BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 72

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals under section 120 of the Act
BETWEEN	PORT GORE MARINE FARMS Applicant
AND	SANFORD LIMITED (ENV-2007-CHC-208 AND ENV-2009-CHC-178) Applicant and Appellant
AND	CLIFFORD EDGAR MARCHANT (ENV-2007-CHC-204 AND ENV-2009-CHC-179
AND	FRIENDS OF NELSON HAVEN AND TASMAN BAY INCORPORATED (ENV-2009-CHC-180) Appellants
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Court: Environment Judge J R Jackson
Environment Commissioner H M Beaumont
Environment Commissioner A J Sutherland

Hearing: at Blenheim on 6 to10 December 2010 and 7 to 9 March 2011
Final submissions received 6 June 2011

Counsel:

J Hassan and J Meech for Sanford Limited
M Hunt for J T Marine Farms Limited
P Milne and F Sing for C E Marchant and Friends of Nelson Haven and Tasman Bay Incorporated
M Radich for Marlborough District Council

Date of Decision: 23 April 2012

Date of Issue: 26 April 2012

DECISION

A: Under section 291 of the Resource Management Act 1991 the appeals by Port Gore Marine Farms and Sanford Limited are refused and the appeals by C E Marchant and Friends of Nelson Haven and Tasman Bay Incorporated are allowed.

B: The Environment Court:

(1) confirms the decision(s) of the Marlborough District Council and declines consent for the Pool Head mussel farm in Port Gore;
(2) cancels the decision(s) of the Marlborough District Council and declines consent for the Gannet Point South mussel farm in Port Gore;
(3) cancels the decision of the Marlborough District Council and declines consent for the Gannet Point North mussel farm in Port Gore.

C: This decision is final in relation to each of the three marine farms referred to in Order B except in relation to one aspect of section 165ZH of the Act. In respect of that provision:

(1) subject to (2) to (5) below this decision shall come into effect on the date eighteen calendar months after delivery of the decision, so that the applicants may each harvest the mussels on their respective lines as at the date of this decision under the existing coastal permits as defined in that section;
(2) the existing permit holders must comply with all relevant conditions of the existing coastal permits until all mussel lines and supporting structures are removed;
(3) the existing permit holders may not seed or otherwise install any new mussel lines from the date of this decision;

(4) nothing in (1)-(3) above shall be interpreted as the grant of new coastal permits to the applicants or any of them; and

(5) no other rights under section 165ZH and/or (if applicable) section 124 of the Act are extended or created by Order (1) above.

D: Leave is reserved for one month to any party to apply to amend Order C if it is ambiguous or otherwise unworkable.

E: Costs are reserved. Any application is to be made within 20 working days of this decision being issued, and any reply is to be lodged and served within a further 15 working days.

REASONS

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1. Introduction

1.1 The issues

[1] Should the resource consents for three high-yielding mussel farms in Port Gore be renewed or not? That question is raised by these proceedings under the Resource Management Act 1991 ("the RMA" or "the Act"). The three sites are close to the southeastern shores of Port Gore on the southern side of Cook Strait. Port Gore is a large bay between Capes Lambert and Jackson on the outer edge of the Marlborough Sounds and is known as the resting place of the Soviet cruise liner *Mikhail Lermontov* which sank on 16 February 1986 after hitting rocks off Cape Jackson.

1.2 Background to appeals

1.2.1 The applicants and the existing farms

[2] There are two applicants for three mussel farms on the eastern side of Port Gore: Sanford Limited ("Sanford") which has applied for two farms, and J T Marine Farms Limited, a company which trades as Port Gore Marine Farms ("PGMF"). All the applications are for permits on sites which contain farms at present : the Pool Head farm (owned by Sanford), the Gannet Point South farm (also owned by Sanford), and Gannet Point North (owned by PGMF). The three farms are shown on the attached map[1] marked "A". The PGMF farm is not named, but is shown as being two areas (described below) north of Gannet Point. The coastal permits for these farms have expired, but are

[1] S K Brown, evidence-in-chief, annexure 2 [Environment Court document 12].

running on[2] while these appeals are resolved. Each of the farms has a complex history, which we will now attempt to summarise.

Pool Head Marine Farm

[3] Sanford's Pool Head marine farm was established in 1998. It covers 12.75 hectares and appears as one farm. However, it originated as two distinct farms, with the smaller three-hectare farm (permits #U050218 and #U941459 together making site 8175) originally owned and established by Kiwi Marine Farms Limited. Site 8501, covering 9.75 hectares (#U950263 and MPE115) and site 8175 fit together to form a rectangular area. The total area of 12.75 hectares is laid out in three blocks with six longlines (each approximately 140 metres long) in each block giving a total of 2,520 metres approximately[3]. There are 1,062 surface structures at this site[4].

[4] The current applications for the Pool Head farm were lodged with the council on 15 May 2008. In 2009, the Hearing Committee declined Sanford's applications for renewed coastal permits for the Pool Head marine farm. Sanford has appealed that decision.

Gannet Point South Marine Farm

[5] Sanford's Gannet Point South marine farm was established in 1993 and purchased by Sanford in 2001. By application lodged on 22 July 2004 Sanford sought a permit to replace permit #U941458 and MPE27 for the existing six hectare marine farm (site 8176). The marine farm is currently configured in two blocks with six long lines (110 metres long) on each[5]. There are 708 surface structures on this farm[6].

[6] In 2007, the Hearing Committee appointed by the Marlborough District Council granted consent to the Gannet Point marine farm for a ten year consent term expiring 1 September 2017. Sanford appealed the term granted and instead seeks a consent term of 20 years.

Gannet Point North Marine Farm

[7] PGMF's marine farm is also located at Gannet Point. It is situated to the north of Sanford's Gannet Point marine farm. The site is consented as two blocks, one of 3.02 hectares and one of 2.98 hectares, north of Gannet Point. Twenty longlines each of 110 metres length, a total of 2,200 metres, were consented but only 18 longlines have been installed. The installation requires up to 611 black floats and 40 red floats, one at each end of each longline[7]. The application we are considering was filed with the MDC

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2 Under section 165ZH of the RMA.

3 D Herbert, evidence-in-chief 27 July 2010, para 11 [Environment Court document 5].

4 D Herbert, supplementary evidence 29 September 2010, para 21 [Environment Court document 5A].

5 D Herbert, evidence-in-chief para 15 [Environment Court document 5].

6 D Herbert, supplementary evidence 29 September 2010, para 21 [Environment Court document 5A].

7 R D Sutherland, rebuttal evidence November 2010, para 15 [Environment Court document 17C].

on 17 July 2008. The council granted consent for a (short) term of eight years expiring 1 September 2017.

1.2.2 The appeals and the parties

[8] Sanford has appealed to this court in respect of both its mussel farms. Appeal ENV-2007-CHC-208 is against the council's limiting the grant of consent for a mussel farm at Gannet Point South to a term of ten years. Sanford's appeal ENV-2009-CHC-178 is against the council's decision to refuse consent altogether for the Pool Head farm.

[9] Mr C E Marchant (ENV-2007-CHC-204 and ENV-2009-CHC-179), a resident of Cockle Bay which is inshore of Pool Head (which is to the west) and Gannet Point (to the north), and Friends of Nelson Haven and Tasman Bay Incorporated ("FNHTB"), a public interest incorporated society (ENV-2009-CHC-180) have appealed against the council's decisions consenting to the Gannet Point farms. They have also joined the Sanford appeals as section 274 parties.

[10] A number of other section 274 parties have joined the appeal proceedings. Several[8] have elected to give evidence on their own behalf and on behalf of Clifford Marchant and FNHTB.

1.2.3 Procedural matters

[11] There are three procedural matters we should record. First we note that the reason the 2007 appeals have taken a long time to come to a hearing is that in 2008 the Environment Court ruled that the appeals relating to the Gannet Point South marine farms should be adjourned so that they could be heard with any appeals in relation to the re-consenting of the other two marine farms. No commercial harm has been done to the mussel farmers in the meantime because Sanford has continued operations on the farms under section 165ZH of the RMA.

[12] Secondly, prior to the hearing Judge Jackson disclosed to the parties that some time prior to 4 November 1996 he had variously acted:

- for J T Marine Farms Limited or its principal on other marine farming related matters;
- for FNHTB at different times on other matters (not in the Marlborough Sounds); and
- (possibly) for the original applicant for a marine farm at Pool Head farm or on other proposed marine farms on the eastern side of Port Gore.

All parties consented to the judge being part of the court to hear and decide the appeals.

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[8] Paul Eglinton, Andrew Crawford (for Sounds Air) and Ronald Marriott.

[13] Thirdly, as discussed with counsel at the end of the hearing, the court's members had hoped to carry out an inspection of Port Gore, the proposed sites, and the adjacent land. Unfortunately, changing circumstances and our other commitments have not allowed us the time to visit the area so we have to make a decision without that benefit. However, we have all visited the Marlborough Sounds for professional and personal reasons over many years, so we are not unfamiliar with the Sounds as a whole or with marine farms within the Sounds.

1.3 Further details of the mussel farms

1.3.1 Footprints and location

[14] If granted, the mussel farms will continue to be located in the same place as the existing marine farms. The applicants seek some minor boundary adjustments. In respect of Sanford's Pool Head marine farm, a GPS survey undertaken in 2002 showed differences between actual consented and as-built boundaries. Under the authority of special remedial Government legislation[9], this was purportedly rectified by application granted by the council in 2008 (after the permit had expired).

[15] Part of the existing (as-built) Gannet Point South farm has also been discovered to be outside the currently consented area. Because Sanford considered this was only slight, it did not apply under the special legislation. Instead Sanford now proposes to remedy that by seeking consent only for the area that is both currently occupied and consented[10]. The essential change is that the Gannet Point South marine farm will not extend as far offshore, when compared to the existing marine farm.

[16] PGMF is only seeking new resource consents for that part of its existing operation which is within its legal (i.e. consented) boundaries.

1.3.2 Proposed modifications to traditional mussel farms

[17] A minor change from Sanford's existing marine farms is that the new consents are for the harvesting of mussels only, whereas the expired consents also enable harvesting of scallops and oysters (although they have always been operated only as mussel farms). More importantly, both applicants are proposing to construct and operate their mussel farms differently from the traditional method used by the existing farms. We now briefly describe the differences between techniques.

Standard surface mussel farms

[18] The long-established practice is to allocate rectangular (more or less) areas in which mussel farmers may establish their farms. A number of longlines, or backbones, are then installed parallel to the longer sides of the allocated area. These are 24-28 mm diameter ropes up to 200 metres or more in length supported by floats in the water surface at regular intervals. Floats are normally black, approximately 1 x 0.5 metres in

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9 The Aquaculture Reform (Repeal and Transitional Provisions) Act 2004.

10 D Herbert, evidence-in-chief paragraphs 13, 17-19 [Environment Court document 5].

plan and may have up to 0.3 metres protruding above the water surface. They are thus visible as a rectangular array over distances of two kilometres or more.

[19] The longlines are held in position by inclined warp ropes secured to anchors placed in the seabed. Vertical ropes (droppers) extend from the longlines down to depths of 10 or 12 metres. Their length is limited either by water depth or by the depth to which light can penetrate. Mussel spat is deposited onto the droppers (seeding) and develops to a condition appropriate for harvesting. Development time is 15-18 months dependent upon temperature and light conditions and on the availability of food. Farms must be visited by service vessels for seeding and harvesting. Periodic checking and maintenance visits are also required.

The PGMF proposal for a partly submerged mussel farm

[20] Principally to mitigate visual effects PGMF proposes a partially submerged mussel farm. Each longline in the proposed farm would be formed as a semi-rigid structure comprising two ropes separated with wooden spacers. The structure will be supported one to two metres below the water surface by attached subsurface floats and by surface floats at 20 metre centres. It will be anchored to the sea bed using inclined warp ropes and block or screw anchors as for a surface farm[11].

[21] The proposal is to install two blocks of each with ten longlines 100 metres long at 16 metre spacing between lines in the same position as the existing farm. The total line length would be 2,000 metres compared with the 2,200 metres of the existing farm. Up to 400 black surface floats will be required whereas 611 such floats are used on the existing farm[12]. The number of red surface floats will remain unchanged at 40.

[22] Partly submerged structures have been successfully trialled through one growing cycle in the Marlborough Sounds[13]. For PGMF, Mr Sutherland commented that it is a proven system which has the benefit of significantly reducing the number of surface floats without changing the basic model for marine farming[14]. No change is proposed to the size, colour and layout of the navigation buoys and the reflectors will not change from those presently installed[15]. There is thus no mitigation with respect to lighting effects. Indeed, as we shall see later, new lighting requirements may be more visible than at present.

Sanford's proposal for near fully submerged farms

[23] Sanford's original applications should be read together with the Memorandum of Counsel for Sanford, dated 29 July 2010, which seeks modifications to these

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11 R D Sutherland, supplementary evidence September 2010, Appendix A [Environment Court document 17A].

12 R D Sutherland, rebuttal evidence November 2010, para 15 [Environment Court document 17B].

13 R D Sutherland, evidence-in-chief July 2010, para 22 [Environment Court document 17].

14 R D Sutherland, rebuttal evidence November 2010, para 31 [Environment Court document 17B].

15 R D Sutherland, supplementary evidence September 2010, para 3C [Environment Court document 17A].

applications so that they are for subsurfacing. That is, Sanford is no longer seeking consent for surface farming (other than for a transitional period of 21 months[16] which we will discuss later if necessary). The reason for the amendment is that Sanford has recognised that the Gannet Point and Pool Head farms are in a special location[17]. In order to reduce visual effects of the farms Sanford proposes a fully submerged farm, which is an adaptation of the surface farm structure. Under the standard technique the longlines hang down from surface floats. In a submerged farm they float up towards the surface, restrained by anchors in the sea bed. Such an approach is only in the developmental stage[18]. It has not been tried in New Zealand but submerged mussel farms are found in France, the United Kingdom and on the east coast of the United States[19].

[24] Each longline would comprise two parallel ropes 140 metres long held apart by spreader floats at two metre centres. The longlines would be further supported at each end by a three tonne buoyancy float and by one tonne buoyancy floats at 20 metre centres. At low tide the tops of the three tonne floats will be 2 to 2.5 metres below the water surface. Droppers eight metres long will be suspended from the longlines[20].

[25] The structure will be anchored to the sea bed by four screw anchors, one vertically beneath each three tonne float and one at each end to which an inclined warp rope is attached. This rope will extend from the three tonne float at a 1:2 slope in line with the structure to the anchor point. In addition two tonne weights will be placed on the sea bed vertically below and attached to each one tonne float. At 50% of full crop the longlines will be essentially horizontal four metres below the water surface at low tide. For less than 50% of full crop the longlines will curve upwards reaching to within 2.75 metres of the water surface at low tide midway between each one tonne float when there is no crop. For more than 50% of full crop the long line will curve downwards.

[26] As recorded earlier, Sanford proposes that the submerged farms be located on the sites of its existing farms at Pool Head and Gannet Point. At Pool Head there will be six longlines each of 280 metres length and four longlines each of 140 metres length, a total of 2,240 metres (cf 2,520 in the existing farm). At Gannet Point six longlines each of 220 metres are proposed so the total length of line (1,320 metres) is unchanged[21]. To facilitate harvesting a light submerged line will extend across the gap between adjacent longlines. Using a grapnel the harvesting vessel will raise this line and thus the

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16 D Herbert, supplementary evidence paragraphs 5-9 [Environment Court 5A].

17 D Herbert, evidence-in-chief 27 July 2010, para 29 [Environment Court document 5].

18 D Herbert, evidence-in-chief 27 July 2010, para 28 [Environment Court document 5].

19 G C Teear, statement of evidence in reply 1 December 2010, para 7.4 [Environment Court document 6].

20 D Herbert, supplementary evidence 29 September 2010, Figure 3 [Environment Court document 5A].

21 D Herbert, supplementary evidence 29 September 2010, para 14 [Environment Court document 5A]; G C Teear, evidence-in-chief, Attachment B [Environment Court document 6].

longlines. In this way the buoyant pickup lines originally proposed to be attached to each one tonne buoy are no longer required for lifting the longlines[22].

Navigation lighting

[27] Once installed the only surface features will be five navigation buoys at each farm: one at each corner and one at the midpoint of the offshore boundary. The buoys will have yellow IALA[23] "A" special mark spar buoys fitted with radar reflectors and lights. Recently the harbourmaster has required that lights be mounted at least two metres above the water surface, be visible for at least two nautical miles (compared with the current requirement of one nautical mile) and are to flash five times every 20 seconds. Thus there will be 75 flashes each minute from each farm[24].

1.3.3 Transitional period

[28] Sanford sought that a transitional period be provided for the change from surface to subsurface marine farming. Mussels are grown on an approximately 18 month cycle. However, weather, sea and seasonal conditions all affect the rate of growth. Flexibility needs to be built in so that existing mussel crops can be allowed to develop to full maturity. Accordingly, Sanford requested a 21 month transitional period[25].

[29] Once the existing crops are removed (and presumably not replaced), to construct the submerged farms Sanford intends to remove all components of the existing farms except for the anchors which will remain in the sea bed. Two days[26] will be required to remove a line and replace it with the submerged structure[27]. Messrs Herbert and Teear discussed the construction of the subsurface marine farms further in their evidence[28].

[30] As we have said, PGMF's proposal is for a modified version of the traditional surface mussel farm. At the hearing PGMF also advanced an alternative position. As we understood Mr Hunt, if the court considers it might not be able to consent to mussel farming on the Gannet Point North site unless there was a move towards subsurface farming similar to Sanford's suggestion, then the court might impose a review condition on the PGMF consent. That proposal was opposed by Mr Milne on the general ground that it was too late (and unfair) for PGMF to change its position; and on the specific ground that a review condition cannot require a consent holder to do anything and thus does not necessarily mitigate any adverse effects, although it may have that result if the

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22 G C Teear, statement of evidence in reply1 December 2010, paragraphs 6.9 and 6.10 [Environment Court document 6].

23 IALA = International Association of Marine Aids to Navigation and Lighthouse Authorities (see www.maritimenz.govt.nz/Publicationsandforms/commercial-operations).

24 D Herbert, supplementary evidence 29 September 2010, paragraphs 33-35 [Environment Court document 5A].

25 D Herbert, supplementary evidence, paragraphs 7-9 [Environment Court document 5A].

26 D Herbert, evidence-in-chief paragraphs 34-35 [Environment Court document 5].

27 D Herbert, evidence-in-chief 27 July 2010, paragraphs 34 and 35 [Environment Court document 5].

28 D Herbert, evidence-in-chief paragraphs 34-35 [Environment Court document 5]; G G Teear, evidence-in-reply paragraphs 6.1-6.5 [Environment Court document 6].

council does review the condition. Mr Hunt responded on the general point that it is never too late to mitigate a proposal. We have some doubts about that, given the warning by the Supreme Court in *Waitakere City Council v Estate Homes Limited*[29] about the Environment Court considering a different application than that considered by the council. However, in the specific circumstances we consider enough of the appellants' witnesses responded to the specifics of such a concept for us to be able to consider it.

[31] As for Mr Milne's specific criticism, we will consider the potential mechanisms for changing the proposal to a fully sub-surface consent if we decide that such a farm is appropriate on all the merits.

2. The existing environment of Port Gore

2.1 Overview

[32] Maps show that Port Gore is approximately an irregular parallelogram with its long sides running northeast-southwest. The long sides are the ridges running down to Cape Lambert and Cape Jackson, the latter being at the northwestern entrance to Queen Charlotte Sound. The short southwestern edge of the bay is backed by a ridge running from Mt Furneaux (823 metres above sea level). The relatively short northeastern mouth of the bay – it is seven kilometres from cape to cape – is open to Cook Strait. The place of Port Gore between the Strait and the Marlborough Sounds is shown on the attached map marked "B".

[33] The first impression of Port Gore from Cook Strait is of stark bare headlands and coastal cliffs which grow in size and bush cover. The ridges rise to the southwest, all with a backdrop of native bush along the southern face of Port Gore.

[34] Floating on the surface of Port Gore there are three groups of mussel farms : a larger set at Melville Cove, several at Pig Bay, and – on the eastern side of Port Gore – the three existing mussel farms at Pool Head[30] and Gannet Point (two) with which we are concerned in these proceedings. For the purposes of these proceedings, since the mussel farms' coastal permits have expired (or at least should be treated as if they have expired), the planners agreed[31] that we must imagine the existing environment as if the Pool Head and Gannet Point mussel farms are not there[32]. There are no jetties or wharves anywhere in Port Gore except in Melville Cove.

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29 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112; [2007] 13 ELRNZ 33; [2007] 2 NZLR 149; [2007] NZRMA 137.

30 As we have recorded, technically there are two marine farms at Pool Head, but they look like and, we understand, are managed by Sanfords as one.

31 J C Kyle, evidence-in-chief para 28 [Environment Court document 21]; S M Dawson, evidence-in-chief para 23 [Environment Court document 22].

32 There is one exception to this – under section 104(2A) – which we have already indicated we will consider in our discussion of section 7(b) of the Act.

[35] Various commercial activities (e.g. farming, tourism, diving, fishing, flight charters etc) associated with its land and sea resources take place within Port Gore. The witnesses all agree that houses, farm buildings, an air strip, woodlots, roads, tracks, electricity lines and fence lines are visible from places around the bay, as are extensive areas of native bush around the southern side of the bay.

2.2 The terrestrial neighbours of the mussel farms

[36] From south to north the landowners on the eastern side of Port Gore are:

- Maori owners of land held under the South Island Landless Natives Act 1906;
- the Marchant family who own a property at Cockle Bay in the southeastern corner of Port Gore;
- the Surgenor family who have a bach in Cockle Bay also; Ms G K Surgenor gave evidence[33] supporting Mr Marchant;
- the Eglinton family whose bach is at Onapopoia to the north of Cockle Bay and Gannet Point; Mr P Eglinton gave evidence[34] supporting Mr Marchant;
- the Harvey family which owns about 360 hectares on the Port Gore side of Cape Jackson at the Kaitangata Bluffs, east of Black Head. Ms K D C Gerard, a section 274 party, gave evidence[35] about the effect of the marine farms on her parents' property and the amenities it enjoys;
- the Marriott family for whom Mr R E Marriott gave evidence[36] as a section 274 party supporting the Marchant and FNHTB appeals.

Five of the principal landowners on the eastern side of Port Gore (or their families) oppose the mussel farms. While we have heard evidence from members of those families, we have treated it with caution especially where it conflicts with, and/or is not supported by, independent expert evidence. We accept that they are not objective about the presence or continuation of the three marine farms we are considering.

[37] Access to the land at the southeastern and eastern side of Port Gore is principally by a rough private road from the Titirangi Road. This road is largely invisible from the sea and consequently reduces the perceived naturalness of the area very little. There are also two landing strips on the Marchant land at Cockle Bay in the southeastern corner; and there is a walking track which comes over the ridge from Ship Cove in Queen Charlotte Sound. In calm conditions several beaches or rocky foreshores can be landed on, but otherwise access from the sea is difficult. There are no jetties on this side of the bay.

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33 G K Surgenor, evidence-in-chief [Environment Court document 34].
34 P Eglinton, evidence-in-chief [Environment Court document 33].
35 K D C Gerard, evidence-in-chief [Environment Court document 31].
36 R E Marriott, evidence-in-chief [Environment Court document 25].

[38] Mr Marchant and his family are the only permanent residents of the area. They live at Cockle Bay and look northwest towards the Pool Head site which is 890 metres away at the closest point[37], and northwards to the Gannet Point South site which is 1.13 kilometres away[38]. A little further north in Cockle Bay is the Surgenor bach. This is only occupied intermittently and is 1.10 kilometres from the Pool Head site and 940 metres from the Gannet Point South site[39]. From the bach there are open views of both existing marine farms.

[39] Several witnesses referred to the noise from use of the Marchant's airstrip[40]. Port Gore Tours Limited offers scenic flights into, and accommodation at, Cockle Bay in the southeastern corner of Port Gore. The appellant, Mr Marchant, whose family runs the business, estimated that there are approximately 120 (or perhaps 210) return flights per year[41]. Each use of the airstrip only lasts a few minutes on landing[42], and (we infer) on take-off. Compared with the hours which would be taken by mussel barges on every visit[43], we consider the existing environment is generally peaceful[44]. The noise from aircraft is only a very minor adverse effect on the Port Gore environment.

[40] The Eglinton bach, over the hill to the north of Cockle Bay and elevated above the sea, is 270 metres from the Gannet Point North site and one kilometre from the South site[45]. Mr Eglinton gave an impressionistic description of the qualities he enjoys at his property. His evidence was supplemented by the evidence of Ms D J Lucas, a landscape architect, who confirmed that the Gannet Point North farm is visible, at a range of about 200 metres, from Mr Eglinton's bach. Prior to the hearing there were some remnant stock on this land, and there is no specific protection for the reverting bush on the Eglinton land.

[41] East of the Eglinton bach, the Harvey bach is 470 metres from the Gannet Point North farm. A member of the Harvey family, Ms K D C Gerard who lives at Hopai Bay in Pelorus Sound but has holidayed in Port Gore since 1984, wrote careful and quite balanced evidence. She described[46] the coastal (including kohekohe[47]) forest growing on her parents' land, and said this has been assessed as regionally significant. It is protected under a Queen Elizabeth II National Trust Covenant.

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37 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].
38 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].
39 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].
40 E.g. C G Godsiff, evidence-in-chief para 13 [Environment Court document 10].
41 Transcript p. 762 lines 8 and 36-38.
42 C E Marchant, evidence-in-chief para 188 [Environment Court document 27].
43 C E Marchant, evidence-in-chief para 188 [Environment Court document 27].
44 If each round trip generates noise within Cockle Bay which lasts ten minutes from when it is first heard to when the aircraft disappears over the ridge towards Picton, then at 120 return trips x 10 minutes (÷ 60), the total aircraft noise would be 20 hours per year, i.e. less than one day.
45 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].
46 K D C Gerard, evidence-in-chief para 1.11 [Environment Court document 31].
47 *Dysoxylum spectabile*.

How wild and remote is eastern Port Gore?

[42] One of the values that most of the owners of land on the eastern side of Port Gore say that they enjoy is its remoteness. Their landscape witness, Ms Lucas, described the various values of Port Gore including the transient values[48] (and especially the contrasts between stormy and calm conditions) that it enjoys. She also described the 'natural darkness'[49] of Port Gore, its very high aesthetic values[50]; and its value to tangata whenua : Cape Jackson's Maori name is Te Taonui-a-Kupe[51] and the Harvey property named "The Footsteps" refers to the footsteps of Kupe (Te Ope-a-Kupe) in the bay below their property – east of Onapopoia. In the end she concluded that it contains "exceptional wild and scenic values"[52]. The applicants' witnesses considered the "remoteness" or "wildness" values of any part of Port Gore only perfunctorily in their evidence-in-chief[53]. Only after caucusing[54] and in cross-examination did Mr Brown give his view that southeastern Port Gore was "not truly remote or wild"[55]. He attributed that to the level of modification of the "inner bay". Two other landscape witnesses, Messrs Carter and Bentley, agreed at caucusing but gave no evidence on the issue.

[43] Mr Kyle, the planner called for the applicants, described Port Gore as "… a remote and rugged location"[56], and he confirmed in cross-examination that it has "… wild and scenic and remote characteristics[57]. He qualified that in his rebuttal evidence by writing that while it is "remote" it is not "… truly remote"[58].

[44] Remoteness is an elusive quality. It has measurable and non-measurableness aspects. In sociological and economic studies remoteness is often measured simply as the road distance to a service centre[59]. Remote is often taken to mean a site has restricted accessibility to goods, services and opportunities for social interaction, whereas 'very remote' means that there is very little accessibility to these things. On that basis the eastern side of Port Gore is certainly remote by New Zealand standards. For recreationalists for whom the journey is as important as the destination – in this context that means boaties other than fisherman including yachties and kayakers – remoteness has another value because it adds to the challenge and time taken to travel.

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48 D J Lucas, evidence-in-chief para 126.7 [Environment Court document 15].

49 D J Lucas, evidence-in-chief para 113 [Environment Court document 15].

50 D J Lucas, evidence-in-chief para 126.5 [Environment Court document 15].

51 "The large spear of Kupe", D J Lucas, evidence-in-chief para 139 [Environment Court document 15].

52 D J Lucas, evidence-in-chief para 126.10 [Environment Court document 15].

53 J A Bentley, evidence-in-chief Appendix 3 [Environment Court document 13]; K J Heather, evidence-in-chief Appendix B paragraphs 50 and 73 [Environment Court document 19].

54 Landscape witnesses' caucusing statement para 9 [Environment Court document 12B].

55 Transcript p. 166.

56 J C Kyle, evidence-in-chief para 69 [Environment Court document 21].

57 Transcript 8 March 2011 p. 594 at lines 3-5.

58 J C Kyle, rebuttal evidence para 6.12 [Environment Court document 21B].

59 see http:/www.health.gov.au/pubs/hfsocc/ocpanew6a.htm: The Accessibility/Remoteness Index of Australia (ARIA).

We have also recorded that the land and sea of Port Gore tend to be separately accessible – the land at Cockle Bay for example is principally accessed by road or by air, and very rarely from the sea. There are (as we have recorded) no jetties in eastern Port Gore. Conversely the sea is largely accessed by boat from around the capes. We consider that eastern Port Gore is also remote in the more subjective sense.

[45] As for "wildness", Ms Dawson, the planner called by the Council, agreed[60] that the modifications of the Port Gore environment such as the houses, the airstrip and the (past) farming have an effect on the wildness of the area. Mr Kyle stated that wildness is a matter of personal perception[61] and not all visitors may consider the area wild. In our view there are a number of indications in the applicants' own evidence that suggest that Port Gore is quite remote and/or wild. For example, Mr Godsiff, a tourism operator called by them, said that Port Gore is difficult to access for recreation, and the mussel farm managers said the same of access for servicing and harvesting of mussel farms.

[46] On a calm, blue day we have no doubt that Port Gore would not be seen by many people as particularly wild. However, it is notorious that New Zealand is the Saudi Arabia of wind. Being on Cook Strait's margins, Port Gore only has a minority of fine calm days. On the majority of days in the year Port Gore as a whole would look wild and feel remote when (if) accessed. In fact, except by land it is quite difficult to access as we have recorded. Any boat trip around Cape Lambert and (especially) Cape Jackson is potentially an exciting experience, as two members of the court know from experience. We find that Port Gore is on average remote and wild, but not very remote nor very wild (although on occasions it undoubtedly is).

Regeneration of eastern Port Gore

[47] Several families have taken steps[62] to remove introduced weeds and pests and to encourage native regeneration. Indeed Mr Marriott has set up a scheme to claim carbon credits presumably under the Climate Change Response Act 2002 and the Climate Change Response (Emissions Trading) Amendment Act 2008. We will consider the extent and rate of success below when setting out the evidence about the terrestrial ecology of the area.

2.3 Amenities for recreation

[48] Port Gore is also used widely for recreation. Mr C G Godsiff, a director of a tourism company with many years' experience working in Marlborough, was called to give evidence for the two mussel farming companies. We accept that his experience entitles him to be treated as an expert on what many visitors find attractive in the Marlborough Sounds. In his opinion Port Gore is often difficult to access because of

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60 Transcript p. 626.

61 Transcript p. 530.

62 K D C Gerard, evidence-in-chief paragraphs 1.11 and 1.12 [Environment Court document 31]; R E Marriott, evidence-in-chief paragraphs 30 and 32 [Environment Court document 25].

sea and weather conditions. Many more places are more accessible and have "… more to offer in terms of scenic … amenity or matters of interest"[63]. However, Mr Godsiff's view of the recreational activities and possibilities of Port Gore was rather limited as the evidence of the next witness showed.

[49] On the other hand, Mr Marchant and FNHTB called Mr R J Greenaway, a recreational planning consultant with extensive experience throughout New Zealand. He described Port Gore as having several important recreation values[64]:

- It provides a remote and scenic recreational boating opportunity;
- It provides a remote and scenic recreational opportunity for tourists and other visitors to the area;
- It is an element of the Queen Charlotte Wilderness Park tourism venture. This is a private extension to the Queen Charlotte Track running from Ship Cove to Cape Jackson offering trampers accommodation at Anakakata Lodge in a remote setting;
- It is … an important t recreational fishing area at other times; and
- It is home to the wreck of the Mikhail Lermontov and the Lastingham and is one of only 19 "*spectacular or popular sites*" for recreational diving in the South Island identified by the Ministry of Agriculture and Forestry in its social value mapping of New Zealand's coastal waters.

[50] Mr Hassan and Ms Meech were critical of Mr Greenaway's evidence, submitting that little weight should be attached to it because the "recreational opportunity spectrum" on which his evidence "focussed" is not recognised in any of the relevant documents, and as he acknowledged in cross-examination is "fluid" and may be adjusted depending on what it is being used for[65]. We are very conscious of those criticisms and record that we always find Mr Greenaway's references to and reliance on the "recreational opportunity spectrum" quite difficult. However, the basic concept(s) that there are varieties of types of recreational experience which, in part, depend on the setting in which they occur is, we suppose, a first step towards being consistent in analysis and comparisons. Further, as we shall see, the now operative New Zealand Coastal Policy Statement 2010 expressly contains an objective[66] requiring maintenance and enhancement of "recreational opportunities" of the coastal environment. So with caution we are prepared to rely on Mr Greenaway's evidence since it was not challenged by opposing evidence to any degree. Nor was it really damaged by specific cross-examination.

[51] Mr Greenaway described how (well out of sight of Port Gore) on the other side of Cape Jackson and within Queen Charlotte Sound approximately 30,000 people walked or biked the Queen Charlotte track in 2004/5[67]. At its northern end in the sound

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63 C G Godsiff, evidence-in-chief para 7 [Environment Court document 10].

64 R J Greenaway, evidence-in-chief para 4.5 [Environment Court document 26].

65 Transcript pp 719-720.

66 Objective 4, NZCPS 2010 p. 9.

67 P Sutton 2005 Queen Charlotte Track User Research 2004-5 (DOC) referred to in R J Greenaway para 4.21 [Environment Court document 26].

that track terminates at Ship Cove. Only a few walkers continue to the north on the 'Outer Queen Charlotte Track' from Ship Cove. This starts with a strenuous climb up to the ridge from Mt Furneaux to Cape Jackson which separates Queen Charlotte Sound from Port Gore and then follows the ridge northeast to a lodge at Anakakata Bay[68] (and beyond to Cape Jackson) on the privately owned Queen Charlotte Wilderness Park. Once on the ridge they have views down into Port Gore. Mr R Marriott, one of the owners of the park, gave evidence[69] that about 500 people stay at the lodge – which is on the Queen Charlotte side of the ridge – each year.

[52] Mr Greenaway pointed out that in the South Island there are only two small stretches of coast which provide relatively easy cruising – the Abel Tasman National Park and the Marlborough Sounds. He described Banks Peninsula and Stewart Island as more challenging. That said, Port Gore can only be approached by boat after navigating around either Cape Lambert, to the northwest or Cape Jackson to the northeast. Because both headlands are exposed to the full marine conditions of Cook Strait, often exacerbated by strong tides, Port Gore is suited to, and is used by more skilled and well-equipped boaters[70]. There is an anchorage in the corner behind Gannet Point in Cockle Bay in south or southeast conditions, and in Melville Cove in winds from the northern semicircle[71].

[53] As for fishing : according to Mr Greenaway[72] it is relatively difficult to find sheltered and relatively accessible[73] inshore line fisheries around New Zealand – they are found only on the Abel Tasman coast and in the Marlborough Sounds. He considered that Port Gore is[74] 'significant in itself' and part of the 'nationally significant network represented by the Marlborough Sounds'. Ms D J Lucas, a landscape architect called for Mr Marchant and FNHTB, recorded that on fine days, when conditions allow access from Picton around Cape Jackson – or from the west around Cape Lambert – there may be up to ten recreational boats fishing on the eastern side of Port Gore, particularly at Gannet Head, and/or sheltering down around Cockle Bay.

[54] Mr Greenaway considered Port Gore is nationally important for recreational diving. A company called 'Go Dive Marlborough' operates from a lodge in Melville Cove and runs multi-day diving trips within the bay[75]. Most of the dives are on the wreck of the *Mikhail Lermontov* which the New Zealand Natural Maritime Record

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68 Anakakata Bay and its lodge are in Queen Charlotte Sound.

69 R E Marriott, evidence-in-chief para 9 [Environment Court document 25].

70 R J Greenaway, evidence-in-chief para 4.19 [Environment Court document 26].

71 R J Greenaway, evidence-in-chief para 17 [Environment Court document 26] referring to The New Zealand Cruising Guide Central Area, K W J Murray and R von Kohorn, 1999.

72 R J Greenaway, evidence-in-chief para 4.8 [Environment Court document 26].

73 We infer it is relatively accessible for fishermen compared with other water users – yachts and kayakers – because the former tend to have faster, more powerful boats and can thus travel to and from Port Gore more quickly.

74 R J Greenaway, evidence-in-chief para 4.8 [Environment Court document 26].

75 R J Greenaway, evidence-in-chief para 4.11 [Environment Court document 26].

describes[76] as "one of the largest and most accessible diving wrecks of the modern era". About 20% of the dives are on the wreck of the *Lastingham*, a 67 metre twin-mast iron sailing ship which sank in about 10 to 20 metres of water of 1884. The diving company ran 26 live-ashore trips in 2009/2010 – a total of approximately 200 divers visiting the bay for two or more days. That appears to represent about half of the diving activity in Port Gore[77].

2.4 The marine ecology of Port Gore

[55] Dr Kenneth Grange, a marine ecologist, described the existing marine environment and the effects of the marine farms continuing to operate. There was no challenge to his evidence[78] in which he described the shoreline of Port Gore as comprising a mixture of rocky reefs and boulders descending to sand and then muddy sand further offshore. Much of the sea floor of the embayment lies at 30-40 m depth. Dr Grange identified three areas of particular ecological value – Outer Port Gore (horse mussels, scallops and red algae), Melville Cove (large reef area) and Gannet Point (tubeworms)[79]. The Gannet Point area is listed in the district plan with its particular ecological value described as *unique subtidal communities on unusual subtidal landform,* and given a status of national significance[80].

[56] A survey undertaken by NIWA described this *sill community* as a shallow-water (<10–20 metres) benthic assemblage around and south of Gannet Point characterised by tube-building polychaetes, horse mussels, hermit crabs, cushion stars, kina, sea cucumbers and scallops. While the distribution of species overlapped, horse mussels and scallops were generally found in deeper areas (10–20 metres) with tubeworms further inshore (<10 metres)[81]. So the beds of tubeworm colonies were from 50 metres to around 100–150 metres from the shore and the horse mussel beds were seaward of these. This sill community is concentrated around Gannet Point itself some 150 metres south-west of the PGMF Gannet Point North farm and 50 metres to the north of the Sanford Gannet Point South farm. It includes the southern part of the undeveloped consent area adjacent to Site 8176[82]. Dr Grange was of the opinion that the rocky reef, boulder and cobble areas, between these marine farms and the shoreline, are sensitive tubeworm habitats[83].

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76 R J Greenaway, evidence-in-chief para 4.9 [Environment Court document 26] – referring to http://www.nzmaritime.co.nz/lermontov.htm.

77 R J Greenaway, evidence-in-chief para 4.11 [Environment Court document 26].

78 K R Grange, evidence-in-chief [Environment Court document 9].

79 K R Grange, evidence-in-chief paragraphs 15–17 [Environment Court document 9].

80 K R Grange, evidence-in-chief para 2.4 [Environment Court document 9A].

81 K R Grange, evidence-in-chief Appendix 11 *Supplementary survey of Gannet Point* at page iv [Environment Curt document 9].

82 K R Grange, evidence-in-chief paragraphs 40–45 [Environment Court document 9] and 3.1–3.3 [Environment Court document 9A].

83 K R Grange, evidence-in-chief paragraph 51 [Environment Court document 9] and supplementary at para 8.2 [Environment Court document 9A].

[57] Dr Grange considered the existing marine farms have changed the benthic marine communities through the accumulation of shell debris and mussels beneath the farms. The debris does not extend beyond the immediate environment, not even as far as the anchor blocks[84].

2.5 The terrestrial ecology of the Cape Jackson peninsula

[58] Two ecologists, Dr R Bartlett and Dr J Roper-Lindsay, and a number of lay witnesses described the terrestrial vegetation and ongoing revegetation of the slopes surrounding Gore Bay and the immediate context of the marine farms at Pool Head and Gannet Point. Drs Bartlett and Roper-Lindsay were agreed that the three marine farms would have no influence on terrestrial ecological processes[85]. Further, their evidence was to inform the evaluation of natural character of the terrestrial part of the eastern Port Gore coastal environment.

[59] Dr Bartlett explained that ecological significance is commonly assessed by considering ecological context, representativeness, rarity and distinctiveness. Viability may also be a factor. She considered that an understanding of the ecological values contributed to an understanding of naturalness, which in turn contributed to an understanding of natural character[86].

[60] Dr Bartlett then first described the broader context of the hillsides surrounding Port Gore. She noted that the upper parts of the south western slopes were covered by primary indigenous forest which extended down some gullies. Lower slopes supported manuka[87] and kanuka[88] at various stages of regrowth with broadleaf tree species and ferns in the gullies. The south eastern slopes were more varied with patches of broadleaf forest in gullies, expanses of kanuka across the mid slopes and sparse tauhinu[89] shrubland in overgrown pasture[90].

[61] Dr Bartlett provided a more detailed description of the vegetation at Pool Head and Gannet Point. We reproduce her summary[91]:

> The kanuka-manuka scrub and forest that provides the immediate context to the foreshore and lower slopes in the vicinity of Pool Head provides continuity of cover but is recently developed vegetation of lower diversity. The slopes above Gannet Point support exotic pasture on which tauhinu, flax, manuka and kanuka vegetation is regenerating. Broadleaved shrubland, scrub and forest is regenerating in patches according to previous clearance and disturbance activities.

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84 K R Grange, evidence-in-chief para13 [Environment Court document 9].
85 Joint statement para 3 [Environment Court document 7C].
86 R M Bartlett, evidence-in-chief paragraphs 20–25 [Environment Court document 7].
87 *Leptospermum scoparium*.
88 *Kunzea ericoides*.
89 *Ozothamnus leptophylla*.
90 R M Bartlett, evidence-in-chief paragraphs 29-30 [Environment Court document 7].
91 R M Bartlett, evidence-in-chief para 34 [Environment Court document 7].

Overall Dr Bartlett considered that areas of significant natural value were restricted to the upper slopes, areas identified in the Plan or gazetted reserves. Early successional forests do provide connectivity between higher forested areas and in places there is a continuum from ridge to the coast. Dr Bartlett concluded that the areas adjacent to the Pool Head and Gannet Point farms did not qualify as significant with respect to section 6(c) of the Act[92].

[62] Perhaps more relevantly, since section 6(c) of the RMA is not an issue in the proceedings, but section 6(a) is, Dr Bartlett responded to a description by Ms Marchant of the vegetation as "a mixture of both virgin and regenerating forest with the overall effect being one of cohesion and natural-looking pattern of growth". Dr Bartlett agreed with Ms Marchant that natural processes were clearly at work but considered the patterns of growth to be influenced by both past and present human activities. In particularly the ongoing retirement of pastures is evident in areas of exotic grassland, shrubland, young and older kanuka regeneration[93]. When asked about her approach to assessing naturalness Dr Bartlett replied[94]:

> I was describing the degree to which natural processes have been allowed to re-assert themselves over the modifications that have taken place previously. So if you are looking at an area of, for arguments sake, exotic pasture, certainly as I said before, there are natural processes at work. But in terms of the continuum to development of a highly natural ecosystem fully functioning with a range of, with diverse vegetation present, in such vegetation the naturalness is extremely high because those natural processes have achieved dominance over the modifications that have taken place previously. And whether that is, as in this case, human induced.

[63] We accept the descriptions of Drs Bartlett and Roper-Lindsay that there is a mosaic of vegetation types on the land in the vicinity of the three marine farms. The stages of succession indicate the times since farming ceased or burning had taken place. They noted the effects of animal pests including possum browsing in kohekohe[95] trees and pig damage. They recognised the intentions of the present landowners to encourage regeneration of indigenous vegetation but noted that they could not predict the aspirations of future landowners.

[64] Pool Head was regarded by the experts as more advanced in regeneration than Gannet Point although it still shows a variation and patchiness in understorey vegetation and overall condition of the canopy. The vegetation is likely to progress, retaining a mix of kanuka canopy on the ridges and dry slopes, with broadleaf forest patches in the gullies, over the next 10 to 20 years. At Gannet Point the pattern of human modification

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92 R M Bartlett, evidence-in-chief para26 [Environment Court document 7].
93 R Bartlett, evidence-in-reply para13 [Environment Court document 7A].
94 Transcript (2010) at p. 93.
95 *Dysoxylum spectabile*.

was considered likely to remain evident, with early successional shrubland likely to be dominant, over the next 10 to 20 years[96].

[65] Dr Roper-Lindsay discussed the "naturalness" of the terrestrial ecosystems of Port Gore. She observed that "[n]aturalness has been widely used for many years as a nature conservation criterion in New Zealand and elsewhere"[97]. She defined naturalness of an ecosystem as "… a state characterised by the lack of human disturbance and intervention"[98] but conceded it "… is impossible to measure empirically"[99]. She wrote that "naturalness" is sometimes also used as a criterion for assessing significance under section 6(c) of the RMA. If that is so we consider (in passing) that is a practice to be discouraged for two reasons. First the three tests for significance under section 6(c) referred to by Dr Bartlett (see above) are already complex and not without their ambiguities[100]. Secondly "naturalness" is a quality that expressly needs to be assessed in respect of the character of the coastal environment and of landscapes under section 6(a) and (b) respectively of the RMA. The concept is, in our view, complicated enough to understand without also introducing a similar idea in section 6(c) – which does not refer to "natural" habitats at all.

[66] Dr Roper-Lindsay wrote that she considered naturalness in ecosystems in terms of the elements, patterns and processes[101]. In the context of nature conservation she considered naturalness to be an ecosystem state characterised by the lack of human disturbance and intervention. Areas with a high proportion of indigenous species were considered more natural. She considered there to be a spectrum of ecological naturalness – from areas of unmodified habitat with a high proportion of indigenous species to artificial man-made places with only exotic species or no biota present[102]. For practical purposes she used a five step scale to assess "ecological naturalness[103]. We now include her table and scale:

Level of naturalness	**Description**
Low	Managed land – e.g. farm, forest, garden. May have common native birds, invertebrates, but introduced species and processes dominate. Human management ongoing

96 Joint statement by Dr Ruth Bartlett and Dr Judith Roper-Lindsay, paragraphs 1–2 [Environment Court document 7C].

97 J Roper-Lindsay, evidence-in-chief para 35 [Environment Court document 8] referring to K F O'Connor, F B Overmars, M M Ralston (1990) *Land Evaluation for nature conservation ...*, Conservation Sciences Publication No. 3, Department Of Conservation, Wellington.

98 J Roper-Lindsay, evidence-in-chief para 35 [Environment Court document 8].

99 J Roper-Lindsay, evidence-in-chief para 39 [Environment Court document 8].

100 Dr Bartlett stated that there might be a fourth ("viability").

101 Thus alluding to policy 13(2)(a) of the NZCPS 2010 which we discuss later.

102 J Roper-Lindsay, evidence-in-chief paragraphs 29–45 [Environment Court document 8].

103 J Roper-Lindsay, evidence-in-chief para 45, Table 1 [Environment Court document 8].

Low-medium	Early naturalisation – e.g. paddock recently retired from grazing, unmown roadside. Some native plants, native invertebrates, birds. Introduced species still dominate
Medium	Mid-stage naturalisation – e.g. paddock with native shrubland vegetation invading. Pasture grasses still dominate ground cover, native birds visit area; native invertebrates in native plants but pests (e.g. wasps) still present
Medium-high	Late stage naturalisation. Shrubland canopy forming; pasture species not thriving; forest/shrubland native birds, invertebrate, lizards present, possibly breeding; introduced pests and weeds still present
High	Uncleared forests, older shrublands; coastal cliffs; reserves. Native species plants and animals dominant; most weeds and pests under management and low in numbers/not breeding or spreading …

[67] On her five-step scale, Dr Roper-Lindsay considered the vegetation at Pool Head to be of medium-high naturalness (late stage naturalisation/shrubland canopy forming) with the upper slopes/ridge lines being of high naturalness (uncleared forest, older shrubland)[104]. She considered the shoreline and upper slopes at Gannet Point to be dominated by native vegetation and of medium-high naturalness, perhaps with some areas of high naturalness. The mid slopes at Gannet Point were of low-medium (early naturalisation/recently retired paddock) to medium naturalness (mid-stage naturalisation/native shrubland invading)[105]. We record those opinions but note that a scale of naturalness of habitats is <u>not</u> the same as a scale of naturalness of landscapes or of natural character of the coastal environment.

[68] The ecological experts did not mention that there is a freshwater *Carex solandri* wetland behind the foredunes at Cockle Bay. This is located on the Marchant property and supports[106] rare plant[107] and bird species (fernbirds). This dune and wetland complex is mapped as site 2/16 in the Sounds Plan[108]. Introduced pampas grasses and cattle have been removed[109].

2.6 The natural character of the coastal environment

[69] Under section 6(a) of the RMA we must first recognise and then protect the coastal environment of Port Gore from inappropriate use and development. Before we can decide whether any one or more of the proposed farms is inappropriate development (and we leave that to Part 6 of this decision) we must first identify how natural that coastal environment is.

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104 J Roper-Lindsay, evidence-in-chief para 59 [Environment Court document 8].
105 J Roper-Lindsay, evidence-in-chief paragraphs 73–75 [Environment Court document 8].
106 D J Lucas, evidence-in-chief paragraphs 106 and 107 [Environment Court document 15].
107 e.g. *Epilobium pallidiflorum*.
108 Map 72 [Volume 3, Sounds Plan].
109 D J Lucas, evidence-in-chief para 107 [Environment Court document 15].

[70] It seems to have been common ground amongst the parties and witnesses that the coastal environment in the vicinity of Port Gore includes all the waters of the bay and the land up to the crest of the surrounding ridgeline (running from Cape Jackson in the northeast through the high points : Oterawhanga, Mt Furneaux, the Saddle on the road and north down the ridge to Cape Lambert at the western head of Port Gore. That much is clear, but there were rather different approaches in the analysis of the coastal environment's character, and in particular to its "natural character'. We have described how two professional ecologists identified the "natural character" of the terrestrial component in ecological terms. Obviously that is highly relevant to establishing the natural character of eastern Port Gore.

[71] However, since naturalness is an anthropomorphic concept we consider that the evidence of at least some of the landscape architects is useful on this topic. Both Ms D J Lucas, called by Mr Marchant, and Mr S K Brown, called by Sanford, expressed an opinion on this topic. The ecologists considered naturalness in ecosystems in terms of the natural elements, natural patterns and natural processes. However, as the NZCPS 2010 shows, the 'natural character' of the coastal environment[110] and the naturalness of outstanding landscapes[111] are features dependent on more than identification of their relatively objective 'characteristics'.

[72] Neither Mr Bentley nor Mr Carter[112] considered the NZCPS 2010 at all and the latter was confused in his terminology. In the end, as counsel for Sanford pointed out[113], the difference between Mr Brown and Ms Lucas was "… as to the proper *adjective* for describing the … [naturalness] of Port Gore". Mr Brown considered it was "high"[114], Ms Lucas "outstanding"[115]. On balance we prefer Mr Brown's assessment.

[73] The Marlborough Sounds Resource Management Plan ("the Sounds Plan")[116] also gives some assistance in identifying natural characteristics. Chapter 2 (Natural Character) identifies landforms, indigenous flora and fauna (and their habitats), water and water quality, scenic or landscape values, and cultural heritage values as contributing[117] to natural character. Other components of natural character are recognised[118] as being identified in other chapters of the Sounds Plan.

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110 New Zealand Coastal Policy Statement 2010, policy 13.

111 New Zealand Coastal Policy Statement 2010, policy 15.

112 T F Carter, evidence-in-chief [Environment Court document 14].

113 Final submissions for Sanford, para 61 [Environment Court document 40].

114 Mr Brown's summary in relation to the coastal environment around Pool Head was that it "… displays a high level of perceived natural character". S K Brown, evidence-in-chief para 54 [Environment Court document 12].

115 Ms Lucas considered it showed a "very high" natural character. D J Lucas, evidence-in-chief para 110 [Environment Court document 15].

116 In fact, the Sounds Plan is a combined regional, regional coastal, and district plan under the RMA.

117 Policy 2.2/1.3 of Chapter 2 Natural Character (Sounds Plan p. 2-4].

118 Policy 2.2/1.4 of Chapter 2 Natural Character [Sounds Plan p. 2-4].

[74] Neither the waters nor the surrounding land of Port Gore are pristine, but we find that, on a general spectrum from very natural through highly modified to urban/industrial, the coastal environment of Port Gore ranks as highly natural.

2.7 The landscape(s) of Port Gore

[75] Two of the four landscape architects called – Mr Brown[119] and Ms Lucas, agreed that eastern Port Gore is an outstanding natural landscape[120]. A third, Mr T F Carter, called by PGMF, was of the opinion that only the "Outer Bay" was an "Outstanding Natural Landscape or Feature"[121]. In doing so he described[122] the Inner Bay as including the Gannet Point (Onapopoia) mussel farms. That approach is wrong at law in that he should have imagined the "existing environment" without the Gannet Point marine farms.

[76] The landscape architect called for the council, Mr J A Bentley, pointed out[123] that the Sounds Plan identifies three areas within Port Gore as "Areas of Outstanding Landscape Value":

- Cape Jackson south to Waimatete;
- the cliff faces of Kaitangata east of Black Head;
- the eastern side of Cape Lambert (on the other side of Port Gore).

In Mr Bentley's opinion there are[124] "other elements" within Port Gore which are outstanding natural features. He expressly stated[125] that the "lower slopes extending from Gannet Point in the east to Pig Bay in the west should not be considered an outstanding natural feature due to previous modifications …" even though the "forested ridgeline"[126] above them is, in his view, an "outstanding natural feature of Port Gore". He did not consider in his evidence-in-chief whether Port Gore or a part of it is an outstanding natural landscape.

[77] Mr Carter disagreed[127] with Mr Brown and Ms Lucas where they each concluded that the Inner Port Gore was an outstanding natural landscape. In his evidence-in-chief he wrote[128]:

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119 S K Brown, evidence-in-chief para 14 [Environment Court document 12].
120 Under section 6(b) of the RMA.
121 T F Carter, evidence-in-chief para 50 [Environment Court document 14].
122 T F Carter, evidence-in-chief para 26 [Environment Court document 14].
123 J A Bentley, evidence-in-chief para 5.29 [Environment Court document 13].
124 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
125 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
126 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
127 T F Carter, rebuttal evidence para 8 [Environment Court document 14B].
128 T F Carter, evidence-in-chief para 52 [Environment Court document 14].

> I do not consider at this point Inner Port Gore is an outstanding natural landscape and see no reason to challenge the "designation"[129] in the [Sounds Plan].

He was referring there to the Sounds Plan's description of areas within the Marlborough Sounds as outstanding landscape areas. Mr Carter expressly[130] treats those as being outstanding natural landscapes within the meaning of section 6(b) of the RMA. He then wrote that Mr Brown and Ms Lucas' conclusions were not justified by the Sounds Plan which does not include Inner Port Gore as an outstanding natural landscape.

[78] For PGMF Mr Carter criticised Ms Lucas when she wrote[131]:

> The whole of the inner Port Gore character area, and also the whole of the greater Cape as a feature, should be assessed together not further subdivided.

He stated that assessment at that scale had two difficulties[132]:

> The first is that it does not address the issue of landscape scale in relation to the potential effects of proposed marine farming activity. I identified in evidence this factor as the viewing distance and visibility.

We consider he is simply wrong about that as a matter of law. The principal (but not the only) relevance of landscape to the RMA is that section 6(b) requires outstanding natural features to be recognised and protected (from inappropriate development). Before what is inappropriate can be assessed, a qualifying landscape has to be recognised. In fact, as the court has pointed out before[133], it is necessary:

(1) to identify the landscape in which a proposal is set;
(2) to ascertain whether the landscape is natural and, if so, how natural; and
(3) to assess whether any natural landscape is also outstanding.

[79] The question of the size (as opposed to the location) of the proposal is usually irrelevant to identifying the landscape. Sometimes there may be a large proposal in a small landscape such as an enclosed valley. Often, as here, there may be a relatively small proposal in a very large landscape. The question of the scale of a proposal may be highly relevant to how adverse any effects are, but it is almost always irrelevant to the recognition of the landscape in which it is set.

[80] Mr Carter's second criticism was that[134] "when assessed at the very large scale utilised by Ms Lucas other landscape values are improperly drawn into the assessment".

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129 Scare quotes added to show he is not using the word in a technical sense.
130 T F Carter, rebuttal evidence para 8 [Environment Court document 14B].
131 D J Lucas, evidence-in-chief para 22.5 [Environment Court document 15].
132 T F Carter, rebuttal evidence para 5 [Environment Court document 14B].
133 For example see *High Country Rosehip Orchards Limited v Mackenzie District Council* Decision [2011] NZEnvC 387 at [74].
134 T F Carter, rebuttal evidence para 6 [Environment Court document 14B].

That may not necessarily be the case but we agree with Mr Carter that some of the factors identified by Ms Lucas have a tenuous relationship to the landscape of Inner Port Gore. As examples he identified[135] her references to the historical values associated with Ships Cove (and its use by Captain Cook) and to the biophysical values of Mt Stokes. We agree about the former, but can see why at least the eastern flanks of Mt Stokes can be conceived as part of the landscape of Inner Port Gore.

[81] We do not accept the slicing and dicing approach of Mr Bentley and Mr Carter when it comes to assessment of landscapes and features under section 6(b) of the Act. While the Sounds Plan may initially appear to support their approach, on a more careful analysis it does not do so. As we shall see, the scheme of the Sounds Plan is that the integrating concept when considering at least section 6(a) to (c) of the RMA is in paragraph (a) which requires recognition and protection (where appropriate) of the natural character[136] of the coastal marine area. In *Kuku Mara Partnership (Forsyth Bay) v The Marlborough District Council*[137] the court concluded that:

> The provisions of … Chapter [5 of the Sounds Plan] … make it clear that although the objective and policies of that chapter are intended to apply specifically to areas identified as having outstanding landscapes, they also apply to all other areas where substantial activities … are being considered.

The landscape assessments of "areas of outstanding landscape value" must be read in that context and in the light of two other aspects of the plan : first that the Sounds in their entirety are treated as having "outstanding visual values"[138]; and secondly, that the "areas of outstanding landscape value" are a visual-based assessment[139] not an overall landscape assessment.

[82] In his closing submissions counsel for PGMF tried to bolster the evidence of Mr Bentley and Mr Carter by submitting that[140]:

> [t]he concept of outstanding both in terms of the simple meaning of the word and the place of that term at the top of a hierarchy of values must mean that it is of the highest quality genuinely justifying the epithet outstanding. It has to be ranked number 1 with a meaningful distinction between that ranking and lesser landscape an important ingredient to the validity of the scale.

We do not accept that : while we agree it is important not to dilute the quality that goes to make a natural landscape outstanding, we consider that Mr Hunt has overstated the legal test in section 6(b) of the RMA. We consider that while outstandingness (of landscapes) must be close to the top, at least one and possibly two values come higher :

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135 T F Carter, rebuttal evidence para 6 [Environment Court document 14B].

136 Policy 1.5 and Explanation [Sounds Plan p. 2-4].

137 *Kuku Mara Partnership (Forsyth Bay) v The Marlborough District Council* Decision W25/2002 at [486].

138 Para 5.1.1 – Chapter 5 Landscape [Sounds Plan p. 5-1].

139 2.3 Methods [Sounds Plan p. 2-5].

140 Final submissions for PGMF para 46 [Environment Court document 41].

"uniquely superior" and "the best". For example, in Pelorus Sound, Tennyson Inlet might be seen as uniquely superior and Ngawhakawhiti as simply the best. However, we do not discount Messrs Carter's or Mr Bentley's opinions on this ground because there is no evidence that they were applying Mr Hunt's incorrect test.

[83] It is a serious defect of Messrs Bentley and Carter's evidence that they were not considering areas that could realistically, in the Port Gore context, be described as landscapes. It is easy to divide a landscape up into smaller components ("units" or features) with lower landscape qualities, but it is meaningless in terms of the section 6(a) recognition of landscapes to do so. Landscapes need to be outlined and considered as wholes.

[84] We prefer the assessment of the two more senior and experienced landscape architects, Mr Brown and Ms Lucas, that (at least) the eastern half of Port Gore is an outstanding natural landscape. There was some fine distinction making by counsel in their cross-examination of Ms Lucas, and indeed a worrying conflation by Ms Lucas of a "landscape" and a "feature" in answer to a question from the court[141]. That approach is wrong. Parliament used the two words separately, and as the Environment Court has explained, under the RMA a feature is a component of a landscape : *Wakatipu Environmental Society v Queenstown Lakes District Council*[142]. Despite that conclusion, we consider it did not undermine her evidence in any significant way. In any event she was of the same opinion as Mr Brown and his evidence on this issue was not seriously challenged.

[85] In the end we think Ms Lucas' approach is much closer to the spirit of section 6(b) and (now) policy 15 of the NZCPS 2010 than Mr Carter's so we prefer her conclusion that Inner Port Gore is an outstanding natural landscape. Further, in the Sanford proceedings, Mr Brown assessed the "southeastern part of Port Gore … [as] an Outstanding Natural Landscape, <u>despite the presence of human activities and structures</u> …"[143] (our underlining) and we find that evidence to be compelling.

[86] That finding is generally consistent with the decision of the court in *Kaikaiawaro Fishing Co Limited v Marlborough District Council*[144]. There the Environment Court was considering applications for marine farms at two sites further north on the western side of Cape Jackson : one site at Kaitangata and the other at Waimatete Bay. In response to the evidence of a witness who said that the impact of the two proposed

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141 Transcript (2010) p. 414.

142 *Wakatipu Environmental Society v Queenstown Lakes District Council* [2000] NZRMA 59. Thus to describe the Marlborough Sounds as a "feature" of the Marlborough District as a whole is not to use "feature" in the section 6(b) sense. To avoid confusion we recommend that looser meanings of the word "feature" are avoided in any proposed amendment plan for the district/region.

143 S K Brown, evidence-in-chief para 50 [Environment Court document 12].

144 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999.

marine farms on the landscape of the Port Gore coastline was "low indeed", the court stated[145]:

> But it is not the general modified landscape of Port Gore which is in issue in this case. It is the *outstanding landscape of the area in which the marine farms are to be* (chiefly) *located*. The qualification is important to recognise and becomes more so in the context of s.6 of the Act.
>
> It follows that the effects of the application in each bay [are] required to be determined both on its own merits and collectively. We therefore approached the bays initially as two separate entities and then together in the context of the Cape Jackson-Black Head landscape. For it is the relatively highly unmodified area [around the sites] which is in issue and which draws the traveller in to inquire as to its attributes more closely. The total landscape of Port Gore is so broad that it is only on close inspection that the viewer becomes aware of the natural qualities of its individual parts. On our site visit, undertaken by launch, we gathered a much greater appreciation of what is involved.

We are slightly troubled by the smaller landscape identified by the court there (although it still has a coastline that is 11 kilometres long). It seems to us in the *Kaikaiawaro* decision the concept of a landscape as a large discrete area could have been used, given the immense scale[146] of Port Gore, to reasonably analyse the eastern side of the bay as a separate landscape from the western (Melville Cove) side. The important point for present purposes is that the court in *Kaikaiawaro* found the eastern side of Port Gore (at least from Cape Jackson to Black Head) to be an outstanding natural landscape.

3. The statutory framework and the legal issues

3.1 Which version of the RMA applies to each application?

Pool Head : pre-2008 amendments

[87] Sanford lodged its coastal permit application for the Pool Head mussel farm on 14 May 2008. Therefore, its status must be assessed in accordance with the Act, as though the 2009 and later amendments to the RMA had not been made[147]. However, we remind ourselves that section 88A(2) of the Act directs that we must assess the merits of the proposals under the versions of the relevant subordinate statutory instruments which are current or proposed at the date of the hearing.

Gannet Point South : pre-September 2004 amendments

[88] Sanford lodged its application for the Gannet Point South mussel farm on 21 July 2004. Therefore, the status of the application must be assessed in accordance with the RMA, as though the 2005 and 2009 amendments to the RMA had not been made[148].

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145 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999 at [105] and [106].

146 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999 at [5].

147 Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 160(3).

148 Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 160(3) and Resource Management Amendment Act 2005, section 131(1)(b).

Gannet Point North

[89] PGMF lodged its application for the Gannet Point North mussel farm on 17 July 2008 which means that it should be treated under the same law as Sanford's Pool Head application.

3.2 The relevant RMA provisions

[90] In summary, in coming to our decision the court must, always subject to Part 2 of the Act, have regard to[149]:

- section 104 which outlines the matters (i.e. effects, policies, plans, other matters) to be considered when determining any resource consent application;
- section 104B which provides that consent may be granted for a discretionary activity, and that conditions can be imposed on that consent; and
- section 108 which relates to conditions.

[91] The relevant instruments we must have regard to under section 104(1)(b) are:

- the New Zealand Coastal Policy Statement 2010 ("the NZCPS 2010");
- the Marlborough Regional Policy Statement ("the RPS"); and
- the Sounds Plan.

It is important to set out the relevant objectives and policies because they frame the prediction of possible effects.

[92] Also under section 104, subsection (2A) requires us to have regard to, for each marine farm, "… the value of the investment of the existing consent holder". We will consider and apply section 104(2A) when we turn to section 7(b) under Part 2 of the Act.

[93] There is one other set of documents we must consider : section 290A directs the court to have regard to the Commissioners' decisions on the applications. We record that, strictly, section 290A applies only to Sanford's Pool Head marine farm and PGMF's application and not to the Gannet Point South marine farm application[150], although we will, out of respect to the council's decision, consider its reasons for the last decision anyway.

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149 Section 104 RMA.

150 Section 290A was inserted, as from 10 August 2005, by section 106 of the Resource Management Amendment Act 2005 (2005 No 87).

3.3 The activities for which consents are sought and their status

3.3.1 Is each proposed mussel farm in an Aquaculture Management Area?

[94] At this point we have to enter the maelstrom which is the current law of aquaculture. That is because mussel farms are "aquaculture activities" within the meaning of that term as defined[151] in the RMA. It means:

> (a) … the breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest if the breeding, hatching, cultivating, rearing, or ongrowing involves the occupation of a coastal marine area; and
> (b) includes the taking of harvestable spat if the taking involves the occupation of a coastal marine area; but
> (c) does not include an activity specified in paragraph (a) if the fish, aquatic life, or seaweed –
> (i) are not in the exclusive and continuous possession or control of the person undertaking the activity; or
> (ii) cannot be distinguished or kept separate from naturally occurring fish, aquatic life, or seaweed.

[95] Section 12A of the RMA then imposes a precondition to the grant of any consent for a marine farm. It provides that no person may occupy a coastal marine area for the purpose of an aquaculture activity except in an aquaculture management area ("AMA") in a regional coastal plan. Section 12A(1A) prevents applications for such coastal permits, except in an AMA.

[96] How are AMAs established? Section 165AB of the RMA provides that an AMA can be established by:

- Being included in a regional coastal plan or proposed regional coastal plan under section 165C (i.e. using the Schedule 1A process); or
- Becoming an AMA under section 44 or 45 of the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 ("the Aquaculture Reform Act").

[97] The relevant regional coastal plan for Port Gore is in the Sounds Plan. There are no express AMAs in the Sounds Plan because at the time it was made operative[152], the concept of an AMA did not yet exist. However, section 20 of the Aquaculture Reform Act deems all marine farming permits existing at 1 January 2005 to be coastal permits. The three existing mussel farms were deemed to have coastal permits by this section[153]. Then section 45(3) of the Aquaculture Reform Act provides that an area subject to a deemed coastal permit is also deemed to be an AMA for the purposes of the

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151 Section 2 of the RMA as substituted on 1 January 2005 by section 4(2) of the RM Amendment Act (No. 2) 2004.

152 In 2003.

153 Marine farming permit MPE128 relating to East Pool Head (site 8175) was issued on 5 March 1995, and replaced by U050218 on 2 August 2005. MPE115 relating to East Pool Head (site 8501) was issued on 27 June 1995, and the term extended on 21 May 2008. MPE127 relating to Gannet Point South (site 8176) was issued on 14 March 1995.

RMA. Accordingly, the applications are not prevented by section 12A(1) and (1A) of the RMA.

3.3.2 What activities are consents required for?

[98] The precondition (referred to in the previous part of this decision) having been satisfied, there are potentially three sets of activities for which the proposed mussel farms may need consents:

(1) to occupy the farm areas[154] for the purpose of marine farming;
(2) for construction and use of structures (the submerged farms) under section 12 of the RMA;
(3) for managing, in the coastal marine area, the effects on fishing and fisheries resources of aquaculture activities (the farming of greenshell mussels[155]) under section 30(2) of the RMA.

The first and second categories are straight-forward : the applications are required for activities to which section 12(1) and (2) of the RMA apply, i.e. activities including erection and use of structures (e.g. lines, buoys etc), associated disturbance of the seabed (e.g. installing anchors), and associated occupation of water space. As for the third set of activities, it is quite difficult to work out what the deemed coastal permits (former MAF licences) are. Fortunately, we do not have to resolve that because in these proceedings there is not evidence before us that any of the proposed mussel farms will cause adverse effects on the marine ecology of the areas in which they are each proposed.

3.3.3 What consents are required under rule 35.4 of the Sounds Plan?

[99] Rule 35.4 in the Sounds Plan[156] provides that (relevantly):

> Application must be made for a discretionary activity … for the following:
>
> …
> - Occupation of the coastal marine area;
>
> …
> - Disturbance of … seabed …;
>
> …
> - Marine Farms in [CMZ1] which are listed in Appendix D2;
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> …
> - Structures in the coastal marine area …

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154 On the evidence for the applicants:
- in the case of site 8501, this is approximately 9.75 hectares;
- for site 8175 approximately 3 hectares; and
- for site 8176 approximately 6 hectares.

155 *Perna canaliculus.*

156 Sounds Plan pp 35-13 and 35-14.

Thus there are general provisions for certain activities or structures, and specific provisions for identified marine farms, including the three sites with which these proceedings are concerned. They are specifically listed in Appendix D2 by name and the council's reference number[157].

[100] The Sounds Plan's Zoning Map shows that all of Port Gore is zoned as Coastal Marine Zone 1 ("CMZ1") except for Melville Cove and the marine farms listed in Appendix D2. The map is accompanied by a notation which reads:

> Marine farms having the status of Controlled Activities in terms of Rule 2.5 exist within the Coastal Marine Zones J and 2 and in Port Gore within the Coastal Marine Zone 1 with the status of Discretionary Activities in terms of Rule 3. Maps and records of the detailed locations of those marine farms will be held by the Council pursuant to the requirements of Section 35 of the Resource Management Act 1991. [Underlining added]

The future tense in the last sentence is inaccurate. No detailed maps and records of any of the three mussel farms appear to have been held by the council at any time. At least, none were produced to us.

[101] In summary, the district rules require consent for the activities of occupation of space and erection and use of structures in the coastal marine area, disturbance of the seabed, and for marine farms listed in Appendix D2. Rule 35.4.1 then provides a list of general assessment criteria[158]. Some of these merely repeat the statutory considerations in section 104. Other effects-oriented criteria will be considered in Part 5 of this decision.

3.4 Jurisdictional issues

[102] A number of jurisdictional issues were raised for Mr Marchant and FNHTB. They include:

(1) whether the amended applications (changing from surface to sub-surface) by Sanford are within the scope of its original application;
(2) whether any parts of the applications are prohibited as being within the CMZ1 zone under the Sounds Plan;
(3) whether any parts of the applications are outside an Aquaculture Management Area (AMA) because the existing marine farms, and the applications to "renew" them which we are considering, are not on the sites previously approved by the Marlborough District Council. If that is so is the court deprived of jurisdiction in relation to those parts of the applications?

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157 Sounds Plan Appendix D2 p. App D-1.
158 Sounds Plan pp. 35-14 and 35-15.

(4) the effect of the Environment Court's decision in *Pelorus Wildlife Sanctuaries v Marlborough District Council*[159] as to the scope of section 121A(1A) of the RMA.

[103] The jurisdictional issues were raised at an unusual time. Mr Milne, counsel for Mr Marchant and others, stated throughout the management of these appeals towards a hearing, that there were jurisdictional difficulties facing Sanford and PGMF. However, the details of his arguments were identified rather later than we would have liked. Thus we heard over half the evidence before we were given the nearly full jurisdictional arguments for Mr Marchant, and all of the evidence before we received the complete submissions of Mr Milne and the submissions of counsel for the other parties on these issues. The reason for that delay is that Mr Milne always submitted that the court should hear and determine the substantive merits of the appeals before deciding the jurisdictional arguments because, he argued, if the court decided that it should not, on the merits, grant one or more of the mussel farms it would not need to resolve some or all of the legal issues. At the various judicial conferences the other parties acquiesced to that course, so, with some reluctance, the court agreed to it. Accordingly, we set aside the jurisdictional issues at present and will assume that the proposed mussel farms are within jurisdiction.

4. The policy and plan framework

4.1 The Marlborough Sounds Resource Management Plan

[104] The Sounds Plan[160], made operative on 28 February 2008, is a combined district, regional and regional coastal plan. It contains three volumes – one of objectives and policies and methods, one of rules and a final volume of maps.

[105] Volume 1 of the MSRP contains 23 chapters of which three are particularly relevant. They are emphasised in this list of the most important chapters:

Chapter 1.0 Introduction
Chapter 2.0 Natural Character
Chapter 3.0 Freshwater
Chapter 4.0 Indigenous Vegetation
Chapter 5.0 Landscape
Chapter 6.0 Tangata Whenua and Heritage
Chapter 7.0 Air
Chapter 8.0 Public Access
Chapter 9.0 Coastal Marine
Chapter 10.0 Urban Environment
...
Chapter 22.0 Noise

159 *Pelorus Wildlife Sanctuaries v Marlborough District Council* [2010] NZEnvC 411.
160 Sounds Plan para 1.0 [page 1-1].

Chapter 23.0 Subdivision

Natural Character (Chapter 2.0)

[106] The introduction to the Natural Character chapter explains[161] that it provides an "integration mechanism" for natural character and supports other sections of the Sounds Plan. It contains one objective and that simply repeats section 6(a) of the RMA. Of more assistance are the implementing policies which, because of their importance, we quote in full. They are[162] (grammar as in the original):

Policy 1.1	Avoid the adverse effects of ... use or development within those areas of the coastal environment ... which are predominantly in their natural state and have natural character which has not been compromised.
Policy 1.2	Appropriate use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated.
Policy 1.3	To consider the effects on those qualities, elements and features which contribute to natural character, including: (a) Coastal and freshwater landforms; (b) Indigenous flora and fauna, and their habitats; (c) Water and water quality; (d) Scenic or landscape values; (e) Cultural heritage values, including historic places, sites of early settlement and sites of significance to iwi; and (f) Habitat of trout.
Policy 1.4	In assessing the actual or potential effects of subdivision, use or development on natural character of the coastal and freshwater environments, particular regard shall be had to the policies in Chapters 3, 4, 5, 6, 12, 13 and Sections 9.2.1, 9.3.2 and 9.4.1 in recognition of the components of natural character.
Policy 1.5	Promote an integrated approach to the preservation of the natural character of the coastal and freshwater environments of the Marlborough Sounds.
Policy 1.6	In assessing the appropriateness of subdivision, use or development in coastal and freshwater environments regard shall be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal.
Policy 1.7	To adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment, wetlands, lakes and rivers (and their margins) are unknown.
Policy 1.8	To recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole.

[107] The explanation states:

> The above objective and policies seek to support other sections of the Plan in terms of their contribution to natural character and provide an integration mechanism for the management of natural character.

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161 Chapter 2.0 para 2.1 [Sounds Plan p 2-1].

162 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].

[108] The Sounds Plan's description of the natural character areas of the Marlborough Sounds are contained in Appendix 2 to the volume of objectives and policies. There are two natural character areas relevant to these proceedings. The proposed mussel farms are contained in the "D'Urville Island – Northern Cook Strait" Marine Character Areas[163]. The collective characteristics of the marine character area are described in the Sounds Plan as being[164]:

> Exposed; clear, cold oceanic waters, strong currents, off-shore reefs, stacks and islands; rich reef communities; bryozoans and horse mussel beds; massive tube worm colonies.

The adjacent land on the peninsula leading out to Cape Jackson is in the "Stokes"[165] terrestrial natural character area. The bedrock is siliceous Marlborough Schist and the landforms are mostly very steep or moderately steep, evenly contoured hill slopes[166]. The forests of "lower altitude hill slopes … and coastal forests" (a description which covers the land adjacent to the mussel farm sites) is described as "severely compromised"[167]. However, as described above, that situation has improved somewhat over recent years through the actions of the landowners.

Landscape (Chapter 5.0)

[109] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values". Then 'Areas of outstanding landscape value' are shown on the Landscape Maps in Volume 3. Relevantly Map 78 shows that the ridgelines to the east and south of Cockle Bay are "prominent ridges"; Maps 75 and 78 describe both Cape Jackson and the area of the Kaitangata Bluffs as "Area[s] of Outstanding Landscape Value". There appears to have been a deliberate policy to exclude any area of water as part of those particular areas[168].

[110] The objective for landscape in the Sounds Plan mirrors section 6(b) of the RMA with an additional and rather mysterious emphasis on the management of "… the usual quality of the sounds". The implementing policy 5.3/1.1 is relevant. It is[169] to avoid, remedy or mitigate adverse effects of development and use "…on the visual quality of outstanding natural features and landscapes, identified according to criteria in Appendix One". The other five policies guide terrestrial development.

[111] We find the Sounds Plan quite confusing on landscape values for several reasons. First, despite identifying the whole of the Sounds as having outstanding visual values, it then identifies the "areas of outstanding landscape value" without identifying

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163 Appendix Two of Sounds Plan [p. Appendix Two – 64].
164 Appendix Two to Sounds Plan [p. Appendix Two – 64].
165 Appendix Two of Sounds Plan [p. Appendix Two – 40 and 41].
166 Appendix Two to Sounds Plan [p. Appendix Two-41].
167 Appendix Two to Sounds Plan [p. Appendix Two-42].
168 Elsewhere, e.g. in Tennyson Inlet, the sea is included in the area of outstanding landscape value – see Map 77 of the Sounds Plan.
169 Policy 5.3/1.1 [Sounds Plan p. 5-3].

what makes those two assessments different. Second, the category of landscapes which are (nationally) important under the Act – outstanding natural landscapes – are not identified. That is important because at least in Port Gore the "Areas of Outstanding Landscape Value" are too small to be described as "landscapes". A landscape is a broad encompassing area. Third, the implementing policy quoted above does not refer to the "Areas of Outstanding Landscape Value" but reverts to the statutory language[170] and refers to criteria in Appendix One of the Sounds Plan to guide decisions as to whether a section 6(b) landscape or feature is involved. With respect, the Sounds Plan is a very confusing document about landscape values, even for an informed reader. For a layperson it must be a nightmare.

[112] Chapter 5 also recognises the issue[171] that when deciding whether development is appropriate or not:

> … the siting, bulk and design of structures on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

However, that concept does not appear to have moved into the policies.

The Coastal Marine Area (Chapter 9)

[113] The first objective for Chapter 9 is[172]to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. Implementing policy 9.2/1.1 identifies the values which are to be maintained. They are conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, other activities, including those on land, public access to and along the coast, public health and safety, recreation values; and water quality. Most of these are in issue to some extent on these proceedings[173].

[114] Policy 9.2.1/1.2 requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied. The only other relevant policies are 9.2.1/1.12 and 1.13. These state[174]:

> Policy 1.12 To enable a range of activities in appropriate places in the waters of the Sounds including marine farming, tourism and recreation.

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170 Of section 6(b).

171 Para 5.2.2, Chapter 5 Landscape [Sounds Plan p. 5-3].

172 Objective 9.2./1.1 [Sounds Plan p. 9-4].

173 The exceptions are:
- e) Marine habitats and sustainability;
- g) Navigational safety;
- i) Public access to and along the coast;
- f) Natural character of the coastal environment.

174 Policies 9.2.1/1.12 and 1.13 [Sounds Plan p. 9-6].

> Policy 1.13 Enable the renewal as controlled activities of marine farms authorised by applications made prior to 1 August 1996 as controlled activities, apart from exceptions in Appendix D2 in the Plan.

The Sounds Plan explains[175] that "The extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters". By itself policy 9.2.1/1.12 does not assist much because each of the applications concerns the conflicts between mussel farming on the one hand and tourism and recreation on the other. Policy 9.2.1/1.13 does not apply in these proceedings, because all the sites come within the exceptions in Appendix D2.

[115] The implementing methods include zoning and rules. Under the zoning provisions (shown in Volume 3 – Maps) the coastal marine area (other than port and marine areas) is divided into two zones numbered one and two. We have already described how in Coastal Marine Zone 1 marine farms are prohibited and in Coastal Marine Zone 2 marine farms are controlled or discretionary. The description of the methods explains that in the CMZ1 marine farms are prohibited because[176]:

> These areas are identified as being where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values.

Cross-examined by Mr Milne, Ms Dawson described that[177] as "the" explanation of the CMZ1. In her evidence-in-chief she wrote that the effect of the zoning was thus[178]:

> This Zone, its rules, implementation methods, and associated policies, set the context for the area within which these marine farms in Port Gore are to be considered – an area where the values are generally presumed to be incompatible with the establishment of marine farms. However, the sites in Appendix D2 [of the Sounds Plan] are specifically identified as anomalies within the CMZ1. There are no statements in the [Sounds Plan] which indicate any presumption that granting consents to these discretionary activities is … inappropriate or … appropriate.

We think that is a fair summary of the Sounds Plan's approach to the zone. That is consistent with the description of Chapter 9 in *Kuku Mara Partnership v Marlborough District Council*[179]:

> The difficulty with Chapter 9 as we pointed out in the Forsyth Bay decision[180] is that it rather offers all things to all people … so it comes back to matters of fact before the Court.

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175 Explanation of objective 9.2.1/1 [Sounds Plan p. 9-6].
176 Para 9.2.2 : Methods [Sounds Plan p. 9-7].
177 Transcript p. 629 line 40.
178 S M Dawson, evidence-in-chief para 20 [Environment Court document 22].
179 *Kuku Mara Partnership v Marlborough District Council* Decision W39/2009 at p. 196.
180 *Kuku Mara (Forsyth Bay) Partnership v Marlborough District Council* Decision 25/2002.

[116] The second objective[181] relates to water quality. No issue was raised in respect of it. The third coastal marine objective[182] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy 9.4.1/1.1 identifies the same list of values as did policy 9.2.1/1.1 already listed. Later in the list of implementing policies there is a set of three which are potentially relevant. They are[183]:

Policy 1.7	Recognising (by way of controlled activity status) the importance of renewing the majority of existing marine farms authorised by applications made before 1 August 1996 while mitigating adverse effects on the environment by way of conditions.
Policy 1.8	Providing for minor adjustments to boundaries of resource consent areas for existing farms without increasing their size so as where necessary to reduce adverse effects or to recognise existing locations of farms.
Policy 1.9	Enable the adverse visual or ecological effects of particular farms to be addressed when the rules expressly provide for that.

In fact, policy 9.4.1/1.7 is not relevant because marine farming in the CMZ1 is not a controlled activity, but the other two policies are relevant. Policy 9.4.1/1.8 allows "minor adjustments" to marine farm boundaries which is important because in this case there is a mismatch between the existing mussel farms and the areas shown on the expired or expiring coastal permits issued under the RMA. Policy 9.4.1/1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which puts emphasis on the wording of the rules.

[117] We have already described the relevant rules about marine farming in an earlier part of this decision.

4.2 The Marlborough Regional Policy Statement

[118] The Marlborough Regional Policy Statement ("MRPS") became operative in 1995 and is currently being reviewed. It was of course prepared under the old – now replaced – New Zealand Coastal Policy Statement. We have read the relevant objectives and policies in the MRPS and agree with Ms Dawson's opinion[184] that it gives only "broad guidance when it comes to consider any particular resource consent application". At law it probably does rather less than that in relation to applications within the coastal environment since the NZCPS 2010 came into force. The new national coastal policy statement makes rather sharper distinctions than the MRPS does.

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181 Objective 9.3.2/1 [Sounds Plan p. 9-10].
182 Objective 9.4.1/1 [Sounds Plan p. 9-16].
183 Policies 9.4.1/1.7 to 1.9 [Sounds Plan pp 9-17 and 9-18].
184 S M Dawson, evidence-in-chief Attachment H para 27 [Environment Court document 22].

[119] Briefly, the MRPS includes three sections relevant to these applications. They are:

- Part 5 Protection of Water Ecosystems
- Part 7 Community Wellbeing
- Part 8 Protection of Visual Features

[120] There is a broad water ecosystems objective[185] that the natural diversity of species and the integrity of marine habitats be maintained or enhanced. There is one relevant, rather bland implementation policy[186] that gives little direction to this.

[121] The principal objective as to community wellbeing in this section is[187]:

> To maintain and enhance the quality of life of the people of Marlborough while ensuring that activities do not adversely affect the environment.

A relevant policy[188] on amenity values seeks to:

> Promote the enhancement of the amenity values provided by the unique character of Marlborough settlements and locations.

[122] Objective 7.1.9 is also important even if it merely restates section 5(2) of the RMA. Its implementing policies include[189] (relevantly):

> [enabling] appropriate type, scale and location of activities by:
> - clustering activities with similar effects;
> - ensuring activities reflect the character and facilities available in the communities in which they are located

– and some encouragement for aspiring marine farmers[190] in seeking to ensure:

> that no undue barriers are placed on the establishment of new activities … provided that … water … and ecosystems [are] safeguarded and any adverse environmental effects are avoided, remedied or mitigated.

[123] The policy for the allocation of space for marine farms in the Regional Policy Statement states that allocations will be "… based on marine habitat sustainability, habitat protection, landscape protection, navigation and safety, and, compatibility with other adjoining activities"[191].

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185 Objective 5.3.10 [MRPS p. 44].
186 Policy 5.3.11 (Habitat disruption) [MRPS p. 44].
187 Objective 7.1.2 [MRPS p. 55].
188 Policy 7.1.7 [MRPS p. 57].
189 Policy 7.1.10 [MRPS p. 59].
190 Policy 7.1.12 [MRPS p. 60].
191 MRPS policy 7.2.10(d).

[124] The RPS contains a separate chapter on "Protection of Visual Features". The one general objective[192] is to maintain and enhance "… the visual character of indigenous, working and built landscapes". There are three policies to implement that objective. The first policy relates to "outstanding landscapes" and is to avoid, remedy or mitigate[193] "… the damage of identified outstanding landscape features arising from … (relevantly) the erection of structures". The second policy is to "promote the enhancement of the nature and character of indigenous, working and built landscapes by all activities which use land and water"[194].

[125] Those two policies are rather vague as to what they apply to. Fortunately the third is a little clearer. It is[195] to preserve the natural character of the coastal environment. The explanation to that policy includes the statements that "Natural character includes the land and water ecosystems of the coast, and the interactions within and between those ecosystems"[196] and that "Managing natural character enables resource users to address the effects of their activities on the environment".

[126] The identified methods for protection of visual features include establishing "controls in resource management plans" – thus authorising the rules in the district plan. There is also a very interesting explanation and example for these methods. It states[197]:

> Major changes in the landscape occur when new elements are first introduced which conflict with the character already there. For example, the first mussel farm into a bay changes the bay from a smooth water surface, while additional mussel farms merely add to the change.

None of the witnesses referred to that example, but we consider it may be of assistance, although we always need to bear in mind that this is primarily an evidential matter for each of the particular three applications we are considering.

4.3 The New Zealand Coastal Policy Statement 2010

[127] The witnesses agreed that the New Zealand Coastal Policy Statement 2010 ("the NZCPS 2010")[198] is relevant. The following parts of the objectives are particularly relevant[199]:

> **NZCPS 2010 Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:

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192 MRPS objective 8.1.2.
193 MRPS policy 8.1.3.
194 MRPS policy 8.1.5.
195 MRPS policy 8.1.6.
196 Explanation to MRPS policy 8.1.6.
197 Explanation to Methods 8.1.7 MRPS.
198 This came into force on 3 December 2010.
199 We have omitted all references to subdivision as irrelevant for the purposes of these proceedings.

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of ... use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

...

NZCPS 2010 Objective 4

To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:

- recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;

...

NZCPS 2010 Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- 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 wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- ...
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- ...
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate use, and development.

[128] To achieve those objectives there are many policies. Relevantly, general policy NZCPS 2010/4 requires integrated management of natural and physical resources in the coastal environment. Policy 5 deals with land or water "held" under other Acts and is not relevant to these proceedings.

[129] NZCPS 2010 policy 6(2) is important[200] because in relation to the coastal marine area it requires recognition of:

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[200] Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.

a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, ...
b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
...

We note that different parts of policy 6 may pull in different directions, and this case is a good example of that.

[130] The more general NZCPS 2010 policies 6(2)a and c are then elaborated on with a specific policy for aquaculture which is obviously important in this case:

NZCPS 2010 Policy 8: Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

a. including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
   i. the need for high water quality for aquaculture activities; and
   ii. the need for land-based facilities associated with marine farming;
b. taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
c. ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

We note that in this case a. and c. are not relevant, the first because we are not concerned with the approval of a regional policy statement or plan; the latter because on the evidence water quality is not an issue. We will discuss policy 8b when we consider the efficient use of the water resource of Port Gore under section 7(b) of the Act. For present purposes it is sufficient (but important) to note that marine aquaculture might be found room for in the coastal environment : it has nowhere else to go.

Natural character of the coastal environment

[131] Then follows two policies on natural character and landscapes which are highly relevant in these proceedings. They are (relevantly):

NZCPS 2010 Policy 13: Preservation of natural character

1. To preserve the natural character of the coastal environment and to protect it from inappropriate use, and development:
   a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
   b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:

c. assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
d. ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

2. Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
   a. natural elements, processes and patterns[201];
   b. biophysical, ecological, geological and geomorphological aspects;
   c. natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
   d. the natural movement of water and sediment;
   e. the natural darkness of the night sky;
   f. places or areas that are wild or scenic;
   g. a range of natural character from pristine to modified; and
   h. experiential attributes, including the sounds and smell of the sea; and their context or setting.

NZCPS 2010 Policy 14: Restoration of natural character

Promote restoration or rehabilitation of the natural character of the coastal environment, including by:

a. identifying areas and opportunities for restoration or rehabilitation;
...
c. where practicable, imposing or reviewing restoration or rehabilitation conditions on resource consents ..., including for the continuation of activities; and recognising that where degraded areas of the coastal environment require restoration or rehabilitation, possible approaches include:

   i. restoring indigenous habitats and ecosystems, using local genetic stock where practicable; or
   ii. encouraging natural regeneration of indigenous species, recognising the need for effective weed and animal pest management; or
   iii. creating or enhancing habitat for indigenous species; or
   iv. rehabilitating dunes and other natural coastal features or processes, including saline wetlands and intertidal saltmarsh; or
   v. restoring and protecting riparian and intertidal margins; or
   ...

[132] There have been some decisions of the Environment Court about the meaning of "natural character" in section 6(a) of the RMA but they probably now need to be read in the light of the NZCPS 2010 objective 2 which is (relevantly) "To preserve the natural character of the coastal environment and protect natural features and landscape values through ... recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution ...".

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201 We see policy 13(2)(a) as potentially confusing because it is our understanding that it is standard (but, with respect, not very useful) landscape architectural practice to describe a "landscape" as a combination of natural "elements, processes and patterns". Here the same usage is being applied to the "coastal environment".

The implementing policy 13(2) then requires "Recogni[tion] that natural character is not the same as natural features and landscapes or amenity values …" Regrettably, that policy is not as clear as it might be. It seems odd to state that generic "natural character" is not the same as "natural features and landscapes", the latter being the subject of policy 15. The distinction seems obvious because it is a comparison of different categories (apples and oranges) : the first item is a quality (or characteristic) – naturalness – and the second category is a set of (descriptions of) places which may have that quality or characteristic to a greater or lesser degree. To understand the distinction we simply need to point out that "natural character" does not exist by itself : the NZCPS 2010 and indeed the RMA itself always speak of the "natural character" or "natural[ness]" of something : the coastal environment in the first case[202] and a feature or landscape in the second[203].

[133] It is perhaps also worth pointing out that under the NZCPS 2010 "natural character" is a more objective quality than the "outstandingness" of natural landscapes (and/or features). As we shall see shortly a number of values of outstandingness do not also apply to the identification of natural character in policy 13.

[134] Mr Milne submitted in relation to policy 13 of the NZCPS 2010 that it:

> only requires adverse effects on natural character to be avoided where that character is outstanding or where the effects would be significant …

So far we agree, but he then continued by stating[204] that the policy "… does not detract from the over-riding requirement to preserve natural character". We agree with counsel for Sanford that is wrong. There is no absolute protection in section 6(a) of the RMA : protection is only from inappropriate development. To implement that the NZCPS 2010 policy 13(1)(a) states that adverse effects of activities on natural character in areas with outstanding natural character should be avoided : but that is as far as the policy goes (or can go).

[135] Policy 13 of the NZCPS 2010 contains a two part process for identifying[205] and assessing[206] natural character or naturalness. The first step – <u>identification</u> of natural character – places the coastal environment (or feature or landscape) being considered in the range from pristine through modified to highly modified after considering the list in policy 13(2). It should be noted that in both steps the identification and assessment of "ecological aspects" is only one of a number of matters to be considered. The second step is then to <u>assess</u> the coastal environment on an evaluative scale which expressly

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202 Under section 6(c) of the RMA.
203 Under section 6(b) of the RMA.
204 Final submissions for Mr Marchant, para [430] [Environment Court document 39].
205 Policy 13(c) and 13(d), policy 14(a) and policy 15(c) [New Zealand Coastal Policy Statement 2010].
206 Policy 13(c) and policy 15(c) [New Zealand Coastal Policy Statement 2010].

includes outstanding[207], high[208], and degraded. That rather suggests a full five point scale to us, with medium and low between high and degraded.

Natural features and landscapes

[136] This policy states:

> **NZCPS 2010 Policy 15: Natural features and natural landscapes**
>
> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate use, and development:
>
> a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
> b. avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; including by:
> c. identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
> ...

A list of ten characteristics or values then follows. Most of them have been covered in our discussion of the landscape's naturalness but there are several matters which contain more evaluative elements. They are:

> (iv) aesthetic values including memorability and naturalness;
> ...
> (vi) transient values;
> (vii) whether the values are shared and recognised;
> (viii) cultural and spiritual values for tangata whenua ...;
> (ix) historical and heritage associations; and
> (x) wild or scenic values;

These evaluative elements are in addition to the identification and assessment of the "natural character" or "naturalness" elements of the landscape or feature in question.

[137] It is important that under policy 15 any adverse effects on outstanding natural landscapes and features should be avoided, whereas in other parts of the coastal environment only "significant" adverse effects need to be avoided. Policy 15(a) is applicable here since we have found that eastern Port Gore is an outstanding natural landscape.

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[207] Policy 13(1)(a) [New Zealand Coastal Policy Statement 2010] : this point on the scale of values for coastal environments is particularly interesting because it is adopted from section 6(b) of the Act.

[208] Policy 13(1)(c) [New Zealand Coastal Policy Statement 2010].

Conclusions as to policies 13 and 15

[138] We tentatively consider that the relationship between policies 13 and 15 of the NZCPS 2010 is this : policy 13 recognises that the quality of "natural character" of the coastal environment is likely to be different in most cases from the "naturalness" of landscapes generally. In particular, the coastal environment is likely to have headlands, dunes, reefs and surfbreaks[209] or the sound and smell of the sea[210] which will not be components of most landscapes. Policy 13 is not saying that "natural character" is different from "naturalness", merely that naturalness in the coastal environment requires identification of (usually) some different qualities from terrestrial activities. But where policy 15 does differ from policy 13 is in imposing a second evaluative step.

[139] Aspects of the lists in policies 13(2) and 15(c) are relevant both for the identification and the assessment, although some are more obviously useful for the latter evaluation : e.g. experiential attributes[211], wild or scenic values[212].

5. Predictions as to effects of the proposals

5.1 Introduction

[140] There are two preliminary issues. First we need to bear in mind that we must imagine the environment, for the purposes of section 104(1)(a) of the Act, as if the three marine farms are not actually in it. We were not referred to any direct authority on that, but it is a logical consequence of the expiry of the earlier permits. If we had to take the continued presence of the farms on site into account it would undermine any persons' claims to be adversely affected. To that extent the question we asked at the beginning of this decision is slightly inaccurate : the case is not, at law, about whether resource consents should be renewed but, subject to section 104(2A) which we discuss later, whether they should be granted.

[141] We now clear away several predicted adverse effects which we find are likely to be adequately dealt with by conditions. That is important because when considering effects under section 104(1)(a) of the RMA we must consider mitigated effects : *Elderslie Park Limited v Timaru City Council*[213]. We now consider those effects. The evidence, produced by the opponents of the mussel farms, was that the farms would be likely to cause adverse effects on the environment of Port Gore first in the form of "noise pollution" by music, and secondly from creating rubbish which is washed up on its shores. As to the first : historically crews working on mussel farms often played music at high volumes and the sound carried readily over the sea's surface to adjacent boats and especially occupiers of houses and baches on adjacent shorelines. In this case both Sanford and PGMF accepted that a condition restricting music (in fact we were told this is now fairly standard) should be imposed if consent is granted.

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209 Policy 13(2)(c) [New Zealand Coastal Policy Statement 2010 p. 17].
210 Policy 13(2)(h) [New Zealand Coastal Policy Statement 2010 p. 17].
211 Policy 13(2)(h) [New Zealand Coastal Policy Statement 2010].
212 Policy 15(c)(x) [New Zealand Coastal Policy Statement 2010].
213 *Elderslie Park Limited v Timaru City Council* [1995] NZRMA 433 (HC).

[142] As for the second type of nuisance, Ms Gerard described[214] the problem of rubbish (floats, cut-off pieces of mussel lashing) on beaches. Similarly, Mr Marchant gave evidence including photographs of the quantities of rubbish that he and his family find on the beach in front of their home. Again the applicants accepted a condition as appropriate to deal with that. We will look at the efficacy of the proposed condition later (if we need to).

[143] Mr Marchant complained that the MDC has failed in the past to enforce conditions. We make no finding about that at this stage except to point out that any person – including Mr Marchant – may apply[215] to the Environment Court for enforcement orders to ensure conditions of resource consents are complied with, if there is evidence of non-compliance. Of course, if we get to the stage for any of the applications that we think it should be granted, the past history of compliance (or not) with conditions may affect the conditions to be imposed on the new consent.

5.2 Effects on ecology and natural character

[144] When considering the effects of any of the farms on the marine ecosystem(s) it is reasonable in these circumstances to infer that the (future) effects of the proposed mussel farms will be very similar to the effects of the existing farms on nearly the same locations. Certainly that seems to be the basis on which Dr Grange made his assessment of likely effects. He observed that less than 10% of the water passing through the farms was filtered by the mussel crops leaving well over 90% of the phytoplankton available for the rest of ecosystem. Deposition of faeces and pseudofaeces[216] was very low and largely confined to the boundaries of the farms. Dr Grange considered this to be ecologically sustainable. He considered the resulting benthic environment under the farms is relatively diverse with an increased number of predatory starfish and other mobile invertebrates. He observed a higher diversity of fish species, cushion stars and kina than on the adjacent muddy seabed[217].

[145] Dr Grange considered the proposal to submerge the farms will result in a slightly lower stocking density and an immeasurable reduction in effects[218]. Overall he considered the marine ecological effects of the operation of the farms over a number of years to be minor and the continued operation to pose no risk to the surrounding water column and benthic communities, including the sensitive habitats at Gannet Point[219].

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214 K D C Gerard, evidence-in-chief para 1.16 [Environment Court document 31].

215 Any application should be accompanied by an affidavit giving as much detail as possible about the alleged breaches.

216 Our understanding of "pseudofaeces" is that they are particles which a mollusc has rejected as food – they are wrapped in mucus and expelled without passing through the mollusc's digestive system.

217 K R Grange, evidence-in-chief paragraphs 26–52 [Environment Court document 9] and 5.3–7.2 [Environment Court document 9A].

218 K R Grange, evidence-in-chief paragraphs 53–54 [Environment Court document 9].

219 K R Grange, evidence-in-chief para 63 [Environment Court document 9] and 8.2–8.3 [Environment Court document 9A].

We accept the evidence of Dr Grange that the effects of the existing marine farms operating within Port Gore have been minor and the proposed continued operation would pose no risk of increased effects. We note that the effects are localised and largely reversible once structures have been removed.

Trends in land use

[146] Mr Ronald Marriott owns the northern part of Cape Jackson and runs what he described as a "remote experience" business that includes a walking track – the Outer Queen Charlotte Track – between Ship Cove and the tip of Cape Jackson. He saw the Cape Jackson peninsula as a recreational reserve[220] stretching for 90 kilometres from the tip at the northern end to Anikiwa[221].

[147] Mr Marriott stated that all landowners on the Cape Jackson peninsula had stopped farming and instituted pest and weed management programmes to promote native revegetation. He considered that it took only 10 years for native cover to erase the signs of farming, 30 years to establish a "proper native forest", and 60 years to establish a forest that "only an expert would know had ever been cleared"[222].

[148] Mr Roy Grose, an employee of the Department of Conservation ("DoC"), appeared in response to a witness summons. He has visited the Port Gore area over the last 20 years and observed the pattern of pasture being replaced by native vegetation. He considered the revegetation to have been aided by goat control by the Marchants and their neighbours, complemented by sporadic possum control. Wilding pines have been removed. Mr Grose has sensed a change in the attitude of the private land owners with a number actively encouraging native regeneration, recognising the value of its role in storing carbon and taking a more holistic approach[223].

[149] Mr Grose noted the riparian strip, generally 20 metres wide, around the entire Port Gore coastline being managed by DoC to provide access and preserve natural values along the coast. Adjoining landowners are encouraged to allow regeneration of native vegetation. He acknowledged the leadership shown by the Marriott family converting from sheep farming, controlling animal and weed pests, and putting 500 hectares of their property into a carbon sink scheme[224] (by which we infer he meant an emissions trading scheme as explained earlier).

Predictions on likely changes in terrestrial ecology

[150] The regeneration of native vegetation in this part of Port Gore (taking place following the retirement of farming land) and the value of the resulting ecosystem are

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220 In a non-legal sense strictly, a "recreation reserve" is as explained in section 17 of the Reserves Act 1977.

221 R E Marriott, evidence-in-chief paragraphs 5–11 [Environment Court document 25].

222 R E Marriott, evidence-in-chief paragraphs 30 and 36 [Environment Court document 25].

223 R T Grose, evidence-in-chief paragraphs 29–31 [Environment Court document 28].

224 R T Grose, evidence-in-chief paragraphs 32–38 [Environment Court document 28].

both increasing. We have found that a mosaic of vegetation and habitat value exists across the various properties and the ecological naturalness is highest along the ridgeline, where there is mature forest, and along some parts of the shore, where there is relatively undisturbed coastal vegetation. The mid slope areas exhibit a range of values from recently retired pastures to early succession shrubland with canopy closure. It seems likely that the regeneration will continue and active pest management efforts by the local community will assist in maintaining and increasing the ecological values of the terrestrial environment.

[151] We have described how Dr Bartlett considered the vegetation cover at Pool Head to be visually natural albeit she considered this perceptual element to be only one component of natural character. She described the vegetation as relatively young and the process of regeneration affected by introduced mammals. She considered that the vegetation would develop into a diverse forest of high ecological value but not within the 20 year timeframe proposed by Sanford for its consent[225]. At Gannet Point Dr Bartlett considered that a high degree of naturalness was unlikely to develop over a 20 year period particularly given the continued grazing of the lower slopes by goats and stock[226]. During cross-examination Dr Bartlett noted that Cockle Bay, with its former pasture and the airstrip, exhibited the least regeneration when compared to Gannet Point and Pool Head[227].

[152] Dr Roper-Lindsay noted that many of the factors that had modified the terrestrial ecosystem at Pool Head and Gannet Point were now absent or declining in influence. Based on her observations and discussions with the community she considered the naturalisation process would continue raising the level of naturalness in ecological terms[228].

5.3 Likely direct effects on the environment

Servicing and harvesting visits

[153] Visits will be necessary for setting up the mussel farms, seeding the lines with spat, regular maintenance, and for harvesting. One of the ways in which to begin to assess the likely number of visits by boats to the mussel farms is to look at the records of visits to the existing farm. PGMF's records of visits to the Gannet Point North site show a range of 9 to 15 visits per month with durations ranging from 48 to 79 hours/month[229]. Estimates of servicing requirements for the partially submerged farm are 11 to 13 visits per month with monthly durations ranging from 54 to 71 hours[230]. These figures are very similar to those recorded for the existing farm. We see no

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225 R M Bartlett, evidence-in-chief para 62 [Environment Court document 7].

226 R M Bartlett, evidence-in-chief para 63 [Environment Court document 7].

227 Transcript at p. 81.

228 J Roper-Lindsay, evidence-in-chief paragraphs 88–92 [Environment Court document 8].

229 R D Sutherland, supplementary evidence September 2010, Appendix D [Environment Court document 17A].

230 R D Sutherland, supplementary evidence September 2010, p. 6 [Environment Court document 17A].

mitigation arising from the partially submerged farm with respect to either frequency or duration of visits.

[154] For Sanford, Mr Herbert estimated that the time required to service the existing marine farms was 19.22 hours/month and 15.2 hours/month for Pool Head and Gannet Point respectively[231] with the total number of visits to the two farms being recorded as 217 over two years which equates to nine visits per month[232]. We do not understand why the estimated service duration of 19.22 hours/month for the Pool Head farm differs so much from the recorded 48 to 79 hours/month for the nearly equivalent sized PGMF farm. We suspect the records are not very accurate, as answers to cross-examination by Mr Milne acknowledged.

[155] Mr Herbert suggested the submerged farms would be visited fortnightly for checking the structures and the crop (26 visits/year). In addition visits will occur each 18 months to each line for harvesting and seeding[233]. For the 16 lines in the two farms this amounts to approximately 20 visits/year. The total of 46 visits/year or four visits/month is less than half his estimate for the existing farms noted above. Presumably it is on this basis that Mr Herbert anticipated that the change from surface to subsurface marine farming operations would not of itself necessitate an increase in the number or duration of visits by Sanford's vessels once the farms are operational[234].

Effects on visibility

[156] Mr Hassan submitted that:

> ... subsurface technology will result in a dramatic reduction in surface features. For the Pool Head marine farm, there are currently approximately 1,062 surface floats and for the Gannet Point marine farm approximately 708, which are laid out in a uniform rectangular grid of surface floats typical of marine farms[235]. The existing marine farms also have four marker floats which are located at each corner of the marine farms.

In fact, we predict that the structures visible above the water will be more imposing than that due to the requirements by the Marlborough harbourmaster, Captain A van Wijngaarden. He has indicated that each subsurface farm should be marked by five special marker "IALA" spar buoys on each farm (three on the offshore boundary, two on the landward boundary) which will be fitted with radar reflectors, lights and top marks[236]. Their purpose is to ensure that navigational safety requirements are met[237].

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231 D Herbert, evidence-in-chief 27 July 2010, Tables 1 and 2 [Environment Court document 5].

232 D Herbert, supplementary evidence 29 September 2010, para 38 [Environment Court document 5A].

233 D Herbert, supplementary evidence 29 September 2010, paragraphs 42 and 43 [Environment court document 5A].

234 D Herbert, supplementary evidence 29 September 2010, para 46 [Environment Court document 5A].

235 D Herbert, supplementary evidence paragraphs 17, 18 and 21 [Environment Court document 5A].

236 D Herbert, supplementary evidence para 33 [Environment Court document 5A].

237 A van Wijngaarden, evidence-in-chief para 8 [Environment Court document 18].

Otherwise we accept there will be no other above-surface features to the marine farms (other than when the vessels are working on the lines)[238].

Lights at night

[157] The lights (on the spar buoys) are likely to be very noticeable : it is common ground that there will be 9,000 flashes every hour[239] if all three farms are consented. Further, the lights will be brighter[240] than the existing lights because they need to be visible at two kilometres.

Summary

[158] In comparison with the existing farms we predict that there will be in each case (and accumulatively):

- greatly reduced visibility of the farm during daylight hours;
- an increased effect of lighting at night time;
- no increase and possibly some reduction in the frequency and duration of visits by service vessels.

However, we need to bear in mind that the proper comparison in each case is with eastern Port Gore with no marine farms.

5.4 Effects on amenities of residents and terrestrial visitors

[159] The opponents of the mussel farms allege that the mussel farms will individually, or together if more than one is granted, reduce the amenities of Port Gore not merely by being there but also because of the number of visits from boats servicing the mussel farms. Ms G K Surgenor described[241] how when she stands on the beach at Cockle Bay she can see marine farms to the left (Pool Head) and the right (Gannet Point South). She said that "the farms are a constant reminder of human industrialisation of the landscape".

[160] For her part Ms K D C Gerard was concerned about the impact of, in particular the effect of PGMF marine farm on the visual amenity further north. She properly conceded[242] in her evidence-in-chief that none of the existing marine farms is visible from her family's bach at the Kaitangata Bluffs but described them as being[243] "… a large visual component" on the drive in and as being visible from many parts of the property. Her main concern was that the farms[244]:

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238 D Herbert, supplementary evidence para 20 [Environment Court document 5A]; G C Teear, evidence-in-reply para 8.3 [Environment Court document 6].
239 C E Marchant, evidence-in-chief para 171 [Environment Court document 27].
240 C E Marchant, evidence-in-chief para 171 [Environment Court document 27].
241 G K Surgenor, evidence-in-chief para 21 [Environment Court document 34].
242 K D C Gerard, evidence-in-chief para 1.14 [Environment Court document 31].
243 K D C Gerard, evidence-in-chief para 1.14 [Environment Court document 31].
244 K D C Gerard, evidence-in-chief para 1.17 [Environment Court document 31].

> … interfere with the remote, wild and peaceful experience that this area offers to us, our visitors and all who value the place … It is not just about visual impacts, it is about the noise from harvesting and service vessels, the lighting at night and the pollution of our beaches.

[161] We have described the location of Mr Eglinton's bach which is 270 metres[245] from the closest point on the Gannet Point North mussel farm. During the day he will, on his uncontradicted evidence, hear[246]:

> The sound of the motor being placed into forward and reverse gear, people talking, radios [blaring], bangs from metal on metal.

From his verandah he will be able to see the IALA-standard spar lights on the farm blinking[247] and the floodlights of any vessels working into the night[248].

[162] PGMF tried to undermine this evidence first by reference to its obvious subjectivity, and secondly by the submission from Mr Hunt that in reality the effects cannot be as bad as he describes because he still goes to and enjoys his property as he described in his stream of consciousness way. We find it implicit in Mr Eglinton's description that when describing the attractions of his bach and surrounds he was not describing a day when a servicing boat was working down in front of it (at a distance of more than 270 metres downhill).

[163] The Gannet Point South farm is one kilometre[249] away and not visible from Mr Eglinton's bach although its noises may, depending on wind and sea conditions, be heard from there. Elsewhere on his property the southern marine farm is visible from the hillslopes, which will be subjected to the same type of effects previously identified.

How visible will the new mussel farms be?

[164] For several reasons the opinions of the landscape architects on the visibility of each of the proposals were quite tentative. That was in part caused by Sanford's proposed mussel farms having not been tried[250] before in a commercial setting in the Marlborough Sounds, and partly because the details of Sanford's amended proposal only came to the other parties as late as August 2010 (Sanford)[251] and September 2010 (PGMF)[252] – well after the notices of appeal had been lodged[253].

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245 J A Bentley, evidence-in-chief p. 18 [Environment Court document 13].

246 P Eglinton, evidence-in-chief para 31 [Environment Court document 33].

247 P Eglinton, evidence-in-chief para 29 [Environment Court document 33].

248 P Eglinton, evidence-in-chief para 31 [Environment Court document 33].

249 J A Bentley, evidence-in-chief p. 18 Table 1 [Environment Court document 13].

250 W R MacDonald, evidence-in-chief para 28 [Environment Court document 4].

251 The jurisdictional issues raised by this, we have already parked to decide at the end of this decision.

252 D J Lucas, evidence-in-chief para 229 [Environment Court document 15].

253 W R MacDonald, evidence-in-chief para 27 dated 27 July 2010 [Environment Court document 4].

Pool Head and Gannet Point South farms

[165] It was on the advice of the landscape architect Mr S K Brown that Sanford proposed to submerge its two mussel farms, because he said that he could not support the effects of the farms as they are at present. That was, of course, very proper advice which demonstrated Mr Brown's professionalism and independence. Thus we put considerable weight on his opinion as to the effects of each of the two submerged farms. In his view that would have a very positive effect in relation to both operations by "dramatically reducing the overall presence and effects of marine farming"[254] on this part of Port Gore. He based that conclusion on his assessments that:

- in the day, from shallower viewing angles (such as from Cockle Bay) the profile of the farms would be "… effectively reduced to four buoys, of which two are painted black"[255], and as a result would look like a group of moorings, not like a conventional mussel farm;
- at night the two warning lights would be visible at the two outer corners of each farm[256].

He also acknowledged that harvesting methods would not alter[257], and that from elevated viewpoints the profile of the underwater lines would still be visible[258]. We prefer Mr Brown's evidence to that of Ms Lucas in respect of the likely daylight visibility of the proposed farms.

Other effects of visiting boats

[166] However, we are uneasy about Mr Brown's initial assessment of the other effects of the farms. First he rather underestimated the effects of visiting boats – he referred to harvesting, but as we have recorded, servicing also brings vessels to the farms frequently; secondly his assessment of the lights at night was rather superficial.

[167] In his evidence in reply Mr Brown considered the evidence of Ms Lucas on those issues. Mr Brown accepted that the navigable hazard requirements will increase the likely visibility of the five spar buoys on each farm – they must now be visible at a range of two kilometres, whereas one kilometre suffices at present[259]. He agreed in reply[260] that:

> … the night-time lights are still likely to affect perceptions of the relative solitude, quietude and remoteness of Port Gore and its margins – to some degree – although any such assessment is

254 S K Brown, evidence-in-chief para 78 [Environment Court document 12].
255 S K Brown, evidence-in-chief para 72 [Environment Court document 12].
256 S K Brown, evidence-in-chief para 75 [Environment Court document 12].
257 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
258 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
259 Although Mr Marchant gave evidence that the lights have not been installed on the PGMF farm, and have not been working on the Sanford farms.
260 S K Brown, evidence-in-reply para 23 [Environment Court document 12C].

> contextualised by the presence of residential lights around Cockle Bay and Melville Cove together with lights aboard any vessels moving within the bay itself.

He considered that the effects of the lights are acceptable[261].

[168] As for visiting boats Mr Brown relied on updated information from Mr Herbert (for Sanford) as to vessel visits. He considered that the 11 to 28 metre vessels used by Sanford for servicing and harvesting would be apparent but not "… dominant or highly intrusive elements"[262] within Port Gore. He claimed[263] to have discussed servicing in evidence-in-chief but the only reference to vessels we can find is the one we have mentioned, which refers to "harvesting"[264]. His assessment in reply was informed by his view that inner Port Gore is not pristine, and so[265]:

> Ms Lucas has carried the idea of 'maintaining and enhancing amenity values' to a level that is excessive, given the historic working nature of much of Port Gore and multiplicity of recreational, productive, scenic and other values that still apply to it.

While we agree that Ms Lucas may have overstated the impacts of the servicing and harvesting of vessels, and of the spar lights at night (although not by much), we are also concerned that Mr Brown has not stepped back and recalled his primary assessment of the inner Port Gore. Further, it is of real concern that he did not address these effects in detail in his evidence-in-chief.

[169] Further, Mr Brown's evidence on the effects of vessels was slightly equivocal. In his evidence-in-reply he wrote[266]:

> In my opinion, the 11-28 m long vessels employed by Sanford will be apparent, but hardly dominant on highly intrusive elements within Port Gore's seascape. They will also, depending upon the sea state and wind direction, be audible at times. But these factors do not persuade me that such vessels, or indeed other vessels of a similar size used for recreation and pleasure, are inappropriate within the Bay's maritime setting.

Mr Brown is a very thoughtful witness but it appears to us he has applied a wrong test when he considers whether the activities will be "dominant or highly intrusive". Further, it is the effect of the activities in the context of the policies protecting the outstanding natural landscape which he should be assessing, not their effect within the "maritime setting" (for which there exists no policy to set the parameters). Conversely, in answer to a question in cross-examination, he expressed his belief that Port Gore does not have to be treated like a national park[267], and that is putting the test too high as well.

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261 S K Brown, evidence-in-reply para 24 [Environment Court document 12C].
262 S K Brown, evidence-in-reply para 29 [Environment Court document 12C].
263 S K Brown, evidence-in-reply para 25 [Environment Court document 12C].
264 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
265 S K Brown, evidence-in-reply para 30 [Environment Court document 12C].
266 S K Brown, evidence-in-reply 1 December 2010 para 29 [Environment Court document 12C].
267 Transcript p. 163.

[170] Given our findings that the eastern side of Port Gore is an outstanding natural landscape, policy 15 of the NZCPS 2010 applies. That suggests any activity which has adverse effects should often be avoided, not only highly intrusive adverse effects.

[171] We predict that to a reasonable occupier of the Eglinton or Surgenor land and baches these effects will be more than minor. They will, as Mr Eglinton stated, supported by Ms Lucas, introduce an industrial feel to the area around the marine farm.

[172] We have already pointed out that Mr Carter, the landscape architect for PGMF, appears to have assumed the existing marine farms were part of the existing environment so his assessment of effects was based on an incorrect starting point.

[173] Mr Kyle, the planner called for both applicants, wrote that he approached the matter on the basis that harvesting, servicing, lighting and boat and machinery noise were not part of the existing baseline although he noted, for no good reason that we can see (given that admission), that harvesting and emission of noise from servicing boats are permitted activities. In any event, as Mr Milne observed, his evidence-in-chief on this was sparse. Sanford's counsel tried to remedy that by asking further questions by way of oral evidence-in-chief. Mr Kyle observed that on a recent (2011) visit the brightest light in eastern Port Gore was the Marchants' large illuminated TV, and concluded that "the lighting would not present effects that should be considered of such significance as to be adverse"[268]. That answer did not identify the policy framework in which he is assessing the intensity or scale of the effect and is therefore not very useful.

[174] Mr Hassan and Ms Meech in their final submissions for Sanford submitted in effect that the local residents and visitors were being inconsistent when they objected to the impacts of the marine farms. They wrote that[269]:

> … [I]t is … understandable that their appreciation for their own amenities such as aircraft, televisions and other structures and amenities will mean they will find their noise, lighting and other impacts acceptable, by contrast to how they feel about such impacts of the marine farms.

There is some validity to that point, but it cannot be pushed too far. We have already found that the noise from aircraft is a brief and minor intrusion compared with the noise of servicing and harvesting mussels. As for television and other lighting and their effects on eastern Port Gore, they are domestic effects which might, on a small scale, be expected in inner Port Gore.

[175] Ms Lucas, the landscape architect for Mr Marchant, wrote more on the effects of the servicing and harvesting operations on the amenities of occupants of the adjacent land. She assessed the effects of the Gannet Point North marine farm as having "very

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268 Transcript p. 531.

269 Final submissions for Sanford, 20 May 2011 para 37 [Environment Court document 40].

significant adverse effects on the experience of the natural character, natural landscape and amenity values of this shore"[270]. Her detailed evidence on this issue was cross-examined on at some length by Mr Hunt but without seriously undermining her opinions. He submitted that Ms Lucas "let herself down with a failure to balance her assessment of the PGMF from a sea based perspective"[271]. That strikes us as a debater's point : if no party or witness was suggesting the marine farms had adverse effects when experienced from the sea then we cannot see how it was a significant omission on Ms Lucas' part not to consider that. Similarly his criticism of her photographs showed perhaps that she did not edit their number as fully as she might have, but that is not a matter of substance. The court regularly makes allowances for the pressure under which expert witnesses have to prepare their evidence. We have considered whether it is appropriate for a landscape architect to express an opinion on the effects of activities on amenity values and conclude that it is: a good deal of landscape architecture is about creating, maintaining or improving amenities. That is subject to the proviso that all witnesses should assess effects in the light of the relevant policies.

[176] At this point we should consider the extent of any permitted baseline under section 104(2) of the RMA, because there would be no point in considering adverse effects on amenities if we should disregard them as part of a permitted baseline. While boats of any size have unrestricted access (subject to the laws of navigation) to the eastern side of Port Gore and to anchor there, we find it fanciful to think they would visit with anywhere near the frequency that commercial boats will visit this side of the bay to service one to three mussel farms. We are satisfied on the evidence that Cockle Bay is simply too open to winds from too many quarters to be used continuously for recreation. Further, while the emission of noise from mussel farming is a permitted activity, it is fanciful to think it will occur (indeed at law it cannot occur) unless one or more coastal permits is granted.

[177] In any event, given the uncontroverted evidence of Mr Marchant that, while he has always been opposed to these three marine farms, their substantive merits have never been considered by the Environment Court in either a district plan or resource consent context, we consider that in the exercise of our discretion[272] we should consider the (mitigated) noise effects from the marine farm operations. We should add that there was no evidence that noise from the operations in any way breached the rules of the Sounds Plan.

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270 D J Lucas, evidence-in-chief para 223 [Environment Court document 15].

271 PGMF: final submissions para 89 [Environment Court document 41].

272 Under section 104(2) of the RMA.

[178] It is of concern that the experts for Sanford and PGMF did not address the effects of servicing and harvesting the marine farms in their evidence-in-chief. Mr Hassan and Ms Meech submitted that the effects of those activities had been "thoroughly considered by Mr Kyle and Mr Brown in their evidence"[273] for Sanford, but omitted to record that their opinions were only expressed in evidence-in-reply and/or in cross-examination. If, as in this case, an expert's opinions on independent relevant matters not traversed in their evidence-in-chief are invariably and unhesitatingly consistent with the results of their earlier evidence on other matters that they have traversed, the court is entitled to be concerned about the objectivity and independence of those new opinions. While there is a suspicion of that in Mr Brown's evidence-in-reply, there is more reason for concern about Mr Kyle's evidence-in-reply (written and oral).

[179] An important aspect of the effect of servicing and harvesting of the mussel farms is that they are weather-dependent. Rough seas affect access as well as on-site operations so that the boats will not be working on the marine farms under these conditions. Counsel for Sanfords seemed to think that was beneficial for the amenities of the Cockle Bay and Cape Jackson residents. But that is not necessarily the case, rather the weather dependence of servicing and harvesting operations is likely to have the effect that on the fine[274] days on which residents of southeastern Port Gore are enjoying their amenities, that enjoyment is likely to be impaired (in their opinion) by the intrusion of boats servicing one or more of the marine farms. Mr Marchant pointed out[275] that "… if there's two weeks of norwesterlies there won't be much activity, but then there's a rush of activity after that".

5.5 Effects on wildness and remoteness

[180] In Mr Greenaway's opinion[276] Port Gore has high values of naturalness and remoteness which "… combine to give [it] a very high amenity value for those who live in or visit the area".

Effects on the amenity values of marine recreation

[181] As for the likely effects of one or more marine farms in this part of Port Gore on recreational values, Mr Greenaway's assessment of the existing surface mussel farms was that[277]:

- they compromise the ability to afford a 'remote' marine recreation setting by introducing a strong element of commercial development, via the presence of the farms, their buoys and lights, and their servicing by commercial vessels;

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273 Sanford final submissions, para 116 [Environment Court document 40].
274 Transcript p. 753 lines 43-46.
275 Transcript p. 753 lines 20-23.
276 R J Greenaway, evidence-in-chief para 3.1 [Environment Court document 26].
277 R J Greenaway, evidence-in-chief para 7.4 [Environment Court document 26].

- they adversely affect the natural character of the setting and so diminish the opportunity for a recreation experience which is differentiated from that available throughout the vast majority of [the] Marlborough Sounds.

[182] We have described how Mr Godsiff considered[278] that the tracks and tours offered by Mr Marriott were better suited to the needs of most visitors. In summary, he did not consider the proposed mussel farms would have any adverse effect on the amenity of tourists in the area, nor did he consider that the area had high access values.

[183] We consider Mr Greenaway accurately reflected the evidence when he wrote[279]:

> The focus by the Council and the [a]pplicants has tended to be on recreation use rather than the value of the area in terms of remote experience recreation and remote experience from a wider cultural perspective.

Since the council and applicants' evidence was simplistic and less comprehensive than Mr Greenaway's, we prefer the latter.

Gannet Point North

[184] Mr Greenaway referred to PGMF's proposal to halve the number of flotation buoys for its (surface) Gannet Point farms. He wrote[280]:

> This amended proposal makes no difference to my assessment of the effects of the proposal on natural character of the coastal environment, or on amenity values at Gannet Point and in the Port generally. The farms will still be substantially visible from the water and the land and have a similar frequency of attendance by service and harvesting vessels. If this farm continues it will, in my opinion, have the same or very similar detraction from amenity values and natural character as the present farm. This farm is an inappropriate use and development of the coastal marine area. It is and would be an anomaly in the heart of a remote and scenic area that is recognised in the Marlborough Sounds Resource Management Plan as being inappropriate for marine farming.

Pool Head and Gannet Point South

[185] In relation to the Sanford sites, Mr Greenaway wrote[281] of subsurface farms:

> … if the sub-surface farms are approved, they will have a lesser impact on visual amenity than the current farms. I expect that this, in turn, will reduce the perception by recreational users of intrusion into an otherwise largely natural environment. However, in my opinion, the presence of the farms and the relatively frequent servicing by commercial vessels would still significantly compromise the 'remote' experience values and natural character of this part of Port Gore.

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278 C G Godsiff, evidence-in-chief para 8 [Environment Court document 10].
279 R J Greenaway, evidence-in-chief para 10.2 [Environment Court document 26].
280 R J Greenaway, evidence-in-chief para 9.3 [Environment Court document 26].
281 R J Greenaway, evidence-in-chief para 9.5 [Environment Court document 26].

Cross-examination did not significantly weaken Mr Greenaway's evidence, nor was there any competent witness for the applicants who gave a different view. In fact, the only passage that Mr Hunt appeared to refer to[282] as weakening Mr Greenaway's view of the remoteness of Port Gore was an answer by the witness to a question from the court where Mr Greenaway stated[283]:

> MR GREENAWAY: that would be part of my earlier answer I think – the concept that you are still in a setting that has got clearly – it is not an area that is I guess remote essentially, remote from obvious structures, obvious activity. I should not say – a lot of activity, obviously there are going to be boats coming in and out.

However, we consider that Mr Greenaway was not resiling from his view that Port Gore is remote, but was drawing attention to the role of boats within it, as the continuation of his answer a few lines later revealed[284]:

> … You have got a setting where you can have remote values but with … quite large palatial boats coming into it.

6. Overall evaluation

6.1 Introduction – weighing all relevant matters

[186] We consider first how better, on the evidence, to enable the people and communities of the Sounds to provide for their wellbeing[285]. The qualitative evidence that the mussel farms, individually or together, would add to the economic and hence social wellbeing of the Sounds communities, especially that at Havelock, was uncontroverted. In respect of the two Sanford farms, Mr W R MacDonald, the branch manager at Havelock, wrote[286] that they contributed 4.4% or 600 tonnes of the total mussels harvested by Sanford at Havelock within the last year. On Sanford's calculations[287] approximately one job is created by every 48 tonnes harvested so the production from farms represents over 12 jobs within Sanford's operations. The NZCPS 2010[288] requires us to take that into account, as we do : employment is always an important consideration, especially in these difficult times for the global economy and New Zealand export industries. On the other hand, for reasons we address shortly, if we were to refuse consent for any one (or more) of these marine farms then we are hopeful that new coastal water space can now be found elsewhere around Marlborough's coastline so that jobs would not be lost. That would take the sting out of Mr Herbert's concern that "… any reduction in mussel farm space may make it uneconomic to continue farming the rest of Sanford's mussel farms in the area"[289]. Equally, we consider that Mr Hunt's submission that "… it is nonsense to suggest

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282 PGMF final submissions para 171 [Environment Court document 41].
283 Transcript p. 731 line 23.
284 Transcript p. 731 line 33.
285 Under section 5 of the RMA.
286 W R MacDonald, evidence-in-chief para 25.1 [Environment Court document 4].
287 W R MacDonald, evidence-in-chief para 25.1 [Environment Court document 4].
288 NZCPS 2010 policy 8(b).
289 D Herbert, evidence-in-chief para 21 [Environment Court document 5],

relocation is an option where plainly it is not"[290] is now unlikely to be true, or at least not for much longer. We also recognise that at least for Sanford[291](and probably for PGMF) it is "critical" that Sanford has sufficient farms to enable it to achieve efficiencies of scale in use of its vessels and Havelock factory.

[187] An important positive aspect of each application is that mussel farms require high water quality and productive sites. Both those qualities are present for each of the three proposals, so policy 8(b) of the NZCPS 2010 would be achieved. A relatively minor positive effect is that the presence of a mussel farm might enhance fishing for some – there might be more snapper[292] to be caught.

Alternative sites

[188] For Sanford Mr MacDonald stated that it was very important to Sanford that its existing marine farms are reconsented because it is very difficult at present to create new space – new AMAs were not being created at the time of the hearing. Mr Hunt agreed that there are "real obstacles" securing alternative sites. We sympathise with the applicants : the approval of AMAs has been stalled for some years. However, the time it has taken us to deliver this decision (caused in substantial part by pressure of priority work as a result of the Christchurch earthquake sequence especially after February 2011) has largely remedied that situation by Parliament's enactment[293] of the Resource Management Amendment Act (No. 2) 2011 which came into effect on 1 October 2011 ("the 2011 Aquaculture Act"). Amongst the changes made by that Act are the removal of the requirement for AMAs to be established before resource consent applications may be made. So if we were to refuse any one or more of these applications before us, the disappointed applicant can try to re-establish elsewhere.

[189] We accept that if we were to approve any one or more of the marine farms that would not deplete the environmental capital of Port Gore for future generations[294]. Upon expiry of the term(s) of consent the marine farm structures (buoys, lines, anchors) can be removed with negligible lasting effect on the environment, according to Dr Grange's unopposed evidence[295].

6.2 Section 6 of the RMA

6.2.1 Introducing the matters of national importance

[190] Together with, or potentially against, those key positive matters under section 5(2) of the RMA we have to weigh various matters of national importance under sections 5(2)(a) to (c) and 6 of the Act, particularly:

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290 PGMF final submissions para 137 [Environment Court document 41].
291 W R MacDonald, evidence-in-chief para 25.3 [Environment Court document 4]
292 D Herbert, evidence-in-chief para 65 [Environment Court document 5].
293 NZS 2011/69.
294 Under section 5(2)(a) and (b) of the RMA.
295 K R Grange, evidence-in-chief [Environment Court documents 9 and 9A].

- recognition and protection of the natural character of the coastal environment;
- recognition and protection of the outstanding natural landscape of Port Gore.

There is an inherent tension between those two matters in these proceedings, at least when each of the proposals is considered at the level of the NZCPS because the natural character of the coastal environment of eastern Port Gore is only high, whereas we have found that the landscape is an outstanding natural landscape. That suggests we should explain our understanding of the relationship between section 6(a) and (b) of the RMA. It is this : while the coastal environment stretches around all of New Zealand's extremely long coastlines, and every segment of the coastal environment may be seen as part of one (or sometimes more than one) landscape or a (landscape) feature, relatively few parts of the coastal environment are in an outstanding natural landscape. So when a part of the coastal environment is also within, or coincides with, an outstanding natural landscape the landscape is at first sight (and depending on context) even more important to the national interest than the coastal environment is. The result is that adverse effects which may be appropriate in the coastal environment normally may be inappropriate in a coastal environment which is also an outstanding natural landscape. Conversely, even in an outstanding natural landscape, a proposal may be so important under section 5 that it is appropriate to allow it anyway.

6.2.2 Having regard to the New Zealand Coastal Policy Statement 2010

[191] Objective 2 of the NZCPS 2010 elaborates on section 6(a) of the RMA by suggesting areas of the coastal environment where various forms of development and use would be inappropriate and protecting them from such activities. This is (nearly) followed through in at least two places. First in NZCPS 2010 policy 8 on aquaculture which requires regional instruments to recognise the significant existing and potential contribution of aquaculture to well-being of local people and communities by providing for aquaculture in appropriate places; and secondly in policies 13(1)(c) and 15(d) and (e) by requiring that at least areas of "high natural character" be mapped or otherwise identified and that objectives and policies be included in the instruments. We wrote "nearly" about implementation of objective 2 because there is no policy which requires regional instruments to state where aquaculture might be inappropriate.

[192] As it happens the relevant regional coastal plan is the Sounds Plan and that has anticipated this policy by showing areas in the Marlborough Sounds where marine farms are generally appropriate and those where it is not. As outlined earlier, most of eastern Port Gore is in the CMZ1 where marine farming is prohibited. However, by making marine farming on each of the three sites with which we are concerned a discretionary activity, the Sounds Plan has effectively kicked the appropriateness of a farm on each back up the hierarchy of planning instruments, that is the Regional Policy Statement, the NZCPS 2010 and Part 2 of the Act itself.

[193] Under NZCPS 2010 policy 8 we have to take account of the economic benefits of aquaculture. We have described the skimpy evidence on that above and take it into account in coming to our overall conclusion. We must also take into account the social benefits. The evidence for Sanford was that the company is a relatively large contributor to the Marlborough economy. It employs 220 people and contracts up to 50 more. It spends approximately $15.5 million in wages and salary annually[296]. We accept that these three mussel farms are (at least together) regionally important for their benefits and have regard to that.

[194] Under policy 15 of the NZCPS 2010 we must avoid adverse effects of activities (such as mussel farming) on the outstanding natural landscape (including the seascape, as we have found it to be) of eastern Port Gore. Mr Kyle, the planner called for the applicants, did not mention this policy even in his rebuttal evidence[297] where he discussed the NZCPS 2010 generally. Ms Dawson, the planner called by the council, only referred to the old, now replaced, NZCPS.

[195] The closest that Mr Kyle came to mentioning policy 15 was when he wrote[298]:

> The key consideration is to determine whether the proposed marine farms are inappropriate in the context of the natural character and landscape values that apply in this particular location.

But he did not refer to the fact that there are different policies for the coastal environment[299] and for any outstanding natural landscapes[300] in that environment. That is particularly important since the landscape architect – Mr Brown – with whom he purported to agree[301] and whose view that "the Bay" was outstanding in landscape terms he accepted[302], was of the opinion that eastern Port Gore was an outstanding natural landscape which means that NZCPS 2010 policy 15 applies. Thus when coming to his view on the appropriateness of the Sanford proposals Mr Kyle has not told us why or how his view is compatible with policy 15(1) which requires that adverse effects should be avoided if an activity is to be found appropriate. We do not accept that Mr Kyle has undertaken a "careful assessment"[303] of the NZCPS 2010 and consequentially cannot give much weight to his conclusions.

[196] Mr Brown's answer in cross-examination was[304]:

> My point is that this is a landscape in which natural elements have primacy, but which also has a degree of modification and that the proposed [SPAR] buoys, lighting and even the vessels

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296 W R MacDonald, evidence-in-chief para 17 [Environment Court document 4].
297 J C Kyle, rebuttal evidence [Environment Court document 21B].
298 J C Kyle, evidence in reply para 8.6 [Environment Court document 21B].
299 NZCPS 2010 policy 13.
300 NZCPS 2010 policy 15.
301 J C Kyle, evidence-in-chief para 25 [Environment Court document 21].
302 Transcript p. 535 line 8.
303 Sanford final submissions para 214 [Environment Court document 40].
304 Transcript pp 171-172.

> associated with the marine farms are consistent with that level of modification and the retention of the values that I have identified.

[197] Mr Hunt, counsel for PGMF, did not refer to the most relevant policies in the NZCPS 2010 (we discuss these below). It may be that was because of his "… acknowledge[ment] that the Part [2] issues trump the [NZCPS]"[305]. In one sense that is correct – the NZCPS is below and must implement Part 2 of the RMA. However, in an important way it is incorrect : the NZCPS 2010 implements and gives slightly more detailed guidance on the more open or opaque aspects of sections 5 and 6 of the RMA.

6.3 Having particular regard to section 7 matters

6.3.1 Introduction

[198] Of the list of matters in section 7 to which we are to have particular regard, the following were addressed in evidence:

> …
> (b) The efficient use and development of natural and physical resources:
> (ba) …
> (c) The maintenance and enhancement of amenity values:
> (d) Intrinsic values of ecosystems:
> …
> (f) Maintenance and enhancement of the quality of the environments:
> (g) Any finite characteristics of natural and physical resources.

Paragraphs (f) and (g) are adequately subsumed in other discussion, but we should consider section 7(b), (c) and (d) separately. None of the other paragraphs are relevant.

6.3.2 Efficient use of resources (section 7(b))

[199] A cost-benefit analysis is not compulsory under section 7(b) of the RMA, even when matters of national importance are recognised as relevant : *Meridian Energy Limited v Central Otago District Council*[306]. However, nothing in the High Court's decision on that proceeding undermines the Environment Court's assumption that a cost-benefit analysis is very useful. Indeed, without it an assessment of efficiency under section 7(b) tends to be rather empty.

[200] It is, in theory, straightforward to calculate the net benefit of the two possible options open for the use (or protection) of the water space where each mussel farm is proposed to be located. The net benefit of the marine farm should be compared with the net benefit of the water space if empty of the farm. The latter benefit is more than zero because the water space has financial value for fishermen, social value for recreationalists, and is part of the district's environmental capital. There are three sets

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305 PGMF's final submissions para 113 [Environment Court document 41].

306 *Meridian Energy Limited v Central Otago District Council* [2010] NZRMA 477 at 116 (HC); [2011] 1 NZLR 482.

of persons[307] affected by the use or protection of the water space : producers (i.e. the mussel farmer), consumers (mussel eaters or exporters), and third parties affected by externalities. The latter can be positive (improved fishing around the mussel farm) or negative (loss of natural quality of the coastal environment). Then, adopting the formula stated in *Memon v Christchurch City Council*[308] the court, or the local authority at first instance, can ascertain the net benefit of the marine farm as follows:

> nb (farm) = ps + cs + pe – ne
> where:
> nb (farm) = net benefit of a marine farm
> ps = producer surplus
> cs = consumer surplus
> pe = positive externalities
> ne = negative externalities.

[201] If that calculation had been performed here for each mussel farm space we would have been able to make a more objective assessment of the economic (and social) value of the two scenarios (i.e. mussel farm or none[309]). Unfortunately, we were not informed of the (past) or present or forecast and discounted future income streams to be derived from each farm. We were merely informed that the two Sanford farms in eastern Port Gore represent "substantial" capital investment[310]. Nor did we hear argument as to whether, when calculating the producer surplus, we should treat wages in economists' conventional way (as a cost) or as a benefit. We suspect, but do not decide the issue, that the NZCPS 2010 effectively requires the latter in view of policy 8's differentiation between economic wellbeing and social and cultural wellbeing.

[202] We did, of course, receive evidence from a number of witnesses as to the employment opportunities created by the marine farms but none of that was put in a form which enabled us to quantify the social benefit of each proposal. Instead we are left with unquantified or qualitative assessments on both sides of the ledger. While such an analysis would have been very useful in these proceedings it was not provided by any party. Given the dearth of evidence, we are simply not able to make any quantitative assessment of which option for the water space of each proposed mussel farm provides a greater social, economic, or cultural benefit, and is thus a more efficient use of that part of the coastal environment. Of course, those problems pale into insignificance compared with the difficulties of putting a value on the externalities caused by having at least one mussel farm in eastern Port Gore.

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307 *Memon v Christchurch City Council* Decision C116/2003.

308 *Memon v Christchurch City Council* Decision C116/2003 at [76], quoting and adopting the evidence of an experienced economist, the late Mr P Donnelly.

309 Accordingly decision-makers simply have to make their best assessment of whether the net benefit of the proposed farm is negative or positive.

310 W R MacDonald, evidence-in-chief paragraphs 25 and 26 [Environment Court document 4].

[203] In the absence of quantified evidence it is worth pointing to the approach taken by the Sounds Plan on locating the point at which a mussel farm's benefits might be exceeded by the costs. Because at some point the marginal benefits of marine farms are outweighed by section 6(a) and (b) values – amongst others – the council has provided in its planning maps for most existing farms to be located in a zone – Coastal Marine Zone Two - where marine farming is provided for (as controlled or discretionary activities depending on location) and Coastal Marine Zone One where marine farming is prohibited. There is a policy decision in the Sounds Plan that in some places the other values in section 5(2) outweigh the economic values. That is exemplified by Attachment "B" to this decision, which is a copy of a map compiled by the Marlborough District Council showing "Marine Farms, Mooring(s) and Jetties in the Marlborough Sounds"[311]. That plan has to be read with some care because the moorings and jetties occupy a greater proportion of space on the map than they do on the water. However, it does give a general indication of the sharp contrast in the utilisation of the two principal sounds – with Queen Charlotte lined with jetties giving access to houses and baches, whereas the coastline of the more convoluted Pelorus and Kenepuru Sounds is dominated by marine farms (in blue on the map).

Is allocating space for marine farms a tragedy of the commons?

[204] Mr C Potton, a well-known photographer called for Mr Marchant and FNHTB, appeared to trespass rather beyond his expertise when he expressed his opinion[312] that Port Gore:

> … is an area that largely defines itself [as] a larger "common …"[313]. The well-known tragedy of the 'commons' is that, as it is parcelled out and given over to extractive uses, it inevitably becomes of diminishing value to the majority of people as a recreational and cultural resource. It loses its wild spirit and becomes like everywhere else that humans modify.

That is an insight in the last sentence which has been referred to by other witnesses, but we should point out that Mr Potton has made a (common) misinterpretation of the "tragedy of the commons". The phrase was first used by Garrett Hardin in 1968 in the journal *Science*. where he wrote[314]:

> The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

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311 R J Greenaway, evidence-in-chief Attachment 2 [Environment Court document 26].

312 C Potton, evidence-in-chief para 19 [Environment Court document 29].

313 Mr Potton actually used the plural 'commons' but it makes more sense in this sentence to think of Port Gore as a large common.

314 G Hardin, *Science* 162 (December 13, 1968) pp. 1243-1248. Also at (http://www.sciencemag.org/cgi/reprint/162/3859/1243.pdf).

…

> Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another … But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons rings ruin to all.

One of the principal points of the tragedy of the commons as Hardin perceived it, was precisely the opposite of Mr Potton's point : that the common had not been "parceled out" was part of the problem.

[205] In fact neither the 'Tragedy of the un-regulated commons' – as Hardin later conceded his paper was really about[315] – nor the parceling criticised by Mr Potton, really applies in this situation. We are faced with a situation where the council has, in its Sounds Plan, given some policy guidance as to where it might generally be appropriate to locate and operate marine farms, and where it is generally inappropriate. We consider the application of those policies shortly.

Existing investment in the mussel farms

[206] Because the applications are in respect of existing marine farms which are continuing to operate under section 165ZH of the Act until these appeals are resolved, we must have regard to[316] "the value of the investment of the existing consent holder". Mr Kyle[317] for PGMF and Ms Dawson for the council[318] stated this includes more than the cost of obtaining the original consent and the plant and lines on site. Mr Kyle said that the value included the returns to the occupier and the added value to factories, export earnings, and the economic wellbeing of a community. We have already recorded on these matters that there was no quantified evidence as to their net benefit.

[207] For the appellants Mr Marchant alleged[319] that the applicants had been making illegal gains because at least part of each of their marine farms was outside the (now expired) consent boundaries. We are unable to determine the truth of that allegation so proceed on the basis that the existing farms are (largely) correctly sited. Superficially, more cogent was the observation by Mr Marchant[320] that all the structures in the existing marine farms are removable and re-useable on another site. That was confirmed by Ms Dawson[321].

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315 G Hardin "Will commons sense dawn again in time". The Japan Times Online (http://search.japantimes.co.jp).

316 Section 104(2A) RMA 1991.

317 J G Kyle, evidence-in-chief para 78 [Environment Court document 21].

318 S M Dawson, evidence-in-chief para 50 [Environment Court document 22].

319 C E Marchant, evidence-in-chief para 164 [Environment Court document 27].

320 C E Marchant, evidence-in-chief para 164 [Environment Court document 27].

321 S M Dawson, evidence-in-chief para 50 [Environment Court document 22].

[208] We received only the briefest submissions[322] on what is meant by section 104(2A). The "existing investment" referred to might include any one or more of the following:

(1) the value of the plant and lines on site;
(2) the value of the current crop;
(3) the cost of the "renewal" application;
(4) a capitalisation of the likely returns;
(5) the net social benefit;
(6) the employment opportunities.

[209] If we were to consider the positive downstream or flow-on effects of the proposal as part of the investment of the existing consent holder we would also need to consider the negative effects, both direct and accumulative. Further, counting any of these matters as part of the "investment" of the existing consent holder would mean that they were all double-counted. We have already explained how the net benefit of a marine farm should be calculated and it includes the net present value of all those items.

[210] Since all other aspects of the (net present) value of existing (and proposed) investments are had particular regard to under section 7(b), there is only one item which is not counted and that is the net present value of stock on the lines at the expiry of the previous resource consents. It is important that, if resource consents are refused for any one or more of the farms under consideration, then any crop currently growing should not be wasted.

[211] The existing investment on these mussel farms is the mussel crop which is growing there at present and which cannot be harvested for up to 18 months (that being the average length of cycle for a mussel-line). All this suggests that if we are minded not to grant substantial new resource consents then we should consider granting brief consents to allow harvesting or at least ensure our decision does not take effect immediately.

[212] We consider that the witnesses and counsel have misconceived slightly what section 104(2A) is about. It does not require a consent authority to consider the costs of the application for "renewal" – they are sunk costs.

6.3.3 Maintaining and enhancing amenity values

[213] "Amenity values" are defined[323] in the Act as meaning:

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322 Sanford final submissions paragraphs 168 and 171 [Environment Court document 40]; PGMF final submissions paragraphs 131-139 [Environment Court document 41].

323 Section 2 of the RMA.

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

Despite that anthropocentric characterisation Sanford submitted both in opening[324] and closing[325] that:

> … the yardstick of amenity values had to go beyond individual witness' perceptions. It needed to encompass a great community perspective, taking strong guidance from the [Sounds Plan].

We accept that is generally correct except for the word "great" which should be deleted : we do not understand why it was suggested. But certainly individual perceptions of the effects of a proposal on their future amenities will usually not be a sufficient guide to reasonableness of the effects : people do tend to resist change simply because it is different to what they know[326]. Essentially the test for effects on amenities is one of reasonableness in the given context and that can usually be better informed by reference to the district plan.

[214] On the evidence there appear to be three issues in relation to the effects on amenities:

(1) which of the lay witnesses were reasonable?
(2) what does the district plan say?
(3) how does the court assess the expert evidence?

[215] On the question of the lay evidence Mr Hassan and Ms Meech submitted[327] that the lay witnesses demonstrated "… highly selective subjective judgement with respect to the [proposals'] effects on amenity values". We consider counsels' examples in turn. The first was that Ms K Marchant[328] and her father, C E Marchant[329], gave little credit for the significant mitigation of the surface patterns of the Sanford mussel farms, yet could justify the Marchant airstrip as appropriate despite its strong visual footprint. Counsel are correct to some extent, although we have some sympathy for the Marchants' position : even an expert's objectivity would be stretched by a substantial last minute change in a proposal for two surface to two subsurface mussel farms. The Marchants had little time to reflect on the extent and implication of the changes.

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324 Sanford's opening submissions paragraphs 123-126 [Environment Court document 2].
325 Sanford's closing submissions para 85 [Environment Court document 40].
326 That is not the case in these proceedings since the marine farms (in a different, more intrusive form) are already on site.
327 Sanford's closing submissions para 89 [Environment Court document 40].
328 K Marchant, evidence-in-chief paragraphs 53 and 84 [Environment Court document 16].
329 C E Marchant, evidence-in-chief para 80 [Environment Court document 27].

[216] Secondly, counsel said that the Marchants had no tolerance[330] for navigational lights but were not troubled by the lights of houses in the Bay[331]. We consider that counsel for Sanfords cannot make much of this : as Mr Milne submitted[332]:

> the Marchant's television is not visible from the Cockle Bay beach, the Eglinton property or most other relevant viewpoints.

In contrast, the SPAR lights would be visible from all directions around Port Gore[333] – that is their function. That answer was criticised by Mr Hassan and Ms Meech[334]: "… it is not valid to dismiss the consideration of onshore lighting effects from viewpoints such as from the water itself". In fact, it is valid for two reasons : on the evidence the number of nights spent by boats in Cockle Bay is very small because it is so exposed; and secondly we infer that the Marchants would speedily install curtains (Mr Kyle, the planner for Sanford, commented[335] on their absence) if it made such a difference to these proceedings that we would grant consent because they had none.

[217] Finally, we accept, with some reservations (as expressed earlier), Mr Greenaway's evidence that recreational opportunities will be reduced in quality by the presence of one or more marine farms. Mr Hassan and Ms Meech submitted[336] that Sanford's marine farms will not "in any way constrain either land or water based recreation". In a limited physical sense that may be correct, but the farms would have indirect effects. We have found that we prefer Mr Greenaway's evidence to that of Mr Godsiff, and Mr Greenaway's evidence is that recreational opportunities will be lost. At least in relation to water-based recreation there is little evidential basis for that submission.

6.3.4 Intrinsic values[337]

[218] We were referred to *Director-General of Conservation v Marlborough District Council* where the Environment Court stated[338]:

> The narrow approach to recreational issues does not appear to us to recognise the **intrinsic value** to the Sounds as having some areas which **present as remote wilderness areas (such as this) left available for the wilderness experience by the few**.

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330 Cross-examination of Ms Karen Marchant – transcript p. 434; also K Marchant, evidence-in-chief para 99 [Environment Court document 16].

331 K Marchant, evidence-in-chief para 100 [Environment Court document 16]; C E Marchant, evidence-in-chief para 121 [Environment Court document 27].

332 Submissions for Marchants para 415 [Environment Court document 39].

333 Except where obscured by topography.

334 Sanford final submissions para 110 [Environment Court document 40].

335 Transcript p. 529.

336 Sanford final submissions para 139 [Environment Court document 40].

337 Section 7(a) of the RMA.

338 *Director-General of Conservation v Marlborough District Council* Decision W89/1997.

We are uneasy about that because we consider it conflates two different concepts – the enjoyment of the remoteness of an area, which is essentially an anthropocentric concept related to amenity values – as already discussed – and the intrinsic values of the ecosystems in that area. Both values have to be had particular regard to[339] under section 7, but the RMA treats them as separate things. Section 7(d) requires us only to have particular regard to the intrinsic values of ecosystems. Intrinsic values are defined[340] as:

> mean[ing] those aspects of ecosystems and their constituent parts which have value in their own right, including –
> (a) their biological and genetic diversity; and
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

These were not put in issue by the evidence.

6.4 Other matters[341]

The innovation of Sanford's sub-surface farming proposal

[219] We want to record how positively impressed we are with Sanford's innovative sub-surface marine farm proposal. Technically this is not a positive effect, but it appears to be a potentially very useful method of substantially mitigating the passive visual impact of mussel and other marine farms. When coming to our final decisions below we will assume that not only the Sanford proposals but also the PGMF proposal will eventually be totally sub-surface on the Sanford model described early in this decision, with the result that each marine farm will, at least during daylight hours, be much harder to see from land or water.

6.5 Outcome

General assessment

[220] We now assess the three proposals in terms of the General Assessment Criteria in rule 35.4.1.5 of the Sounds Plan[342] and in terms of the relevant NZCPS 2010 policies. First we consider the matters which are common to each of the proposed mussel farms. In terms of the likely effects of the proposal on the wider community[343] we recognise[344] the undoubted financial advantage to the applicants if the three mussel farms (or any of them) is allowed to continue. Allied to that, and indeed rather more important under section 7(b) of the Act, is the net economic benefit to society of the proposals.

[221] On the other side of the scales are the adverse effects of each of the mussel farms and activities on them on the amenities[345] of the occupiers of the neighbouring land. We also consider that the proposals (or any of them) will not contribute positively to the

339 Section 7(c) and (d) respectively of the RMA.
340 Section 2 of the RMA.
341 Considerations under section 104(1)(c) of the RMA.
342 Sounds Plan pp. 35-14 and 35-15.
343 Rule 35.4.1.1.5.1 [Sounds Plan p. 35-14].
344 Policy 8 Aquaculture [New Zealand Coastal Policy Statement (2010) p. 15].
345 Rule 35.4.1.1.5.1(a) [Sounds Plan p. 35-14] and Rule 35.4.1.1.5.2 [Sounds Plan p. 35-15].

character[346] of the surrounding area – especially on land. (We consider this further under the NZCPS 2010 shortly.) Servicing of the farms and the night lights will visually intrude on the outstanding natural landscape of eastern Port Gore, and will detract from views which contribute to the aesthetic coherence of Port Gore. Each proposal will in a more than minor way diminish the natural character of the locality[347]. By themselves, we consider the cost of those adverse effects is unlikely to outweigh the benefits supplied to the community by the mussel farms.

[222] Another positive is that each mussel farm would largely maintain the future use potential of the renewable water resource[348]. The other factors in rule 35.4.1.1.5 are neutral in respect of the proposal.

[223] The direct and downstream employment opportunities are in favour of the proposals under the NZCPS 2010. However, we must also consider some powerful policies in relevant statutory instruments as to the preservation of natural character of the coastal environment and of outstanding natural landscapes and features. Most important are policies 13, 14 and 15 of the New Zealand Coastal Policy Statement 2010 because we have found that the coastal environment of the eastern side of Port Gore has outstanding natural character and is part of an outstanding natural landscape. The policies require[349] that adverse effects of activities on the natural character (or natural landscape) should be avoided. The witnesses for Sanfords or PGMF have barely referred to policies 13 or 15 at all. Mr Kyle, who might have been expected to analyse it, as the principal planning witness for both applicants, referred to it and then merely stated that he considered the three proposals are not "an inappropriate use"[350] because of the level of existing modification. That is of concern because potential adverse effects cannot, or at least should not, be assessed in a vacuum. All adverse effects are effects in terms of objectives or policies.

[224] The weight to be given to those policies is reinforced to some extent by the policies in the Sounds Plan. It has anticipated some of the policies[351] in the NZCPS 2010 by mapping different areas in the Sounds as either generally suitable for marine farming (the CMZ2) and those where it is not merely discouraged, but actually prohibited (the CMZ1). The map of the Sounds showing where there are existing or consented marine farms suggests quite strongly that areas where farming is prevented are important so as to maintain areas where the natural character of the coastal environment is not adversely affected by marine farming. We proceed on the basis that under the Sounds Plan marine farms are treated as being possibly justified, despite their anomalous presence in the CMZ1, by their historical presence and exceptional

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346 Rule 35.4.1.1.5.1(c) [Sounds Plan p. 35-15].
347 Rule 35.4.1.1.5.3(c) [Sounds Plan p. 35-15].
348 Rule 35.4.1.1.5.4(b) [Sounds Plan p. 35-15].
349 Policies 13(1)(a) and 15(1)(a) [New Zealand Coastal Policy Statement (2010) pp 15-17].
350 J C Kyle, evidence in reply para 8.5 [Environment Court document 21B].
351 Policy 13(1)(c) and (d) [New Zealand Coastal Policy Statement (2010) p. 17].

productivity. Given that rather unsatisfactory and open-ended guidance in the Sounds Plan, we now look at the higher guidance in the Marlborough Regional Policy Statement, the NZCPS 2010 and ultimately in Part 2 of the Act.

Conclusions on adverse effects

[225] We consider the effects of servicing and harvesting one farm and of its night lights would still be more than minor adverse effects on occupiers of adjacent terrestrial properties. Of course, the effects will fall rather differently on these occupiers depending on which farm is being considered. For example, the Eglinton property would not be affected much by either of the Sanford mussel farms; the Surgenor property would be minimally affected by the Gannet Point North farm, whereas the Marchant property would be affected by any of the three mussel farms, albeit considerably less by the Gannet Point North farm. That farm, of course, affects occupants of the Eglinton property most intensely.

[226] Any of the farms would have an adverse effect on the recreational users of the sea[352] by reducing the remoteness and natural character of eastern Port Gore.

[227] We are reassured that there is some independent confirmation in the MRPS that placing a "new" mussel farm in a bay is usually a major change to its environment. The methods for Chapter 8 of the MRPS include an explanation that[353]:

> Major changes in the landscape occur when new elements are first introduced which conflict with the character already there. For example, the first mussel farm into a bay changes the bay from a smooth water surface, while additional mussel farms merely add to the change.

That is important because while in this case (as we shall describe) the major adverse effects of the Sanfords' mussel farms will not be the passive effects on the surface of the water, but the active effects of harvesting, each of the farms can be regarded as the first one in the southeastern corner of Port Gore, and in Cockle Bay particularly. Thus, reinforced by the Sounds Plan, we find that if we were to grant consent to one mussel farm, then that first farm would be a major change to the natural character of eastern Port Gore.

<u>Specific assessment matters</u>

[228] At this point we must pause, step back and consider each of the proposed mussel farms separately. While it has been very useful to consider all three applications, and their likely accumulative effects together, it is also important that we consider each of the farms separately, as if it was the only one that we might grant.

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352 R J Greenaway, evidence-in-chief paragraphs 7.6 and 7.7 [Environment Court document 26].

353 MRPS method 8.1.7.

[229] We also have regard to the council's decision on each application[354]. All three of the council's decisions related to rather different (surface) mussel farms, compared with the subsurface proposals we are considering, so we infer that the adverse effects we have found to exist are not as adverse as the effects that the council considered in each case.

Pool Head

[230] The two decisions for this farm were notified (together) on 22 September 2009. As recorded earlier, the council refused consent to both applications because the application failed to adequately mitigate the adverse effects of the marine farm on the natural landscape in the area. The man-made structures would detract from the natural values of an area that is now in an advanced state of regeneration. The impact of a marine farm at this site was significant enough to be contrary to the Sounds Plan's objectives and policies relating to visual amenity, landscape and natural character; and the marine farm(s) would not promote the purpose of the Act; nor were they appropriate development of the coastal marine area.

Gannet Point South

[231] This decision was notified on 14 August 2007 so it was the first farm reconsented. Council relied on their finding that the environmental effects of the existing farm were within the anticipated "parameters" of the MSRMP. It was satisfied (as are we on the evidence) that the effects on the nearby "sill community" resulting from the marine farming activities would be not more than minor.

[232] The council's view on the relationship of the mussel farm with the adjacent land was interesting. It acknowledged that the land is changing from a "worked environment to one of high landscape value". On the basis that over time the continuing regeneration of vegetation cover may elevate the natural character of Port Gore to the point where marine farming activities in parts of the bay are no longer appropriate, it concluded that the consent should be granted but only for a term of ten years. The council contemplated that the appropriateness of the marine farm could be re-assessed then. That raises a number of considerations which are common to the Gannet Point North farm, to which we now turn.

Gannet Point North

[233] This decision was notified on 22 September 2009. The council decided that the application was consistent with the purpose of the Act. It concluded that any adverse effects are likely to be sufficiently mitigated as it seeks to undertake an activity that will provide economic benefits to the applicant as well as the wider community. Because the activity is discretionary the council considered that the Sounds Plan recognised and anticipated marine farming at this site (provided the effects could be mitigated) and

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354 Section 269A of the RMA.

therefore a farm was in keeping with the objectives and policies of the planning framework. With respect that was rather facile. The site is in the middle of the CMZ1 where all marine farming is prohibited, presumably because it does not meet the objectives and policies of the various planning instruments. The fact that mussel farming on the site is (anomalously) a discretionary activity must mean that just as there is no presumption that a farm on it does not meet the relevant objectives and policies, similarly there is no presumption that it does. The application should be considered on its merits and the council failed to do that.

[234] Again, because vegetation on the adjacent land was seen as not having reached the point where a marine farm would significantly detract from its natural character, the application was considered not to breach Part 2 principles. The council aligned the expiry date with the consent issued for the Gannet Point South marine farm by granting consent for a shorter term (eight years) to allow for further assessment then. The council did not state whether it found the site to be in an outstanding natural landscape. Nor did it consider the operative NZCPS, let alone the NZCPS 2010 which we must apply. In the circumstances we can put little weight on the fact that the council granted consent. We are encouraged in that finding by the fact that the council rather hedged its decision by granting a short term of eight years (two of which have nearly run already).

[235] While we predict that the adverse visual effects of this mussel farm on the Eglinton property will be minimal for any reasonable observer, we also predict that for up to a third of every month the servicing and harvesting boats will be a more than minor adverse effect on occupants of the Eglinton house and property. We consider that the boats will, since they must be added to the effects of other boats passing Gannet Point, have a moderately intrusive effect on the peace, privacy and quiet enjoyment of any reasonable person on the Eglinton property for more than a day or two.

[236] In PGMF's case there is one further positive benefit which we need to have regard to : it is that its lessee uses the mussels to produce a product "Lyprinol" that its witness, Mr Sutherland, said has therapeutic value. We could have had <u>particular</u> regard[355] to that claim if its net benefit had been quantified, but we give it some weight anyway. We agree with Mr Hunt that the PGMF Gannet Point North site is the site with the least conflict with existing land-based activities and is, from the Marchants' perspective, the least obtrusive. It is the marine farm we would be most likely to grant.

[237] Even if Mr Hunt is correct[356] (and we have found he is not) and the adverse effects of the PGMF mussel farm are only minor then that is enough to trigger policy 15(1) of the NZCPS 2010. That requires that adverse effects, even minor ones, should be avoided, (obviously minimal effects can be disregarded).

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355 Under section 7(b) of the RMA.

356 PGMF final submissions para 107 [Environment Court document 41].

Conclusions

[238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the Act requires that each application for a mussel farm should be declined.

[239] It is not necessary to determine the jurisdictional issues identified earlier in this decision.

Notes on the past and short-term future of the three marine farms

The previous history of the marine farms

[240] We have decided this case without reference to the prior history of the marine farms. However, we should record that Mr Marchant gave a detailed history (and copious exhibits) of the history of the three farms. Because we were running short of hearing time (the court was sitting in a leased room which had to be vacated for a prior booking) we requested that counsel for the applicants not cross-examine on these issues. Consequently, while the history might be relevant under section 104(1)(c) of the RMA, we are unable to consider it fully and fairly. We have assumed for the purposes of this decision that each of the expired farms was correctly established, but we do not make any finding that is so.

[241] However, we record that if this decision is appealed successfully and the proceedings, or any of them, sent back to the court we would need to hear further evidence on the history of the marine farms, because according to Mr Marchant's at present uncontroverted evidence there have been some rather irregular changes in the resource consents' location in the water and at least one *prima facie* curious retrospective approval of such a change by the council.

Post-hearing events

[242] Since the hearing Mr Marchant has, through counsel, complained that some mussel lines on the sites have been harvested and new lines put in place. We consider that the relevant owner was entitled to do that under their running on consents. While we have refused new consents, we consider that – especially in the light of section 104(2A) – some mechanism should be put in place to allow the marine farmers to harvest the lines at present in the water.

[243] Initially we were attracted to Mr Hassan and Ms Meech's idea[357] of granting short-term consents, but then we realised that a farmer could string those out by applying for a further renewal thus triggering section 165ZH again. The appropriate solution appears to be to refuse consent but to delay implementation of the decision for a maximum of eighteen months to allow all current lines to be harvested. No new lines

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357 Sanford, final submissions para 253 [Environment Court document 40].

should be sown in the meantime. In other words, if lines fall due for, and are harvested, within the next eighteen months they must not be replaced.

For the Court:

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J R Jackson
Environment Judge

Attachments:

A. The Pool Head and Gannet Point Marine Farm Licensing Areas ... (S F Brown, evidence-in-chief Attachment 2 [Environment Court document 12])
B. General Location Plan (S F Brown, evidence-in-chief Attachment 1 [Environment Court document 12])
B. Map of Marine Farms, Moorings and Jetties in the Marlborough Sounds (R J Greenaway, Appendix 2 [Environment Court document 26]).

Jacksoj/Jud_Rule/D/Port Gore Marine Farms v MDC.doc.