available to the Council). It is clearly important that the Council proceed with that process as expeditiously as possible if they are concerned at the potential for further applications.

[153] We gathered from several witnesses giving evidence before the Court that there were in fact a significant number of applications which had been filed but were caught by the current moratorium. We are unable to see how the processing of this application can create a precedent in respect of these other matters which are caught by the current legislation and potentially by any variation or changes introduced to the coastal plan.

[154] Mr Clark for the applicant raised with the Court the argument that the granting by the CRC of the consent for Squally Bay at 35 hectares is inconsistent with their decision in this case. Again we find it difficult to accept that in respect of the wide range of criteria that must be taken into account in an application it is possible to draw an exact parallel between Squally Bay and Double Bay:

- The site envisaged at Squally Bay stands offshore;
- It is not enclosed within the headlands of a bay;
- It is significantly larger and more open;
- There are potentially different viewing audiences and different recreational audiences in this area. An example is that without evidence we would not know what level of kayak use there might be in Squally Bay or whether there is an owner having a bach within proximity of the marine farm.



[155] Overall, in the context of Banks Peninsula, we consider that it is not logical and is inappropriate for the Court to start extrapolating that the granting of a consent at either Pigeon Bay or Squally Bay establishes that a consent should be granted at Double Bay. It is clear that in the context of this plan each site must be considered on its own merits in the context of the relevant criterion and the provisions of the superior documents and the Act.

[156] There are other matters under section 104(1)(i) which we should mention briefly. One is that it was intended that the applicant would service this farm in conjunction with their farm at Pigeon Bay. As the farms are serviced from Lyttelton, Double Bay is en route to Pigeon Bay. On this basis there is likely to be no significant increase in vessel movements, at least pre-harvesting. There are economies of scale that are in favour of such an application. We do not believe that significant attention should be given to this aspect of the matter but we do recognise that it is a benefit of the application. However, there is no guarantee these farms will stay in common ownership for the foreseeable future.

[157] Finally under section 104(1)(i), it seemed to underlie certain of the CRC witnesses and some of the questions of counsel that there was now a desire by the CRC to move marine farms offshore to avoid potential conflicts with the natural character of the coastal environment. We make the point clearly that there is nothing in the policy or rules that indicates that preference. If it is intended to be included in a variation to the plan it is certainly not explicit within the plan at the current time. Secondly, this preference (if one exists by the CRC) relies on technology as yet untried. Mr Acton-Adams, a director of the applicant company is a person with considerable experience in marine farming issues. He suggested that he would rather "*them than me*". We suspect that the success or otherwise of the farms on Banks Peninsula and at slightly more exposed sites (such as Squally Bay) may be indicative of the ability of sites further offshore to endure open sea wave action productively.

[158] We comment that we have not heard any argument as to the merits of the offshore option and this is not before us in the context of this hearing. Accordingly, it is not possible for this Court to conclude whether offshore marine farms represents a viable or realistic alternative at Banks Peninsula. We have simply heard no evidence



that would enable us to reach such a conclusion. Nor, in the context of this case, is it appropriate for us to reach such a conclusion.

Exercise of the Court's discretion

[159] Section 105(1)(b) gives the Court a general discretion to grant or refuse consent and to impose such consent conditions as it sees fit. We assume that generally speaking the conditions intended are in the form proposed by Mr Loe for the CRC consent hearing and/or imposed on the Squally Bay decision. We have already indicated that we consider that there is cause for including conditions if the consent is granted relating to:

- (a) A benthic survey after a set period of time, say 2 to 3 years to ascertain what affect the marine farm has had on the sea floor;
- (b) Conditions requiring the proper management of the marine farm to avoid excess floats, lose lines and the like and shore debris.

[160] Accordingly we shall assume that the application is intended to proceed in this way.

Section 5

[161] We conclude the determination as to whether this application should be granted turns on an integration of the various factors we have identified and a decision as to sustainable management under the Act. The Act is enabling in nature, seeking to enable people and communities while sustaining the potential of natural and physical resources, the life-supporting capacity of air water and soil and eco-systems, and avoiding remedying or mitigating adverse effects.

[162] From our discussion as to the various elements that impact upon this discretion it is clear to us that size and location are key factors in whether a marine farm should be established at the site. In respect of the location we have concluded that if a marine farm is sited near to the eastern headland then it will represent a reasonable balance between the various factors under section 5. In our view it is critical to avoid any impact on access to the inner bays, and minimise the effect on access to the shoreline.



To that extent we would have had considerable concerns with the original proposal having regard to the length of foreshore which would be affected and the level of intrusion into the bay.

[163] In respect of the issue of size, again the extent to which the farm extends out from the shore and the overall area involved in relation to the total area of the bay are, in our view, critical factors. We have concluded that farms in the range suggested in Appendices 3, 4 and 5 are at such a size that impact on the entire bay is not significant. Furthermore we have concluded that if the farm is located near the headlands, then any of the three options proposed would achieve the Court's approach under section 5 in respect of location.

[164] We accept Mr Rackham's evidence that the proposed site is one of the very few places around Banks Peninsula which is suitable for the establishment of marine farms. In support of this conclusion we take into account:

- (a) The lack of natural features on the eastern coast of Double Bay;
- (b) The fact that a marine farm would be indented behind the headlands but not into Big Bay or Blind Bay themselves;
- (c) The area is not covered by Schedule 5.13 or Policy 8.15 of the PRCEP;
- (d) That the site would give some protection, particularly from southerlies;
- (e) That the proposed site would leave the inner bays free and easily accessible for both land based and boating activities;
- (f) That either option (3), (4) or (5) would not generally interfere with access to the coastline in this area.

[165] In respect of size we have concluded that 11 hectares would have been too large in that it would occupy nearly some 10% of the bay area. All of the three options in our view are suitable in terms of size. In particular each would :

- (a) Reduce the amenity impact to negligible levels to most (if not all) of the viewing audiences;
- (b) Occupy a reasonable area at the head of the bay;
- (c) Provide a clear access to Double Bay and to inner bays.



[166] We have concluded in respect of configuration that Appendix 4 represents the best option because:

- (a) There is less distance from the shore occupied, just over 200 metres;
- (b) That it is within the line of the headlands so there are no navigational issues.

[167] In our view such a siting and configuration would have a minimal impact on the natural character of Double Bay. The mussels themselves are natural as is the growth process. The structures represent an acceptable intrusion into the Bay at this scale. The harvesting is only once per 18 months and servicing is little different to other boating activities.

[168] Overall we conclude that the Act's purpose is best met by allowing the activity subject to appropriate conditions. To do so is consistent with PRCEP, NZCPS, RPS and Part II of the Act.

[169] The parties have indicated that if the Court is minded to grant consent then the final conditions will need to be approved by the Court. We anticipate that the conditions will be similar to those for the Pigeon Bay and Squally Bay sites, and generally in accord with those suggested by Mr Loe. We have also suggested at least two additional conditions.

Directions

[170] We have concluded that resource consents to operate a marine farm for green lipped mussels at Double Bay should be granted in accordance with terms and conditions which will be set. The actual wording of the grant of consents and the final conditions are to be circulated by the applicant to the Council and other parties within 20 working days. Comments are to be forwarded by them to the applicant within 10 working days thereafter.



[171] Subsequently the applicant is directed to file the draft consents and conditions, with any amendments agreed and with any comments from the parties and/or the applicant, with the Court 10 days thereafter. If the final terms and conditions cannot be agreed, then the Court will consider the same and issue either directions or a memorandum as to final conditions. The configuration should follow the form proposed in Appendix 4.

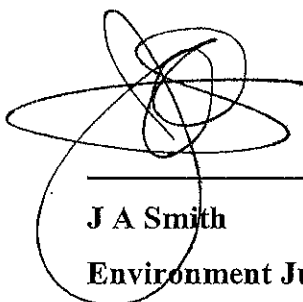
Costs

[172] This case is finely balanced. Although the applicant has been successful on appeal, the area consented to is significantly less than that originally applied for. We are of the tentative view that this is not an appropriate case for the award of costs. If any party seeks costs, then such application must be filed within 20 working days, replies 10 days thereafter, and final reply 5 working days thereafter.

DATED at CHRISTCHURCH this

17th day of June 2003.

For the Court:



J A Smith
Environment Judge



Issued¹¹: **18 JUN 2003**

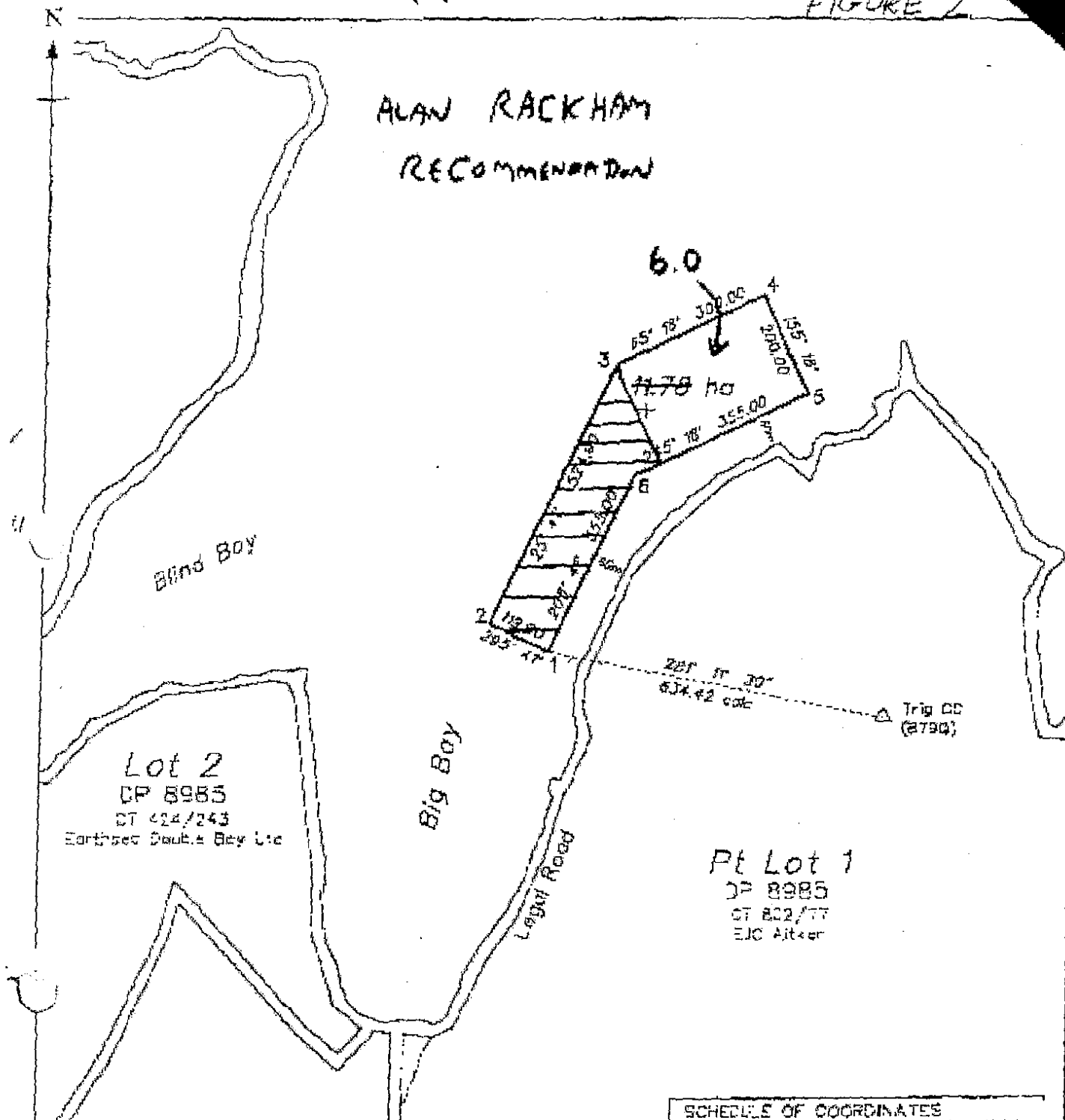
¹¹ SmithjeVud_Rule\d\RMA 528-02

There is no Appendix 1 or Appendix 2

The next page is Appendix 3



ALAN RACKHAM
RECOMMENDATION



Proposed
Coastal Permit

Pigeon Bay Aquaculture Ltd

SCHEDULE OF COORDINATES		
New Zealand Map Grid		
Point	East	North
1	2500717.2	5732083.7
2	2500610.0	5732135.2
3	2500837.5	5732508.3
4	2501100.0	5732733.6
5	2501193.6	5732551.0
6	2500871.1	5732423.9
Centre	2500891.2	5732522.9
Trig CC	2501339.6	5731960.5

NOTE: The position of this application has not been surveyed.
Baseline from Land Information NZ Cadastral Data

BANKS PENINSULA DISTRICT



SCALE 1:10,000

0 200 300 400 500 600 700 800

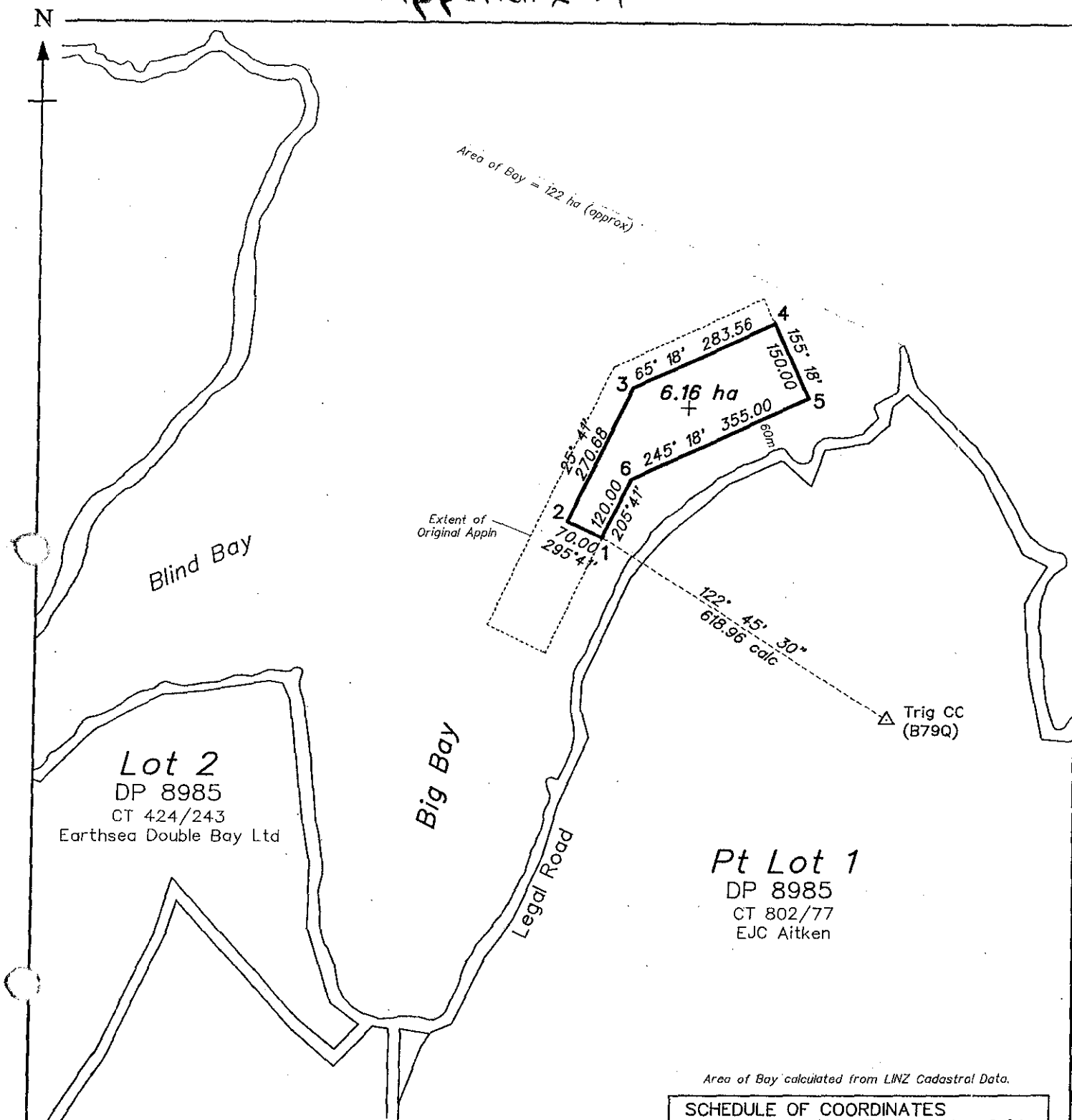
Datum: New Zealand Map Grid

Prepared by:

Date 24/01/01

DRAUGHTING Plus

MF_134a.gcd



Area of Bay calculated from LINZ Cadastral Data.

SCHEDULE OF COORDINATES		
New Zealand Map Grid		
Point	East	North
1	2500819.1	5732295.4
2	2500756.0	5732325.8
3	2500837.3	5732569.7
4	2501130.9	5732688.2
5	2501193.6	5732551.9
6	2500871.1	5732403.6
Centroid	2500974.1	5732533.5
Trig CC	2501339.6	5731960.5

Proposed Coastal Permit

Area Amended September 2002

Pigeon Bay Aquaculture Ltd



The position of this application has not been surveyed.
Coordinates from Land Information NZ Cadastral Data

SCALE 1:10,000

100 200 300 400 500 600 700 800m

BANKS PENINSULA DISTRICT

Datum: New Zealand Map Grid

Prepared by;

DRAUGHTING Plus

Date 26/09/02

MF_1134b.gcd

Appendix D

N

Area of Bay = 122 ha (approx)

Blind Bay

Big Bay

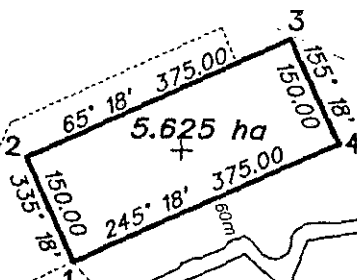
Legal Road

Lot 2

DP 8985

CT 424/243

Earthsea Double Bay Ltd



Pt Lot 1

DP 8985

CT 802/77

EJC Aitken

Trig CC
(B79Q)

Area of Bay calculated from LINZ Cadastral Data.

Proposed Coastal Permit

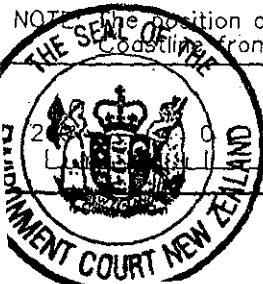
Area Amended November 2002

Pigeon Bay Aquaculture Ltd

SCHEDULE OF COORDINATES		
New Zealand Map Grid		
Point	East	North
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2	2500858.4	5732562.8
3	2501199.1	5732719.5
4	2501261.8	5732583.3
Centroid	2501060.1	5732573.1
Trig CC	2501339.6	5731960.5

NOTE: The position of this application has not been surveyed.
Coastline from Land Information NZ Cadastral Data

BANKS PENINSULA DISTRICT



SCALE 1:10,000

100 200 300 400 500 600 700 800m

Datum: New Zealand Map Grid

Prepared by;

Date 06/11/02

DRAUGHTING Plus

MF_1134c.gcd

Chapter 8 Activities and Occupation in the Coastal Marine Area

Principal Reason

Control of activities is needed to resolve conflict between recreational uses, to protect the coastal environment and to deal with the adverse environmental effects of activities in the Coastal Marine Area.

Methods

The Methods used or to be used by Environment Canterbury are;

Co-ordination and facilitation

Other legislation

Regional rules

Policy 8.3

In considering applications for resource consents to undertake activities in the Coastal Marine Area, Environment Canterbury, and the Minister of Conservation in relation to Restricted Coastal Activities, will have regard to:

- (a) the existing level of use and development in the area and the national priority in the New Zealand Coastal Policy Statement to preserve the natural character of the coastal environment; and
- (b) the need to protect characteristics of the coastal environment of special value to Tangata Whenua; and
- (c) effects on the public use and enjoyment of the coast, including public access to and along the Coastal Marine Area, and the contribution of open space to the amenity value of the coast; and
- (d) cumulative effects of such activities on the coastal environment both within and outside the immediate location; and
- (e) existing agricultural and other use and development of the adjacent land area, and any adverse effects on that activity; and
- (f) the status of any lands or areas administered by the Department of Conservation that are affected; and
- (g) the publicly notified purpose of any proposal for protected status, if the application affects an area proposed for protection under a statute administered by the Department of Conservation; and
- (h) the possibility of natural features migrating inland as the result of dynamic coastal processes, including sea level rise, and the ability of natural features to protect subdivision, use and development from erosion and inundation; and
- (i) the need to protect existing network utility infrastructure where such infrastructure is located adjacent to or within the Coastal Marine Area.



Explanation

The New Zealand Coastal Policy Statement requires this plan to provide for a number of matters, including those listed above. Chapter 1 of the New Zealand Coastal Policy Statement provides for the preservation of the natural character of the coastal environment. Chapter 2 of the New Zealand Coastal Policy Statement provides for protection of characteristics of the coastal environment of special significance to Tangata Whenua. Chapter 3 of the New Zealand Coastal Policy Statement provides for other matters in relation to the subdivision, use or development of areas of the coastal environment.

Much of the Coastal Marine Area of Canterbury abuts agricultural land. There is a need to ensure that any activities allowed in the Coastal Marine Area can satisfactorily co-exist with agricultural use. [Developments in the Coastal Marine Area may have adverse effects on residents who live adjacent to the Coastal Marine Area, including a loss of amenity, dust or noise.]

These matters apply in addition to the matters listed in Policies 8.4, 8.5 and 8.7, and the matters that the Act requires a consent authority to consider.

[A consent authority is subject to the purpose of the Act to promote sustainable management which includes enabling people to provide for their social, economic and cultural wellbeing. In addition to the listed possible adverse effects of the activity the benefits of the proposed activity to people and communities is an important consideration.]

Land and areas referenced under the Conservation Act 1987 and other land and areas administered by the Department of Conservation are listed in the Canterbury and Nelson-Marlborough Conservation Management Strategies. The areas are also identified for the Canterbury Conservancy as a layer on Environment Canterbury's computerised Geographic Information Services database. Reference to these sources should be made so that the status of any land or area can be taken into account when deciding resource consents. [See NZCPS Policies 4.1.1 and 4.1.2.]

Principal Reason

To provide for matters of national significance that are set out in the New Zealand Coastal Policy Statement.

Methods

The Methods used or to be used by Environment Canterbury are:

Investigations;
Co-ordination and Facilitation; and
Regional rules
[Other legislation]





Policy 8.5

In considering applications for resource consents to occupy the Coastal Marine Area, Environment Canterbury, and the Minister of Conservation in relation to Restricted Coastal Activities, should:

- (a) give priority to maintaining safe anchorages for vessels; and
- (b) avoid impeding navigational channels and access to wharves, slipways and jetties; and
- (c) avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available; and

- (d) have regard to existing commercial use of the area and any adverse effects on that activity, ~~including recognition of the designated Port Operational Areas~~; and
- (e) have regard to any adverse effects on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
- (f) have regard to any adverse effects on the cultural, historic, scenic, amenity, Tangata Whenua, and natural values of the area; and
- (g) have regard to available alternative sites and the reasons for the applicant's choice of site; and
- (h) have regard to existing use and development of the area and the extent to which the natural character of the area has already been compromised; and
- (i) only provide for the period or periods of occupation that are reasonably necessary to meet the purposes for which occupation is sought.

Explanation

There are limited areas of sheltered coastal water in the Coastal Marine Area of Canterbury. The waters are largely restricted to Banks Peninsula. The proximity of Christchurch means that there is considerable recreational fishing and boating in this area. ~~The established operations of the two commercial ports are protected by ensuring that access to the ports, and appropriate use of the operational areas, is maintained.~~

Activities that require the allocation of space, such as marine farms, compete with other uses of the area. Consideration should be given to the effects of occupation on existing uses and values for the area, including effects on the local community and the cumulative effects of displacing existing uses and values.

These matters apply in addition to the matters listed in Policy 8.3, and the matters that the Act requires a consent authority to consider.

Principal Reason

To give priority to maintaining public and vessel safety, the use of existing infrastructure, and to take account of existing public and commercial use of the Coastal Marine Area and the adverse effects of the proposed occupation.

Chapter 1 of the New Zealand Coastal Policy Statement makes it a national priority to preserve the natural character of the coastal environment. Policy 4.1.6 of the New Zealand Coastal Policy statement also requires consideration of alternatives and the reasons for the choice of site.

Methods

The Methods used or to be used by Environment Canterbury are:



**PERMITTED ACTIVITIES IN THE TRANSITIONAL AND
PROPOSED BANKS PENINSULA DISTRICT PLANS**

Within the former Mt Herbert county area of the Banks Peninsula District, the following activities are permitted activities in both the Transitional and Proposed District Plans:

Within the Coastal Protection Area (CPA) :

- Farming
- Creation and maintenance of reserves
- Outdoor recreation
- Conservation activities

Between the CPA and 100m inland of MHWS: As above, plus:

- Farm accessory buildings and structures
- Home enterprises
- Erection of a dwelling on 40 ha or more (provided it has legal access to a formed public road).

In the area > 100m inland of MHWS: As above, plus:

- Discrete woodlot (up to 2ha and no more than 50% of site), except that no exotic forestry may be planted within an area of significant indigenous vegetation (which includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

Within the former Akaroa County area of the Banks Peninsula District, the following activities are permitted activities in both the Transitional and Proposed District Plans

Within the CPA:

- Farming
- Creation and maintenance of reserves
- Outdoor recreation
- Conservation activities

Between the CPA and 100m inland of MHWS: As above, plus:

- Farm accessory buildings and structures
- Home enterprises

In the area > 100m inland of MHWS: As above, plus:

- Discrete woodlot (up to 2ha and no more than 50% of site), except that no exotic forestry may be planted within an area of significant indigenous vegetation (includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

The principle difference between the Mt Herbert and Akaroa County areas is that, in the former, dwellings are permitted on sites greater than 40ha, and in the latter they are not permitted as of right on sites of any size.

Note: In the Proposed Banks Peninsula Plan, if an activity is not listed as permitted, controlled or discretionary, it is a non-complying activity (Rule 9.2 in Chapter 19).



Comparison between the Transitional and Proposed District Plans

Transitional Plan – Mt Herbert Section – Permitted Activities
Agricultural, horticultural, and pastoral farming, boarding kennels, veterinary hospitals and clinics, racing stables, beekeeping, apiaries and stockyards.
Factory farming (conditions apply)
Forestry in accordance with Part 9 (conditions apply): (1) Shelterbelts under 2ha (2) Mixed woodlot and woodlot forestry (see definitions – mixed woodlot is <5ha, woodlot is <2ha) (3) The planting and tending of indigenous tree species for the purpose of soil conservation or beautification.
Public and private parks, reserves, and recreation grounds; golf courses, walkways and public halls
A dwelling on a land area of 40ha or more.
Home occupations and craft activities accessory to existing dwelling units (conditions apply)
Repair, modification, or improvement of any existing dwelling
Family flat accessory to an existing dwelling unit (conditions apply)
Farm workers' accommodation (which means accommodation provided on a farm for persons employed full time on the property)
Public Utilities
Farm accessory buildings, accessory buildings for predominant uses and for existing approved conditional uses
River protection, flood control, drainage, erosion control and soil conservation works and shelter planting (except major works involving land purchase) by and under the control of the Regional Water Board

Transitional Plan – Akaroa Section – Permitted Activities
Agricultural, horticultural, and pastoral farming
Factory farming
Woodlot forestry (see definition, <3ha)
Planting and tending of native bush
Reserves, parks and passive recreation areas, public walkways
Replacement of existing dwellings
Family flats associated with existing dwellings
Home occupations (not including selling to the general public).
Guest accommodation associated with existing farmhouses
Small public utility structures
Accessory buildings and structures (excluding dwellings)
Water and soil conservation works



Proposed Plan – Permitted Activities

Within Coastal Protection Area (no erection of any building or structure, or earthworks permitted except for fencing, water storage and reticulation, troughs and pipes for farming purposes):

- Farming
- Creation and maintenance of reserves
- Outdoor recreation which does not involved the commercial use of motor vehicles
- Conservation activities
- Maintenance and repair of roading infrastructure undertaken by Council

Within area between CPA and 100 m inland of MHWS: As above, plus:

- Farm accessory buildings and structures
- Home enterprises
- The erection of dwellings and accessory buildings (no more than 1 on any site between 10ha and 20 ha, or on sites greater than 20 ha, one dwelling per 20 ha)
- Earthworks where the maximum uphill cut is 2m and the maximum downhill vertical spill is 2.4 metres.

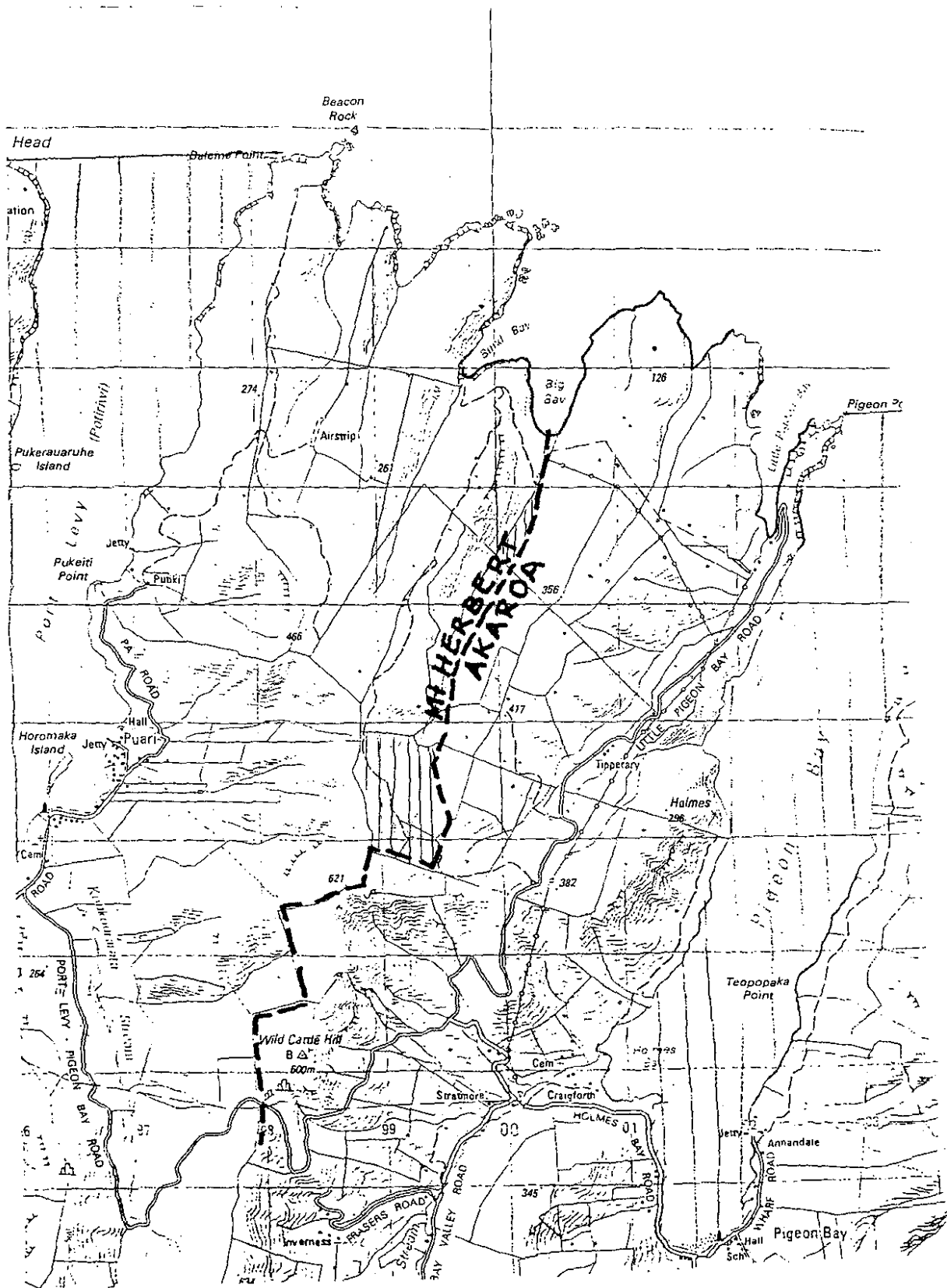
In the area > 100 m inland of MHWS: As above, plus:

- Woodlot forestry (which means a discrete plantation of trees of no more than 2 ha in area and covering no more than 50% of a site) Except that no exotic forestry may be planted within an area of significant indigenous vegetation (includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

MP2242-MP



Annexure 1



Position of Old County Boundary

