REVIEW OF THE PROPOSED NATIONAL ENVIRONMENTAL STANDARD FOR MARINE AQUACULTURE (NES:MA)

FOR CONSISTENCY WITH THE NEW ZEALAND COASTAL POLICY STATEMENT 2010

Prepared for the Department of Conservation

October 2018

Allan Planning & Research Ltd

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EXECUTIVE SUMMARY

This report is an independent review, by an experienced resource management and environmental planning practitioner, of the indicative National Environmental Standards for Marine Aquaculture (NES:MA) which have been developed by officials of the Ministry of Primary Industries in collaboration with officials from the Ministry for the Environment and the Department of Conservation, and with the assistance of an Aquaculture Reference Group.

The need for a NES:MA was identified several years ago to address problems associated with the very large number of marine farms which will need to seek replacement consents in the early 2020s. Extensive background investigations were undertaken and alternative means of managing the identified problems evaluated. In mid-2017 a discussion document "Proposed National Environmental Standard for Marine Aquaculture" was released, and public submissions called for. Over 100 written submissions were received.

If the NES:MA proceeds, it will require the approval of Ministers before being promulgated as a regulation under the Resource Management Act (RMA).

The Department of Conservation sought an independent review in order to be sure that local authorities, who will administer the NES:MA, and who must give effect to the New Zealand Coastal Policy Statement 2010 (NZCPS 2010) through regional policy statements and plans, are not placed in a situation where they are administering national-level documents that are not closely aligned. The review has investigated consistency between the current (October 2018) version of the indicative NES:MA regulations (as modified as a result of submissions and further investigations) and relevant objectives and policies of the NZCPS 2010.

The indicative NES:MA provisions are limited to existing marine farms (with some areas being excepted) and the management of replacement consents for those farms. Limited modifications in areas in specified circumstances, and some changes in species of existing farms are provided for within the indicative NES:MA regulations. All marine farms will be required to meet the proposed provisions of the indicative NES:MA relating to biosecurity management.

The review systematically works through the relevant NZCPS 2010 policies in terms of the content of the current version of the NES:MA, taking into account current good planning practice, information and interpretation from case law, and provides comments on consistency.

The NZCPS 2010 policies, and the area of environmental management the review addresses, are as follows:

Strategic Planning (Policy 7)
Natural Features and Natural Landscapes (Policy 15)
Natural Character (Policy 13, Policy 14)
Indigenous Biological Diversity (Policy 11)
Precautionary Approach (Policy 3)
Aquaculture (Policy 6, Policy 8)
Treaty of Waitangi, Tangata Whenua and Māori Heritage (Policy 2)
Harmful Aquatic Organisms (Policy 12)
Historic Heritage Identification and Protection (Policy 17)
Enhancement of Water Quality (Policy 21)
Discharge of Contaminants (Policy 23)

The review has found there is good consistency between the current version of the indicative NES:MA regulations and the NZCPS 2010. As the majority of existing marine farms will be considered as restricted discretionary activities, particular attention has been paid to the matters over which RMA decision-making discretion has been reserved and how these reflect NZCPS 2010 policies, taking into account the context of the existing marine farms. The indicative NES:MA enables councils to provide for greater leniency of discretion (by controlled activity status) through their plans if they decide.

In sensitive circumstances, such as where a marine farm is included within an area identified in a proposed or operative plan as having outstanding natural character or being in an area of outstanding natural landscape value or an outstanding natural feature, additional considerations will apply. Similarly, the matters of discretion include a number of details relating to the protection of indigenous ecosystems and species.

Where a replacement consent involves a change of species farmed (within the limits of the NES:MA), or provides for a limited realignment of structures, additional matters of discretion will also apply.

The indicative NES:MA also provides for circumstances where a council determines, in a proposed or operative regional coastal plan, that an area is inappropriate for existing marine farming. Applications for replacement consent for existing marine farms within such areas will be treated as discretionary activities, or a more stringent consent status, if that is also determined by the council.

The policies where greatest risk of inconsistency was identified was Policy 2 relating to recognition of the Treaty of Waitangi and Māori cultural values. The indicative NES:MA has included new provisions which address potential inconsistency by requiring a consultative and reporting process, or for limited notification on potentially affected groups where consultation requirements are not met.

The matter of consistency of the indicative NES:MA regulations and NZCPS 2010 Policies 13 and 15 where areas of natural character, natural landscapes and natural features may be identified as having high but not outstanding qualities, was also carefully considered. On the basis of detailed information available on the chances of significant adverse effects being associated with existing marine farms when replacement consents are sought, it was found that the NES:MA includes sufficient provisions to address this risk.

The provisions which require adequate biosecurity plans, by condition of consent, for all marine farms, provide a major improvement over the *status quo* situation.

The indicative NES:MA regulations are complex and a small number of aspects have been identified which will require careful attention during their refinement through legal drafting to ensure that the intent of the indicative provisions is achieved. The biosecurity provisions rely on an external document which has not been available for review. However, on the basis of available information, the intentions for the NES:MA are clear, and the content throughout has been found to be consistent with relevant NZCPS 2010 policies

1 BACKGROUND

1.1 Introduction

In June 2017 the Ministry for Primary Industries (MPI)[1] in association with the Ministry for the Environment (MfE) published a discussion document (the discussion document) outlining a proposed National Environmental Standard for Marine Aquaculture (the NES:MA)[2].

The stated objective in developing the proposed standard was:

> *"To develop a more consistent and efficient regional planning framework for the management of existing marine aquaculture activities and on-farm biosecurity management, while supporting sustainable aquaculture within environmental limits".*

The report described the background of the existing marine aquaculture industry, its importance to the national economy, the significant challenge faced by existing marine farms[3] in seeking replacement coastal permits[4] as existing permits expire over the coming decade, and the risks to the wider environment and the industry itself due to the absence of a nationally consistent requirement for biosecurity management plans for marine farms.

Having identified the problems noted above[5], the MPI worked with the MfE and the Department of Conservation (DOC) alongside an Aquaculture Reference Group[6] in developing further national direction and assisting in the development of options to address the identified problems.

The work which led to the publication of the NES:MA discussion document involved an iterative process of identification and screening of options in increasing detail to arrive at the preferred option of a National Environmental Standard, to be promulgated under the Resource Management Act (the RMA). The discussion document provides information and a comprehensive review of the background and issues which led to its publication. Usefully, it included indicative provisions of a NES:MA (as Appendix F), and a Biosecurity Management Plan template (as Appendix K).

The NES:MA approach, as promulgated in the discussion document, includes a number of specific limitations:

- it applies only to replacement consents (with the exception of the biosecurity management plan requirements, which apply to all marine farms)
- it does not cover new or extended farms
- where a marine farm replacement consent involves:
    - a complete change in species farmed involving a change in all structures; or
    - a complete change from consented fed species to non-fed species, or vice versa; or

[1] Since 1st May 2018 the MPI officials involved in the process have been part of Fisheries New Zealand, a branch of MPI.
[2] https://www.mpi.govt.nz/dmsdocument/18407/loggedIn
[3] . The term "marine farm" is used in the indicative regulations to refer to an existing consented contiguous spatial area used for aquaculture activities.
[4] Coastal permits are the consents issued by regional authorities under the Resource Management Act 1991 within the coastal marine area. This includes permits to occupy and use the coastal space to which the permit applies as well as undertake activities such as mooring of structures, farming and harvesting of species, and discharges particularly when feeding of fish is involved.
[5] The problem identification stage is understood to have been undertaken within the scope of the government's 2012 Aquaculture Strategy and Five-year Action Plan to Support Aquaculture - https://www.fisheries.govt.nz/dmsdocument/15895/loggedIn
[6] See Appendix A to the discussion document for the makeup of this group.

- the addition of, or complete change in consented species, to scampi, crayfish (rock lobster) or crab

it is not covered by the NES:MA.

- specified areas are excluded from the NES:MA in relation to the replacement consent, realignment and change of species provisions
- where spat farming is involved, the NES:MA change of species requirements do not apply.

However, the NES does provide for some changes in species, a change in structures where a change in species is involved, and a degree of realignment occupying new space and relocating from existing space (up to a third).

The biosecurity components of the proposed NES:MA would apply to both existing and any future marine farms.

The discussion document sought written submissions to assist in the preparation of a report and recommendations to the Minster for the Environment and the Minister of Primary Industries on whether or not to proceed with the proposed NES:MA. Submissions, 107 in total, were received from a wide range of individuals and organisations[7].

Publication of the discussion document effectively initiated the RMA public process required for national direction instruments[8] under Section 46A of that Act.

1.2 Work Since Submissions Closed

Since submissions closed early in August 2017, the officials working group established for the development of the discussion document has analysed the submissions and continued investigations of aspects of the proposed NES:MA to address matters raised in the submissions.

In accordance with the requirements of the RMA[9], which must be followed whether or not the eventual recommendation is to proceed with the NES:MA, and regardless of the extent of modification to the proposal on which submissions were originally sought, a report and recommendations has been progressively developed under RMA Section 46A, alongside a modified NES:MA. The requirement for a Section 32 report is also being progressed.

> The Section 46A report is incomplete and remains in draft at the time of preparing this report. Similarly, the proposed NES:MA provisions have been available for review only in draft. It is understood that the preparation of an eventual NES:MA, should one eventuate, would be done by parliamentary legislative drafters. This report relies on the current drafts of both documents. The Section 32 report has not been sighted.

[7] https://www.mpi.govt.nz/news-and-resources/consultations/proposed-national-environmental-standard-for-marine-aquaculture/submissions/
[8] National Policy Statements and National Environmental Standards.
[9] RMA Section 52 brings the requirements for the Minister's consideration together.

The review of submissions and preparation of the necessary RMA Section 46A report[10] has been undertaken progressively by officials and has resulted in numerous modifications to the detail of the proposed NES:MA as made publicly available in the discussion document.

These modifications are generally in the nature of "fine tuning" which endeavour to address issues which were raised in submissions either as matters of general concern or as specific suggestions. As a general observation, the modifications proposed have considerably advanced the original proposed NES:MA in terms of the matters which are the subject of this report.

The general layout of the proposed NES:MA has not been modified as a result of submissions or any of the other matters which must be included in the Section 46A report.

1.3 Relationship between National Environmental Standards and National Policy Statements

The NES:MA is promulgated as a national environmental standard, one of four types of instrument of national direction under Part 5 of the RMA: the others being national policy statements, the New Zealand Coastal Policy Statement (NZCPS) and national planning standards.

The RMA requires that there shall be at all times, at least one NZCPS[11]. The responsibility for this national policy statement lies with the Minister of Conservation. The purpose of the NZCPS is to *"state objectives and policies in order to achieve the purpose"* of the RMA in relation to the coastal environment of New Zealand. Since 1994, when the first NZCPS was gazetted, it has been recognised that the coastal environment includes all of the coastal marine area and other areas and natural and physical resources which are in some way interrelated with the coast or coastal marine area[12]. The current NZCPS was gazetted in 2010, and is referred to as the NZCPS 2010. Policy 1 of the NZCPS 2010 sets out the extent and characteristics of the coastal environment.

The RMA provides for other national policy statements. Unlike the NZCPS, these are not specifically prescribed by legislative content, but are provided for within the RMA as an opportunity for national direction[13].

Effectively, Sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 comprise a national policy statement[14].As well as the NZCPS, these provisions are a national policy statement directly relevant to marine aquaculture.

There are a range of other operative national policy statements[15], but none have direct relevance to the proposed NPS:MA.

In accordance with the schema of the RMA, most resource management responsibilities are devolved to local authorities. Regional authorities are required to have one regional policy statement[16] and one or more regional coastal plans for the coastal marine area[17]. They may also have other regional plans[18].

[10] The statutory requirement for this report is set out in Section 46A(4). Section 51(1) sets out the range of other matters which must be included in this report. In addition to the submission and the proposed national direction itself this includes, RMA Part 2 matters of national importance and any additional material provided by the Minister in terms of Section 47A(1)(b) and any other relevant matter.
[11] See RMA Sections 56 to 58.
[12] The Section 2 RMA inclusive and broad definition of 'environment' applies.
[13] See RMA Sections 45 and 45A.
[14] See Section 9(5) of that Act.
[15] NPS on Urban Development Capacity, NPS for Freshwater Management, NPS for Renewable Electricity Generation and NPS on Electricity Transmission.
[16] See RMA Section 59.
[17] See RMA Section 64. This also specifies the Minister of Conservation's role.
[18] See RMA Section 65(1).

Territorial authorities are required to have a district plan for the district[19]. When councils are unitary authorities, they must meet the same requirements. The current trend is for plans to be as integrated as practicable, with unitary councils moving towards a single planning document encompassing all requirements. Regional councils are also moving towards a "one plan" model, including the regional policy statement and regional coastal plan.

Regional policy statements and plans, regardless of their level of fragmentation or integration, are required to give effect to a NZCPS and any other national policy statements[20].

National environmental standards are of a different nature. They provide for regulation rather than policy. Their provisions override rules and other regulatory mechanisms in plans, but may provide flexibility for plans to make their own provisions in specified circumstances. This scope is set out in detail in RMA Section 43A. RMA Sections 43A to 43E and 44A specify the relationships between national environmental standards and other regulatory instruments (including designations and bylaws) and how any conflict is to be addressed.

The RMA is, however, silent on the relationship between national policy statements and national environmental standards[21].

RMA regional policy statements and plans must thus give effect to the NZCPS and not duplicate or conflict with a national environmental standard such as the NES:MA.

It is clear that, in relation to managing marine aquaculture (to the extent that a NES:MA would), both statutory requirements must be met – i.e. that the NES:MA does not create circumstances where a plan may not be giving effect to the NZCPS 2010. This has been a particular issue for all involved in the development of the NES:MA. It includes officials representing the Minister for the Environment who must recommend both national policy statements and national environmental standards under RMA Section 24(a) and (b) but is also responsible for monitoring relationships between functions, powers and duties of central and local government, to the regional authorities responsible for preparing (and in some cases amending) regional policy statements and regional coastal plans. It also includes officials representing of the Minister of Conservation, who has specific responsibilities to approve regional coastal plans under RMA Section 28(b).

It is fundamentally important that meeting both statutory requirements does not set in place conflicting obligations for a consent authority.

> In terms of the evaluation undertaken in this report, the term "consistency" has been used to express the appropriate relationship between the NZCPS 2010 and a future NES:MA. It is however acknowledged that this term may not fully reflect the nuanced relationship between the two, particularly given the relationship between a national policy statement which is of necessity interpreted and expressed at regional and local level and the relatively straight-forward formulation necessary for national environmental standards that have the effect of rules.

The matter of consistency of the proposed NES:MA and the NZCPS has been "top of mind" for the officials in modifying the proposed NES:MA provisions in the discussion document and in developing the Section 46A report.

[19] See RMA Section 73.
[20] See RMA Sections 62(3), 67(3), 75(3).
[21] As it is between separate national policy statements – see Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council CIV-2017-470-000057 [2017] NZHC 3080 for an explanation of the relationship.

1.4 RMA Context for Aquaculture Activities

As substantial and long-term users of the coastal marine area, a specific set of provisions has evolved in relation to aquaculture activities[22] within the RMA. These have been subject to a range of changes over time, so the provisions identified below are the current ones. Regional coastal plans may reflect previous requirements[23], but administration of plan provisions must reflect the specific requirements of the Act.

The development of marine farming in many areas preceded the RMA, and previous legislation providing for maritime planning schemes had resulted in only two such schemes becoming operative[24]. The Marine Farming Act 1971 had consolidated the law relating to marine farming, and leases and licenses issued under that legislation had been protected in the RMA transitional provisions. First generation regional coastal plans were developed under the RMA, including various provisions for aquaculture, and consent applications were processed and case law developed throughout the 1990s. With the growth of the industry and the pressure it was exerting on space in the coastal marine area, the RMA processing pressure being experienced by some regional councils, and due to legislative issues relating to priority of applications[25], a moratorium was placed on new marine farms under the RMA in late 2001. In 2004, under the Aquaculture Reform (Repeals and Transitional Provisions) Act, the Marine Farming Act 1971 was repealed, the RMA moratorium provisions were lifted and all existing leases and licenses for marine farms became deemed coastal permits.

These deemed permits were given a common 20-year term, meaning that permits of many of the existing marine farms expire simultaneously at the end of 2024. However, marine farms that had been consented under the RMA, or jointly under the RMA and Marine Farming Act, may have been granted a range of terms (with a maximum of 35 years) meaning that these permits may expire at specified dates up to 2035.

All new marine farms are now addressed directly through regional plans, and all coastal permits for marine farming are issued under the normal RMA consenting processes. Such permits provide for disturbance, deposition, structures, use and occupation within the coastal marine area (RMA Section 12), and, if relevant, provide for discharges into the coastal marine area (RMA Section 15). A coastal permit, whether it is a new or replacement consent, both allocates space for use, and manages the effects of the consented activity.

There remain a number of provisions in the RMA now however which relate specifically to marine farming[26]. These will continue to have effect, regardless of a NES:MA being introduced by Order in Council. Such provisions:

- provide that a regional plan cannot include rules that authorise any aquaculture activity as a permitted activity (RMA Section 68A)

- provide specifically that when a replacement consent for a marine farm is being considered, the value of the investment of the existing consent holder must be taken into account (RMA Sections 104 and 165ZH)

[22] Aquaculture activity is defined in RMA Section 2, and the marine farming the proposed NES:MA refers to comes within that definition.
[23] For example, the Hawke's Bay Regional Coastal Environment Plan includes an extensive off-shore aquaculture management area (AMA), as that was a requirement for new aquaculture at the time the plan was being formulated (during the moratorium).
[24] Under the 1977 Town and Country Planning Act, Wellington Maritime Planning Scheme and Manukau Harbour Maritime Planning Scheme became fully operative. The Proposed Marlborough Sounds Maritime Planning Scheme did not complete all statutory processes.
[25] This arose from new applicants for space already occupied by exiting marine farms whose term was coming to an end, where there was no basis for recognising or prioritising the interests of existing permit holders who had not yet sought a new permit.
[26] Many of these specific provisions were inserted through the Resource Management Amendment Act (No.2) 2011.

- provide specific service requirements for notification to the Ministry of Fisheries (RMA Section 107F), and specific responsibilities relating to any determination of the Ministry of Fisheries (RMA Section 116A)

- provide that the duration of a consent cannot be less than 20 years (RMA Section 123A)

- provide that the lapse period for a marine farm is no more than 3 years (RMA Section 125)

- in some circumstances may limit a consent authority's ability to review the conditions of a resource consent unless the chief executive of the Ministry of Fisheries has made a decision (RMA Section 128). A similar provision applies where a change of condition is sought by a permit holder (RMA Section 127)

- protect and prioritise consideration of replacement consents ahead of other applications for the same area (RMA Section 165ZH and 165ZI)

- require that monitoring information and compliance history must be considerations when determining replacement consent (RMA Section 165ZI).

Other general provisions of the RMA relating to notification, rights of objection by applicants where a decision is made by delegated authority, and rights to appeal and to take part in appeals, will also continue to apply.

2 MEETING THE BRIEF

2.1 The Brief

The DOC has sought that there should be an independent peer review, primarily of the Section 46A report, to ensure that matters relevant to the consistency of the proposed NES:MA with the NZCPS 2010 are appropriately and adequately addressed.

The scope of work set out in the brief, in summary, was as follows:

i) To provide advice to officials on the structure, scope and content of the section 46A report and its relationship to the section 32 RMA evaluation report, Cabinet paper and the Regulatory Impact Statement to ensure that matters relevant to consistency of the proposed NES:MA with the NZCPS 2010 are appropriately and adequately addressed.

ii) To review various drafts and those parts of a final report to be prepared by MPI with input from MfE and DOC in accordance with section 46A RMA that relate to consistency of the proposed NES:MA with relevant objectives and policies of the NZCPS 2010 (and relevant provisions of the Hauraki Gulf Marine Park Act 2000).

iii) To identify inconsistencies (if any) between the current and subsequent working versions of the proposed NES:MA and the NZCPS 2010 that have not been the subject of a submission.

iv) To provide concurrent advice to MPI, MfE and DOC officials on amendments that may be made to the proposed NES:MA in relation to consistency with the NZCPS 2010 and discuss with officials their comments on that advice.

v) To produce a report to DOC, to be shared with MfE and MPI, which may be referenced in a departmental briefing to the Minister of Conservation and then made public, advising on consistency between the proposed NES:MA as recommended to Cabinet and the NZCPS 2010, identifying any areas of inconsistency and the significance of any inconsistency.

2.2 The Background

In undertaking this work, the review was to have particular regard to:

i) Decisions of courts, Boards of Inquiry, the Auckland Unitary Plan Independent Hearings Panel and Commissioner panels chaired by former Environment Court Judges relevant to RMA plans giving effect to, and resource consents having regard to, the NZCPS 2010 and providing interpretive guidance on the NZCPS.

ii) Methodologies for assessing natural character and landscapes and the concept of the "existing environment" when undertaking assessments for both plan reviews/changes and for resource consent applications. This should include the NZ Institute of Landscape Architects Best Practice Note: Landscape Assessment and Sustainable Management (2 November 2010), and evolving landscape practice since that date.

iii) Policy approaches that have been adopted to give effect to the NZCPS 2010 in regional coastal plan reviews since the NZCPS came into effect, particularly in respect of policies 2, 4, 7, 8, 11, 13, and 15.

iv) Current planning practice in the major aquaculture regions with respect to applications for replacement coastal permits for marine farms.

Sylvia Allan, the author of this report, has had lengthy and extensive involvement as a planning practitioner with many aspects of marine aquaculture, as well as more generally with coastal planning. A brief CV is included as Appendix 1.

2.3 Response to the Brief

In response to the brief, the work listed below has been undertaken:

- Familiarisation with the discussion document and its appendices.
- A general review of the submissions, and a specific and more detailed review of the submissions identified as addressing matters of consistency between the approach to and content of the proposed NES:MA.
- As and when necessary[27], a review of the documentation and practice referred to in Section 2.2 above.
- In meeting items i and ii of the brief, drafts of the developing Section 46A report have been provided by Fisheries New Zealand[28]since May. A number of officials' meetings have been attended at which sections of the report particularly relevant to the subject have been discussed[29]. In practice, the approach adopted in preparing the report, and the style and format of the outline Section 46A report, were found to be appropriate and only verbal comments were provided.
- Items iii and iv of the brief are discussed in subsequent sections of this report and a summary is included in Section 16 of this report.
- Item v of the brief comprises this report and its findings.

This report has been prepared during the processes of finalisation of the Section 46A report, and in part relies on analysis and discussion set out in that report.

[27] The reviewer has been directly involved in a number of the items referred to in Section 2.2 above, so reading was targeted to address less familiar material.
[28]The branch of MPI established 1 May 2018 (see footnote 1).
[29] 14th June, 29th June, 3rd August, 7th September, 8th October.

3 SUBMISSIONS ON CONSISTENCY BETWEEN PROPOSED NES:MA AND NZCPS 2010

3.1 Introduction

Of the 107 submissions on the discussion document, 48, or close to half, were identified as noting or commenting on matters relating to the NZCPS 2010. The list of submitters who made comments on these matters is provided in Appendix 2. Of these, several made comments arising from some or all of the 42 specific questions set out in the discussion document. Others provided comments on the basis of issues of importance to that individual or organisation. Many of the aquaculture interests who commented on such matters used a template developed by Aquaculture New Zealand, resulting in a consistent identification of issues – 15 in total. Three submissions were limited to consideration of the spat catching and holding activities at Wainui Bay, Tasman District[30].

The submissions from a number of community groups, individuals and local authorities were very comprehensive and detailed, expressing concern about consistency, or inconsistency.

3.2 Main Matters Raised

The submissions addressed consistency with NZCPS 2010 in general, but many raised issues in relation to specific NZCPS policies as outlined below.

Policy 15 – Natural features and natural landscapes

Of these, Policy 15 was most frequently mentioned (29 submissions). Policy 15 interprets RMA Section 6(b)[31], and relates to the protection of natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development. Submitters queried the robustness of the identification of outstanding features and areas in terms of landscape values in regional coastal plans generally, some regional coastal plans specifically, and queried the proposed status for existing marine farms in the proposed NES:MA in terms of NZCPS policy to avoid adverse effects. This included examples where marine farms had been allowed within identified outstanding areas even after they had been identified.

Others pointed out the importance of Policy 15(b) and the sliding scale of effects in relation to other (not outstanding) natural features and landscapes, and queried the adequacy of the proposed NES:MA in relation to these.

Under both Policy 15(a) and (b), the adequacy of identification in current plans was raised as an issue.

Policy 13 – Preservation of natural character

Submissions on Policy 13 were almost as frequent as those on Policy 15 (25 submissions). Often, but not always, these were from the same submitters.

Policy 13 primarily interprets components of RMA Section 6(a), and relates to the preservation of the natural character of the coastal environment, including the coastal marine area, from inappropriate subdivision, use and development.

[30] This was the subject of a private plan change to request to the Tasman Resource Management Plan, and a subsequent appeal to the Environment Court. The decision had not been released at the time submissions closed on the discussion document.
[31] As well as a number of RMA Section 7 matters.

As with Policy 15, submitters raised concerns about identification of such areas, including inadequacies and uncertainties arising from Policy 15 itself (i.e. methodologies of assessment, the adequacy of mapping both outstanding and high areas of natural character), policy content in regional coastal plans, and queried whether the proposed NES:MA provided adequate opportunity to address such matters.

Policy 11 – Indigenous biological diversity

Policy 11 relates to indigenous biological diversity. It interprets RMA Section 6(c) by identifying species and circumstances where adverse effects must be avoided, and provides a list of items where avoidance of effects is directed. It provides a second tier of circumstances where significant adverse effect must be avoided and all other effects avoided, remedied or mitigated.

This policy was specifically mentioned in 17 submissions, and submitters were again concerned about adequacy of identification in plans and whether actual and potential effects could be recognised and either avoided, or avoided, remedied or mitigated through processes provided for in the NES:MA.

A small number of submissions commented on the need for an ecosystems approach, rather than a focus on specific species. They also noted the interconnectedness of life cycles and the need to identify, for example, places providing feeding, breeding, roosting and movement requirements for species.

Policy 7 – Strategic planning

This policy was raised in seven submissions. It relates to strategic planning in the coastal environment and the identification of areas where particular forms of subdivision, use and development are inappropriate, or may be inappropriate without the consideration of effects through a resource consent process.

Submissions expressed concern about the processes of identification of areas where marine farms may be inappropriate – in many cases marine farms had been established well before evaluations of "inappropriateness" were possible. Submitters also expressed concern about the scope of applications (consent status) and actual consent processes under the NES:MA.

Some submitters raised concerns about the NES:MA getting ahead of necessary planning processes and locking in longer-term consents without the necessary strategic planning having been undertaken. Others felt that bay-wide planning was needed for aquaculture, and the NES processes and the activity status proposed would cut across this.

Policy 8 - Aquaculture

Policy 8 of the NZCPS 2010 relates specifically to aquaculture, recognising its importance and requiring that regional policy statements and plans provide for aquaculture "in appropriate places". Submitters referring to this policy, five in total, were generally active participants in the industry seeking more leniency in activity status. A "neutral" submission noted that restricted discretionary status may not enable the benefits to be taken into account in a resource consent application.

Policy 2 – The Treaty of Waitangi, tangata whenua and Māori heritage

The potential for inconsistencies with NZCPS Policy 2, which addresses the Treaty of Waitangi, tangata whenua and Māori heritage, was raised in four submissions. Matters raised included the omission of RMA Section 6(e) matters as considerations, and that no provision was made to notify or involve tangata whenua in decision-making.

Other NZCPS 2010 Policies

One or two submissions each raised consistency matters in relation to:

Policy 3 Precautionary approach

Policy 6 Activities in the coastal environment (particularly the functional need for aquaculture to take place in the coastal marine area)

Policy 12 Harmful aquatic organisms (in relation to the appropriateness of a national environmental standard, rather than regional or tailored provisions)

Policy 14 Restoration of natural character

Policy 17 Historic heritage identification and protection

Policy 21 Enhancement of water quality

Policy 22 Sedimentation

Policy 23 Discharge of contaminants.

In relation to the last five policies noted above, the matters of consistency raised were whether the policies would be achieved with the proposed NES:MA.

Concerns over Cumulative Adverse Effects Issues

A thread of concern running through many of the submissions relates to how the NES:MA would manage cumulative adverse effects. Types of such effects noted ranged from cumulative effects on water quality, ecological sustainability, natural character and on natural features and landscapes. Submitters were concerned that the proposed NES:MA would "lock in" adverse cumulative effects already perceived, or adverse effects that had not yet been fully recognised (particularly ecological effects). The NZCPS refers to cumulative effects in Policy 4, Integration and Policy 7, Strategic Planning[32]. Only Policy 7 was specifically mentioned in these submissions: rather cumulative adverse effects were raised in relation to the implementation of other policies.

Concerns over Timing

A small number of submissions have raised concerns about the proposed NES:MA's timing in relation to plans seeking to meet the NZCPS's policy requirements. As with comments on cumulative effects, the concern is about "lock in" of long-term consents that may undermine the ability of future planning to address NZCPS policies, including the directive policies where avoidance of adverse effects is required[33].

3.3 Matters submissions may not have identified to ensure NZCPS 2010 consistency

The submissions on matters of consistency appear to be comprehensive. There are no obvious aspects of the NES:MA where consistency with the NZCPS has not been queried, or vice versa.

[32] Cumulative effects are also mentioned in Policy 24, relating to coastal hazards, which is not directly relevant to the proposed NES:MA.

[33] These submissions particularly refer to the adverse effects of existing marine farms on what otherwise might be outstanding natural landscapes or areas of high natural character.

Officials preparing the Section 46A report have proposed a number of changes to the first draft of the proposed NES:MA to try to ensure better alignment between the provisions of the proposed NES:MA and the relevant NZCPS 2010 policies.

3.4 Approach to these Submissions

Section 5 onwards of this report evaluates the current version of the proposed NES:MA referred to as (the indicative NES:MA regulations – see Appendix 3) for consistency in terms of each of the NZCPS 2010 policies referred to in submissions. This report does not seek to directly respond to the submissions[34] - rather the submissions have provided context to the independent analysis. It should also be recognised that this review takes into account the numerous changes to the details of the proposed NES:MA which have resulted from the submissions.

Policy 22, relating to sedimentation and raised by one submitter, is not considered to raise any issues in relation to replacement consents[35] for marine farms or the broader biosecurity matters addressed in the proposed NES:MA, and is not discussed in this report.

Policy 7, as an overview or general planning policy is discussed first, followed by the three policies which have drawn the most submissions relating to consistency.

Before that, the following section of this report sets out a brief commentary on the NZCPS 2010, its status, contents and administration. This section draws on case law which has developed rapidly and progressively since a private plan change request and resource consent applications were made by the New Zealand King Salmon Company Limited for additional areas for salmon farming in the Marlborough Sounds. These were heard and determined as a proposal of national significance under Part 6AA of the RMA by a Board of Inquiry through the Environmental Protection Authority's Board of Inquiry process in 2012/2013. For the first time in the history of the RMA, several matters progressed to and were determined by the Supreme Court. Prior to this, a long line of Environment Court cases, and a number of High Court cases dealing with marine farming, particularly in the Marlborough Sounds, had assisted in expressing appropriate planning and industry practice in terms of the RMA.

[34] That is the purview of the Section 46A report.
[35] Due to both the wording of the policy and the nature of the activities to be covered by the indicative NES:MA regulations. Policy 22 focuses on erosion material (sediment) originating from land use activities including forestry and stormwater discharges.

4 NZCPS 2010 OVERVIEW COMMENTS

4.1 RMA Part 2

Part 2, which comprises Sections 5 to 8, sets out the purposes and principles of the RMA. The purpose is promoting the sustainable management of natural and physical resources as explained and elaborated on in subsections (1) and (2) of Section 5. Section 6 sets out matters of national importance which must be recognised and provided for by those exercising powers and functions under the RMA. Section 7 sets out other matters which those exercising powers and functions must have particular regard to. Section 8 applies the principles of the Treaty of Waitangi as matters which must be taken into account in decision-making.

Part 2 sets the scene for the development of a range of policy, and planning instruments, from national directions to regional policy statements and plans, to district planning.

As explained in Section 1.3 of this report, the NZCPS has a particular place in the structure of policy and planning instruments due to its original identification as a necessary instrument for managing the coastal environment[36]. RMA Section 56 sets out the purpose of the NZCPS as to *"state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand"*.

These must then be given effect to through regional policy statements and regional and district plans.

4.2 Contents of the NZCPS 2010

As would be expected from the wording of Section 56 and the RMA definition of coastal environment, the NZCPS is wide-ranging and comprehensive, and its objectives and policies range from the aspirational to the directive.

The NZCPS 2010 has an important preamble describing the challenges in promoting sustainable management, and sets out key issues, many of which relate to matters the NES:MA must also deal with. The interpretation section of the NZCPS 2010 makes it clear that the order of policies is not an indication of relative importance.

The introductory section of the NZCPS 2010 dealing with the application of the policy statement points out the requirement for the NZCPS 2010 to be given effect to, and requires that that is done "as soon as practicable"[37].

It also notes that, subject to RMA Part 2, when considering an application for resource consent, and submissions on the application, relevant provisions of the NZCPS 2010 must be had regard to.

The six objectives within the NZCPS 2010 are generally high-level interpretations of Part 2 which establish a set of directions for coastal management (using terms such as "safeguard", "preserve", "take account of", "maintain and enhance", "recognise", and "enable"). The most directive of the objectives, Objectives 5 and 7 are "enhance" objectives relating to coastal hazard risks and New Zealand's international obligations, and are not directly relevant to the proposed NES:MA.

[36] All other national policy statements have been developed more recently – the next promulgated in 2008.
[37] Cross-referencing to RMA Section 55. The only "time bound "NZCPS 2010 provision appears to be in Policy 28, requiring the Minister to undertake monitoring and a six-year review and report of NZCPS effectiveness.

Objective 6, the "enabling" objective, provides underlying support for an aquaculture industry, properly managed, as follows:

> *"Objective 6*
>
> *To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, 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."*[38]

Objective 1, however, requires safeguarding of the integrity, form, functioning and resilience of the coastal environment and the sustaining of its ecosystems (including maintaining and enhancing natural biological processes, protecting representative or significant natural ecosystems and maintaining diversity of coastal flora and fauna, and maintaining and enhancing coastal water quality). Objective 2 requires preservation of natural character and natural features and landscape values through identifying and recognising such characteristics and qualities and their location and distribution, identifying areas where various forms of use and development would be inappropriate and encouraging restoration.

It is at the next, policy, level that the provisions become more directive.

Many of the NZCPS 2010's 29 policies are not directly relevant to aquaculture. Those that are have been identified in submissions and are noted in Section 3 of this report will be discussed further in later sections of this report.

Of particular note because of their directive nature to local authorities and decision-makers are the following:

> **Policy 7 (1)** – the requirement to identify areas where particular forms of use and development are or may be inappropriate and provide protection through objectives, policies and rules.
>
> **Policy 7(2)** – the requirement to identify coastal processes, resources or values under threat or at significant risk from adverse cumulative effects, and include provisions in plans to manage those effects.
>
> **Policy 11** – avoiding adverse effects of activities on listed taxa, ecosystems, communities or habitats; and avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on a specified range of ecological circumstances.
>
> **Policy 13** – avoiding adverse effect or activities on outstanding natural character; and avoiding

[38] Note – only applicable bullet-points included – some bullet-points omitted.

significant adverse effects and avoiding, remedying or mitigating other adverse effect of activities in all other areas of the coastal environment.

Policy 15 – avoiding adverse effects of activities on outstanding natural features and outstanding natural landscapes; and avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on other national features and landscapes in the coastal environment.

4.3 DOC Guidance on the NZCPS 2010

The DOC has developed Guidance Notes to assist with the interpretation of the NZCPS 2010[39]. Not all NZCPS 2010 policies are yet subject to such guidance[40], and, as many of the other guidance notes were prepared in 2013, they are substantially outdated[41]. It is understood a review of the older guidance notes, including addressing more recent case law, is underway. Its release is however likely to post-date the issue of any NES:MA.

This review has not considered the content of the Guidance Notes, except in a very general sense.

4.4 Review of the Effect of the NZCPS 2010 on RMA Decision-Making

In February 2018, in accordance with NZCPS 2010 Policy 28, the Minister of Conservation issued a "Review of the effect of the NZCPS on RMA decision-making". It comprised two volumes – a 50-page overview and key findings, and a volume of background information. This could be said to comprise an "effectiveness review" of seven years of experience with the NZCPS.

The key findings were:

- Strategic and integrated planning underpins effective NZCPS 2010 implementation
- Implementation is well advanced in some places but less well advanced elsewhere
- Consistent methodologies and further implementation guidance are still required
- There are strongly polarized views on the implications of *King Salmon* decision on NZCPS directive policies[42].

This review provides useful background as to the effectiveness of the NZCPS 2010 and its progressive implementation. It is backed up by a number of areas of detailed analyses and findings from consultation.

The analysis of case law showed that of the 35 "Category A" decisions, where the NZCPS was substantially discussed and its interpretation or application analysed, the largest single activity grouping, 11 in total, involved aquaculture matters[43]. These included two Supreme Court decisions, and two High Court decisions. Policies 13 and 15, along with Policy 6 have been the most frequently mentioned provisions addressed.

[39] https://www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement/policy-statement-and-guidance/

[40] Including Policies 11 and 12, relevant to this report.

[41] In contract, Guidance Notes on coastal hazard policies were issued in December 2017 and can be regarded as expressing current interpretations.

[42] This final finding should be regarded as simply a reflection of the time, as there was no indication in the review that there was any need for a change to the NZCPS 2010 – rather, the potential for developing consensus views should be explored.

[43] This indicates a continuing trend with at least three additional significant decisions over the past year relating to aquaculture. One, the RJ Davidson Family Trust decision was at the Court of Appeal.

The review includes a number of case studies where integrated or single-activity planning was involved, to investigate the impact of the NZCPS on the outcome. It identified that key aquaculture regions (Marlborough, Waikato and Northland) had made considerable progress towards their second-generation plans.

It identified that a lack of consistent methodologies, particularly in relation to Policies 13 and 15 is hampering reflection of these policies in plans.

It also found that there was no evidence that decision-makers on resource consents were not having regard to the NZCPS 2010 in reaching decisions, and noted that *"effective implementation of the NZCPS 2010 in higher-order plans is likely to be an important factor in achieving effective implementation through consents, particularly given the effect of* [The] *King Salmon* [decision] *on the weight that is given to statutory documents"*.

The effectiveness review concluded with an identification of the focus of future work: supporting strategic and integrated planning; an audit of the implementation work already done on the directive policies (particularly filling information gaps and sharing information between agencies in relation to Policy 11); responding to uneven implementation through support, and placing more emphasis on region-wide identification, assessment and mapping of coastal characteristics, completion of guidance and prioritising work on developing consistent assessment methodologies for natural character, natural features, and natural landscapes.

While the NES:MA may be seen as not being directly aligned with the emphasis on strategic and integrated planning in the effectiveness review, given the extensive replacement consenting requirements ahead, it is not necessarily a general approach that is inconsistent, provided that the resource consent requirements in the NES:MA are sufficient to provide for adequate consideration under the NZCPS. Comfort can be taken from the review's finding that there is no evidence that the NZCPS 2010 is not being appropriately had regard to in resource consent decisions.

4.5 Case Law relating to the NZCPS 2010 and other Relevant Case Law

Case law provides legal interpretation of legislation and instruments developed under that legislation. It can also assist practice in indicating suitable responses to legislative requirements, particularly at Environment Court level.

The *King Salmon* decisions[44] were the first time that RMA legislation had reached the Supreme Court, and the first of these was ground-breaking in its interpretation and in overturning High Court case law that had provided guidance that RMA Part 2 should be interpreted and exercised on the basis of a "overall judgment" since 1994[45].

The key findings of the first *King Salmon* case (NZSC 38)have:

- Confirmed that RMA Section 5 must be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time that Section 5(2) matters are achieved.

[44]Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38; and Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd [2014] NZSC 40.
[45] The seminal case being NZ Rail Ltd v Marlborough District Council, 1994, NZRMA 70 (HC).

- Emphasised the importance of the policy flow from RMA Part 2, through national policy into regional policy statements and regional and district plans on the basis of the "giving effect" requirement. This means that, when plan preparation or variations or reviews are involved, and there is a relevant national policy statement, recourse to Part 2 should not be necessary except where plan provisions do not "cover the field", where the provisions are uncertain, or there is a claim of invalidity. The outcome has been a new emphasis on seeking to ensure that the NZCPS is adequately reflected in plans.

- Emphasised the importance of the language used in documents. The directive tone of words like "avoid" must be respected and carried through into lower-order documents. The more specific and directive the words, the clearer the obligation to implement the provisions.

- Clarified that the adverse effects to be avoided, and what is "inappropriate", needs to be assessed by reference to what is being protected or preserved[46].

- Clarified that the methodological requirements of the NZCPS (in that case Policies 13 and 15) must be followed – i.e. the relevant qualities must be assessed (at regional level), areas that require protection or preservation must be identified, and regional policy statements and plans must include objectives, policies and rules which achieve the policies.

While addressing aquaculture and the NZCPS, the first *King Salmon* decision has had far reaching implications in terms of all planning practices.

The second *King Salmon* decision (NZSC 40) was also relevant and important to aquaculture, although of less national notice. This appeal addressed adequacy of information about water quality issues with regard to the feeding of salmon, and aspects of the adaptive management approach taken by the Board of Inquiry. It effectively considered the availability of an adaptive management approach in terms of NZCPS 2010 Policy 3 (precautionary approach) and reviewed the application of Policies 8, 12, 21 and 23 in the circumstances of the *King Salmon*private plan change and concurrent resource consents. The decision addresses what is necessary for an adaptive management regime to be an acceptable tool, including the ability to suspend, mitigate and remedy non-compliant circumstances. The decision also confirmed that proposed conditions of consent could not be an irrelevant factor to be taken into account, nor improper, when deciding on a plan change that allocated space and allowed an activity (in that case, salmon farming). The decision emphasised the two separate processes of plan change and consent[47] and the need to consider them separately. It also emphasised the need to consider matters such as water quality on a regional basis. It confirmed the usefulness of assessment criteria within a plan and noted the ability of councils to review conditions under RMA Section 128[48] and 132.

More recently the *RJ Davidson Family Trust* case[49] has yielded a similar interpretive decision relating to resource consents. This case concerned a proposed marine farm (two blocks) in Beatrix Bay in Marlborough Sounds which had been declined by the council, and the Environment Court[50]. The legal question referred to the High Court and on to the Court of Appeal is somewhat similar to that addressed in the first *King Salmon* case outlined above – whether it is necessary to look at Part 2 of the RMA when "having regard to" the NZCPS, in relation to a resource consent application[51].

[46] The Court noted that it may be possible to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to Policies 13 and 15 where the avoidance of these effects is not necessary or relevant in achieving the necessary protection or preservation.
[47] See para 146 of the decision.
[48] This provision has been rarely used, but was also noted by at least one local authority submitter in relation to addressing RMA cumulative effects.
[49] RJ Davidson Family Trust vs Marlborough District Council CA97/2017 [2018] NZCA 316.
[50] The Environment Court decision is relevant to habitat recognition and protection and is noted later in this report.
[51] The Environment Court and High Court decision had applied the same approach that the Supreme Court had in relation to a plan change to the resource consent application.

The Court of Appeal found that a consent authority must have regard to RMA Part 2 "when it is appropriate to do so". Noting that all decisions made under it must seek to "achieve the purposes of" the RMA of which Part 2 is fundamental, and reiterating much of the reasoning from the first *King Salmon* decision, it determined that the statutory language of Section 104(1) clearly contemplates direct consideration of Part 2 matters. It noted the NZCPS does not contain the range of policy provisions that apply to plan development when a resource consent is sought, and that not all plans may inevitably reflect Part 2 provisions[52]. The Court determined that Part 2 matters should be considered in relation to resource consent applications, but the relevant planning documents adequately expressed Part 2, so the error was of no consequence in that case.

This decision does not signal that Part 2 matters can apply in a resource consent setting to render regional policy statements and plans ineffective[53]. Rather, the Court expects these lower order instruments to effectively reflect the higher order (Part 2 and NZCPS) requirements.

The outcome of the first *King Salmon* decision has been subsequently endorsed a number of times in varying circumstances, including emphasis on the importance of strategic planning in the coastal marine area and the significance of the directive language and the methodologies set out within the NZCPS.

Where resource consents are involved, the Court of Appeal's decision in *RJ Davidson Family Trust* is so recent that there is as yet no new case law. However, the relevance of Part 2, the NZCPS 2010, and the regional policy and planning documents (to the extent they reflect the NZCPS) have all been endorsed through that decision.

A number of other cases provide detailed interpretative assistance in relation to specific NZCPS 2010 policies. Rather than describing them here, they are referred to later in this report as appropriate.

4.6 The State of Applicable Plans

The Environment Court, in the April 2018 Wainui Bay case[54] appeared to express a degree of frustration about the perceived slow response of some local authorities to NZCPS 2010 directives. Citing Policy 7, and particularly the requirement to identify areas where activities, etc, are inappropriate or may be appropriate subject to conditions, it noted that the respondent council had not yet undertaken the processes necessary for Policies 13 and 15 to be given effect to. It stated:

> *"Section 55 RMA directs that regional policy statements and plans must be amended so that their objectives and policies give effect to the NZCPS as soon as practicable. Where the NZCPS is especially directive, such amendments must occur without following a Schedule 1 process[55]. But there is nothing in the RMA that prevents the processing of changes to regional policy statements and plans while that Section 55 duty is being undertaken".*[56]

The same commentary applies to resource consent applications. As the case law referred to earlier demonstrates, decision-makers, whether dealing with plan changes or resource consent applications, are able to have recourse to RMA Part 2 and the NZCPS directly if the plan is inadequate.

The DOC effectiveness review noted that progress was being made, primarily through the development and implementation of second generation resource management plans, in implementing the NZCPS 2010. This included in the main marine farming areas. The *King Salmon* decisions are now sufficiently in

[52] Although that outcome is "desired and anticipated".
[53] It drew attention and endorsed the High Court decision's concern about this potential outcome.
[54] Friends of Nelson Haven and Tasman Bay v Tasman District Council, NZEnvC 046.
[55] Referring to Section 55(2A)(a) RMA.
[56] It is fair to note that the privately-initiated plan change before the Court related to a single small area where spat catching remained a discretionary activity.

the past for these new plans to reflect the Supreme Court interpretation.

Some plans have made progress in relation to some of the more problematic aspects of implementing the NZCPS 2010 – by making sure that the methodology used to determine the plan's responses to a number of policies is transparent and accessible in the plan. This particularly relates to areas of outstanding values (natural character, and natural landscapes in particular)[57].This enables the qualities, characteristics and values to be understood and interpreted when the local authority is faced with a resource consent application, and should lead to more consistent administration.

It is however recognised that plans are subject to change[58]and review, and that community perceptions and values change over time. It is important that a future NES:MA does not constrain changing perceptions of how the NZCPS 2010 directives may be interpreted in different areas over time.

The following sections of this report address the question of consistency between the NZCPS 2010 and the current draft of the proposed NES:MA. The order seeks to address the strategic planning policy issue first, and then other policies in the order of frequency of mention in the submissions. Relevant case law is referred to as appropriate.

4.7 The Hauraki Gulf Marine Park Act 2000

This Act applies to a specified geographical area which containsa number of existing marine farms. Its purpose includes the integrated management of the Hauraki Gulf marine area, islands and catchments, which the Act determines is nationally significant.

The review has considered the implications of the proposed NES:MA in the light of the provisions of this Act, particularly the provisions of Sections 9 and 10 relating to the national policy statement status of parts of the Act.

It is considered that, by evaluating the consistency of the indicative NES:MA regulations with the policies of the NZCPS 2010, which are of similar detail and which also apply, the review will have adequately addressed the provisions of the Hauraki Gulf Marine Park Act. It is also recognised that the spatial planning that is being undertaken for that area may result in modifications to the Auckland Unitary Plan in due course, which will be able to be managed through the provisions of the NES:MA to the extent that they apply.

[57] The Auckland Unitary Plan is one of a number of plans which have adopted this approach.
[58] Including through changes that may be initiated outside "normal" council planning processes.

5 STRATEGIC PLANNING (POLICY 7)

5.1 What the NZCPS says

Policy 7(1) of the NZCPS 2010 requires local authorities preparing regional policy statements and plans to (paraphrased):

- Consider where, how and when to provide for activities at a regional and district level in the coastal environment;
- Identify areas where particular activities of form of use and development:
  - are inappropriate
  - may be inappropriate without the consideration of effects through a consent process; and
- provide protection from inappropriate use and development through objectives, policies and rules.

Policy 7(2) provides they must also identify in regional policy statements and plans, resources, values or coastal processes under threat or at significant risk from adverse cumulative effects, and include provisions in plans to manage those effects, including thresholds and specifying acceptable limits to change, to determine when activities causing such effects are to be avoided.

5.2 What Practice/Case Law does

Case law has confirmed the great importance of this strategic planning context in achieving the purpose of the RMA (see discussion in previous section of this report) in the coastal environment.

A number of regional councils have dealt with allocation of space for aquaculture through various forms of "zoning", including identifying areas where marine farming is prohibited (for a variety of reasons) and no consent can be applied for, or may be permissible if various effects can be adequately managed through a range of activity statuses. These are often accompanied by specified "minimum requirements" in the form of conditions attached to an activity status (with additional scope for tailored conditions to manage a greater range of environmental effects on the basis of individual applications). Where the minimum conditions are not met, the activity status usually changes to one with a greater degree of difficulty[59]. Such provisions are underpinned by objectives and policies related to the analysis that Policy 7 and other NZCPS policies require[60].

Where local authorities have moved to implement second generation regional policy statements and regional coastal plans these endeavour to give effect in terms of current best practice to the NZCPS 2010 specific policies (discussed later) as well as to the overall requirements of Policy 7(1). These plans have included the activity status for pre-existing marine farms which the process has determined to be appropriate, taking into account the wide range of RMA matters necessary.

Policy 7(2) is less well developed in plans, although some plans such as the Tasman Resource Management Plan and the Coastal Marine Zone 3 for salmon farming in the Marlborough Sounds

[59] That is, if the minimum conditions stated in the plan for, say, a restricted discretionary activity are not met, the activity would become a discretionary activity with a wider range of matters able to be considered. Similarly a discretionary activity where the conditions in the plan cannot be met may cascade to a non-complying activity where the RMA provides specific "tests" for consents to be granted.

[60] A number of regional coastal plans were effectively meeting this policy requirement directly under the RMA Part 2 and the 1994 NZCPS. In some cases the terminology of these plans is not current, and the NZCPS 2010 directives are not fully met.

Resource Management Plan[61]have enshrined an adaptive management approach within its aquaculture management areas to address the potential cumulative adverse effects of marine farming. Generally however, cumulative adverse effects are not well-addressed, often because of lack of baseline data, insufficient understanding of adverse effects and their cumulative components, or lack of allocation or mechanisms when there is already existing use and development.

The *King Salmon* cases do provide a way of handling cumulative effects by requiring baseline investigations, ongoing monitoring of effects, and limiting the gradual build-up to maximum consented intensity of new farms through conditions on consents. This however was applied in relatively unusual circumstances. The Supreme Court has however endorsed consent conditions as a method of effectively achieving the requirements of Policy 7(2), and has noted a council's powers to implement review conditions (assuming such conditions have been applied to an ongoing consent). Case law has noted two particular cumulative effects relating to matters addressed in specific NZCPS 2010 policies: water quality effects from nutrification from fed species[62], and depletion of micro-organisms of various types within the water column, and potential ecology system scale effects with mussel farming[63].

5.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

The indicative NES:MA regulations exclude some areas with "settled" provisions for marine farming from their application (this includes Tasman District and Wilson's Bay in the Waikato Region).

The NES:MA is predicated upon restricted discretionary activity status for the existing farms covered by the NES, with variations of this status in some circumstances, and variation in matters of discretion in other situations.

Restricted discretionary activity status carries with it the opportunity for a decision-maker to approve an application subject to conditions or decline consent.

Restricted discretionary status is described in RMA Section 87A(3). For this class of activities, a consent authority's power to decline a consent or to apply conditions is restricted to the matters over which discretion is restricted (in this case to those specified in the proposed NES:MA). However, as all decisions on resource consent applications are subject to RMA Part 2, and Section 104 specifies that relevant provisions of the New Zealand Coastal Policy Statement, regional policy statements and plans (including proposed versions) must be had regard to, the applicable NZCPS 2010 policy framework, including the relevant policies will also be applicable and considered in a decision. Case law has however made it clear that a consent authority cannot rely on the comprehensiveness of RMA Part 2 to override the matters that have been specified as matters to which discretion has been restricted[64].

While restricted discretionary status is normally considered to pose a lesser degree of difficulty for applicants than discretionary or non-complying, it does not guarantee that a consent will be granted[65].

[61]Inserted by the Board of Inquiry into the Plan.
[62] King Salmon, ibid.
[63] RJ Davidson Family Trust NZCA 316, ibid. A more comprehensive discussion is contained in the earlier Environment Court decision on the same application – NZ Env 81 (2016), particularly paragraphs 51 to 77.
[64] Lambton Quay Properties Nominee Ltd v Wellington City Council, 2013, NZEnvC 238, and the subsequent High Court judgment CIV-2013-485-007919 [2014] NZHC 878.
[65] It is noted that the restricted discretionary status is usually not notified, as is proposed for the NES:MA. However, the underlying requirements for notification in RMA Section 95 to 95G continue to apply.

For marine farms where the proposed NES:MA applies[66], the following provisions are included within the basic "restricted discretionary activity" provisions. Brief comments are made about the effect of these provisions:

- The marine farm is essentially exactly the same, or smaller in area, than in the current permit. This limits creep in area and/or intensity.

- The structures and anchoring systems are basically the same as in the current permit. This limits any change or increase in effects from the surface, water column and benthic structures. If this requirement is not met, the application is considered to be an application for new space[67]

- The layout, positioning, density, lighting and marking of marine farm structures are a matter of discretion in relation to public access and navigational safety.

- For any application where a plan (proposed or operative) includes an adaptive management approach, this becomes a matter of discretion. This will provide some opportunity to manage adverse cumulative effects where plan development processes have identified such effects[68].

- Duration, lapsing and review conditions are a matter of discretion. These may be used to address potential cumulative effects over time if necessary. Review conditions are however limited to RMA Section 128, and careful attention to the wording of such conditions will be required.

- For marine farms requiring supplementary feeding, additional matters are management of effects on water quality, benthic values and biogenic habitat. These may be used to address potential cumulative adverse effects through carefully-crafted conditions.

However, where an activity is within an area which is, at or after 1st January 2019, identified in a proposed or operative regional coastal plan to be inappropriate for existing aquaculture, the activity is fully discretionary. This means that all actual and potential effects can be considered when a replacement consent is sought. The provision, as worded to include provisions in proposed plans, has the effect of codifying the provision in RMA Section 86B(3)(e) which would otherwise apply, with discretionary status for existing farms. Discretionary status provides a council with the ability to consider and apply conditions to any application for a replacement consent. However, this provision sets a baseline, and more stringent activity classifications can be applied, including non-complying or prohibited status[69].

The wording of this provision gives councils freedom to make changes to their plans over time to introduce new areas which may be inappropriate for existing marine farms. This is appropriate, as in the longer term community attitudes and values may change.

Limited realignments[70] of existing marine farms are provided for in areas other than those identified as inappropriate (and therefore with discretionary status under the NES:MA) or moving into areas identified in a plan as non-complying or prohibited. These are subject to additional considerations including positive effects that may result, and adverse effects on the area of the extension.

[66] Recognising that these circumstances are limited as noted in Section 1.1 of this report.
[67] However, when some categories of change of species applications are involved a change of structures may be envisaged and these applications are subject to a number of additional relevant considerations. This results in a potential internal conflict within the indicative NES:MA regulations which will need to be resolved by careful drafting of the final NES:MA Clause 7(d) and (e).
[68] This provision has limitations relating to the timing of plan processes and individual consents, and may also necessitate review of consents if the plan provisions post-date the grant of consent.
[69] Under Section 87B(1)(c) prohibited activity status rules apply only once they have become operative.
[70] Limited to farms under 10ha which have not been realigned within the past 10 years, to no more than one-third of the area, a contiguous area.

Where species changes are proposed as part of replacement consents, the same general provisions apply, but a slightly wider range of considerations (acknowledging that the associated structures may also need to change[71]).

The proposed NES:MA contains provisions relating specifically to replacement consents for existing marine farms or realignments within areas identified under NZCPS 2010 Policies 13 and 15, which are discussed under those headings later in this report.

In summary, the NES:MA provides standardised provisions, generally based on restricted discretionary status, for existing established marine farms. These provisions however recognise that a region's coastal marine area will, through policy statements plans, and the processes involved, if not now in the future, have different areas identified through techniques of overlays, zoning, or other identification.

These identifications will reflect information, qualities and values that are derived from RMA Part 2, and more specifically from giving effect to NZCPS 2010 policies. The basic restricted discretionary activity status provides for consent subject to a range of conditions, or for consent to be declined.

5.4 Comments on Consistency

While the indicative NES:MA regulations, in their current form[72], provide a framework for the continuation of existing established marine farming activities as they are, and provide for some limited modifications, these provisions are not unfettered and do not guarantee that replacement consents will be able to be obtained.

In providing for present and future plan provisions to influence the considerations relating to the consent process, and in some cases the status of activities, the NES does not limit the process or the flexibility for different regional authorities to respond in an appropriate way to RMA Part 2 or to NZCPS 2010 Policy 7(1).

In relation to Policy 7(2), the opportunities to address cumulative adverse effects from existing marine farms are less apparent.

However, it would appear that identification of adverse cumulative effects under NZCPS 2010 Policy 7(2) could result in identification of areas under Policy 7(1)(b)(i) or (ii), and provide a council the ability to change the activity status to a more restrictive one (discretionary, non-complying or prohibited) through a plan process.

Even without that process, some of the mattes of discretion included in the indicative NES:MA regulations would enable reduction in intensity or density of farming, and potentially a reduction in farmed area[73]. This particularly applies where a plan includes an adaptive management regime in some form. The meaning of "a codified adaptive management approach" has not been defined in the indicative NES:MA regulations. For the avoidance of doubt, some definition or description will be needed in the regulations when promulgated. This should be scoped to allow for both geographically broad (region-wide) and narrow (bay-scale) approaches, and approaches that are provided in detailed policy and/or in rules.

The minimum consent duration of 20 years (determined by the RMA and not the NES[74]) does give some cause for concern, however review conditions which may be applied to consents provide some

[71] And what may have been appropriate under an earlier consent may need to be the subject of different or more stringent conditions if consent is to be granted.
[72] See Appendix 3.
[73] But this is limited to presence of reefs or biogenic habitat.
[74] The RMA provides that shorter-term consents may be issued if the applicant requests or a shorter period is required to ensure adequate management of adverse effects.

opportunity to address unforeseen cumulative adverse effects. There may be a lag, however, in achieving the protection required from inappropriate activities in Policy 7 if the identification of inappropriate areas post-dates the seeking of replacement consents.

Overall, it appears that the current draft of the proposed NES:MA does not inhibit the ability of regional councils to undertake strategic planning or address cumulative adverse effects provided consent processes are well-informed and the opportunities to consider effects and apply conditions are well-handled. Over time, it can be expected that plans will provide more detail, enabling greater clarity in terms of community values, and identification of some areas where a plan's activity status may replace the NES:MA[75]. Thus it is considered that there is no consistency issue between the NES:MA and NZCPS 2010 Policy 7.

[75] Through the ability for a plan to include more lenient or more restrictive provisions in some circumstances – see indicative regulations 18, 18A and 4O. The provision for stringency will need to be clearly extended to include applications involving changes in species.

6 NATURAL FEATURES AND NATURAL LANDSCAPES (POLICY 15)

6.1 What the NZCPS 2010 says

Policy 15 (a) and (b) direct local authorities to protect natural features and landscapes in the coastal environment from inappropriate development by:

- Avoiding adverse effects of activities on outstanding natural features and outstanding natural landscapes (including seascapes), and

- Avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects of activities on other natural features and natural landscapes.

Policy 15 also requires in (d) and (e) that where natural features and natural landscapes require protection, they should be mapped or otherwise identified[76] in the regional policy statements and plans, and the plans should include suitable objectives, policies and rules to achieve protection.

Policy 15(c) provides an inclusive but comprehensive explanation of what should be identified and assessed in determining outstanding and other natural features and landscapes[77].

This is one of NZCPS 2010's most directive policies, but one that in practice has been fraught with difficulties.

6.2 What Practice/Case Law does

The practice of identifying outstanding and other landscapes and natural features of importance has primarily rested with the profession of landscape architects, who have provided best practice guidance[78]. However, these were relatively general and did not provide sufficient detail for practitioners to consistently agree on appropriate methodology or documentation systems. Further, landscape architects may not always be best placed to identify outstanding or important natural features, which may have no particular or obvious visual or aesthetic expression but may rely on geological or natural process understanding, or may be undersea features[79].

There have been numerous aquaculture and other cases which have grappled with the recognition of outstandingness or importance[80], with the extent of adverse effects of a proposed activity or development and with the concept of inappropriateness[81] in the context of avoiding adverse effects. A further issue has been case law which has not accepted that mapped or otherwise identified landscapes or features in a plan are definitive identification, and have accepted that a review of the local landscapes qualities and values is necessary or at least appropriate in relation to a very wide range of circumstances[82]. While courts have sought to rely on expert advice, at times in the past the courts themselves have had to form their own judgments.

[76] This identification could include reference to type of feature in a plan provision, such as provisions referring to headlands in the operative Marlborough Sounds Plan.
[77] These are based on modified Pigeon Bay factors – Pigeon Bay Aquaculture v Canterbury Society Inc v Queenstown Lakes District Council C180/1999 [2000] NZRMA 59 – but are more comprehensive.
[78] NZICA, 2010. It is understood that the NZILA is continuing with development of updated guidance, including responding to a number of specific issues raised by the Environment Court.
[79] There appears to be no definitive case law on the distinction, and in the past plans have tended to run them together as ONFLs.
[80] A review of relevant cases is provided in Western Bay of Plenty District Council v BOP Regional Council, 2017, NZEnvC 147.
[81] The King Salmon case acknowledged that what is appropriate varies by context.
[82] This has often been related to determining the appropriate mitigation or remedy of landscapes that are less than outstanding.

The Environment Court has taken a significant interest seeking valid and consistent methodologies for assessment of landscape values.

In the recent *Wainui Bay* case[83], the Court raised questions of scale of landscapes in relation to the resource management issues being addressed, and made its own determination of the relevant landscape scale (within the much wider Golden Bay outstanding natural landscape which had been determined by another Environment Court earlier). It criticised the methodology of both experts who presented evidence, and refused to "prefer" either. It was equally critical of the respondent council for not having undertaken any development of the policies of the NZCPS 2010 in the regional policy statement and resource management plan.

NZCPS 2010 Policy 15 has however helped practice in clarifying the need and basis for identification of outstanding landscapes and outstanding natural features, where adverse effects must be avoided, and a "second tier" of other areas where specific assessment and responses is needed.

Landscape assessments have in some circumstances identified outstanding landscapes regardless of the presence of existing aquaculture activities. In other circumstances, aquaculture has been provided for in or near to existing outstanding landscape areas, seemingly without detracting from those values. A problem in the past has been that landscape assessment stopped at the edge of the coastal marine area and did not recognise the value of seascapes and/or the interplay of land and sea. Drawing boundaries around areas has also often been controversial, as have the applicable policy and rule provisions.

The Auckland Unitary Plan is widely regarded as incorporating current good practice. Here the bases, or criteria, for recognition of an item or area are set out in policy, and the qualifying criteria are set out alongside a description of the item or area in a schedule[84]. The areas are mapped as overlays on the planning maps. This is applied to both outstanding natural features and outstanding natural landscapes. This systematic approach is considered to make assessing effects and appropriateness more transparent.

It is not the purpose of this report to address the details of what continues to be a complex matter of identification, policy development and practice: rather it is important to ensure that the contents of the proposed NESMA should not form an impediment to the achievement of NZCPS 2010 Policy 15 through policy statements and plans.

6.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

For marine farms where the NES:MA applies, the following provisions in the indicative NES:MA regulations refer to marine farms within outstanding natural features and outstanding natural landscapes identified in a proposed or operative regional policy statement or regional coastal plan. Brief comments are made about the effect of these provisions:

- The area of outstanding natural landscape or the outstanding natural feature must be mapped, identified by GPS or NZTM co-ordinates, clearly named and identified by physical boundaries, or named if it is an area or feature with clear boundaries (e.g. a bay). The additional provisions below will be applicable only where a regional council has undertaken the identification exercise to the stage where it is at least included in a proposed plan.

- Existing marine farms in these areas are restricted discretionary activities, subject to all the considerations that apply to applications for replacement consents outside such areas, but with

[83] Friends of Nelson Haven and Tasman Bay v Tasman District Council, 2018, ibid.
[84] Which may also note the presence of existing marine farms with a qualifier about their impact.

the additional matter *"effects of the aquaculture activity on the values and characteristics that make the area, feature or landscape outstanding"*. This provision will be most readily and consistently interpreted where a council has undertaken a systematic analysis of values and characteristics. It will be more complex where areas are only identified. However, the exercise would not be impossible.

- If the area is also identified in the plan or proposed plan as an area inappropriate for existing aquaculture, a replacement consent becomes a fully discretionary activity. In these circumstances it is likely that 'outstanding' qualities will be analysed alongside the other reasons for inappropriateness.

Where a realignment is proposed for a marine farm within such an area[85] two additional matters of discretion are applied;

- the additional matter above
- any positive effects of the realignment.

This recognises that a slight shift in location may have beneficial effects on the qualities of the natural landscape or feature, depending on the details and the context.

The provisions described above apply only to existing marine farms in identified **outstanding** natural features and natural landscapes, or areas where existing marine farms are identified as inappropriate in an operative or proposed plan.

To meet the requirements of NZCPS 2010 Policy 15(b), whether or not "other" natural features or natural landscapes are identified in a plan, it appears that there are no matters of discretion that allow for consideration of avoiding significant adverse effects or avoiding, remedying or mitigating other effects. While the general matters of discretion include controls over structures, including layout, positioning (including density), lighting and marking, this discretion is limited to matters of public access and navigational safety.

However, generally, where an existing farm provides for supplementary feeding, an additional matter of discretion is *"management of the visual appearance of surface structures in relation to location, density, materials, colour and reflectivity"*. This recognises that such farms are likely to have more significant structures above the surface and these will have been originally subject to conditions over such matters.

6.4 Comments on Consistency

The particular recognition of areas and qualities of outstanding natural landscapes and outstanding natural features in the indicative NES:MA regulations will allow for an appropriateness evaluation, a consent to be granted or refused, and relevant conditions to be applied, in areas that have been identified as such in proposed or operative plans. These provisions apply both to marine farms whose location is unmodified, and those covered by the realignment provisions. It also applies to marine farms involving supplementary feeding where structures at and above the surface are likely to be more visually prominent. This is consistent with Policy 15(a).

The general absence of ability to consider and address significant adverse effects in relation to Policy 15(b), in natural areas which do not qualify as outstanding, may appear to be inconsistent with this equally directive provision.

[85] Note that if a marine farm is not already in such an area, it cannot move into one in a realignment.

The Section 46A report documents additional investigations which have been undertaken by officials into the likelihood of significant adverse effects from existing marine farms in areas which have not been identified as outstanding natural features or outstanding natural landscapes and seascapes. These investigations revealed a low risk of levels of effect at the "significant" level from existing farms[86]. The most likely risk could be expected to relate to marine farms involving supplementary feeding, due to the nature of their structures, or where a change of surface structure is involved as part of a change in species to be farmed. The indicative NES:MA regulations provide that visual effects can be managed in all circumstances for these existing farms[87].

Thus the indicative NES:MA would seem to adequately address the risk of existing marine farms which seek replacement consents having significant adverse effects on natural features or landscapes which are not identified as outstanding in a proposed or operative plan. The provisions provide consistency with the first part of Policy 15(b), as they include opportunities for management of visual effects in the most likely circumstances where significant adverse visual effects may exist, or may occur in future if they were not able to be the subject of conditions.

This thread of management ability continues to apply, if necessary, to meet the remaining general directive of Policy 15(b), to avoid, remedy or mitigate all adverse effects on natural features or natural landscapes. The provisions remain available for councils to seek to generally reduce the visual impacts in the specified circumstances where replacement consents are sought, through judicious application of conditions.

Beyond this, it would be expected that councils could continue to apply methods through their plans such as statements of intent to work with the industry, encouraging the use of best practice (minimum visual impact) structures, and providing design advice on colours and reflectivity in the marine environment.

On the basis of these considerations, the proposed NES:MA can be said to be consistent with the NZCPS 2010 Policy 15.

[86] Particularly given the "entry" requirement that replacement consents can only be considered if surface structures are similar to those already in place.

[87] There is a need to align and standardise the wording currently in indicative NES regulations 13(h), 32(q) and 36(r) and (s) relating to visual impact of surface structures. This should provide for both the application of conditions, or the ability to decline consent in the rare circumstance that adverse effects are found to be significant.

7 NATURAL CHARACTER (POLICY 13, POLICY 14)

7.1 What the NZCPS says

Policy 13(1)(a) and (b) directs the preservation of the natural character of the coastal environment from inappropriate use and development by:

- avoiding adverse effects of activities on areas with outstanding natural character, and
- avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on natural character in all other areas with those qualities.

In Policy 13(1)(c) and (d) natural character is to be assessed by mapping or otherwise identifying *"at least"* areas of high natural character, and regional policy statements and plans must identify areas where natural character must be preserved, and include applicable objectives, policies and rules.

Policy 13(2) points out that natural character is not the same as natural features and natural landscapes, or amenity values. It sets out a list of matters that may contribute to natural character.

As with Policy 15, this is one of NZCPS's most directive policies. It implies that both areas of high and outstanding natural character should be mapped or otherwise identified.

Policy 13 has a companion policy, in Policy 14. This is not directive, but seeks opportunities to restore natural character by including policies, rules and other methods to restore and rehabilitate the natural character of the coastal environment, including through conditions on resource consents.

7.2 What Practice/Case Law does

Natural character as a concept has been more readily understood than natural landscapes and natural features. Early attempts to codify levels of natural character were led by landscape architects, and were primarily based on obvious measures along a scale from pristine (bush and unmodified landforms) to urban development. Assessments were normally restricted to land. Only in the early 2000s did the Environment Court point out that natural character continued into the coastal marine area, including the water and the sea bed[88].

More recently, the identification of natural character has involved a range of expertise[89], and tends to be systematically scored.

In comparison with outstanding natural landscapes and natural features, the Courts have been less critical of the identification of natural character qualities, and less concerned about boundaries. In the *Clearwater Mussels* case[90], the decision explained the concept, noting that it was not a subset of landscape values (recognising that while this may often be so, in many circumstances that would not be the case - paragraphs 125 and 126 of the decision). In the same decision, the Court clarified that assessment of natural character and landscape effects within an application for a replacement consent proceeds on the basis that the marine farming structures are not there[91]. However, while natural landscape character would be fully restored by the removal of the structures and associated activity, natural character will continue to have been impacted by marine farming to date (effects on the

[88] Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council (W25/2002)
[89] Including ecological and biodiversity.
[90] Clearwater Mussels Ltd v Marlborough District Council, Decision No [2018] NZEnvC 88. Note that this decision is subject to appeal.
[91] Due to the limited duration of consents.

benthos) (paragraph 122).

Policy statements and plans are increasingly identifying areas of natural character to be preserved, mapped on the basis of outstanding and high qualities. As with Policy 15, good practice now provides that the details of the bases for identifying areas of outstanding and high natural character are included in the plan in some detail. Again, the Auckland Unitary Plan provides an example of good practice. While the coastal marine area does not feature greatly in the identified areas, there are some such areas, often comprising marine areas adjacent to islands or headlands.

Generally, the restoration policies and other provisions required by Policy 14 are kept at a high level in plans, with opportunities for restoration through consent conditions identified as the most usual method.

7.3 How the indicative NES:MA regulations deal with matters within the ambit of these policies

For marine farms where the NES:MA applies, provisions which are very similar to those for outstanding natural features and outstanding natural landscapes are applied to areas of outstanding natural character. These are described below, along with brief comments on the effect of these provisions:

- The area of outstanding natural character must be mapped, identified by GPS or NZTM co-ordinates, clearly named and identified by physical boundaries, or named if it is an area with clear boundaries. The additional provisions below will only be applicable where a regional council has undertaken the identification exercise to the stage where it is at least included in a proposed plan.

- Existing marine farms in these areas are restricted discretionary activities, subject to all discretionary considerations that apply to applications outside such areas, but with the additional matter:*"effects of the aquaculture activity on the values and characteristics that make the area, feature or landscape outstanding"*. This provision will be most readily and consistently interpreted where a council has undertaken a systematic analysis of values and characteristics contributing to the area's natural character. It will be a more complex analysis where areas are only identified and not described by the attributes that make them outstanding. However, that would not be an impossible task.

- If the area is also identified in the plan or proposed plan as an area inappropriate for existing aquaculture, a replacement consent becomes a fully discretionary activity. In these circumstances it is likely that 'outstanding' qualities will be analysed alongside the other reasons for inappropriateness.

Where a realignment is proposed for a marine farm within such an area[92], two additional matters of discretion are applied;

- the additional matter above

- any positive effects of the realignment.

This recognises that a slight shift in location may have beneficial effects on natural character, depending on the details and the context.

The provisions described above apply only to existing marine farms in identified areas of outstanding

[92] Note that if marine farm is not already in such an area, it cannot move into one.

natural character, or areas where existing marine farms are identified as inappropriate in an operative or proposed plan.

As with Policy 15(b), the NES:MA does not make any provision for identified areas of high natural character, despite requiring that "at least" such areas should be assessed and mapped.

7.4 Comments on Consistency

The particular recognition of areas and qualities and characteristics of outstanding natural character in the proposed NES:MA will allow for an appropriateness evaluation, and consent to be granted or refused, and if granted, conditions to manage the adverse effects can be imposed for areas identified in plans. This is consistent with Policy 13(1)(a).

The absence of ability to consider and address significant adverse effects in areas that might not be outstanding, but might have high natural character values is noted in relation to Policy 13(1)(b).

For these areas, officials have undertaken further investigations as noted earlier in relation to outstanding landscapes. The analysis has identified low risk of existing marine farms being associated with significant adverse effects in areas within or near to identified areas of outstanding natural character. This is highly likely to also apply to areas identified as having high natural character.

The ability to manage adverse effects on natural character through the NES:MA is not considered so critical as in areas of natural landscape values given that the prior presence of the marine farm will have already modified at least the benthos from its previous qualities.

The indicative NES:MA regulations include the provisions relating to management of visual impacts (which have a level of relationship with natural character values) discussed in Section 6 of this report. They also include some provisions, discussed in the next section, relating to ecological values which will go part of the way to addressing Policy 13(1)(b) matters, given that ecological values contribute considerably to natural character values in the coastal marine area.

There is little opportunity within the scope of the restricted discretionary activity matters to take up the opportunities provided by Policy 14. However, bonds or alternative mechanisms are a provision that is available within the matters of discretion to ensure *"repair or removal of abandoned or derelict farms, and reinstatement of the environment"*.

On the basis of these considerations, the proposed NES:MA can be said to be consistent with the NZCPS 2010 Policy 13and Policy 14.

8 INDIGENOUS BIOLOGICAL DIVERSITY (POLICY 11)

8.1 What the NZCPS says

Policy 11 directs the protection of indigenous biological diversity in the coastal environment by (paraphrased):

(a) avoiding adverse effects of activities on a range of specified taxa, ecosystems, habitats and areas (the latter being those with nationally significant community types, and those set aside under other legislation), and

(b) avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects of activities on a range of specified types of areas, ecosystems, habitats and ecological corridors.

In contrast to Policies 13 and 15, this policy does not indicate methodologies for identification or protection. However, it could be assumed that policy statements and plans would need to undertake identification of these for the region, and include objectives, policies and rules to provide for the level of protection required. Some of these are area-based and subject to mapping but others are not, as discussed below.

Notably, there are no decisions to be made in terms of appropriate, or inappropriate, development in terms of Policy 11 protections.

8.2 What Practice/Case Law says

Because of the range of items and areas requiring protection in terms of this policy, policies and plans have developed a range of methods of protection.

A number of the areas and habitats are readily identifiable and are included in plans as part of areas of outstanding or high natural character. Where this is done, it would be expected that the specific ecological values would be part of the identification and contribute to the basis for the necessary protection through policy and rules.

Usually, plans also seek to identify, and map separately, significant natural areas, or areas of particular ecological or habitat values. These tend to be land-based, although in the coastal marine area they may identify specific reef systems, spawning areas, or intact communities. These identified areas are protected by policy and rules. This may include recognition as areas where all, or specified forms of use and development are inappropriate in terms of NZCPS 2010 Policy 7.

A third type of protection relates to areas and values that are smaller and localised and often identified and protected only at consent stage. These are protected through identification of habitat type (e.g. reefs) or through a "significance test" through policy or criteria in regional policy statements. As this protection relies on triggers through a consent process, the protection tends to be somewhat haphazard and there is some vulnerability to loss from permitted or controlled activities or cumulative minor adverse effects not recognised in relation to individual consents.

A fourth type of protection applies to species which are so wide ranging that mapping in a plan would not capture their full occurrence or habitat requirements – this includes migrating species, species with extensive feeding ranges, or species that are so rare that their habitats may not be fully understood (including those at the edge of their range). These can only be protected through policy in plans (although parts of lifecycles may be protected through identified areas providing for parts of their lifecycle or life – e.g. breeding or feeding areas).

Through practice, a number of techniques have been developed for avoidance, remediation or mitigation of adverse effects and applied through consents.

The "avoid" requirement of Policy 11(a) has been closely considered in a number of recent Environment Court cases. In the *Clearwater Mussels* case[93] the Court applied NZCPS Policy 3 to the habitat areas of King Shag[94], as well as Policy 11(a). They found that the proposals (replacement consents for two marine farms where consents had earlier lapsed) would *"in net terms, give rise to an adverse potential effect to King Shag, and hence to ecological and biodiversity values…. The proposals would increase risk to, and not avoid, adverse effects"* on a threatened species. A similar finding was made in relation to the same species in the Environment Court's decision on the *JR Davidson Family Trust* case[95]. Likewise, in Admiralty Bay, the Court determined there should be no additional marine farming area because the area was important habitat for Dusky Dolphin[96].

The various courts tend to review only the most contested of applications, so much of the practice in this area relies on an experts' advice and appropriate conditions on consents.

8.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

General

For marine farms where the proposed NES:MA applies, there is no general "carve out" provision for mapped areas of ecological values that have been identified in terms of Policy 11, as applies for areas of outstanding natural character, natural features or natural landscapes. Nevertheless, because of the close integration of important ecological values and outstanding natural character, these provisions do provide for some level of Policy 11 protection. The ability under NZCPS 2010 Policy 7 to determine areas of ecological values as inappropriate for marine farming activities is also available.

Given that the NES:MA deals only with the replacement consents for existing marine farms and their slight realignment, it is likely that any localised Policy 11 attributes will have either been lost or substantially modified due to the prior existence of the farm. In contrast, wider-ranging components of indigenous biological diversity will have co-existed with the pre-existing farm[97], sometimes for decades.

There are however three matters of reserved discretion in the general indicative regulatory provisions which relate to localised or wide-ranging ecological risks:

- Firstly, a matter of discretion refers to *"effects[98] on reefs and/or biogenic habitat underneath and within:*
    - *i. 20 metres of an inter-tidal marine farm*
    - *ii. 50 metres of a sub-tidal marine farm."*

  Specific definitions are applied to the term reef, biogenic habitat, and sub-tidal and inter-tidal marine farm.

[93] Ibid
[94] Recognising that this species is threatened and vulnerable to natural stochastic events and human impacts. While breeding, feeding and roosting areas were identified in the relevant plan, the feeding range is much larger than mapped.
[95] Ibid
[96] Friends of Nelson Haven and Tasman Bay Inc vs Marlborough District Council Decision [2016] NZEnvC 151. Note that this decision related to proposed expansion of existing marine farms.
[97] It is noted that cases referred to earlier in this section related to either new or expanded marine farms, or marine farms that had not been operated to their consented limits.
[98] It must be assumed that any effect is adverse in these circumstances.

This provision will enable the effects of the marine farm on the most likely habitat areas to contain indigenous biological diversity, near to existing marine farms, to be considered and conditions applied to avoid, remedy or mitigate. This reflects Policy 11 requirements.

- Secondly, a matter of discretion refers to *"management practices to minimise mammal and seabird interactions with the marine farm, including entanglement"*.

  This provision seeks to ensure that a marine farm will minimise risk to protected and other faunal species through imposition of conditions. This is limited to management practices rather than density or intensity of activity, but still provides considerable opportunity due to the term "minimise".

- Thirdly, for offshore marine farms (as defined in a new definition), *"adverse effects of entanglement of large whales"*[99]is a matter of discretion. This matter of discretion provides for specific conditions intended to prevent such adverse effects on such species.

Management of noise may include underwater noise, a consideration of benefit to some marine mammals.

Farms with Supplementary Feeding

Where the marine farm involves supplementary feeding, there are additional matters relating to ecological management which may be beneficial in relation to achieving Policy 11, as follows:

- Management of effects on water quality and the benthic environment[100]
- Effects on reefs and biogenic habitat
- Management practices to minimise shark interactions with the marine farm.

Two of the three of these items may have indirect benefits – the first requiring a wide-ranging consideration of the benthic environment in the vicinity of the marine farm and water quality, and the latter applying under Policy 11 only to rare or threatened shark species[101]. The inclusion of the middle item above extends the range of the consideration that would otherwise apply to effects on reefs and biogenic habitat well beyond the 50m, and provides a basis for conditions to avoid, remedy or mitigate adverse effect that may be significant or less[102].

Realignment

Marine farm realignments, otherwise provided for under the same basis as replacement consents, may not result in extension into a significant ecological area that has been identified in an operative or proposed regional policy statement or plan. This is an important recognition of plan provisions.

Where a realignment seeks to occupy space containing reef or biogenic habitat[103], this would be addressed through conditions.

Realignments bring into play two additional matters of discretion – effects on the benthic environment

[99] "Large whales" are defined by taxon and species in the NES:MA. See footnote l of Schedule 1 of the indicative NES regulations.
[100] There is also specific reference to use of antibiotics and therapeutants, antifouling materials and lighting and underwater lighting, all of which may have effects on indigenous ecosystems.
[101] There are two threatened shark species, and eight species at risk.
[102] Down at least to minor.
[103] Which is not within a significant ecological area, so the realignment is not prevented.

and the seabed from anchoring systems, and adverse effects on marine mammals and seabirds in the new space to be occupied.

It is also noted that in some (probably unusual) circumstances a realignment may be beneficial in terms of enabling recovery or restoration[104] to the formerly-occupied space.

Change of Farmed Species

When an application for a replacement consent involves a change of farmed species, the activity status remains restricted discretionary, but with the additional matters of discretion relating to genetic effects of escapees on wild populations and cultural effects from the translocation of taonga species. Both may be applicable in terms of Policy 11, depending on the wider indigenous biodiversity context.

Biosecurity

Biosecurity provisions are addressed in more detail later in Section 12of this report, in relation to NZCPS 2010 Policy 12. These provisions clearly relate to and also assist in the achievement of NZCPS 2010 Policy 11.

8.4 Comments on Consistency

The range of provisions which endeavour to limit the ability of replacement consents to further adversely affect the indigenous biodiversity requirement of Policy 11, and to provide scope for safeguarding conditions, in the indicative NES:MA regulations is extensive.

This is a complex area, and the presence of the existing marine farms is acknowledged to have modified existing indigenous biodiversity in some areas before values were adequately identified and protected.

In terms of past practice, it is unlikely that the recent Environment Court decision to decline replacement consents for two existing marine farms in Pig Bay[105] could include consideration of the risk of adverse effects on King Shag directly under the indicative NES:MA regulations[106]. However, that was one of many considerations brought to bear on that case, and was not in itself determinative.

The NES:MA is considered to be consistent with NZCPS 2018 in relation to Policy 11.

[104] Contributing to the achievement of Policy 14.
[105] Clearwater, ibid.
[106] Unless the existing farm was in an area where the activity status was discretionary.

9 PRECAUTIONARY APPROACH (POLICY 3)

9.1 What the NZCPS says

Policy 3(1) directs the adoption of a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

For coastal resources potentially vulnerable to climate change, Policy 3(2) requires attention to outcomes in the light of climate change vulnerabilities.

Replacement consents for marine farms will be considered in a context where the actual effects of the activity are largely known, except for cumulative effects which may become apparent only over decades.

A number of submitters have raised issues of ocean acidification and increasing water temperatures associated with climate change. The impacts of such changes may lead to changes in locations and types of aquaculture (including changes in preferentially farmed species). Most of these adjustments if and when they occur, can be expected to be undertaken outside the scope of the NES:MA.

9.2 What Practice/Case Law says

The precautionary principle is provided for through processes of preparing regional policy statements and regional coastal plans, as well as in evaluating applications for resource consents. It is noticeable that, compared to district planning, regional coastal plans are essentially cautious, in that, generally, all but small scale or transient activities, and activities which are necessary for existing infrastructure (cleaning of sand from stormwater drain outlets, other small-scale maintenance) require a consent.

A range of techniques for adaptive management have been developed for larger-scale or more intensive (particularly artificially fed) forms of marine farming and embedded in regional coastal plans and/or resource consents in response to the precautionary principle policy in the NZCPS 2010 and its 1994 predecessor[107].

A number of such provisions have been through Environment Court processes[108] and the second *King Salmon* decision of the Supreme Court[109] examined the appropriateness of such an approach in depth.

The precautionary approach has also been addressed by the Courts in relation to individual marine farms. In the decision of the Environment Court in a very long-running appeal relating to marine farm expansion in Admiralty Bay[110], the Court noted that when original consents were granted in 2001 there was no knowledge that the bay was significant Dusky Dolphin habitat. The area is also within the feeding range of King Shag, of which much less was also known at the time.

Although the applicant had subsequently proposed an adaptive management plan as part of its approach (along with a significantly reduced area for expansion). The decision found that some of the

necessary components for an adequate adaptive management plan were not possible in this case (i.e.

[107] Application of a precautionary approach was of the general principles to which regard was to be had in the NZCPS 1994. Policy 3.3.1 of that document was worded similarly to NZCPS Policy 3(i), with activity status identified as a main means of providing for a precautionary approach.
[108] Including the successive processes which led to the inclusion of the aquaculture provisions in the Tasman Resource Management Plan, and the *RJ Davidson Family Trust* Environment Court decision, ibid. The High Court confirmed the Environment Court's findings on precaution in *RJ DavidsonFamilyTrust* on appeal in CIV-2016-406-14 [2017] NZHC 52.
[109] Sustain our Sounds v New Zealand King Salmon Company, ibid.
[110] Friends of Nelson Haven and Tasman Bay (2016), ibid.

surety that irreversibly damage to a protected species would not have occurred before the damage became apparent). In this case, the Court was dealing not only with extended areas of marine farming, also with the presence of a number of farms which had never been consented (and which would not thus come within the NES:MA).

In the *Clearwater* case[111], the Court briefly considered the precautionary principle in relation to the replacement consents sought, but determined that NZCPS Policy 11 had more direct application in its determinations on potential ecological effects.

9.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

Policy 3 requires a precautionary approach when there is uncertainty and effects are potentially significant. Generally, the effects of existing marine farms are known. The most likely aspects where a precautionary approach may continue to be appropriate relate to interactions of fauna with marine farms, adverse effects on areas of ecological values, cumulative effects on water quality and wider marine ecological values, and biosecurity matters. The extent to which a decision or conditions seek to be precautionary will depend very much on the specific circumstances of an application.

Provisions to address these matters have been set out in Section 11 of this report. In summary, matters of discretion would allow a precautionary approach to be applied through conditions, or possibly a decline of consent, if justified, as follows:

- in managing effects on reefs and/or biogenic habitat under or near to marine farming
- in managing interactions with seabird or mammal interactions with a marine farm
- where a change in farmed species is proposed
- in relation to tangata whenua values (this is discussed in greater detail in Section 11 of this report)
- in relation to biosecurity
- in any circumstance where a plan provides for an adaptive management approach to be taken.

Review conditions and/or bonds may also be used to address the precautionary principle.

In any circumstance where the indicative NES:MA provides that a replacement consent is discretionary (i.e. in areas that proposed or operative regional coastal plan has determined are inappropriate for existing marine farms), or the council has allocated a more stringent activity status, a precautionary approach may be applied to any relevant adverse effect.

9.4 Comments on Consistency

Given that the application of the NES:MA is limited to existing marine farms, their minor realignment, and changes in species, the NES:MA contains appropriate provisions relating to the precautionary requirements of NZCPS 2010 Policy 3(1).

The indicative NES:MA regulations do not address Policy 3(2), but it would not be expected that they could address the long-term climate change effects which may lead to industry adjustments across existing marine farms. They do not foreclose such adjustments.

The indicative NES:MA regulations are considered to be consistent with NZCPS Policy 3.

[111] Ibid.

10 AQUACULTURE (POLICY 6, POLICY 8)

10.1 What the NZCPS says

These two NZCPS 2010 policies provide the framework for consideration of activities in the coastal environment (Policy 6), and the need for specific recognition of aquaculture (Policy 8).

Policy 6 is entitled "Activities in the coastal environment". Many of the clauses refer to the landward side of that environment, but a number can be relevant to aquaculture, including (paraphrased):

- Policy 6(1)(e) which refers to control of landside development so as to not compromise activities of national or regional importance that have a functional need to locate in the coastal marine area.

- Policy 6(1)(g) which refers to renewable resources and their potential to meet the needs of future generations. The example included is of energy resources, but this could equally apply to natural food resources in the coastal marine area to the extent that they support non-fed marine aquaculture.

- Policy 6(1)(h) which requires consideration of adverse visual effects of development in areas sensitive to such effects including headlands and prominent ridgelines.

- Policy 6(1)(j) which seeks that sites of significant indigenous biological diversity or historic heritage should be buffered.

Specifically in relation to the coastal marine area, the following relevant general policies include:

- Policy 6(2)(a) recognising the potential contribution to social, economic and cultural wellbeing from its use and development.

- Policy 6(2)(b) recognising the need to maintain and enhance access to public open space and recreational qualities and values.

- Policy 6(2)(c) recognising that some activities can only take place within this area due to their functional needs, and requiring methods for their provision in appropriate places.

- Policy 6(2)(e) promoting efficient use of occupied space by requiring multiple use of structures where practicable, the removal of redundant structures (where they have no reuse, amenity or heritage values) and considering whether consent conditions are needed to ensure space is used effectively and without unreasonable delay.

Policy 8 provides a specific planning mandate for aquaculture, based on recognition of its existing and potential contribution to the wellbeing of people and communities, through:

- Providing in regional policy statements and regional coastal plans for aquaculture activities in appropriate places (recognising the need for high quality water and land-based facilities).

- Taking account of the social and economic benefits of aquaculture.

- Ensuring that other development does not make water quality unsuitable for aquaculture in

areas set aside for that purpose.

Overall, this policy framework recognises existing aquaculture and its benefits, as well as setting out a number of considerations for expanded, modified and new aquaculture. This set of policy provisions provides support for an efficient mechanism whereby existing marine farms which are coming up for replacement consents would be effectively and efficiently evaluated. Elements of the policy underpin a level of intervention through re-evaluation of some effects and conditions of consent.

10.2 What Practice/Case Law says

As noted earlier, regional policy statements and plans have made varied provision for marine aquaculture and existing marine farms. Existing marine farms have been evaluated for replacement consents under several of these plans, within the applicable consent status and relevant matters taken into account in the processes.

A small number of replacement consent processes have resulted in consents being declined[112], or a change in species being refused[113].

There appears to be nothing in case law that has been critical of the applicable plan provisions for replacement consents, with the small number of examples reaching the courts being evaluated in terms of the statutory provisions in the context of the existing environment.

10.3 How the indicative NES:MA regulations deal with matters within the ambit of these policies

The relevant provisions of these two NZCPS 2010 policies are generally enabling to aquaculture within an appropriate planning framework (within which other NZCPS 2010 policies would also be given effect to).

The NES:MA will provide a consistent nation-wide set of provisions for consideration of replacement consents upon the expiry of existing consents for existing marine farms. This is accordance with the general provisions of the two above policies.

Within the indicative NES:MA regulations there is provision for activity status to be varied from the "basic" restricted discretionary status where a regional coastal plan includes provisions for greater leniency (i.e. controlled activity status) in relation to most of the provisions in the indicative NES:MA regulation. This is in accordance with the provisions under Policy 6(1)(g) and Policy 6(2)(a) noted above.

Where there are areas identified in a plan where existing marine farms are determined to be inappropriate, replacement consents must be assessed as discretionary activities, but greater stringency (i.e. non-complying or prohibited status) is provided for if the plan process also determines that.

Management of adverse visual effects, referred to in Policy 6(1)(h), in sensitive visual locations is addressed by the matter of discretion relating to the visual appearance of structures where supplementary feeding is involved, and where species changes sought would result in more prominent surface structures. Where the marine farm is located within an area identified as having outstanding characteristics, visual impacts would also be able to be considered if they impinged on the values and characteristics which contribute to the area's identification as of outstanding significance.

[112] Clearwater, ibid.
[113] White Rock as part of King Salmon, ibid. In this case the previous consent had lapsed. KPF Investments Ltd vs Pelorus Wildlife Sanctuaries Ltd, et al, [2014] NZ EnvC 152.

The policy that seeks buffering of sites of significant indigenous biodiversity – Policy 6(1)(j) – is addressed at the small scale through the ability to assess adverse effects on reefs and biogenic habitat.

This same policy also refers to buffers in relation to historic heritage. When a farm proposes a realignment, any effects on historic heritage are a matter of discretion.

The provisions which provide discretionary control over structures in terms of ensuring continued reasonable public access (including recreational access) and for navigational safety provides for at least the maintenance, and potentially the enhancement of, public and recreational access in accordance with Policy 6(2)(b).

Policy 6(2)(c) requires efficiency in the use of space, which is catered for by indicative NES:MA regulations which provide for consideration of alternative species, a degree of realignment, timing of occupation in relation to seasonal activities, and conditions for bonds, financial contributions or other mechanisms to ensure repair or removal of abandoned or derelict farms and reinstatement of the environment. The unreasonable delay component is addressed by the 3-year lapse date directly under the RMA.

10.4 Comments on Consistency

The indicative NES:MA regulations adequately address all relevant matters in NZCPS 2010 Policy 6 and Policy 8 and are considered to be consistent with those policies.

11 TREATY OF WAITANGI, TANGATA WHENUA AND MĀORI HERITAGE (POLICY 2)

11.1 What the NZCPS 2010

Policy 2 of the NZCPS 2010 reflects Objective 3. The objective is to take account of the Treaty of Waitangi, recognise the kaitiaki role of tangata whenua and provide for tangata whenua management in the coastal environment. Policy 2 further expands and interprets the objective by (paraphrased):

- recognising the traditional and cultural relationships of tangata whenua and areas of the coastal environment
- involving tangata whenua in the preparation of regional policy statements and plans
- incorporating mātaurangi Māori as far as practicable in regional policy statements, plans and plan changes and resource consent applications
- in appropriate circumstances, providing for Māori involvement in decision-making
- taking into account any relevant planning document (including iwi management plans) recognised by the relevant iwi authority or hapū and lodged with the council
- providing opportunities for the exercise of kaitiakitanga
- providing for identification, recognition and protection, and management of places of historic, cultural or spiritual significance or special value in consultation and collaboration.

This is a far-reaching policy. Lack of specific provision for these policy areas led to criticism in submissions on the proposed NES:MA.

11.2 What Practice/Case Law says

Increasingly councils are seeking to collaborate with relevant iwi and hapū in preparing regional policy statements and plans, including regional coastal plans. The extent to which this has so far been achieved would involve a much more extensive inquiry than the scope of this report.

For both policy statement and plan submission hearings, as well as when applications for a consent proceed through a hearing process, it is usual for a hearing panel to have a tangata whenua representative, although these are not usually people with mana whenua[114].

Increasingly, cultural values are taken into account in identifying outstanding natural features and landscapes. They may contribute to recognition of areas of outstanding natural character, and to identification of areas of habitat of taonga species, particularly if documented in relevant iwi or hapū management plans.

Cultural values are generally considered in cases relating to aquaculture that proceed through the courts, depending on the context and nature of plan provisions or application details themselves. They are rarely definitive in a decision, but rather contribute to the overall recognition of values.

[114]Because of the potential for claims of conflicts of interest.

In the *KPF Investments* case[115], involving a change of species from mussel to salmon farming, NZCPS 2010 Policy 2(a) was one of two factors leading to a decline of consent[116]. The Court found that not only did the proposal fail to recognise that *"tangata whenua have a traditional and continuing cultural relationship with the area of the site and its environment which has already been weakened by the four (existing or proposed) salmon farms in the vicinity"*. The Court considered the cumulative effects on the tangata whenua weighed "quite heavily" against a grant of consent.

11.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

This is the policy aspect where the most significant changes have been made to the indicative NES:MA regulation provisions as proposed in the original discussion document[117]. In response to submissions pointing out that Treaty considerations had been omitted in the draft, officials have proposed methods within the indicative NES:MA which enable information on cultural values to be taken into account.

These provisions work as follows:

- At the time that any application is made under the NES:MA regulations, the applicant must demonstrate that, within the previous 12 months, they have undertaken a process described in Schedule 1 to the indicative regulations, and the application must include the report prepared in terms of that schedule.

- The requirement applies to replacement consent applications, applications where realignment is involved, and applications to change farmed species.

- The Schedule 1 process involves the applicant obtaining from the council a list of iwi, hapū, customary marine title groups and customary rights groups whose existing interests may be affected by the activity. The applicant must contact and notify all those on the list about the consent to be sought. The schedule process includes the opportunity for those contacted to respond and provide information pertaining to cultural values. The applicant must provide a report with the application detailing any adverse effect on sites or areas of significance to tangata whenua and proposals to avoid, remedy or mitigate such adverse effects, the information provided by tangata whenua, the outcome of any dialogue and details of any change to the application that arose.

- A matter of discretion when such a report is provided is *"effects on sites and areas of significance to tangata whenua as identified in the report"*.

- If the applicant does not follow this process, this discretion does not apply: instead a new and broader matter of discretion comes into play, being *"effects on tangata whenua values"*. Alongside this provision is a provision that *"any such application will not be publicly notified"*, which appears to release such applications from the generality of *"no public **or limited** notification"* which applies otherwise (except in areas identified as inappropriate for existing marine farms or for realignment applications)[118]. The implication is that limited notification to the groups who would otherwise have been served notice under the Schedule 1 process would be highly likely in such circumstances.

[115] KPF Investments Ltd (2014) 152, Ibid. The existing consent had approximately seven years to run when the appeal was heard, but the Court acknowledged the importance of RMA Section 165ZH in establishing a longer-term priority and taking into account the value of the investment, as a basis for making the correct decision at the time.
[116] The other matter being its presence in an area of outstanding natural landscape value.
[117] These were indicated as requiring further discussion with iwi authorities.
[118] See indicative NES:MA regulations 16 and 17.

The wording of these provisions requires some refinement. However in most cases it is likely to lead to productive consultation, covering the matters in NZCPS Policy 2. It will also assist in the identification of taonga species and an understanding of cultural impacts of their translocation[119], and thatcultural and spiritual values in natural landscapes and natural features are expressed[120]. One shortcoming is the relatively short timeframe for iwi and other groups to respond to the applicant, inherent in the 25 day timeframe between notification on the groups and the ability to lodge.

This requirement is likely to place some pressure on groups, and some provision should be made within the NES:MA for applicants to meet the reasonable costs of the groups in responding to the notices.

11.4 Comments on Consistency

The provisions described above are new additions in the indicative NES:MA regulations, as a result of the submissions received and further consultation.

They will ensure that potentially affected iwi, hapū and those with customary interests in the application area are informed and have the right to provide information and in some cases to be heard. The councils processing the applications will need to ensure that the process requirements are diligently and transparently performed so that the information they receive is valid, and there are a number of ways this can be achieved[121].

As the provisions are process-based they are sufficiently flexible to meet the Policy 2 requirements in all circumstances.

It is considered that the provisions described above, newly-included indicative NES:MA regulations, bring the regulations into consistency with NZCPS 2010 Policy 2.

[119] A specific matter of discretion applies to all change of species applications under the NES:MA. Where such species are within the compass of NZCPS 2010 Policy 11, this will assist in the achievement of that policy.
[120] And thus contribute to the achievement of NZCPS 2010 Policy 15.
[121] E.g. through in-house cultural advisors, use of independent consultants, or limited notification processes.

12 HARMFUL AQUATIC ORGANISMS (POLICY 12)

12.1 What the NZCPS says

Policy 12(1) sets out a requirement that regional policy statements and plans provide for, as far as practicable, the control of activities that may adversely affect the coastal environment through the release or spread of harmful aquatic organisms[122]. Conditions on resource consents are promoted as a means of assisting the management of risks.

Policy 12(2) provides an indicative list of the activities which may give rise to the risks to be addressed in Policy 12(1), including introduction of contaminated structures into an area, discharges or disposal of organic material from vessels or structures, and the establishment and relocation of equipment and stock associated with aquaculture.

12.2 What Practice/Case Law says

Biosecurity policy relating to aquaculture is now included within second generation regional coastal plans[123]. While some consents include conditions requiring biosecurity management, biosecurity management and individual farm biosecurity plans have been largely promoted by the industry itself. However, as noted in the discussion document, coverage, content, quality and administration of such plans is uneven. Many consented marine farms are understood to continue to operate with little regard to industry best practice guidance or their own plans, and operators may not be knowledgeable about the reporting requirements of regulations under the Biosecurity Act 1993 relating to unwanted organisms.

Regional councils also either have moved, or are moving towards developing their own biosecurity management strategies, of which the marine environment is one component. This will provide for overall improved biosecurity management at regional scale.

Biosecurity considerations appear not to have featured in RMA case law relating to marine farming.

12.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

The indicative NES:MA regulations include "management of biosecurity risks" as a matter of discretion which applies to all circumstances where replacement consents are sought under the NES:MA.

However, it goes considerably further in relation to NZCPS 2010 Policy 12, including indicative regulations with universal application. The provisions apply to all existing marine farms (including those seeking replacement consents under the NES:MA provisions) and to all new applications, as summarized below:

- Applications for all marine farm coastal permits may only be granted where a Biosecurity Management Plan (BioMP) has been lodged and assessed as meeting the requirements of a guidance document or template[124].

[122] Defined in the NZCPS 2010 as *"Aquatic organisms which, if introduced into coastal water, mayadversely affect the environment or biological diversity, pose athreat to human health, or interfere with legitimate use orprotection of natural and physical resources in the coastalenvironment"*.

[123] Biosecurity was not a matter encompassed by the NZCPS 1994. DOC guidance notes are still in preparation relating to NZCPS 2010 Policy 12.

[124] This document is in preparation and has not been able to be reviewed as part of this report. It would be incorporated into the standards by reference, and periodically updated. Appendix K in the discussion document however provides an indication of content.

- For marine farms with permits which expire after 31st January 2025, before this date the responsible regional council must have completed a review of such permits (using the RMA Section 128 procedures) with the purpose of ensuring that such farms supply, and their permits are subject to) an adequate, ongoing and updatable, BioMP.

- The contents of the BioMPs that are instituted or modified under the conditions of the permits resulting from the councils' reviews will need to be consistent with the guidance document or template (as for those conditions imposed through the replacement consent process).

- Monitoring and annual reporting to the responsible council will be requirements of the conditions of the permit, and modifications due to regular reviews of the BioMPs must be certified by the council before becoming effective.

While the details are still in development, this framework will be a major step forward for environmental sustainable management in seeking to limit biosecurity risks which can adversely affect a range of ecological, natural character, visual and other values as well as the security and effective operation of the industry itself.

12.4 Comments on Consistency

The indicative NES:MA regulations relating to biosecurity are consistent with Policy 12 of the NES:MA and represent a major step forward in this aspect of environmental management.

13 HISTORIC HERITAGE IDENTIFICATION AND PROTECTION (POLICY 17)

13.1 What the NZCPS says

Policy 17 requires the protection of historic heritage[125] in the coastal environment from inappropriate use and development, and provides an inclusive list of methods for protection including identification and regulation of items in regional policy statements and plans, and conditions on resource consents.

Potential adverse effects relating to this policy were raised in a few submissions.

13.2 What Practice/Case Law says

The review of heritage recognition and protection which resulted in the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act) resulted in identification of three streams of heritage protection. The first two, protection of identified places and items of heritage and/or cultural significance, are largely implemented through the RMA. The third, protection of archaeological sites, remains directly implemented through the HNZPT Act. There are cross-overs, particularly with pre-1900 identified places and items, which mean that the protection of some sites or areas may come under both statutes.

Regional policy statements and regional coastal plans include protection policies and usually incorporate a schedule of protected items in the coastal marine area (which may include known archaeological sites, areas of significant cultural heritage recognition, and items such as shipwrecks). They may include precautionary policy relating to "accidental discovery" of archaeological items, including within the coastal marine area. Consents may have conditions relating to accidental discovery attached (although care has to be taken to avoid duplicating roles under the HNZPT Act).

No examples were found in case law where heritage protection was a matter at stake in a marine farm hearing[126].

13.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

As far as is known, no existing marine farms which would be subject to the NES:MA extend into identified protected heritage places or items, so effects on historic heritage are not included in matters of discretion for most replacement consent evaluations.

However, where a realignment is involved "effects on historic heritage" is an additional matter of discretion.

It is also recognised that the process for tangata whenua consultation described in Section 11 of this report will identify and address effects on sites and areas of cultural heritage significance.

13.4 Comments on Consistency

The indicative NES:MA regulations make appropriate provision for matters in NZCPS Policy 17 and are consistent with the policy.

[125] As defined in the RMA.
[126] Heritage values are intimately associated with Māori cultural values, and may also contribute to recognition of amenity values and amenity landscapes.

14 ENHANCEMENT OF WATER QUALITY (POLICY 21)

14.1 What the NZCPS says

Policy 21 of the NZCPS 2010 is limited to circumstances where water quality has deteriorated to the point that it is adversely affecting natural environmental qualities, water based recreational activities or existing uses including aquaculture. The policy requires that where such circumstances are occurring, priority must be given to improving water quality through a range of suggested methods.

A small number of submissions identified this NZCPS policy as relevant to replacement consents for existing marine farms.

14.2 What Practice/Case Law says

This policy addresses circumstances which would not generally be expected to be associated with marine farms, although if existing activities such as aquaculture are being restricted by deteriorating water quality the policy does come into play and a council may need to prioritise water quality improvements in relation to those activities, including through its planning processes and other methods.

Regional policy statements and regional coastal plans may include areas which are subject to specified water quality standards being met. These are normally related to prime recreational areas or areas subject to stormwater or treated wastewater discharges.

RMA Section 107 also deals directly with the risk of significantly reduced water quality due to discharges by setting minimum baselines.

Water quality aspects are normally considered when consent applications are considered for artificially fed species consents are granted subject to discharge conditions, which may include an adaptive management regime.

14.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

Although this particular NZCPS 2010 policy is not considered relevant to the NES:MA and outside its purpose, the following provisions are included which relate to management of water quality:

- Matters of discretion for all replacement consent applications include management of rubbish and debris.

- Where a plan or proposed plan includes a codified adaptive management approach, this is a matter of discretion. Adaptive management approaches usually include some component relating to water quality.

- Where a replacement consent application involves supplementary feeding, effects on water quality are a matter of discretion.

- Where a change in species is involved (including to include paua and/or sponges), or where fin fish are involved in the species change, *"measures to avoid, remedy or mitigate adverse effects on water quality in terms of organic enrichment"* is a matter of discretion.

These provisions should be able to manage water quality to standards that avoid NZCPS 2010 Policy 21

coming in to play at any stage. If risks of significantly deteriorated water quality are identified in relation to a single or cumulatively to a group of farms, either enforcement of existing conditions, or application review conditions should be able to prevent such circumstances.

14.4 Comments on Consistency

The provisions of the indicative NES:MA regulations are considered sufficiently comprehensive in relation to water quality management that they would not result in circumstances that could trigger Policy 17 considerations. Thus there is no issue of lack of consistency between the NES:MA and this NZCPS 2010 policy.

15 DISCHARGE OF CONTAMINANTS (POLICY 23)

15.1 What the NZCPS says

Policy 23(1) deals with discharges of contaminants to water and require activities doing so to have particular regard to (paraphrased):

- the nature of the contaminants
- the sensitivity of the receiving environment
- the assimilative capacity of the receiving environment.

Significant adverse effects are to be avoided and even within allowable mixing zones, adverse effects are to be minimised.

(The remainder of this extensive policy is focused on discharges of stormwater, human waste, and discharges from ports and similar marine installations, so do not apply to marine farming).

15.2 What Practice/Case Law says

Contaminant discharges to the coastal marine area under RMA Section 15 are one component of the suite of consents required to establish and operate a marine farm. The consented components range from a concentration of "natural" discharges from farmed species, to antibiotics, therapeutics and feedstocks for supplementary fed species, to detritus from the farmed organisms, and material from cleaning of structures and equipment.

These aspects of management of marine farms have been extensively investigated over the decades that marine farming has occurred in New Zealand, and acceptable practice management methods have been developed and are normally embedded in activity descriptions and/or consent conditions. Appropriate policy is included in regional policy statements and regional coastal plans.

Whether the discharges affect water quality and/or the benthos, more modern consents include requirements for monitoring and reporting of effects. This is particularly the case where adaptive management regimes are involved.

The second *King Salmon* decision[127] dealt extensively with discharges, water quality conditions and adaptive management, and set out expectations for management regimes for these as the most recent and largest marine farms involving supplementary feeding. These include requirements to establish baselines and the continued involvement of a peer review panel. The requirements relating to these consents are not likely to be needed for existing marine farms when replacement consents are considered.

However they do establish good practice requirements.

Older consents may not include any conditions relating to discharges, except relating to discharges of rubbish and waste materials. When supplementary feeding is involved, conditions normally include feed limits.

[127] SoS, ibid.

15.3 How the indicative NES:MA regulations deal with matters within the ambit of this policy

The most typical type of applications will be those involving "base case" conditions where the area, structure, and consented species are materially the same as existing. Where these involve supplementary feeding, feed limits must not exceed those in the pre-existing permit.

In such circumstances, matters of discretion which relate to discharges are limited to discharges of rubbish and debris, and benthic effects on reefs and biogenic habitat below and close to the farm. Where supplementary feeding is involved, matters of discretion also encompass management of effects on water quality and the benthic environment[128], use of antibiotics and therapeutants and antifouling compounds[129].

Where an operative or proposed plan includes an adaptive management regime, that matter of discretion also comes into play.

Information, monitoring and reporting requirements are also a matter of discretion which could be used to monitor discharge effects.

When a change of species involving a change in subsurface structures is involved, hydrodynamic effect are also included in the matters of discretion. This may modify the ability of contaminants discharged to disperse from a site and so is relevant to considerations under this policy.

Where a replacement consent application involves additional types of supplementary fed species, matters of discretion include measures to avoid, remedy or mitigate adverse effects on the benthic environment and the seabed, and adverse effects on water quality in terms of organic enrichment, as well as the hydrodynamic effects and antibiotic and therapeutic use, and antifouling matters noted earlier. The matter of discretion relating to adaptive management regimes also applies[130].

15.4 Comments on Consistency

The indicative NES:MA regulations contain limited provisions to manage discharges from conventional marine farms, except where potential effects on sensitive habitats (reef or biogenic habitat) are involved. It is generally accepted that marine farm discharges do affect the benthos, but water quality impacts are not particularly measurable or able to be managed in relation to individual farms[131].

Where supplementary feeding is involved, however, both water quality and benthic effects increase, and these need to be managed. The indicative NES:MA regulations provide for this. These provisions carry through into applications for species changes where supplementary feeding is involved. Where a species change involves a change in subsurface structures, but no supplementary feeding, there is the ability to consider some aspects of water quality (flushing) and benthic change.

Where proposed or operative regional coastal plans include an adaptive management approach, applications will be subject to considerations relating to such provisions, and information, monitoring, reporting and review provisions can also assist with the management of the effects of discharges to water.

[128] In this case, not limited to reefs and biogenic habitat.
[129] Note that discharges of odour to air are also encompassed, although this is not within NZCPS 2010 Policy 17.
[130] In this case, the matters of discretion are so broad that it is likely that adaptive management conditions could be imposed, regardless of the relevant proposed or operative plan.
[131] Note earlier comments on potential cumulative effects, and the ability to apply adaptive management measures in some circumstances.

These provisions are consistent with the requirements of Policy 23(1) in that they allow decision-makers to consider and have particular regard to the effects of the discharges in the particular receiving environment and apply appropriate conditions.

16 CONCLUSION

This review has considered the current draft of the indicative NES:MA regulations at the stage where they are about to be reported back to the relevant Ministers, prior to a decision being made on whether or not to proceed with the regulations. Significant modifications have been made to the proposed NES:MA regulations as a result of matters raised in submissions on the discussion document released in June 2017.

The review involved interaction with the officials tasked with assessing the submissions and proposing modifications to the indicative regulations, as well as reviewing the range of documents which form the trail of background work involved in preparing and modifying the indicative regulations.

The evaluation of the current draft of the indicative NES:MA regulations against the relevant objectives and policies of the NZCPS 2010 indicates good consistency between the two. Changes proposed by the officials have addressed a number of issues that would otherwise have existed.

Given the limited application of the large part of the indicative NES:MA regulations, to replacement consents for marine farms, the restricted discretionary status is considered generally appropriate. The variation to full discretionary activity status in some circumstances, and the ability for councils to provide for greater leniency of activity status in specific situations, or greater stringency in other circumstances in certain environmental contexts (see Appendix 3 to this report, which shows the changes made) meet NZCPS policy provisions.

The changes proposed to the draft regulations in the discussion document have particularly related to NZCPS 2010 Objective 3 and Policy 2, relating to the principles of the Treaty of Waitangi, where a process has been proposed to be embedded in the indicative regulations, replacing a loose intention for a matter of discretion. They have also provided for further matters of discretion relating to potential ecological implications – both benthic ecology and potential effects on marine mammals and birds. These provisions focus on aspects of greatest risk and are not open ended, but can be expected to adequately manage risk of adverse effects. A change has clarified that where a proposed or operative regional coastal plan has identified that existing marine farms are inappropriate, the activity remains discretionary, better enabling NZCPS Policy 7 to be effective.

Changes have also been made which ensure that marine farm replacement consents that involve more prominent above-surface structures, or those that are realigning to in part occupy new space, are subject to management of visual appearance in addition to other potential effects in the newly occupied area.

Where a proposed or operative regional coastal plan includes provisions relating to adaptive management, this is also a matter of discretion over which conditions can be imposed. This, along with some other provisions, enables councils, over time, to address potential cumulative effects.

Where changes are sought to be made to the species farmed, the provisions have been enhanced to incorporate the ability to manage a number of potential adverse effects which could arise from such changes.

The indicative NES:MA regulations are complex and a small number of aspects have been identified which will require careful attention during their refinement through legal drafting. The biosecurity provisions rely on an external document which has not been available for review. However, on the available information the intentions for the NES:MA are clear, and have been found to be consistent with relevant NZCPS 2010 policies.

APPENDIX 1 – BRIEF CV OF SYLVIA ALLAN

Sylvia Allan is an experienced planning consultant with more than 45 years' experience in urban, rural and coastal policy development and planning practice. She has a BSc (Hons) in physical geography and geology from Canterbury University and a post-graduate Diploma and Town Planning from the University of Auckland. She is a Fellow of the New Zealand Planning Institute, and a past President of that Institute. She has been awarded a Distinguished Service Award by the New Zealand Planning Institute and the first Nancy Northcroft Planning Practice Award.

Throughout her extensive career Sylvia has worked with both the public and private sectors and community organisations and groups. She has provided planning advice to public agencies, community groups and individual businesses and is an expert in statutory planning including the requirements of the Resource Management Act. She is an experienced project manager and has been responsible for major environmental investigations, consultation processes, and the preparation of resource consent application documentation. Sylvia has managed hearing and appeal processes through the Environment Court and Boards of Inquiry, and has provided expert evidence on many occasions on planning-related aspects.

Sylvia has been actively involved in coastal and maritime planning since the late 1980s, including assisting several regional councils developing coastal components of regional policy statements, and regional coastal plans. She has also assisted private clients, particularly aquaculture and port clients, with submissions on such plans and on the New Zealand Coastal Policy Statement. She had major involvement in developing the provisions for aquaculture management areas now included in the Tasman Resource Management Plan and the Hawke's Bay Regional Coastal Plan. She has assisted marine farming companies in the Marlborough Sounds and Hawke's Bay obtain a range of consents, and consent holders in the Bay of Plenty obtain approvals for changes to farmed species. She has also assisted numerous individuals and community organisations oppose specific applications, including the proposed changes to the Marlborough Sounds Resource Management Plan sought by New Zealand King Salmon Co Ltd. Recently she has been a lead author of the Ministry for the Environment's "Coastal hazards and climate change: Guidance for Local Government", and has assisted the Department of Conservation with its guidance on a number of policies in the 2010 New Zealand Coastal Policy Statement.

APPENDIX 2 – LIST OF NAMES OF SUBMITTERS IDENTIFIED AS RAISING NZCPS 2010 RELATIONSHIP ISSUES

SUB-0003	Paul Ashley Keown
SUB-0006	Robin Britton
SUB-0007	Liz Griffiths
SUB-0008	Peter James
SUB-0010	Donald J Mead
SUB-0013	TeĀtiawa Manawhenua Ki Te Tau Ihu Trust
SUB-0015	Black Shag Oysters
SUB-0016	Royal Forest and Bird Protection Society (Nelson-Tasman Branch)
SUB-0017	Schofield Seafarms
SUB-0018	Gulf Mussel Farms
SUB-0019	Coromandel Mussel Kitchen
SUB-0020	Kiwi Buoys
SUB-0022	New Zealand Native Fisheries Ltd
SUB-0023	Jade River Oysters
SUB-0024	Tasman District Council
SUB-0027	Taniwha Oysters Ltd
SUB-0028	Parua Bay Oysters
SUB-0030	Southland Conservation Board
SUB-0037	Royal Forest and Bird Protection Society of New Zealand Inc
SUB-0038	Kenepuru& Central Sounds Residents' Association
SUB-0039	Real Journeys Ltd
SUB-0042	Gold Ridge Marine Farm Ltd
SUB-0043	Helen Campbell
SUB-0044	Friends of Nelson Haven and Tasman Bay Inc
SUB-0045	TeRūnanga o Toa Rangatira
SUB-0047	NgatiPikiao Environmental Society
SUB-0049	Coromandel Marine Farmers Association
SUB-0051	Tui Spiritual and Educational Trust and Tui Community
SUB-0061	Marlborough Aquaculture Limited
SUB-0064	West Coast Regional Council
SUB-0065	Auckland Council
SUB-0072	J B Walker Family Trust
SUB-0073	Forest and Bird Golden Bay Branch
SUB-0074	Resource Management Law Association
SUB-0078	Environmental Defence Society
SUB-0080	Aquaculture New Zealand
SUB-0081	Brightlands Bay Aquaculture Ltd
SUB-0082	Huia Aquaculture Ltd
SUB-0084	Wakatu Resources Ltd and Kono NZ LP

SUB-0086	New Zealand Conservation Authority
SUB-0089	John and Judy Hellstrom
SUB-0090	Marlborough District Council
SUB-0094	Westpac Mussels Distributors Limited
SUB-0095	Gordon Mather
SUB-0100	Environment and Conservation Organisations of NZ Inc
SUB-0102	Ngati Makino Iwi Authority
SUB-0105	East Bay Conservation Society
SUB-0106	Ambush Marine

APPENDIX 3 – INDICATIVE NES:MA REGULATIONS (AS AT MID-OCTOBER 2018) REFERRED TO IN THIS REPORT

Indicative NES Regulations(Version as at 12.10.18)

The purpose of this Appendix is to provide an indication of what regulations contained in an NES: Marine Aquaculture could look like. Should the proposal proceed a final NES will be prepared by the Parliamentary Counsel Office in accordance with that office's requirements and drafting guidelines.

Changes to the proposed regulations (included as Appendix F in the discussion document) recommended by officials in response to submission are shown as tracked changes (i.e. ~~strikethrough~~ for deletions, underline for additions). A comprehensive discussion of the basis for these changes is included in the RMA Section 46A report.

References in this Appendix are to alphabetical endnotes which contain clarifying notes on particular clauses and/or definitions of particular terms used in the indicative NES regulations.

Proposed provisions for replacement consents for existing marine farms and for realignment for the National Environmental Standard: Marine Aquaculture

Note: the provisions relating to biosecurity management plans also have effect for any application covered by these provisions

1. (a) Regulations 2-19 apply to existing marine farms where the same species as authorised by a current coastal permit is to be farmed.
   (b) Where an application for a replacement consent for an existing marine farm includes a proposal to change the consented species ~~being farmed~~, regulations 20 to 44 apply. ~~As outlined in those regulations, matters of discretion outlined in regulations 12 – 15 will also apply.~~

Replacement consents for existing marine farms within outstanding natural features, outstanding natural landscapes, and/or areas of outstanding natural character in either a regional policy statement or regional coastal plan

2. Unless Regulation 5 applies, e~~E~~xisting marine farms[a] located within[b] outstanding natural features, outstanding natural landscapes and/or areas of outstanding natural character that have been identified[c] in proposed or operative regional policy statements or regional coastal plans are a restricted discretionary activity[d] if the requirements under 3 are met.
3. Requirements:
   (a) At the time of application under 2, the marine farm holds a current coastal permit[e] for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and
   (b) The application is for a marine farm in the same location as authorised by the current coastal permit; and
   (c) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and
   (d) The structures and anchoring systems are materially the same as those authorised by the current coastal permit[f]; and
   (e) The species to be farmed are only those authorised by the current coastal permit; and
   (f) For aquaculture requiring supplementary feeding, feed limits shall not exceed those contained in conditions on the current coastal permit; and
   (g) At the time of application under 2, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.
4. (a) Where an application for consent for an existing marine farm cannot meet the requirements of 3(a) or (c), the application is classified as an application for new

space and is not covered by these provisions.

(b) Where an application for consent for an existing marine farm cannot meet requirement 3(b) and it is not proposed as a realignment under 9, the application is classified as an application for new space and is not covered by these provisions.

(c) Where an application does not meet the requirements of 3(g), the application is classified as a restricted discretionary activity, subject to the following:

i. The matters of discretion listed in Regulation 12 apply to any such application, with the exception of Regulation 12(e); and

ii. The following additional matter of discretion applies to any such application: Effects on tangata whenua values; and

iii. Any such application will not be publicly notified.

Replacement consents for existing marine farms in areas identified as inappropriate for existing aquaculture in regional coastal plans

5. Where, after 1 January 2019 ~~following the gazetting of this national environmental standard~~, a regional council determines through a proposed or operative regional coastal plan that an area of the coastal marine area is inappropriate for existing aquaculture, existing marine farms located within that area are a discretionary activity.

Replacement consents for existing marine farms in all other areas

6. Existing marine farms located in areas other than those defined in 2 or 5 above are a restricted discretionary activity if the requirements under 7 are met.

7. Requirements:

(a) At the time of application under 6, the marine farm holds a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and

(b) The application is for a marine farm in the same location as authorised by the current coastal permit; and

(c) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and

(d) The structures and anchoring systems are materially the same as those authorised by the current coastal permit; and

(e) The species to be farmed are only those authorised by the current coastal permit; and

(f) For aquaculture requiring supplementary feeding, feed limits shall not exceed those contained in conditions on the current coastal permit; and

(g) At the time of application under 6, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

8. (a) Where an application for consent for an existing marine farm cannot meet the requirements of 7(a) or (c), the application is classified as an application for new space and is not covered by these provisions.

(b) Where an application for consent for an existing marine farm cannot meet requirement 7(b) and it is not proposed as a realignment under 9, the application is classified as an application for new space and is not covered by these provisions.

(c) Where an application does not meet the requirements of 7(g), the application is classified as a restricted discretionary activity, subject to the following:

i. The matters of discretion listed in Regulation 12 apply to any such application, with the exception of Regulation 12(e); and

ii. The following additional matter of discretion applies to any such application: Effects on tangata whenua values; and

iii. Any such application will not be publicly notified.

Realignment of existing marine farms (excluding fed aquaculture) in all other areas

9. Realignment of existing marine farms (excluding marine farms for aquaculture requiring supplementary feeding) that are located in areas other than those defined in 5 above is a restricted discretionary activity if the requirements under 10 are met.

10. Requirements:

(a) At the time of application under 9, the marine farm holds a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and

(b) The existing marine farm shall not exceed 10 hectares in size; and

(c) The application is for the realignment of an existing marine farm, provided:

i. No part of the existing authorised area has been realigned in the last ten years, and

ii. A minimum of two-thirds (2/3) of the existing authorised area remains, and

iii. The new area is no more than one-third (1/3) of the existing authorised area, and

iv. The new area is contiguous to the existing authorised area, and

v. The new area will not be located within an area identified as non-complying or prohibited for new aquaculture in an operative or proposed regional coastal plan, and

vi. Where the existing marine farm is not currently within outstanding natural features, outstanding natural landscapes and/or areas of outstanding natural character, t~~T~~he new area will not be located within outstanding natural features[g], outstanding natural landscapes~~,~~ and/or areas of outstanding natural character~~, and/or significant ecological areas~~ that have been identified in an operative or proposed regional policy statement or regional coastal plan; and

vii. The new area will not be located within significant ecological areas that have been identified in an operative or proposed regional policy statement or regional coastal plan.

(d) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and

(e) The structures are materially the same as those authorised by the current coastal permit (with the necessary modifications in location as required by the realignment); and

(f) The species to be farmed are only those authorised by the current coastal permit; and

(g) At the time of application under 9, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

11. (a) Where an application for consent for an existing marine farm cannot meet the requirements of 10(a) or (d), the application is classified as an application for new space and is not covered by these provisions.

(b) Where an application does not meet the requirements of 10(g), the application is classified as a restricted discretionary activity, subject to the following:

i. The matters of discretion listed in Regulation 12 apply to any such application, with the exception of Regulation 12(e); and

ii. The following additional matter of discretion applies to any such application: Effects on tangata whenua values.

Matters of discretion for restricted discretionary activities under this regulation

12. Discretion is restricted to the following matters in relation to all restricted discretionary activities under this regulation (for replacement consents for existing marine farms /

realignment):

(a) The duration and lapsing of the consent and review conditions
(b) Timing of occupation in relation to seasonal activities such as spat catching
(c) The layout, positioning (including density), lighting and marking of marine farm structures within the marine farm site, in relation to:
    i. ensuring continued reasonable public access (including recreational access) in the vicinity of the marine farm
    ii. navigational safety, including the provision of navigation warning devices and signs
(d) Integrity and security of the structures, including the anchoring systems
(e) Effects on sites and areas of significance to tangata whenua as identified in the report required by clause 7(a) of schedule 1 ~~[tangata whenua values, such as effects on waahitapu, taonga] – note that this is a placeholder matter that needs further discussion with iwi authorities as part of the consultation process for the proposed NES: Marine Aquaculture~~
(f) ~~Significant adverse e~~Effects on reefs[h] and/or biogenic habitat[i] underneath and within:
    i. 20 metresof~~the~~an inter-tidal marine farm[j]
    ii. 50 metres of a sub-tidal marine farm[k].
(g) Management practices to minimise marine mammal and seabird interactions with the marine farm, including entanglement
(h) Adverse effects of entanglement of large whales[l] in offshore marine farms[m] ~~on marine mammals~~
(i) Management of biosecurity risks
(j) Management of noise, rubbish and debris
(k) Where a proposed or operative regional coastal plan contains a codified adaptive management approach, then conditions can be imposed on the consent that give effect to that adaptive management approach
(l) Information, monitoring and reporting requirements;
(m) Administrative charges, coastal occupation charges, financial contributions and bonds (or alternative mechanisms to recover the cost of the repair or removal of abandoned or derelict farms and reinstatement of the environment).

13. In addition to those matters listed in 12, the following are additional matters of discretion in relation to a restricted discretionary activity for all aquaculture requiring supplementary feeding under this regulation:

(a) Management of effects on water quality and the benthic environment ~~values~~
(b) ~~Significant adverse e~~Effects on reefsh and/or biogenic habitati
(c) Use of antibiotics~~,~~andtherapeutants[n]~~and~~
(d) ~~a~~Antifouling
~~(d) Fallowing and rotation~~
(e) Underwater lighting
(f) Any other lighting of structures
(g) Management practices to reasonably minimise adverse effects on amenity values from ~~D~~discharges of odour
(h) Management of the visual appearance of surface structures in relation to location, density, materials, colour and reflectivity
(i) Management practices to minimise shark interactions with the marine farm

14. In addition to those matters listed in 12 (and 13, if applicable), the following additional matter of discretion in relation to a restricted discretionary activity for an application made under 2:

(a) Effects of the aquaculture activity on the values and characteristics that make the

area, feature or landscape outstanding.

15. In addition to those matters listed in 12 (and 13, if applicable), the following additional matters of discretion in relation to a restricted discretionary activity for an application made under 9:

    (a) Effects on historic heritage
    (b) Effects on benthic ~~values~~ environment and the seabed underneath the marine farm associated with the proposed anchoring system
    (c) Requirements to surrender consent for space no longer occupied as a result of realignment
    (d) In the newly occupied space, adverse effects on marine mammals and seabirds
    (e) Positive effects of the realignment of the marine farm
    (f) Where the proposed location of the marine farm is located within outstanding natural features, outstanding natural landscape and/or areas of outstanding natural character that have been identified in proposed or operative regional policy statements or regional coastal plans, effects of the aquaculture activity on the values and characteristics that make the area, feature or landscape outstanding.

Notification

16. Applications for a coastal permit under 2 or 6 will not be publicly or limited notified, unless public or limited notification is required under sections 95A(9), 95B(2)-(4), or 95B(10) RMA ~~a statutory exception applies~~.

17. Applications for a coastal permit under 5 or 9 will not be precluded from public or limited notification so councils will follow the normal statutory tests under the RMA in determining whether or not to notify an application.

Ability for plans to have more stringent or lenient activity classification

18. Councils may, through their regional coastal plans, have ~~set~~ activity classifications for consent applications for existing marine farms that are more lenient than those contained in 2, ~~and~~ 6, and 9.

18A. Councils may, through their regional coastal plans, have activity classifications for consent applications for existing marine farms that are more stringent than those contained in 5.

Certain marine farms are exempt from this regulation

19. The National Environmental Standard (with regard toreplacement consents for existing marine farms) will not apply to existing farms in Tasman AMAs and Waikato Wilsons Bay, or to the Wainui Bay spat catching farms.

Proposed change of species provisions of the National Environmental Standard: Marine Aquaculture

20. Regulations 21 – 44 apply to existing marine farms where:

    (a) a different species from that authorised by a current coastal permit is to be farmed;
    (b) different species from those authorised by a current coastal permit are to be farmed.

21. Categories 1, 2 and 3 do not apply to the farming of finfish. Category 4 does apply to finfish.

22. Categories 1 and 2 do not apply to the farming of paua or sponges.

Category 1

23. A change in consented ~~farmed~~ species° as part of an application for a replacement consent for an existing marine farm is a restricted discretionary activity if the requirements under 24

are met.

24. Requirements:

(a) At the time of application under 23, the marine farm is subject to a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and

(b) The location of the marine farm is the same as authorised by the current coastal permit; and

(c) The location, method and form of all structures, including anchoring systems, buoys, surface and sub-surface structures and navigational lighting remains materially the same as authorised by the current coastal permit; and

(d) At the time of application under 23, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

24A. Where an application does not meet the requirements of 24(d), the application is classified as a restricted discretionary activity, subject to the following:

(a) The matters of discretion listed in Regulation 12 apply to any such application, with the exception of Regulation 12(e); and

(b) The following additional matter of discretion applies to any such application: Effects on tangata whenua values; and

(c) Any such application will not be publicly notified.

25. In addition to the matters of discretion under 12, discretion is restricted to the following matters in relation to all restricted discretionary activities under 23:

(a) Management of biosecurity risks arising from the farming of the new species; and

(b) The genetic effects of escapees on wild populations; and

(c) Cultural effects from the translocation of taonga species.

Category 2

26. A change in the form of subsurface structure to provide for a change in consented ~~farmed~~ species as part of an application for a replacement consent for an existing marine farm is a restricted discretionary activity if the requirements under 27 are met.

27. Requirements:

(a) At the time of application under 26, the marine farm is subject to a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and

(b) The location of the marine farm is the same as authorised by the current coastal permit; and.

(c) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and

(d) The location and method of anchoring systems, buoys, surface structures and navigational lighting remain materially the same as authorised by the current coastal permit; and

(e) At the time of application under 26, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

27A. Where an application does not meet the requirements of 27(e), the application is classified as a restricted discretionary activity, subject to the following:

(a) The matters of discretion listed in Regulation 12 apply to any such application, with the exception of Regulation 12(e); and
(b) The following additional matter of discretion applies to any such application: Effects on tangata whenua values; and
(c) Any such application will not be publicly notified.

28. In addition to the matters of discretion under 12, discretion is restricted to the following matters relating to the new species and new or altered sub-surface structures in relation to all restricted discretionary activities under 26:

(a) Management of biosecurity risks; and
(b) The genetic effects of escapees on wild populations; and
(c) Cultural effects from the translocation of taonga species; and
(d) Hydrodynamic effects.

Category 3

29. A change in consented ~~farmed~~ species by the addition of one or more non-fed species or paua as part of an application for a replacement consent for an existing marine farm, where a change in the structures (other than just the subsurface structures) is required, is a restricted discretionary activity if the requirements under 30 are met.

30. Requirements:

(a) At the time of application under 29, the marine farm is subject to a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and
(b) The location of the marine farm is the same as authorised by the current coastal permit; and
(c) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and
(d) At the time of application under 29, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

31. (a) Where an application cannot meet the requirements of ~~under~~ 30(a), (b) or (c), it is classified as new space and is not covered by these provisions.
(b) Where an application does not meet the requirements of 30(d), the application is classified as a restricted discretionary activity, subject to the following:
i. The matters of discretion listed in Regulation 32 apply to any such application, with the exception of Regulation 32(d); and
ii. The following additional matter of discretion applies to any such application: Effects on tangata whenua values.

32. Discretion is restricted to the following matters for all restricted discretionary activities under 29:

(a) The duration and lapsing of the consent and review conditions
(b) Location, extent, type, scale, anchoring systems and integrity of marine farm structures, including the layout, positioning (including density), lighting and marking of marine farm structures within the marine farm site in relation to:
i. ensuring continued reasonable public access (including recreational access) in the vicinity of the marine farm; and
ii. navigational safety, including the provision of navigation warning devices and signs; and
(c) Timing of occupation; and
(d) Effects on sites and areas of significance to tangata whenua as identified in the report

required by clause 7(a) of schedule 1 ~~[tangata whenua values, such as effects on waahitapu, taonga] – note that this is a placeholder matter that needs further discussion with iwi authorities as part of the consultation process for the proposed NES: Marine Aquaculture~~

(e) Management practices to minimise marine mammal and seabird interactions with the marine farm, including entanglement; and

(f) Adverse effects of entanglement of large whales in offshore marine farms ~~on marine mammals~~;

(g) Management of biosecurity risks; and

(h) The genetic effects of escapees on wild populations; and

(i) Cultural effects from the translocation of taonga species; and

(j) Conditions to manage noise; and

(k) Measures to avoid, remedy or mitigate adverse effects on the benthic environment ~~values~~ and the seabed underneath and within:

i. 20 metresof~~the~~an inter-tidal marine farm

ii. 50 metres of a sub-tidal marine farm.

(l) Measures to avoid, remedy or mitigate adverse effects on water quality in terms of organic enrichment; and

(m) Effects of seabed disturbance; and

(n) Where a proposed or operative regional coastal plan contains a codified adaptive management approach, then conditions can be imposed on the consent that give effect to that adaptive management approach.

(o) Information, monitoring and reporting requirements; and

(p) Hydrodynamic effects; and

(q) Where a change to surface structures is proposed, effects of the visual appearance of the surface structures in relation to location, density, materials, colour and reflectivity; and

(r) Administrative charges, coastal occupation charges, financial contributions and bonds (or alternative mechanisms to recover the cost of the repair or removal of abandoned or derelict farms and reinstatement of the environment).

Category 4

33. A change in consented ~~farmed~~ species by the addition of one or more species to a finfish farm, including a change to another finfish species, as part of an application for a replacement consent for an existing marine farm, is a restricted discretionary activity if the requirements under 34 are met[p].

34. Requirements:

(a) At the time of application under 33, the marine farm holds a current coastal permit for occupation of the coastal marine area (pursuant to the Resource Management Act 1991); and

(b) The location of the marine farm is the same as authorised by the current coastal permit; and

(c) The consented area to be occupied is the same or less than that which is authorised by the current coastal permit; and

(d) At the time of application under 33, the consent applicant has within the previous 12 months undertaken the process outlined in schedule 1 and the application includes the report required by clause 7(a) of schedule 1.

35. (a) Where an application cannot meet the requirements of ~~under~~ 34(a), (b) or (c), it is classified as new space and is not covered by these provisions.

(b) Where an application does not meet the requirements of 34(d), the application is classified as a restricted discretionary activity, subject to the following:

i. The matters of discretion listed in Regulation 36 apply to any such application,

with the exception of Regulation 36(d); and

ii. The following additional matter of discretion applies to any such application: Effects on tangata whenua values.

36. Discretion is restricted to the following matters for all restricted discretionary activities under 33[q]:

(a) The duration and lapsing of the consent and review conditions; and
(b) Location, extent, type, scale, anchoring systems and integrity of marine farm structures, including the layout, positioning (including density), lighting and marking of marine farm structures within the marine farm site in relation to:
  i. ensuring continued reasonable public access (including recreational access) in the vicinity of the marine farm; and
  ii. navigational safety, including the provision of navigation warning devices and signs; and
(c) Timing of occupation; and
(d) Effects on sites and areas of significance to tangata whenua as identified in the report required by clause 7(a) of schedule 1 ~~[tangata whenua values, such as effects on waahitapu, taonga] – note that this is a placeholder matter that needs further discussion with iwi authorities as part of the consultation process for the proposed NES: Marine Aquaculture~~
(e) Management practices to minimise marine mammal and seabird interactions with the marine farm, including entanglement; and
(f) Management of biosecurity risks; and
(g) The genetic effects of escapees on wild populations; and
(h) Cultural effects from the translocation of taonga species; and
(i) Conditions to manage noise; and
(j) Measures to avoid, remedy or mitigate adverse effects on the benthic environment ~~values~~ and the seabed; and
k) Measures to avoid, remedy or mitigate adverse effects on water quality in terms of organic enrichment; and
(l) Effects of seabed disturbance; and
(m) Use of antibiotics and ~~,~~ therapeutants; ~~and~~
(n) ~~a~~Antifouling;
~~(n) Fallowing and rotation~~
(o) Underwater lighting
(p) Any other lighting of structures
(q) Management practices to reasonably minimise adverse effects on amenity values from ~~D~~discharges of odour
(r) Where a change to surface structures is proposed, effects of the visual appearance of the surface structures in relation to location, density, materials, colour and reflectivity
(s) Measures to control the visual appearance of surface structures in relation to location, density, materials, colour and reflectivity
(t) Management practices to minimise shark interactions with the marine farm
(u) Hydrodynamic effects
(v) Information, monitoring and reporting requirements
(w) Where a proposed or operative regional coastal plan contains a codified adaptive management approach, then conditions can be imposed on the consent that give effect to that adaptive management approach; and
(s) Administrative charges, coastal occupation charges, financial contributions and bonds (or alternative mechanisms to recover the cost of the repair or removal of abandoned or derelict farms and reinstatement of the environment).

37. For an application to add one or more species under 23, 26, 29 or 33 on a marine farm located within outstanding natural features, outstanding natural landscapes and/or areas of outstanding natural character that have been identified in operative or proposed regional policy statements or regional coastal plans, the following additional matter of discretion shall apply:

    (a) Effects of the aquaculture activity on the values and characteristics that make the area outstanding.

Notification

38. Applications for a coastal permit under 23 or 26 will not be publicly or limited notified, unless public or limited notification is required under sections 95A(9), 95B(2)-(4), or 95B(10) RMA ~~a statutory exception applies~~.

39. Applications for a coastal permit under 29 or 33 will not be precluded from public or limited notification so councils will follow the normal statutory tests under the RMA in determining whether or not to notify an application.

Ability for plans to have more stringent or lenient activity classification

40. Councils may, through their regional coastal plans, have ~~set~~ activity classifications for consent applications for existing marine farms that are more lenient than those contained in 23, 26, 29 and 33.

Certain marine farms are exempt from this regulation

41. All regulations in this National Environmental Standard (with regard to change of species) will not apply to existing farms in Tasman AMAs and Waikato Wilsons Bay, or to the Wainui Bay spat catching farms.

42. All regulations in this National Environmental Standard (with regard to change of species) will not apply to the farming of spat[r]

43. All regulations in this National Environmental Standard (with regard to change of species) apply ~~This regulation applies~~ only to marine farms granted consent prior to the date of the gazettal of this regulation.

Other activities not captured by the Categories and to be managed by the relevant regional coastal plan

44. The following activities are not covered by this regulation:

    (a) A complete change in consented ~~farmed~~ species to non-fed species or paua where a change in all structures is required; and
    (b) A complete change in consented ~~farmed~~ species from finfish to a non-fed species or paua; and
    (c) A complete change in consented ~~farmed~~ species from a non-fed species to finfish;
    (d) The addition of, or complete change in consented ~~farmed~~ species to scampi, crayfish or crabs.

Proposed on-farm biosecurity management plan provisions of the National Environmental Standard: Marine Aquaculture

New and replacement coastal permits for marine farms:

45. A regional council may grant a coastal permit for a marine farm only where a Biosecurity

Management Plan has been lodged and assessed by the regional council as meeting the criteria specified in [the externally referenced document] to avoid or mitigate the associated biosecurity risks.

Coastal permits expiring after 31 January 2025

46. Review of consent conditions to implement biosecurity management plans:

(a) By 31 January 2025 consent authorities with regional council responsibilities must, under section 128(1) of the RMA, have completed a review of coastal permits associated with aquaculture activities in the coastal marine area of that region for any coastal permit that was granted prior to the NES being Gazetted, and which does not have a consent condition which requires the preparation and implementation of a Biosecurity Management Plan for the purposes of effective on-farm biosecurity.

(b) The purpose of the review is to ensure that those coastal permits require the consent holder to supply a BioMP which meets the criteria specified in [the externally referenced document] and that the BioMP is kept up to date and implemented.

It is also proposed that guidance to accompany the above NES clause will suggest model requirements as follows

Where a review undertaken in accordance with clause 46(a) of the NES: Marine Aquaculture identifies an existing costal permit that does not include a condition requiring a Biosecurity Management Plan to be prepared, implemented and kept up to date, the consent authority will need to impose a condition requiring that:

(a) A Biosecurity Management Plan which addresses, but is not limited to the matters set out in [the externally referenced document] will need to be prepared and submitted to the consent authority within six months of the completion of the review under s128(1) of the RMA, for assessment against[s] the criteria specified in [the externally referenced document] and other such matters as necessary to ensure that implementing the Biosecurity Management Plan will achieve effective biosecurity; and

(b) All certified Biosecurity Management Plans are implemented and kept up to date for the duration of the marine farm activity, and are regularly monitored, with the monitoring results reported annually to the consent authority. The implementation of each Biosecurity Management Plan will be externally audited from time to time, as directed by the consent authority

(c) Changes and updates to Biosecurity Management Plans can be undertaken at any time for the purpose of improving the effectiveness of biosecurity measures, including adopting new technology, methods and practices, or in response to improved understanding of biosecurity risks and responses. Any changes to a Biosecurity Management Plan will need to be submitted to the consent authority for confirmation that the Biosecurity Management Plan remains consistent with the criteria specified in [the externally referenced document] and will effectively avoid or mitigate biosecurity risks associated with that marine farm. Any changes resulting from the updates should not be implemented prior to certification of the updated Biosecurity Management Plan.

Schedule 1

(1) A person who intends to apply for a resource consent under Regulations 2, 6, 9, 23, 26, 29, or 33 must provide the regional council or unitary authority for the region in which the marine farm is located with the following information:

- (a) A description of the marine farming activity
- (b) The co-ordinates of the area within which the ongoing marine farming will be undertaken

(2) The information in (1) must be provided no less than 40 working days before the application for consent is proposed to be lodged with the regional council or unitary authority;

(3) The regional council or unitary authority must provide the person who has supplied the information with a list of iwi, hapū, customary marine title groups, and protected customary rights groups whose existing interests the council considers may be affected by the activity;

(4) The regional council or unitary authority must provide the information in (3) within 10 working days after receiving the information provided under (1)

(5) A person who intends to apply for a resource under Regulations 2, 6, 9, 23, 26, 29, or 33 must:

- (a) notify every iwi, hapū, customary marine title groups, and protected customary rights groups the regional council or unitary authority has identified under (3) that he or she proposes to apply for a replacement consent for an existing marine farm; and
- (b) provide those persons with a copy of the information provided to the regional council or unitary authority under (1) above

(6) The notification in (5) must be made at least 25 working days before the application for resource consent is lodged;

(7) The person who intends to apply for a resource consent under Regulations 2, 6, 9, 23, 26, 29, or 33 must provide the regional council or unitary authority with:

- (a) a reporting detailing:
  - (i) the persons notified under (5)(a); and
  - (ii) how and when those persons were contacted; and
  - (iii) the information that was provided to them; and
  - (iv) the name and contact details of every respondent; and
  - (v) any sites or areas of significance to tangata whenua that may be affected by the marine farm, and:
    - a. a description of any adverse effects of the marine farm on the values which make the site or area of significance to tangata whenua
    - b. proposals to avoid, remedy or mitigate any adverse effects described in 7(a)(v)(a)
  - (vi) any other information provided to the applicant on the values of tangata whenua with respect to that area; and
  - (vii) the outcome of any dialogue that was entered into between the person who intends to apply for resource consent and the respondents.
- (b) details of any change that is proposed to the activity as a result of the consultation process

[a] That is, for the purposes of this regulation, marine farm is defined as a single contiguous spatial area used for aquaculture activities (as defined in section 2 RMA) that has a coastal permit for the occupation of the coastal marine area and which may also have coastal permits that authorise one or more of the following activities: the erection, placement, and use of any structures for aquaculture; and any associated disturbance of the foreshore

and seabed, and deposition or discharges in the coastal marine area

[b] Within is defined as a marine farm that has more than 1% of its consented area within an identified mapped ONL, ONF or ONC.

[c] In this context, 'identified' means: mapped, or identified by GPS or NZTM coordinates, or clearly named and identified by description of physical boundaries, or named if it is a physical feature that has clear boundaries (e.g. a harbour)

[d] The NES activity statuses supersede equivalent existing rules in coastal plans (e.g. an NES restricted discretionary rule will supersede an equivalent restricted discretionary rule in a regional coastal plan)

[e] This includes deemed coastal permits and therefore covers all marine farm leases and licenses. It collectively refers to the bundle of coastal permits for aquaculture, including any discharge permits.

[f] For the avoidance of doubt, 'the same as authorised' includes the colour, height, reflectivity and bulk of structures.

[g] Note regional coastal plans may not use the exact wording for the terms listed in this bullet point, e.g. Marlborough Sounds Resource Management Plan uses the term Area of Outstanding Landscape Value

[h] Reef: means exposed hard substrate formed by geological processes and includes areas of bedrock, boulders or cobble. Excludes sand or gravel shoals. [*Note: minimum standards of quality and scale will also accompany these definitions*]

[i] Biogenic habitat: means natural habitat created by the physical structure of living or dead organisms or by their interaction with the substrate. Biogenic habitats occur in a wide variety of environments and may be associated with hard (reef) or soft (sediment) substrates. They include areas of biogenic "reef" formed by rigid or semi-rigid organisms (e.g. beds of horse mussels, bryozoans, sponges, larger hydroids, rhodoliths, shell hash) and seaweed and seagrass beds. Excludes bio-fouling organisms attached to marine farming structures.Note: although *irregular seabed created by burrows and bioturbation* is also "biogenic habitat", this habitat type has been excluded from the definition for the purposes of the NES. [*Note: minimum standards of quality and scale will also accompany these definitions*]

[j] An inter-tidal marine farm is an aquaculture activity where the species and the structures on which they are grown are not covered by water at all stages of the tidal cycle (for instance, rack oyster culture).

[k] A sub-tidal marine farm is an aquaculture activity where the species are grown on lines or structures that, apart from surface floats, are submerged at all stages of the tidal cycle (for instance, green-lipped mussel cultivation)

[l] Sperm whale (*Physeter macrocephalus*) and all baleen whales (Order Mysticeti except pygmy right whale *Caperea marginata*).

[m] Offshore marine farms are defined as:

a) For existing marine farms initially granted consent prior to the date of gazettal of the NES, the five current offshore farms (located in Bay of Plenty (off the coast of Opotiki), Hawke's Bay, Marlborough (a site off D'Urville Island and a site in Clifford Bay), and Canterbury (Pegasus Bay))
b) For marine farms initially granted consent after the date of gazettal of the NES, marine farms that are not located:
    a. Within harbours [based on the legal boundary descriptions contained in Fisheries (Auckland Kermadecs Commercial Fishing) Regulations 1986, Fisheries (Central Area Commercial Fishing) Regulations 1986, Fisheries (Challenger Area Commercial Fishing) Regulations 1986, Fisheries (South-East Area Commercial Fishing) Regulations 1986, and Fisheries (Southland and Sub Antarctic Areas Commercial Fishing) Regulations 1986]
    b. Within the enclosed water limits [as defined in Maritime New Zealand's Maritime Rule 20]
    c. Within Golden Bay (line between Farewell Spit lighthouse and Separation Point)
    d. Within Tasman Bay (line between Guilbert Point and Pepin Island)
    e. Within the Firth of Thames (line between Cave Point and Waimango Point)
    f. Within 500 metres of the coast (including islands) outside of the enclosed water limits

~~That is, marine farms that are not located within enclosed waters such as harbours, sounds, bays and those that are not located close to the coast in more open waters. Offshore farms are more likely to pose exclusion risks for marine mammals, particularly for example migrating whales.~~

[n] Therapeutants: means additives to the marine farming system for the purpose of improving farmed stock health.

[o] This includes one or more additional species, or a complete change in species

[p] For example, this will cover a change in fish species within the existing net pen structures, or the addition of extra growing structures such as oyster trays to existing structures, or polyculture.
This does not apply to a complete change in species from fin fish species to another form of marine farming

[q] In practice, only the relevant matters of discretion would be considered.

[r] This exclusion applies to marine farms consented solely for the purpose of spat, or the addition of spat farming to an existing farm.

[s] The regional council processing an application for a coastal permit would need to assess the accompanying BioMP to determine whether it addresses the criteria set out in the externally referenced document, and implementing the BioMP will suitably avoid or mitigate the biosecurity risks associated with that marine farm.