Decision No. W 19/2003

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of six references pursuant to Clause 14 of the First Schedule to the Act

BETWEEN **GOLDEN BAY MARINE FARMERS**

(RMA 1735/98)

WILLIAM J WALLACE

(RMA 1740/98)

CHALLENGERS SCALLOP ENHANCEMENT COMPANY LTD

(RMA 1758/98)

FIRST WAVE LIMITED

(RMA 1759/98)

NEW ZEALAND MARINE FARMING ASSOCIATION

(RMA 1780/98)

NGATI TAMA MANAWHENUA KI TE TAU IHU TRUST

(RMA 1781/98)

Appellants

AND **TASMAN DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine (presiding)
Environment Commissioner J Rowan
Environment Commissioner J R Mills

HEARING at NELSON on 5 – 9 November 2001, 28 – 31 January 2002, 1 February 2002

FINAL SUBMISSIONS: March 2002

COUNSEL/APPEARANCES

1. J Ironside for Tasman District Council
2. N McFadden/G Downing for Golden Bay Marine Farmers, W J Wallace, Onekaka Offshore Spat Consortium, Waitapu Fishing Company
3. T Castle/T Stallard for Challenger Scallop Enhancement Co Ltd
4. J MacRae/B Rainey for First Wave Ltd (SMW Group)
5. J Hardie for Ngati Tama Manawhenua Ki Te Ihu Trust
6. B Arthur for the Crown
7. P Rutledge for Minister of Conservation
8. R Somerville QC/M Hunt for the Ringroad Consortium: R Somerville QC for the Mussel Industry Group
9. B P Dwyer/C Owen for Tasman Mussels Ltd
10. D Clark for Nelson Ranger Fishing Company Ltd and Marlborough Aquaculture
11. E Sage for New Zealand Royal Forest and Bird Protection Society
12. R Fenney for Friends Nelson Haven and Tasman Bay
13. A Dewar/A Vaughan for Friends of Golden Bay

SECOND INTERIM REPORT AND FINDINGS
TO THE MINISTER OF CONSERVATION,
THE TASMAN DISTRICT COUNCIL,
AND THE REFERRERS
ON AN INQUIRY INTO THE AQUACULTURE REFERENCES
TO THE TASMAN DISTRICT COUNCIL'S
PROPOSED RESOURCE MANAGEMENT PLAN

To **The Minister of Conservation**
Parliament Buildings
Wellington

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Chapter 1: Introduction

[1] At the time of stage I of the Court's inquiry, the parties were encouraged to focus expert and lay evidence on factual matters to establish findings of fact on which to base proposed plan provisions which were to amend the TDC's plan provisions identified at stage I.

[2] We are informed the areas finally identified by the Court in the interim report as AMAs for the future development of aquaculture largely reflect the wishes of the industry, and meet with the approval of the RFBPS and the resident groups. We note that that process resulted in many individuals and groups foregoing the many spat catching areas originally applied for. The limited final industry position may be seen by comparing the spatial extent of the applications in the CMA in Appendices A and B to the interim report with the AMAs allocated in Appendix ZZ.

[3] The proposed objectives, policies, rules and methods to promote aquaculture in the identified AMAs were put forward in evidence, explained, and supported by submissions, largely at stage II of the inquiry. The Court appreciates the considerable care taken by the parties in putting forward their views to bring the references to some finality.

[4] We regret that the inter-related nature of the issues identified in much of the material, has required a greater level of scrutiny than we would have liked, given the pressure to bring closure to these proceedings[1]. We are appreciative that the parties have allowed us enough time to resolve the issues to our satisfaction and that they have respected the process we needed to go through. The result has been that our findings in this further interim report are unanimous.

[5] We acknowledge that some of the terminology in the Interim Report and Findings at Stage I was less than clear and the draft mapping had deficiencies. We have given particular attention to these.

[6] We observe at stage II, the focus has been on the fact that the proposed plan needs to provide efficient procedures which will allow the TDC to manage the applications for resource consents for activities associated with the use, development and protection of the natural and physical resources of the CMA of both Golden and Tasman Bays.

[7] At stage I, because of the large number of individual applicants for coastal permits to catch mussel spat, in particular, a number of consortia were formed to draw disparate individuals and organisations together in order to provide a more unified case and reduce the large areas of the CMA applied for. Requiring the parties to consolidate their positions is a frequent requirement of the Court at the outset of large cases where there are numerous parties, presenting similar facts to achieve a similar end. Some consortia were in fact in existence prior to the proposed plan references being filed. Some include iwi interests.

[8] The industry parties and the areas they gave evidence on, became variously identified throughout the hearing and in the interim report as "GBMFC", "the Ringroad", "SMW", and

[1] It had been hoped to resolve some of the legal issues before the stage II hearing began: see the Court's various Directions issued 7 June 2001 – and the parties' submissions filed in response. It became clear on examination of the issues, however, that they were inter-related and involved evidential matters.

"Tasman Mussels" and so on, because those areas were the only ones on which evidence was given, enabling us to make the findings of fact. But it cannot be suggested that this was done as a precursor to allocating areas of the CMA to individual groups or persons. We discuss this issue further elsewhere. Meanwhile we continue to identify the sites by the iwi, consortium, group or company most closely associated with it.

[9] The Court was told at the outset of stage II that a Mussel Industry Group ("the MIG") was formed as a response to the Interim Report in order to further refine the industry group case on planning issues before the Court. It is stated to be an association of:

- Golden Bay Marine Farmers Consortium;
- Ringroad Consortium;
- The SMW Group;
- Tasman Mussels Ltd; and
- Marlborough Aquaculture.

[10] The MIG helpfully put forward one set of proposed plan provisions. But in spite of the formation of "the MIG" and the appointment of one counsel to make submissions on the proposed deeming and transitional provisions, which support the MIG case, individual counsel for the different parties submitted on a number of the same and related matters. Readers need to be aware of the difference.

[11] Meanwhile the Court views the existence of the MIG industry position, as a further drive for efficiency and integrated management of aquaculture in the Tasman District. This can only be of assistance to the TDC which may be processing whole block applications for mussel farming in the future instead of many small ones.

[12] It will be seen from the list of counsel/appearances that a number of individual groups and parties had either withdrawn from the proceedings or made apologies that their attendance was no longer necessary. This was because their concerns were largely resolved – or they were leaving the formulation of the plan provisions to the experts. Nevertheless all parties to stage I of the inquiry have been provided with copies of this stage II report.

[13] Finally, for the purposes of complete understanding of any who may read this further report, we wish to make it quite clear that we have not taken into account:

[a] the Resource Management (Aquaculture Moratorium) Act 2002 assented on 25 March 2002 – which was enacted after stage II of the inquiry was completed;

[b] proposed legislation reforms for aquaculture (coastal tendering)[2].

[14] The latter issue we wish to comment on at the outset. Challenger in its final submissions at stage II consider it is unrealistic for the Court to proceed to a final report for the Minister without cognisance of the announced policy[3]. The reforms are to provide for an additional allocation mechanism to those presently available. Mr Nugent, as planning consultant to Challenger, identifies that from his point of view coastal tendering between

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[2] Interim Report page 211, paras [1184] – [1185].
[3] Challenger Legal Submissions stage II pages 44 – 45.

completing parties is the best allocation process for the AMAs in Tasman District[4]. It would also resolve staging issues, for example, by way of plan change/variation avoiding relitigation of issues.

[15] We addressed the issue of coastal tendering in the interim report and found it was beyond our jurisdiction to consider[5], and despite the Minister of Conservation's very helpful submissions on the issue at stage II, we have put those to one side[6].

[16] In respect of the moratorium, as Marlborough Aquaculture submit[7], any reading of the legislation[8] indicates that any existing application which predates the moratorium is simply to be suspended pending the moratorium term, after which it will be processed in the normal way if it lies within an AMA. The moratorium procedure falls squarely within the TDC's intent in respect of its advice to all spat catching applicants that the TDC will process outstanding applications once our report is finalised[9].

[17] The issue of existing applications is particularly relevant when we address spat catching in the blue subzones.

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4 Nugent Supplementary EIC stage II pages 6 – 7.
5 Interim Report page 211, paras [1184] – [1185]
6 Minister of Conservation Closing Submissions in Reply stage II pages 3 – 5.
7 Marlborough Aquaculture Submissions in Reply page 5.
8 Resource Management (Aquaculture Moratorium) Act 2002.
9 Exhibit 23 stage I.

Chapter 2: From a Far Far Field: Proposed Deeming Provisions

Introduction

[18] The MIG considers that the inquiry can achieve the purpose of the Act and the objectives of this hearing through three alternative means in the proposed plan provisions:

- the first (and most preferred) is through use of a deeming rule;
- the second is a transitional rule;
- the third is a provision (not being a rule) that regulates process.

[19] Currently, applications may not be made for coastal permits for marine farming as an activity in the CMA of the Tasman District because of a moratorium imposed by way of Gazette Notice, which has the effect of a deemed rule in the transitional regional coastal plan[10].

[20] Marine farming within the meaning in the Marine Farming Act 1971 is a prohibited activity in the CMA of Tasman District due to the application of s.371(2) RMA. This has been the case since the RMA was introduced and will remain so until the rules providing for marine farming in the AMAs are beyond Challenger and incorporated in the coastal plan.

[21] The MIG considers that the prohibition created by the Order in Council has precluded orderly development of mussel farming in Golden Bay, and created a *"pressure cooker"*. To avoid the administrative chaos, which it claims would result in the lifting of the analogous lid, it considers some type of transitional plan provision is required to ensure orderly and informed take up of space. It considers its proposed deeming/transitional rules do this.

[22] Since 1991 the TDC has received many applications for spat catching (35 – 40). Resource consents have been granted for that activity in several areas now in AMAs, including those held by Challenger, GBMFC, Tasman Mussels and Golden Bay Mussels. Appeals have been filed by Challenger over a number of the industry blocks which have been granted consents. Challenger also filed applications over the Ringroad sites to prevent them from obtaining permanent structures over its spat catching operations[11]. We understood Challenger undertook to withdraw those applications.

[23] It appears that in order to gain status to argue about the suitability of specific areas for marine farming, the applications were filed by many individuals or companies for resource consents associated with spat catching as a stand alone activity. It is explained the MIG approach arises from case law from the Court of Appeal (*Fleetwing v Marlborough District Council*) which holds that, in the absence of plan provisions which say otherwise, the first in time to apply for a resource consent for an activity in the CMA is given priority if that application is completed in all its aspects[12]. The industry considers that its proposed deeming provision recognises the chief finding in *Fleetwing*, as the applicants identified in its proposed schedule to the MIG's plan provisions are, in fact, first-in-time to apply for mussel farming.

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10 Gazette Notice No. 3826 – Gazette 1984, 2770.
11 Interim Report page 41 para [231].
12 [1997] 3 NZLR 257; [1997] NZRMA 385.

[24] Meanwhile applications by other members of the industry for spat catching have been held in abeyance – the TDC imposing a moratorium of its own volition in order to halt the processing of spat catching applications pending the resolution of these references[13].

[25] It was explained that the three alternative rules proposed by the MIG for consideration at stage II are designed to give parties who have applied for the (on hold) resource consents for spat catching in any area the Court identified as available for mussel farming or spat holding, a "first in time" priority in gaining a consent for mussel farming or spat holding in these same areas.

[26] We intend to evaluate the question of deeming and non method in this chapter of the decision as a proposed two *methods* for achieving the purpose of the RMA. The transitional rule and method rule we analyse elsewhere.

The Proposed Deeming Rule

[27] The proposed deeming rule is as follows:

> *(a) Deemed Activities*
>
> *(i) Applications for the aquaculture activities of spat catching within the AMA Blue Areas defined by the Environment Court in its interim decision (Decision W42/2001) and shown on Appendices A, B, and ZZ of that decision shall be deemed to be applications for the occupation, use and development of the coastal marine area for the purpose of mussel farming (including the erection of structures).*
>
> *(ii) The applications so deemed shall be the first of those advised by the Council as completed in terms of s92 and listed in Schedule 25.1A of this Plan (new schedule to be drafted).*
>
> *(iii) Each existing resource consent for spat catching within the AMA Blue Areas shall be deemed to be an application for mussel farming in those areas as detailed in Schedule 25.1B (new schedule to be drafted).*
>
> *(b) Processing of Deemed Applications*
>
> *(i) On or after the date upon which the aquaculture provisions of this Plan become operative the deemed mussel farming applications listed in Schedule 25.1A and Schedule 25.1B will be processed in accordance with the Resource Management Act 1991 upon request of the holder of the deemed application listed in Schedules 25.1A and 25.1B.*
>
> *(ii) For the avoidance of doubt a request under b(i) above shall be accompanied by information in accordance with the provisions of Rule 25.1.X4.*
>
> *(c) Prohibited Activities*
>
> *(i) Within the AMA Blue Areas any application for an aquaculture activity that is not a deemed application listed in Schedules 25.1A*

[13] Exhibit 23 stage I.

and 25.1B of this Plan shall be deemed to be a prohibited activity for which no resource consent shall be granted.

(d) Duration of Deeming Provisions.

The provisions of Rule 25.1.X1(a) to (c) inclusive above shall lapse on the second anniversary of the operative date of the aquaculture provisions of this plan or after any appeals on a grant of consent to an application made under Rule 25.1X1(b) have been heard and determined, whichever is the later.

[28] The deeming rule[14] presumes that the Court will allow spat catching in the blue areas (subzones) of the AMAs identified in Appendix ZZ attached to the interim report. The transitional rule, which is the alternative to the deeming rule, sets out the specifics of spat catching in the blue zones as an alternative to the deeming rule and we address it under the heading **Spat Catching in the Blue Subzones of the AMAs in Appendix ZZ.**

The Industry Case for a Deeming Provision

[29] The MIG emphasises that:

It is important that the TDC recognises that there are a number of legitimate 'first in time' applicants and/or consent holders involved with the AMAs that have been zoned for the purposes of spat catching or marine farming. It is necessary for the TDC to ensure that the existing legitimate expectations of those parties as to priority are not lost through the provisions of the proposed plan being implemented.[15]

[30] The MIG also emphasises that it was necessary for the Group to gain status to argue the suitability of specific areas for marine farming by filing individual application for spat catching[16].

[31] The legitimate expectations of the MIG members they say arise from applications for spat catching as an activity in its own right. The MIG considers the rights to have applications processed in accordance with the RMA have been frustrated as a result of the TDC's freeze on processing, pending the outcome of these references. Unless the coastal plan gives some form of recognition to the position of these applicants, their rights to have their applications processed are thus unfairly defeated.

[32] The MIG further considers that whether existing applications are allowed or declined, they give rise to rights; either rights to a consent, or rights of an appeal to the Environment Court. Consequently, it is submitted, the existing applications for mussel spat catching consents create priority over all later applications for the same water space, whether the later applications are for spat catching or mussel farming. This follows from the *Fleetwing* principle, and the fact that, if granted, an application for spat catching will confer rights of occupancy to the water space for the purpose of spat catching. It is suggested it is not open to the TDC to defeat those rights of occupancy by granting a different (and later)

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14 MIG plan provisions attached to Mr Kyle's evidence at stage II as Appendix A.
15 MIG Synopsis of Submissions on Deeming, Transitional and Other Methods for Implementing Procedures and Controls in the Proposed Plan: stage II page 9.
16 Ibid page 2.

applicant a consent for mussel farming over the same water space in the absence of an agreement from the spat catcher.

[33] The MIG refers by way of reference to the impediment to marine farming put in place in terms of the Gazette Notice[17], and to the TDC's decision not to process some applications for spat catching received in the period leading up to the finalisation of the plan provisions. Applications could not be made for coastal permits for marine farming as an activity since 1984 because of a moratorium which has the effect of a deemed rule in the transitional regional coastal plan.

[34] The MIG considers that a fair procedure which acknowledges the industry participation in the inquiry and secures its place in the individual AMAs and which implements its proposed controls over the AMAs, is necessary to achieve sustainable management in terms of s.5(2)(c). The MIG considers also that the deeming rule is fairly and equitably the best way forward, as it enables those who have already committed to this process (and expense) to have certainty. And it creates an incentive for the industry players to undertake the expensive ecological studies and monitoring required. Mr Kyle for the MIG considers that the collection of industry participants involved in the inquiry clearly shows they are in the best position to carry such a position forward.

[35] The MIG also considers that, contrary to the Crown's approach to the issue, the difficulties in resolving the priority problems that will arise concerning those with existing applications must surely provide a basis for accepting that the transitional rule meets the tests under s.32 of the RMA. The s.32 analysis prepared by the four industry planners confirms that this is so. It is also pointed out that the rule endorses a predetermined position for iwi participation as the various iwi are known prior to the plan becoming operative. Further, the rule minimises transaction costs and delays in the initial round of consents and the obtaining and receiving of monitoring data.

[36] The MIG identifies that the "deeming" mechanism is not alien to the resource management jurisdiction. One such provision, s.389 of the RMA, has the effect (for example) of making an application for permission for a reclamation under the Harbours Act, an application for resource consent under the RMA. Taking the example of reclamation, s.88(7) RMA, specifically provides that an application for a resource consent for reclamation is to be accompanied by adequate information to accurately show the area proposed to be reclaimed without in any way limiting the operation of s.88(4) or s.92 RMA. In this case, if further information is required, then this could be made available under s.92, which, the MIG considers, meets the TDC's concern that a deeming provision may be inappropriate because further information may be required.

[37] The MIG considers also that the deeming rule is a provision regulating the process for the granting of an application. For the provision to be intra vires, it must fall within s.67(1) RMA, or the *sui generis* of that section. The MIG considers that it is clear that Parliament intended a regional plan to include the process by which resource management policies would be implemented: see s.67(1)(d), (f), (h), (i), (j) and (k). The proposed deeming provision does not therefore appear to contravene the scope and intent of s.67(1). It is

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[17] Gazette Notice No. 3826 – Gazette 1984, 2770: the MIG Synopsis of Submissions on Deeming, Transitional and Other Methods for Implementing Procedures and Controls in the Proposed Plan, page 2.

contended that the jurisdiction for establishing a deemed provision is s.67(1)(k) and is captured as an appropriate "additional matter" for the purpose of fulfilling the TDC's functions, powers and duties under the RMA.

[38] It is submitted that s.68(1) allows a regional rule to regulate not only substance, but also process. Thus a regulation can encompass, for example, how, when and by whom an application is to be made. The industry also refers to s.68(3) RMA and submits that the thrust of the subsection is to ensure controls relate to addressing effects, particularly adverse ones. This, it is submitted, is the end goal of its suggested deeming rule.

[39] And in relation to the power of the Court to include a deeming rule in the plan, the MIG submit that the RMA is enabling – not prescriptive. It does not prescribe administrative steps, it does not prescribe procedures, or what should be in objectives, policies and methods. The ultimate test is whether what the industry proposes meets the requirements of s.32 and Part II of the Act.

[40] The MIG considers also that matters 2(a) and (c) in the Second Schedule to the RMA (issues that may be provided for in policy statements and plans) clearly contemplate allocation of space in the CMA (to specific community groups). As well, s.12(2)(a) specifically contemplates that plans will contain rules relating to occupation of space in the CMA.

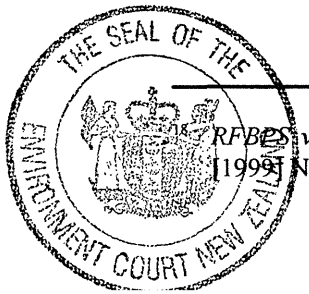
[41] The MIG considers that if the deeming provision offends s.88 RMA (which provides for **any person** to make an application for a resource consent), the provision may be amended and adopted in part or in whole. The crucial point is that the MIG plan provisions do not create a priority, but simply recognise existing ones.

[42] In response to the criticisms of the deeming rule by the TDC, Challenger and RFBPS, the MIG consider also that a number of submissions to the proposed plan (particularly First Wave) requested the right to mussel farm in specific areas where applicants were spat catching already or had applied to spat catch. The MIG submits that the proposed deeming provisions are to implement the interim decision in that they allow for mussel farming in the blue areas of the AMA. The detailed plan rules are thus within the general scope of the submissions/references[18].

The TDC's Response

[43] In a general sense, the TDC submits that what is proposed by the MIG is a "status" rule which confers exclusive standing, and thus priority in being able to apply for consent for mussel farming in AMA blue areas.

[44] In essence, the proposal is a method of allocating space. This issue is of such importance, say the TDC, that it should have been clearly spelt out, not just in references, but also in submissions to the council. In the event, no party made submissions to the TDC, or sought relief in a reference, to limit the range of potential applicants for resource consents to go mussel farming. The TDC considers there are other parties, outside of the current process,



[18] *RFBPS v Southland District Council* [1997] NZRMA 408, *Vivid Holdings Ltd v Auckland City Council* [1999] NZRMA 467.

who have interests in the CMA, and who have expressed strong reservations about the PTRMP seeking to determine issues of allocation of coastal space.

[45] The TDC considers that what the MIG seeks to do is supplant the scheme available in Part VII of the Act for allocating space in the CMA, with a planning regime designed to prefer the industry parties at the expense of others.

[46] The TDC also assessed the Court's power to recommend the inclusion of the deeming and allocation provisions. The TDC considers that the PTRMP must provide for appropriate objectives, policies and rules relating to the use of the AMAs in a manner which reflects the findings of the interim report. It is not, as the industry suggests, to provide for efficient procedures to manage [priority] applications for resource consents in the manner the industry suggests. These procedures are clearly spelt out in the RMA. It is not the function of the Court, the council or the rules in the plan to seek to allocate space to particular individuals whether they are members of the industry, or any other group. The only process authorised to achieve that is contained in Part VII of the RMA.

[47] As to the submissions on legitimate expectations, we were informed the TDC will process applications in accordance with the RMA, and, in the case of competing applications, in accordance with the *Fleetwing* principle. Secondly, in the case of applications currently on hold in the AMAs, it will process applications for activities allowed for in the interim report. It is submitted there cannot possibly be any "legitimate expectation" that the plan will accord priority to applications for mussel farming in the AMA blue areas based on the fact of an existing spat catching application, or an existing consent for spat catching. The TDC considers that there is no need for a deeming or transitional rule to properly reflect existing rights. In any case, in terms of the *Fleetwing* priority, the existing applications for spat catching will not be the first applications for marine farming in the blue areas – under the RMA others outside the MIG may apply.

[48] The TDC also considers the proposed deeming rule places an unwarranted restriction on the standing of "**any person**" to make application for resource consent under s.88(1) RMA. The only qualification on this statutory right is if the activity is prohibited – which is what the TDC intends in the PTRMP by making spat catching in the blue zones prohibited.

[49] As to the MIG's contention that the jurisdiction for the deemed rule arises under s.67(1)(k) RMA, enabling a regional coastal plan to make provision for any of the matters set out in Part I of the Second Schedule, there is nothing in that Part of the Act which confers authority for the allocative rules sought by the industry. In any case, it is s.68(1) which deals with regional rules.

[50] Finally, the TDC reiterates its opinion that the RMA is not about regulating which party gets the space (except for the special procedure in Part VII) but about what activities can or should take place in the space.

The Crown's Response

[51] Crown counsel represented the Ministers for the Environment, Conservation and Fisheries in respect of the deeming issue.

[52] In common with the TDC, the Crown submits that the Court does not have the jurisdiction to include the deeming rule in any proposed plan provisions, and that in any event, the provision is ultra vires on the following grounds:-

- it was never raised in any of the references that particular consortia or individuals expected that their applications for spat catching would allocate to them a priority to have their applications for mussel farming considered before any other applicant;
- it was never raised in any of the submissions at stage I of the inquiry;
- with reference to s.68(2) RMA, the rules in plans are secondary legislation, and can only be valid if there is a power in the primary legislation to make them so: there is no such power.

Thus, there is no jurisdictional basis in the references to introduce rules that grant certain persons priority just because they participated in stage I of the inquiry.

[53] It is submitted that the situation proposed by the MIG would have the effect of treating the individual or consortium concerned as if its members had been granted an authorisation in accordance with the coastal tendering provisions of the RMA, but without having gone through the tendering process – which is open to everyone.

[54] The Crown submits that the interim report does refer to particular sites in terms of the consortium which or person who had applied for resource consents over those areas, but submits that this was understood to be a method of description, not an indication that those particular persons were to be granted any priority over every other person for occupation of those sites.

[55] The starting point for any legal analysis, the Crown submits, is s.63 – the purpose of regional plans. Preparation is undertaken in accordance with the First Schedule (s.64) and the matters to be considered in s.66. Implementation, it is submitted, relates to making use of the plan as a tool to achieve the promotion of sustainable management.

[56] The Crown submits also that administration relates not to outcomes, but to process. Although s.67 specifies that a regional plan "**may make provision for such of the matters in Part I of the Second Schedule**", that discretion is to enable the council to pick and choose between the matters listed in the Schedule, as opposed to adding "**other matters**" [outside the jurisdiction].

[57] The Crown particularly refers to clauses 2 and 3 of Part I of the Second Schedule, and submits that, having identified which matters are to be controlled, or are necessary to implement from the NZCPS, the regional plan shall state the issues, objectives, policies and methods. These all relate to implementation issues, as they are the basis on which decisions are made. Other matters, such as information to be submitted, processes to deal with cross-boundary issues, and procedures to review and monitor the effectiveness of the plan – are all of an administrative nature.

[58] The Crown considers, therefore, that a plan includes more than just "implementation" details – it also includes "administrative" ones. The problem the Crown sees with the MIG proposal is that it is not the inclusion of "**other matters**" which may assist with the council's functions under s.67(1)(k) (an administrative provision), but the inclusion of issues,

objectives, policies and methods (being rules). It is submitted these are implementation tools, not process matters. If s.67(1) applies, then it is paragraphs (a) – (e) that are relevant not the general catch-all of "**other matters**" on a matter of such importance such as deeming.

[59] And the Crown further submits that, as s.67(1)(d) already provides for rules as a method for implementing policies, (and so on up through the line to issues), it is not logical that exactly the same hierarchy may be included for procedural matters with no specific identification of this issue except the catch-all in s.67(1)(k) "**other matters**". To suggest that a further set of rules may be included in a regional plan which is not covered by the specific reference to rules in s.67(1)(d), is not logical. As a "rule", the deeming provision cannot come within s.67(1)(k) for it does not fit within the overall contents of a plan as identified in s.67.

[60] The Crown accepts that a rule or regulation may deal with process matters, but submits this is not the question to ask in this case. The question is whether the RMA (the primary legislation) provides that a regional rule (the secondary legislation) can deal with process - in particular who can apply for a resource consent. The Crown considers that the RMA does not provide for this type of rule. The legislation already provides in detail how an application is made, and the only restriction imposed, is that a person cannot apply for a consent for a prohibited activity: s.88(2). Under the MIG proposal, it is intended, by way of contrast, that everyone (except for an elite few) should not be able to apply to occupy and use common property – space in fact which all of the public "own".

[61] The Crown further submits that the *Fleetwing* principle confirms that the RMA requires applications to be considered on a first in, first served basis. While this may result in difficulties in processing, (except for Part VII issues) the legislation in effect provides no other alternative.

[62] In submissions in reply, the Crown submits that though those with spat catching applications do have priorities in relation to those applications, they are not for mussel farming. If the deeming provision is included in the PTRMP, then it would "create" priorities for applications for mussel farming which do not presently exist.

[63] The Crown submits further that in relation to the deeming rule, both ss.68(1) and 68(3) refer to "activities". Rules prohibit, regulate, or allow "activities". It submits that the purpose of rules is to control such activities – not to provide rules on how matters are to be processed.

[64] The Crown considers that the material provision at issue is not s.32 RMA. Before a local authority (and the Court) can be satisfied that an objective, policy, rule or other method is the most appropriate means of achieving the purpose of the Act, and is the most appropriate means of exercising the function having regard to its efficiency and effectiveness, it is necessary to be satisfied that the matter being considered is one which is *intra vires* the RMA. The issue has always been in terms of compatibility with the scheme of the RMA, particularly in terms of ss.67 and 68.

[65] The Crown submits that the MIG's proposal does not focus on the effects on the environment of undertaking the activity, but does focus on the effects on those who have already lodged applications for resource consents, in order to find a way to avoid the "administrative chaos" it perceives will occur. It submits it would be inappropriate to include

a rule in a plan for the purpose of regulating an activity when it can be identified that the purpose is not in fact to deal with the adverse effects on the environment.

Challenger's Response

[66] Challenger identifies that Yachting NZ and other marine interests commented during submissions and cross-examination that this inquiry was not about allocation of space for mussel farming to particular persons or parties.

[67] Challenger also refers to *Fleetwing* and submits that if it is correct that the first in time is given priority to apply for a resource consent in a CMA, then an application for a coastal permit for spat catching cannot, as a matter of law, afford a priority or status of priority to applicants for a coastal permit for a different activity - in this case, marine farming. Challenger submits that *Fleetwing* is not authority for the proposition.

[68] Challenger considers that the deeming provision has the purported legal effect of prescribing a closed class of persons whose existing consents for a particular activity (spat catching) will be deemed an application for a different kind of activity (mussel farming). For the MIG it is necessary for the deeming rule to change the nature of the activity for the purposes of the deeming provision because mussel farming is prohibited under the Gazette moratorium.

[69] The MIG proposal, Challenger considers, is designed to elbow the public out of its rights of public participation for the purposes of protecting the so-called investment the marine farming applicants have already made in this process. It enables them to use their spat catching consents or applications for "homesteading" purposes, to the exclusion of all others. Challenger submits that this leads to a denial of natural justice in respect of rights which are available to others under the RMA.

[70] Challenger refers to s.88 RMA and submits that the legislation does not provide for the prohibition of applicants or applications for resource consents in the reference process. In the absence of a specific (legislative) direction, Challenger considers that no person can be denied access to rights available, including rights to undertake an activity, albeit with consent, under the RMA. Challenger considers that the deeming rule would lead to results which are completely contrary to the express wording of the Act, its purpose, its principles and its underpinning philosophy.

[71] Challenger endorses the observation made by the TDC, and the Crown, that allocation to particular groups or individuals was not sought in the references and supports their submission that the Court is not embarking on an exercise where an outcome is to be specific allocation to named or identified parties.

[72] In particular, Challenger refer to the First Wave reference called in aid by the MIG and submits that neither the Court nor any party reading that document could possibly have been put on notice over the industry's allocation rule and the process now sought.

Issues

[73] The following issues arise from the various legal submissions on the proposed deeming rule:

- is the deeming provision within the scope of the references?
- did the Court allocate subzones to various industry parties in the interim report?
- what rights do the industry parties have, and do they provide a 'legitimate expectation' for allocation of water space?
- is the deeming provision intra vires the RMA?
- the non rule as a method.
- is the deeming provision or allocation of rights identified in any of the existing Tasman plan provisions?

[74] The last issue did not arise directly, but from the various RMA provisions to do with regional plans (s.66) and the parallels in the proposed RPS with some of the provisions in the First Wave reference. We address it first.

Is the Deeming Provision Identified in Any of the Existing Plan Provisions of the Tasman District?

[75] Section 66(2) RMA requires that in preparing any regional plan the TDC shall have regard to any proposed regional statement in respect of the region. Under s.66(2)(d) it is required to consider the extent to which a regional plan needs to be consistent with the proposed regional policy statement.

[76] Chapter 9 of the current Tasman RPS, (implemented 1 July 2001) deals with objectives and policies to control the CMA of the district.

[77] In assessing Issue 9.4 of that document and the earlier proposed RPS ***Private and Public Rights of Access to Public Space***, the following is addressed under the heading *Allocating Sea Space for Aquaculture*:

> *Marine farming has been significantly limited in Tasman Bay and Golden Bay by a rule initially promulgated under the Marine Farming Act, but which can only be replaced once the council's Regional Coastal Plan is made operative. As a result there is an unsatisfied demand for marine farming sites. Regardless of how much sea space the Regional Coastal Plan makes available for marine farming, there is likely to be competition for sites. There is a need for a fair and open means of allocating sites, particularly if the number of sites to be made available is less than the demand.*
>
> *However, the coastal marine area is public territory and any departure from that must be justified.*

Addressed by Objective 9.4 and Policy 9.4 *Related issue is Issue 9.3.*

...

Objective 9.4:

A fair and efficient process for the allocation of rights to use parts of the coastal marine area, especially where parties are in competition for a limited area.

Reasons:

Where parts of the coastal marine area are available for private activities, after having taken into account the wider public interest, the process for allocating use rights needs to be fair to all parties and administratively efficient.

Addresses Issue 9.4; achieved by Policy 9.4. *Related objectives are Objectives 9.3, 13.2.*

...

Policy 9.4:

The Council will establish procedures for the allocation of sea space between competing applicants that are fair and efficient.

Explanation and Reasons:

For some uses of sea space, such as aquaculture, there is likely to be a continuing demand for sites that is greater than the area allocated by Council. There is a need for administrative arrangements to ensure that competing applications are able to be dealt with in a fair and efficient way.

Methods of Implementation:

(i) The Council will develop policies and rules in the Regional Coastal Plan for the allocation of coastal space. In the period immediately after that plan becoming operative, a closely regulated procedure may be applied in pursuit of equal opportunity for all potential applicants – particularly relating to aquaculture needs. Beyond that initial period, normal application procedure would be resumed i.e. applications lodged as and when necessary.

(ii) The Council will advocate to coastal industries seeking sea space that industry agreements be established to avoid, remedy or mitigate potential conflict in allocation of available sea space.

Anticipated Environmental Results:

(i) Orderly and efficient uptake of any new sea space use opportunities.

Performance Monitoring Indicators:

(i) Degree of satisfaction among industries seeking sea space concerning allocation procedures.

[78] The objective thus seeks a fair and efficient process for the allocation of rights to use parts of the CMA. The policy requires fair and efficient procedures for the allocation of space between competing applicants. The need for administrative arrangements which endorse fairness and efficiency is identified.

[79] Mrs Allan identified that SMW's proposals at stage I addressed concerns about effective allocation in the period immediately following the coastal section of the PTRMP becoming operative. She states that those proposals give a higher level of certainty to the parties and reduce potential administrative costs. She also considers that the proposals now at stage II put forward by SMW are in accordance with Policy 9.4 and the anticipated environmental result, which is the orderly and efficient uptake of any new sea space opportunities[19].

[80] But our perusal of SMW's first set of plan provisions do not point us in the direction the MIG now seek[20]. Under the heading **Structures for Aquaculture**, for example, Mrs Allan provides the following information[21]:

> *The Plan has provided some specific areas, identified as most appropriate and most widely acceptable to the nearby communities, for the purposes of aquaculture. These are Aquaculture Management Area or "zones", and allocate areas, calculated as adequate in total for the next 10 to 15 years of expansion of the aquaculture industry, on the Planning Maps for this purpose. Within these management areas, aquaculture activities will be managed through consent processes, primarily on the basis of controlled or discretionary activities.*
>
> *As a result of this allocation approach, the remainder of the coastal marine area is in an area where consents will not be able to be sought for aquaculture activities. This is the Aquaculture Exclusive Area where aquaculture is a prohibited activity. This gives a level of certainty both for those in the industry, and those who would wish to oppose the widespread or intermittent allocation of space for aquaculture in Golden and Tasman Bays.*

[81] Throughout all stage I evidence, Mrs Allan's evidence in fact emphasises allocation of *areas* on the Planning Maps and allocation of areas in the CMA for zoning for aquaculture. There is nothing about allocation to specific parties.

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19 Allan EIC stage I page 27 para 7.22.
20 Attachment 2 to Mrs Allan's EIC stage I.
21 Allan EIC stage I page 50.

[82] We do not consider that the provisions therefore provide an excuse in the PTRMP for transferring the rights/applications for one activity to another, providing priority for participants in the meantime. The *Methods of Implementation* in the RPS, for example, foreshadows support for a procedure which provides equal opportunity for all applicants, not priority to a closed group of consent holders or applicants for spat catching[22]. The emphasis appears to be on administrative procedures, not allocation. Mrs Allan's Rule 21.X.20 *Methods of Implementation* in her Appendix 2 at stage I foreshadows nothing remotely connected with deeming. Interestingly, the witness identifies the problem the industry face have when at stage I she notes that the open season for spat catching applications prior to the inquiry had little basis for allocation – other than priority of application[23].

[83] The *Fleetwing* principles, therefore, appear to fill the vacuum of any procedure in the PTRMP to do with the administrative arrangements relating to applications for resources and subsequent allocations. Dr P Mitchell for the Ringroad throughout his cross-examination sees the issue as zoning for aquaculture and allocation as two quite separate issues[24].

[84] In submissions on the competitive demand for space and how the TDC might cope with demand for preferential rights received on the notified plan, the TDC advised the Court the *vires* of a proposed balloting rule (enabling balloting of sea space) had earlier been called into question. The TDC undertook a review into what procedures for allocating coastal space were available to it under the RMA[25]. The Minister of Conservation's submission on this provision in the PTRMP (before it was amended) states:

> *Rule 25.1.5(b), (c) and (d) propose a system of allocating rights to apply for a coastal permit for aquaculture via a ballot. This rule is ultra vires as the Council does not have any legal ability under the Resource Management Act to undertake a ballot of this nature. Furthermore the right to allocate preferential rights to apply for coastal space rests with the Minister of Conservation under the coastal tendering provisions of the Act. The plan also provides no indication of the matters the Council would take into account in allocating the right to apply for a coastal permit and therefore lacks certainty.*

[85] The Minister subsequently sought deletion of the balloting provisions from Rule 25.1.5(b), (c) and (d). The TDC advises the balloting rule thus did not survive beyond notification of the plan.

[86] The Court is required to make recommendations on plan amendments to the Minister of Conservation. It is submitted by the TDC that the Minister's earlier submission on the plan is highly relevant to consideration of what is now proposed by the MIG[26]. We agree. Preferential rights for some parties to go marine farming are essentially what the MIG are seeking here, without completing the processes the parties have already begun under the RMA.

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[22] RPS Methods of Implementation (i).

[23] Allan EIC stage I page 12.

[24] Mitchell NOE stage I page 2266.

[25] Tasman District Council and Ministry for the Environment Report on 'Evaluation of Procedures for Allocation of Access to Coastal Place' – March 1997.

[26] TDC Submissions on MIG's (i) Deeming Rule; (ii) Transitional Rule; and (iii) Method of Implementation to be Included in the Resource Management Plan pages 2 – 3.

[87] We conclude that what the RPS calls for on this issue, are only administrative arrangements, and not the allocation of substantive rights to enable the industry to go mussel farming.

[88] The MIG provisions meanwhile at least demonstrate that the industry of its own volition has come together [again] to avoid potential conflict in the allocation of sea space inter parties, in the way it has developed whole subzone management and whole subzone applications for mussel farming – an issue foreshadowed in the RPS *Methods of Implementation (ii)*.

Conclusion

[89] The deeming provision is not identified within any existing plan provisions of the Tasman District.

Is the Deeming Provision Within the Scope of the References?

[90] In one section of our interim report, we investigate the scope of the various references. We identified that the references legitimately must arise from submissions and define the parameter of the inquiry[27]. In terms of the space to be identified for zoning for aquaculture, we confined ourselves to the areas sought by the various referrers, identifying that additional *space* not utilised by existing permit holders also be allocated, exercising our powers under s.293 RMA.

[91] The MIG's focus for the legitimacy of the deeming provision to allocate space for marine farming to an identified group of industry participants, is partly the references. We revisited these various documents with this specific focus in mind. The most relevant submissions and references seeks as follows:

GBMFC and Wallace

- 200 metre extensions landward and seaward at Collingwood as provided for in the Marine Farming Act *and that they be allocated as provided for in the Marine Farming and the Fisheries Act*: a more specific area of the CMA to be defined as available for future allocation for aquaculture;
- the relevant reference seeks similar 200 metre extensions and a reduction of the AEA to 1 nautical mile offshore, excluding the extensions and the farms at Wainui Bay.

[92] We initially identified a provision in the Proposed RPS at stage I of the inquiry in the context of the provision which required the better integration of the RMA and Fisheries Act 1983 and 1996. In the interim report, we found that the fisheries matters that could not be taken into account under the RMA[28] (inter alia):

- those matters relating to s.30(2) issues
- access to an existing fishery by other fishers
- allocation of fisheries resources.

[27] Interim Report page 27.
[28] Interim Report, ***Findings***, page 66.

[93] Thus allocation of the CMA using the Fisheries legislation as a vehicle is outside our jurisdiction.

[94] Section 397 RMA provides for applications made under the Marine Farming Act 1971 before the commencement of the RMA 1991 to be determined under the Marine Farming Act 1971 as if the RMA had not been enacted. Existing permits are therefore protected. Otherwise Mr Coates for the NZMFA identified that the Marine Farming Act process contains no public notification requirement and no public hearing process or appeal to the Environment Court[29]. We did not consider this vehicle for the fresh allocation of space is relevant either.

[95] This did not preclude us allocating additional CMA space at Collingwood and further additional area eastwards under the RMA.

[96] We conclude that this reference does not provide the jurisdiction for a deeming rule.

First Wave

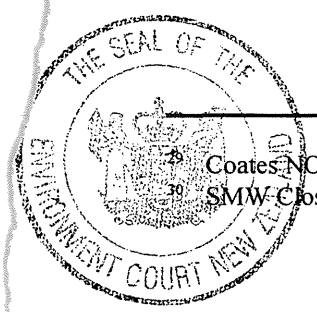
[97] The MIG and SMW particularly called in aid the First Wave reference:

> *This question of allocation is a matter directly raised in the (First Wave) reference ... clearly the reference envisages plan provisions which enable allocations to be made to existing participants.*[30]

[98] The original First Wave submission to the proposed plan sought that the spat catching areas of Tasman and Golden Bays known as the Ringroads should be rezoned as controlled areas for marine farming, on 20 year terms and on conditions similar to those imposed by Marlborough District Council in control of its aquaculture industry.

[99] Note is made in the submission that the Ringroad sites are already occupied from 1 November to 1 May in each year (by Challenger). The submission goes on:

> *Impacts on commercial fishers can be removed by an equitable reallocation of any resources now exploited by fishers affected by permanent marine farming. Two methods of adjustment are possible:*
>
> *(a) allocation of a proportion of Ring Road marine farming area to those fishers exercising quota rights in this area (with reference to the size and fisheries value of the Ring Road areas);*
>
> *(b) holders of Ring Road space purchasing quota of the fish species customarily caught in these areas, and relinquishing or reallocating as for (a) above that quota as a condition of marine farming resource consents.*



[29] Coates NOE stage I page 1041.
[30] SMW Closing Submissions stage II pages 4 – 5.

[100] Prima facie, the First Wave submission (a) and (b) appears to relate to the ITQ quota system. The Court found on Challenger's attempt to achieve integration of Challenger's ITQ property rights into the amended plan that the TDC cannot utilise s.30(1)(a) RMA to achieve that purpose. We found the section is restricted to the integrated management of the natural and physical resources of the region not rights[31]. This finding was not challenged at stage II of the inquiry and the same principle accordingly applies to (a) and (b) of the submission.

[101] Meanwhile, in response to the TDC's decision to delete the Aquaculture Seasonal Restriction Area (ASRA), (including map notations from the proposed area) after the initial proposed plan decision, First Wave gave grounds for the basis of its reference as follows:

> *[i] The identification of parts of the Aquacultural Seasonal Restriction Areas as controlled sites, more than 3 nautical miles from shore, for aquaculture purposes:*
> *[a] is necessary for the efficient and sustainable development of aquaculture in Tasman District*
> *[b] provides an equitable allocation method for resources to existing industry*
> *[c] is compatible with the planning approach adopted in respect of aquaculture by Marlborough District Council.*

[102] Clause (i)(b) also appears to reflect the objective and policy in the RPS referred to earlier. Thus the identification of parts of the ASRAs as controlled sites is expected to provide an equitable method of allocation (delivery) of resources to the existing industry. The reference seeks controlled activity status for aquaculture (the so-called 'allocation method') referred to in the reference on specific sites[32]. And the existing industry was made up of participants at the date the reference response was lodged (1998). There is nothing about deeming spat catching applications or prior consents to become mussel farming ones. Such an inference cannot even be remotely concluded.

[103] First Wave goes on to seek the relief that the TDC zone the following areas as controlled for aquaculture purposes, using definitions, conditions and terms similar to those adopted for this purpose by Marlborough District Council in its Coastal Plan:

> *[a] those parts of adjacent areas A, B and C of Golden Bay's 'ASRA' identified in attached map (annexure C), which are outside 3 nautical miles from shore.*
> *[b] all of Tasman Bay's area A, B and C 'ASRA' identified in annexure C.*

[104] The areas are site specific and the relief sought pertains to areas outside 3 nautical miles from shore, ie the outer Ringroad and the Challenger sites in Golden Bay and also in the Tasman Bay, the Challenger and Ringroad sites[33]. Again there is nothing which contemplates:

> [a] allocation to parties outside the Ringroad and Challenger particularly to those who were not even necessarily contemplated when First Wave lodged its submissions and reference; or

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31 Interim Report page 53 para [297].
32 TDC stage II Submissions in Reply page 4.
33 Interim Report and Findings page 34.

[b] the transformation of spat catching permits/applications into mussel farming ones.

[105] In fact in respect to [a] above, counsel for SMW at stage I of the inquiry submitted:

> *The issue of allocation of any water space which is zoned for aquaculture is not directly before the Court. With respect, it is submitted that in determining references as to the contents of the regional coastal plan, it is not for the Court to assign or allocate space to individuals. Allocation must await any application process that rises from the provisions of the plan as finally determined.*[34]

[106] We did not overlook this submission when we were drawing up the AMAs. It is clearly for the application process to identify who may benefit on a first-come first-served basis. We cannot conceive therefore how the First Wave reference could emerge as laying the foundation for a deeming provision for MIG participants to receive mussel farming priority from spat catching consents or applications. Further, the date of the submission and reference of the First Wave documents preclude allocation to any subsequent industry participants[35].

[107] Finally, as identified by Challenger, SMW did not call any evidence for the Court to identify what the MIG or the First Wave submissions infer. Messrs Tidswell and Edwards were withdrawn from the witness list for reasons which were not made clear. Submissions, without supporting evidence, have little substance on such an important issue[36].

[108] And in fact the only evidence from stage I that we could find of any relevance does not support SMW's stage II stance. It was that of Mr Brierley and appears to confirm SMW's advice to the Court about allocation issues above. In discussing details of the Westhaven Consortium application, Mr Brierley was asked:

> *Q. Tracking down thru this doc the next letter is a letter dated 1 nov 99 addressed to sea health foods care of your bus.*
> *A. That's correct.*
> *Q. At least on my copy what comes next is a map or plan and after it comes a coastal permit application dated Aug 99.*
> *A. Yes.*
> *Q. That is an application for mussels spat catching in Golden Bay.*
> *A. Yes.*
> *Q. And that was becos a gazette notice prevents marine farming.*
> *A. Correct.*
> *Q. But the whole basis of this application is for more than mussels spat catching.*
> *A. It was spat catching we indicated to council we woudl* [sic] *put a further application if the opportunity arose.*
> *Q. And the further application u were up front about was for marine farming in the same area.*
> *A. We havent put in a further application*

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[34] SMW Opening Submissions stage I pages 12 – 13.
[35] Minister of Conservation Additional Submissions stage II 6.11.01.
[36] Challenger Submissions in Reply stage II page 2.

> *Q. The indication u made to council ws this spat catching application wd be fol by an application for marine farming in the saem* [sic] *area.*
> *A. Yes we looked at all our applications and its true that its likely some of the areas we applied for for spat catching we reapplied for marine farming and others hv bn more appropraite* [sic] *for spat catching.*[37]

[109] The notion of successive applications, firstly for spat catching, and then for marine farming appears to acknowledge a further application later in time would be necessary. Whilst Mr Brierley's response is not altogether clear, the SMW intent appears to be. Later Mr Brierley seems to consider that because SMW had applied on a first-in-first-served basis for spat catching, the SMW Group would have priority to go mussel farming[38]. It was not explained in further evidence or submissions how this might occur (at stage I).

[110] What the First Wave submission and reference do, is draw attention to the Marlborough District Council's method of including existing consents in its recently implemented coastal plan. It is clear from the submissions made by counsel for Tasman Mussels (who is also counsel for the Marlborough District Council) that on the basis of the Marlborough rule, it applies to existing permits and licences at the time the plan was proposed. In the case of the PTRMP this is identified as August 1996. In this case the TDC is allowing present spat catching applications to be continued to be processed – perhaps with short term consents but this intention does not signal that spat catching applications may be deemed become mussel farming ones.

[111] The Ringroad submissions state that the Marlborough Sounds Marine Farming Consent Order provides a precedent for putting a method of allocation in the plan. The Minister of Conservation's counsel, who was also involved in the consent order process gave a quite different assessment of the situation. And after identifying that counsel for Tasman Mussels (who was also involved in the Marlborough Plan) had conceded the MIG deeming proposal goes further [than the Marlborough example] but suggests that the principle of inclusion of existing applications and consents remains the same, counsel for the Minister again disagrees. She identifies that the principle that was very important in that case, (both to the Minister and the Department), is that it related to existing marine farm activities. She identifies that Standard 2.5.01 in the Marlborough Plan relates to existing structures and anchoring systems. In her submission, the only precedent the Marlborough Sounds Marine Farming Consent Order establishes – is for existing activities to continue on the same scale and intensity as before. If that is applied to the Tasman example, the rule would apply to applications for the same structures and species. Because of the moratorium in the Tasman District, it would apply only to spat-catching structures and the Collingwood and Wainui marine farms. It could not apply to an activity (marine farming) which is currently prohibited[39].

[112] From the reference, we see that First Wave requires identification of parts of the ASRA as controlled sites for aquaculture purposes. This is seen as an equitable allocation method for resources to the existing industry, and is compatible with the planning approach adopted by the Marlborough District Council. It is not an equitable allocation method to the

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37 Brierley NOE stage I page 1509.
38 Ibid page 1789.
39 See generally Submissions of the Crown, the TDC and Challenger stage II.

MIG entities involved in the deeming submissions. As the Crown submits, our decision [should] allocate *space to activities, not the actors*[40].

[113] And in 'Whole Block Management', an issue identified by SMW in its submissions of a later date, another important feature is identified, namely:

> *It [Whole Block Management] provides a means by which parties to this enquiry may be able to obtain occupancy rights over mussel farming blocks in a manner that avoids defeat of the legitimate expectations that have arisen from prior events, namely:*
> *(a) Applications for consent made, in most cases in 1999. As Mr Jackson confirmed in cross-examination, these were placed 'on hold' pending the outcome of this enquiry on the basis that it would take only weeks or months to be completed.*[41] (our emphasis)

[114] We discuss legitimate expectations elsewhere. Meanwhile the dichotomy in SMW's case is clear. It takes a submission confined on its facts to the Challenger and Ringroad sites as at the time of the submission and the reference, and extrapolates the submission and reference to applications in most cases made in 1999. This cannot be legally or factually correct.

NZMFA

[115] The NZMFA seeks provision for specific sites for subtidal aquaculture in five blocks (specified) in Golden Bay, including existing farms at Collingwood and Wainui within those proposed open areas and the retention of the seasonal sites in Tasman Bay: the relinquishing of sites in the Golden Bay Ringroad in exchange for space in the new aquaculture sites (the five blocks). The reference largely mirrors these submissions but seeks *equal preference in allocation of available water space as that afforded Onekaka Licence 371.*

[116] We had no evidence as to what was meant by *equal preference* in the allocation of water space. The only evidence given by Mr Parris which might be related was *"I am now, and always have been, prepared to surrender marine farming licence 371 so long as I could obtain space at Onekaka landward of the VTL."*[42] What appears to be required here is an exchange of one area of the CMA for another.

[117] In its legal submissions, the NZMFA considered that existing consent holders, whether for spat catching or marine farming structures, should be recognised because of the fact they had statutory consents in place at the time (our emphasis). Counsel for the Association submitted it is not an inappropriate RMA position to adopt. Citing the Marlborough Sounds Plan provision also, NZMFA submits:

> *It would, of course, cause grave hardship to individual farmers if they were to lose longstanding or existing rights as a result of provisions in this new Proposed Plan. Furthermore, the reality of their coastal permits exist and cannot be removed by the provisions of the Plan (other than at renewal) so that*

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40 Crown Closing Submissions stage II page 4.
41 SMW Outline of Opening Submissions stage II pages 7 – 8.
42 Parris EIC stage I page 4.

> *it makes good common sense in a logical legal sense, to recognise the existence of those coastal permits by making Plan provisions for them to continue.*[43]

[118] In terms of the localities identified, the NZMFA sought to protect existing permits – through recognition of areas where structures could properly be located for marine farming purposes, otherwise it supports the cases advanced by the industry that other additional areas *could properly sustain an industry of the order of 50,000 tonnes over the life of the plan.* Mr Coates at the same time acknowledged that the NZMFA had probably stepped back from a fisheries (ITQ) approach – the issue of allocation of space in the CMA [now] being an RMA one[44].

[119] Any inter-relationship between the two disciplines on the question of quota allocation or Fisheries' methods are not for this Court and in light of our ***Findings*** on the legislature interface between the RMA and Fisheries matters nor could they be[45].

[120] In the event, we proceeded largely on allocating areas of the CMA already the subject of existing rights such as those held by the Ringroad and Challenger, GBMFC and Tasman Mussels into subzones – either for spat catching or marine farming and which did not conflict with RMA considerations. We considered that the areas sought had been identified by the industry largely because they equated with sought-after areas to carry out mussel farming and/or spat catching. This was confirmed by Mr Brierley[46]. Allocating to particular parties was not the issue.

Iwi

[121] The joint iwi submission to the PTRMP seeks the relinquishment of spat catching resource consents in the Golden Bay Ringroad sites in exchange for marine farming resource consents in either the designated landward zone landward of the VTL or within the proposed extensions at Waikato and that any system of allocation of coastal space/seabed should recognise the claimed ownership rights of iwi (Ngati Tama, Te Atiawa, Ngati Rarua). The reference seeks the reversal of the 3 mile exclusion zone and to enable each application to be treated on the merits of its locality.

[122] Putting to one side allocation of space to recognise claimed ownership rights, the iwi submission appears not to recognise that the first issue in these references under the First Schedule is to determine suitable areas for aquaculture. It was not to set up a system for relinquishing spat catching consents in favour of marine farming ones when they have different effects. It is to set up plan provisions to allow those matters to occur overall, and to all, by way of objectives, policies, rules and methods.

Conclusion

[123] The deeming provision is not within the scope of the references.

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[43] NZMFA Opening Submission stage I pages 8 – 9.
[44] Coates NOE pages 1027 – 28: NZMFA Opening Submissions stage I page 18.
[45] Interim Report ***Findings*** page 66.
[46] Brierley NOE stage I page 1787.

Did the Court Allocate Areas of the CMA to Identified Parties?

[124] SMW and the Ringroad consider that the Court has allocated various areas of the CMA to various parties. This arises from the Court's approach in equating in the interim decision the various sites with the names of the various companies, and using the word *"unallocated"* on the site under application by Sanfords in Appendix ZZ. It arises also from the Court's comment that we took particular note of SMW's proposal to allocate space to iwi. It was also submitted that we 'allocated' when we stated that the Court could not but *be involved* in the initial allocation decision. This, too, was taken as an indication of our intent.

[125] Firstly, there is no evidence to substantiate what the SMW and Ringroad conclude. The evidence at stage I did not give us a substantive basis on which to draw such inferences. Mrs Allan throughout both her admitted (and not admitted) evidence discusses only effective allocation of [sea] space for the aquaculture industry in the CMA. She lays emphasis on the need to allocate a sufficient area overall, so that there was enough space to 'internally' allocate as she put it. Internal allocation we saw as taking place through the resource consent process although it was not an issue specifically explored[47].

[126] Mr Jackson was cross-examined on the issue thus:

> *Q.* *Cd i turn to the point that you make in para 7.6, that is allocatn, allocatn of the space that is selected. First of all, that problem applies to any approach, doesnt it ,to provsn for aquaculture in the cma?*
> *A.* *Yes.*
> *Q.* *It applies or sorry, adoptg the councils approach of allowg applins to be dealt with on a first in time basis, simply begs the qstn doesnt it?*
> *A.* *Yes that is simply the procedure the act makes avail to council.*
> *Q.* *What is yr concern with allocatn?*
> *A.* *That in much of the coastal marine area in this district at present that may be considered appropriate to a zoned approach is already subject to applns by various parties so that there is limited scope for any other play to enter the industry and i acknowledge that that is not peculiar to a zoned approach, the problem is peculiar to the amt of space sought in the aplns.*
> *Q.* *The councils approach in not identifyg space doesnt overcome those problems does it?*
> *A.* *No.*
> *Q.* *And hv you made yrself familiar with the SMW group proposals?*
> *A.* *I dont rembr them in great detail.*

[47] Allan EIC stage I.

Q. Are you aware they cater for all the major players in the aquaculture industry if i can use that very generic term, and reserve areas for iwi and community groups to ensure there is space which is capable of being fairly, sorry space which is provided that is capable of being fairly allocated?
A. I didnt take partic notes of that aspect of the ev.
Q. I wonder mr jackson if you see any better way of resolvg the allocatn issue than that?
A. No I cant.[48]

[127] As the Crown, the TDC and at least one member of the industry identify, the Court was not asked directly to allocate to specific parties space in the CMA. Marlborough Aquaculture, for example, considers that at the heart of the inquiry, is the establishment of provisions for the allocation of occupation of the CMA for the purposes, *inter alia*, of marine farming. We are clear the Court was not asked to allocate sites to various parties and further cannot, in law, do so. What is before us is a zoning issue as part of a number of reference appeals[49].

[128] In fact the only way the Court could easily distinguish the various sites was by identifying the space with the generic name of the company concerned viz GBMFC, SMW, Tasman Mussels, Ringroad, etc and associated evidence and submissions with that group. That was made clear in the interim report[50].

[129] In order to better define AMAs, these were further refined to individual boundaries, not large amorphous areas of seascape, because this was what the evidence supported. And it was to these boundaries the evidence related, and thus eventually they came to be formed into AMAs. Further, the references generally sought inclusion of existing spat catching consents be they for scallops or mussels. These areas too were already defined and boundaries drawn by identified parties. The same identification applied to those with existing applications.

[130] As identified by Challenger, the only evidence related to the space of the mussel industry parties – their space – and the Court had nothing else on which to make a decision[51].

[131] The TDC and Challenger consider the gazetted moratorium has statutory effect. It prohibits marine farming and applications for that activity. To allow applications for an activity made at the time of the moratorium but not prohibited (spat catching) to be later converted into the activity prohibited by the moratorium (marine farming) would defeat the express provisions of the moratorium and its purpose. This cannot be a lawful outcome. That it cannot is relevant to the nature of the rights. Challenger query whether they exist as rights at all. Many of the rights are uncertain in nature with only some of clear definition[52].

[132] It matters not to the Court that these AMAs are associated with various groups – it is the space allocation and activity with which it is associated which counts. That this was the

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[48] Jackson NOE stage I page 124. In the NOE we have added Q & A for clarity and convenience – a practice we attribute to GBMFC.
[49] Marlborough Aquaculture Submissions in Reply stage II page 6.
[50] Interim Report page 7 para [22].
[51] Challenger Legal Submissions stage II. Appendix C pages 4 – 5.
[52] Ibid pages 26 – 31.

Court's approach is quite apparent from its **Findings on Activity Status** in the interim report which was as follows:

> ***Findings***
>
> - ***Zoning (creation of AMAs) is the method to be used for allocation of additional space for aquaculture in the CMA of the Tasman District.***
> - ***Aquaculture will be a prohibited activity outside any zone or AMA.***
> - ***Spat catching within a zone will be a controlled activity.***
> - ***Spat holding and marine farming within a zone will be a restricted discretionary activity at 50 hectares and the matters over which TDC should exercise discretion are: ...***[53]

[133] Thus the word *"unallocated"* attached to the Sanford site in Appendix ZZ was carefully chosen as the company had withdrawn from the proceedings. It was as yet an unallocated area of space in the CMA, possibly for mussel farming. The Court did not want to identify the site for allocation to aquaculture if there was no relevant evidence to warrant its inclusion. It is public space.

[134] As for the reference to SMW's proposals for iwi, SMW is a major industry group. It made 20 out of 45 applications for spat catching. Mr Brierley considered the Group had applied for a significantly greater number of sites than any other single person or entity[54]. Within the parameters dictated by navigation, natural character, etc it became clear as the inquiry proceeded that the sheer number of sites identified by SMW for its proposals meant that parts of an AMA for the activity of mussel farming would probably be identified with that Group. And through Mr Brierley [at least] there appeared to be an indication that SMW had 'reapplied' for marine farming over some of the spat catching application sites already.

[135] That SMW had considered iwi concerns was an entirely appropriate matter for the Court to consider as a matter of law under the Part II provisions of the RMA. In the light of the stage II evidence, it probably would have been more accurate to say, as did Mr Kyle, that the zoning of certain SMW sites for aquaculture recognises iwi interests. They may well bear fruit in the resource consent process – either for spat catching or mussel farming. But we can put the iwi profile no higher than that.

[136] Further, as Mr Kyle for the MIG identifies, the interim report allocates the blue AMA blocks on the basis of either being existing mussel farms, existing consents for spat catching or consent applications for spat catching received, but not yet processed, by the TDC. These matters, Mr Kyle suggests, are a clear consideration in the Court's deliberation on how much space should be allocated and so zoned[55]. But there was no reference in the interim report – as to where and how they should be allocated for mussel farming and to whom.

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[53] Interim Report page 217.
[54] Brierley NOE stage I page 1514. There was evidence the Ringroad had done the same.
[55] Kyle EIC stage II page 11.

[137] Finally in this regard, despite the TDC's submission that there are other parties out there who might wish to apply for mussel farming permits when the proposed plan is implemented, there was no evidence led to this effect. There was, however, evidence from the MIG that all those with interests in aquaculture in the CMA of the Tasman District were before the inquiry. From this statement we drew the obvious inference that SMW was likely to be a substantial contributor to the industry as a first-in-time applicant to go mussel farming.

Conclusion

[138] The Court did not allocate space in the CMA for mussel farming to individual parties.

Existing Consents/Use Rights

[139] Under this heading, we look at the nature of the different industry existing rights further. It assumes significance here.

[140] The important point to recognise is that the 'rights' issue, if we may term that, was not before the Court at stage I, and was only carefully exposed through cross-examination at stage II[56]. It becomes relevant not only in the allocation issue but also in relation to spat catching in the blue subzones.

[141] It is acknowledged by Mr Kyle[57] that the deeming and transitional provisions providing a smooth transition from spat catching to mussel farming did not have a direct sanction in the interim decision. The questioning of him went as follows:

> *Q. In its barest form even allowing for the additional things you've now mentioned that the plan provisions were directed at it in its barest form what your plan provision prepared for the MIG are designed to achieve is an allocation to the members of the MIG group through the plan provisions*
>
> *A. I disagree with that, the primary objective in assembling the plan provisions in question has been to give life to the matters raised in the decision*
>
> *Q. That's not what Paragraph says*
>
> *A. It quickly became evident in our workings with criticism in formulating an appropriate response that some mechanism would recognise the existing situation within respect bays regarding resource consents and the situation post implementation of this plan would benefit from attention. ...*
>
> *The endeavour was to take cognisance of the factors that prevailed in the respective bays and indeed within the areas now set down as aquaculture management areas at this point in time, without in some way dealing with this current situation the view held was that the formulation of plan provisions that were appropriate to the management of the Aquaculture*

[56] Challenger Legal Submissions stage II pages 17 – 28.
[57] Kyle NOE stage II pages 20 – 23. Kyle EIC stage II page 3.

> *Management Areas beyond the putting in place of the plan would be fought with some difficulty. ...*[58]

The interchange speaks for itself. We turn now to specifics.

Tasman Bay

[142] The Ringroad has mussel spat catching operational sites at the eastern and western ends of the Tasman Mussels site and south of the Challenger site (NN990384). The Ringroad sites now have expired spat catching consents and continue to be exercised under s.124 RMA pending a decision on applications for new consents. The Ringroad also has mussel spat catching operational sites at the eastern and western ends of the Challenger site (NN990386).

[143] Tasman Mussels is the holder of a resource consent permitting occupation for spat catching for 20 years. This is under appeal by Challenger whilst the consent conditions themselves are under appeal by Tasman Mussels. The consent cannot commence until the appeals are determined (s.116(1) RMA)[59].

[144] The important point to note is that the Tasman Mussels consent in question is for spat catching, not mussel farming. As submitted by the TDC, the rights of occupation would not of themselves prevent an application for the activity of marine farming being made or granted over that site while acknowledging that that later consent could only be given effect to on expiry of the existing spat catching consent[60].

[145] We accept therefore the TDC position that it is not correct to state that the provisions of the deeming and transitional rules simply reflect and accommodate existing consents such as these. There is no need for a transitional or deeming rule to do this. The 'reflection' arises under the RMA, not the plan rules. Further, as also pointed out by the TDC, *the transitional/deeming proposals extend party 'rights' and restrict the rights of others by prohibiting them from applying for the activity of marine farming in the blue areas of the Aquaculture Management Areas*[61]. The TDC refers to the First Wave reference and queries where in the reference relief is sought that Golden Bay iwi (for example) be prohibited from applying in their own right for consent to marine farm in an AMA on the plan becoming operative? We agree with the TDC that that cannot be legally correct.

Golden Bay

[146] The Wainui site has a permit for marine farming, including spat catching which will expire in 2008.

[147] The Waikato GBMFC site also has consent for additional spat catching east and west of its marine farming site. These were under appeal by Challenger and others.

[148] Golden Bay Mussels has a central bay site for spat catching but this is under appeal by Challenger.

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58 Ibid pages 23 – 34.
59 Tasman Mussels Submissions stage II page 14.
60 TDC Submissions in Reply stage II page 4.
61 Ibid pages 4 – 5.

[149] The Ringroad in AMA 2 have expired spat catching consents able to be exercised under s.124 RMA pending a decision on applications for new consents for these sites.

[150] In some cases, therefore, resource consents are complete, others are under appeal, others have consents under s.124 of which are in the process of being renewed – as the case may be.

Applications to go Spat Catching

[151] SMW have a number of spat catching applications yet to be heard. Marlborough Aquaculture has one, as does GBMFC.

[152] The TDC has undertaken to hear these as soon as the inquiry is complete. Other applications will be rendered nugatory once the proposed plan is operative.

[153] The MIG deeming rule proposes that applications for spat catching shown on Appendix ZZ shall be applications for the purpose of mussel farming.

Evaluation

[154] Section 124 states as follows:

> **Where the holder of a resource consent that is due to expire –**
>
> **(a) Applies to the appropriate consent authority for a new resource consent for the same activity no later than 6 months before the expiry of the original resource consent, the holder may continue to operate under the original resource consent until the application for the new resource consent and any appeals have been determined; or**
>
> **(b) Applies to the appropriate consent authority for a new resource consent for the same activity in the period beginning 6 months before and ending 3 months before the expiry of the original resource consent, the holder may (if the consent authority in its discretion so allows) continue to operate under the original resource consent until the application for the new resource consent and any appeals are determined.**

[155] Section 124 does not authorise the original activity to go beyond what is sanctioned by the original consent in the meantime until the new consent application is heard. It preserves the status quo: *Steiner v K P & L P Wharfe*[62]. Thus the Ringroad are exercising their [expired] resource consents under s.124 and therefore have a statutory right (as opposed to existing use rights) to do so until the TDC hears the new applications. At that stage the Ringroad may well vary what they require as long as they are not prohibited from doing so under the new plan provisions. This is an issue we return to elsewhere.

[156] Under s.418(6)(d), the Act preserves the status of any application for spat catching ensuring it will be resolved. The status of the number of applications by the Ringroad for spat catching are just that, applications to participate in the spat catching resource with an eye to taking up marine farming when the provisions of the proposed plan are operative and the Act provides the opportunity.

[62] W 61/2000 page 4.

[157] As noted earlier, Challenger's analysis of the MIG plan provisions to allocate to members of the MIG Group includes the point that the issue did not have a direct sanction in the interim decision[63]. Mr Kyle's response to that point was that the matter needs to be viewed in the context of the totality of the approach provided by the MIG. The MIG elaborates on this viewpoint expressing the point of view that *it is necessary for the TDC to ensure that the existing legitimate expectations of those parties as to priority are not lost through the provisions of the proposed plan being implemented*[64].

[158] Challenger considers legitimate expectation is, in essence, a form of public law estoppel. Absent a tenable legitimate expectation in public law, the doctrine of estoppel is not available. Before an estoppel equivalent can apply, the claimed expectations must be:

- permitted by statute;
- be certain in nature;
- be capable of clear definition;
- be justifiable on uncontroverted or non-controversial facts[65].

[159] Challenger submits the expectations claimed by the industry parties meets none of these tests. It cites Fisher J's observation in *Wilbow Corporation (NZ) Limited v North Shore City Council* as to legitimate expectation considerations: *the short answer ... is that mandatory statutory requirements override any expectation howsoever founded*[66]: see *Wade & Forsyth's Administrative Law* (8th ed, 2000) at p 497; *R v DPP exp Kebilene* [1999] 3 WLR 972 at 982.

[160] After examining this issue, we consider the MIG participants cannot put their claims to legitimate expectation any higher than an expectation of procedural fairness[67]. As long as due process is followed, in accordance with the RMA, any legitimate expectation any party or individual might have is fulfilled[68]. The concept is generally confined to processes, and not the substantive result. A legitimate expectation inconsistent with a statutory duty will not be recognised by the Court[69].

[161] In this context, the MIG are entitled to have their outstanding applications dealt with in accordance with the RMA, and the Court of Appeal's findings in *Fleetwing* discussed elsewhere. Any proposed rule which would have the effect of giving the industry's applications for spat catching an advantage or priority over applications for marine farming, goes well beyond any legitimate expectations the MIG may claim.

[162] Clearly too, the MIG can have no legitimate expectation that a provision such as paragraph (a) in the proposed deeming rule will be recommended to be inserted in the plan by the Court, if it creates a priority where there is none. If it simply reflects an existing priority created by the Act's resource consent application provisions, or *Fleetwing*, then it is unnecessary.

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63 Challenger Legal Submissions stage II pages 27 – 28.
64 MIG Submissions stage II page 9.
65 Challenger Legal Submissions stage II pages 30 – 31.
66 [2002] 1 NZLR 114 page 128 [61]. Challenger Legal Submissions stage II page 31.
67 *Coal Producers' Federation of New Zealand Inc v Canterbury Regional Council* [1999] NZRMA 257.
68 *Pring v Wanganui District Council* [1999] NZRMA 449.
69 Supra [67].

[163] Clearly also, para (c), which deems applications other than the ones listed to be a prohibited activity, cuts across the legitimate expectation of other persons that the RMA processes with respect to resource consent applications will be followed. Section 88(2) provides that no application shall be made for a prohibited activity. This is the only exception provided for in the RMA to the general rule in s.88(1) that **any person** may apply for a resource consent.

[164] The MIG's paragraph (c)(i) of the deeming rule prohibits the activity of making specified applications. These are those for an activity (aquaculture) that are not deemed applications listed in Schedule 25.1A and 25.1B. Paragraph (c)(i), therefore, of the proposed deeming rule adds a new class of activities for which no application can be made (the *"activity"* being an application for an activity which is not prohibited) to the class of activities listed in s.88(2). This is contrary, therefore, to the scheme of the RMA. One class of person such a rule would exclude, for example, would be iwi.

[165] A legitimate expectation of preferential treatment even in a process sense (because that is what the deeming rule creates for the MIG) cannot arise simply because a party has expended money and effort in the reference process, or even because the parties have made applications and joined the inquiry as parties in the hopes of achieving some benefit unavailable to others. Whilst the Court may sympathise about this outcome, the industry chose that path well before the inquiry began.

[166] "*Fleetwing*", as the parties throughout suggest, creates a "first in first served" priority for competing applications. The Court of Appeal did not need to decide at exactly what point in the process the applications would be compared (date of application, notification etc). A difference of interpretation at stage II of the inquiry became apparent in the course of submissions on *Fleetwing*. One group contends that *Fleetwing*, although being authority for the proposition that applications are to be dealt with on a first in – first served basis, was not authority for the proposition that a first in time spat catching application could gain priority over a later in time marine farming application.

[167] SMW submits, however, that the existing applications for mussel spat catching consents create priority over all later applications for the same water space, whether the later applications are spat catching or mussel farming. SMW considers that this follows from the *Fleetwing* principle, and the fact that, if granted, an application for spat catching will confer rights of occupancy of the water space. In this SMW appears to be supported by Mr Brierley who was questioned about which entity would have priority to go mussel farming thus:

> *Q.* *thos who hv applied on a first in first succeed* [sic] *basis willhv prior or priority position wont they if the area the Court fixes if any for marine farming is voer* [sic] *the top of where theyv acquired?*
>
> *A.* *Thts corr.*[70]

No further explanation of the issue was given. It is clear to the Court, however, that a prior spat catching consent is not a priority to go mussel farming.

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[70] Brierley NOE stage I page 1789.

[168] The fact of the matter is once the moratorium is lifted, any current resource consents for spat catching only may be implemented once the appeals by Challenger are resolved. And any applications for spat catching are required to be heard by the TDC and decisions given. These too may be appealed to the Environment Court unless the industry decides not to pursue them. Only when such consents expire or are rescinded may the industry go mussel farming. We consider the way forward is not efficient for the industry, but the Court is constrained in what it can achieve. Meanwhile Challenger's concerns with the industry may be over the RMA matters but they may also be outside that jurisdiction being centred in Fisheries issues. That is for the parties to resolve.

Conclusions

[169] We conclude it is outside the power of the Court to recommend the Minister direct the inclusion of paragraphs (a) and (c) of the MIG's proposed deeming rule in the PTRMP. It has been therefore unnecessary to consider provisions (b) and (d) in great detail.

[170] The proposed deeming rule is not sufficiently raised in any reference or submissions. And it is fundamentally at odds with the purpose and scheme of the RMA.

[171] While the industry participants may wish, and feel entitled to, some direct benefit from the effort and costs they have expended in assisting the Court with this complex inquiry, they cannot benefit to the extent of being granted a priority to (and having others excluded from) the AMAs.

[172] This is not an appeal against grant of coastal permit/s for the activity of marine farming. As is the case for any referrer or party to an inquiry, the most favourable outcome that can be expected is a plan which creates an environment, in terms of objectives, polices and rules, favourable to undertaking the activity which the parties wish to undertake. There can be no "reward" to recognise the money or effort expended by industry participants in the form of the deeming rule proposed.

[173] In as far as the proposed deeming rule is advanced to prevent "administrative chaos", that is not a valid resource management reason for inclusion of the rule. We suggest that such 'chaos' may not occur. The MIG is now indicating whole block development with applications to be made by one entity. And as will become apparent in the section on spat catching in the blue subzones, those with interests, rights, and permits will have a range of options by which to further those – or not – as the case may be.

Is the Deeming Proposal Intra Vires the Act?

[174] The MIG suggest that s.67(1) RMA, particularly s.67(1)(k), provides the jurisdiction for the deemed rule. Section 67(1) begins with the requirement that

> **A regional plan may make provision for such of the matters set out in Part I of the Second Schedule as are appropriate to the circumstances of the region ...**
> **and includes issues to be addressed, objectives sought to be achieved as well as policies, the methods to introduce, the principal reasons for a provision and so on.**

[175] Section 67(1)(k) allows for:

> **Such additional matters as may be appropriate for the purpose of fulfilling the regional council's functions, powers, duties under this Act.**

[176] The matters in Part I of the Second Schedule are specified as:

> **1. Any matter relating to the use, development, or protection of any natural and physical resources for which the regional council has responsibility under this Act, including the control of -- ...**

and therein follows a list of matters such as discharge of contaminants, use of land, use of water, noise, etc.

Evaluation

[177] There is nothing in the section which confers any jurisdiction for the allocative rules required by the MIG to transform spat catching consents to mussel farming ones. Further, s.67(1) does not relate to rules. They arise pursuant to s.68(1) which requires the TDC to include rules in a plan to achieve the purpose of the RMA (sustainable management) through providing rules which prohibit, regulate or allow activities. Under s.68(3), the provision specifies:

> **In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect; and rules may accordingly provide for permitted activities, controlled activities, discretionary activities, non-complying activities, prohibited activities and restricted coastal activities.**

[178] In making rules, therefore, the TDC may consider the effect on the environment of activities and rules may provide for a range of activities.

[179] What the MIG are endeavouring to achieve with its transitional rule is not a focus on the effects on the environment of undertaking an activity but a focus on the effects on those who have already made applications.

[180] Clause (2) of Part I of the Second Schedule provides:

> **In the case of a regional coastal plan, any matter relating to the use, development, or protection of the coastal marine area covering the area which a regional council has responsibility for under this Act, in conjunction with the Minister of Conservation, including the control of:**
>
> **...**
>
> **(c) Occupation of space on lands of the Crown or lands vested in the regional council.**

[181] Clause (3) also provides:

> **In the case of a regional coastal plan, any matters necessary for the implementation of any policy stated in a New Zealand coastal policy statement in respect of the Crown's interests in land of the Crown in the coastal marine area.**

[182] Having identified other matters which may be provided for from Part I of the Second Schedule, the regional plan shall state the issues, objectives, policies and methods. As submitted by the Crown, these all relate to implementation as they are the basis on which decisions are made. Other matters such as information to be submitted, processes to deal with cross-boundary issues and procedures to review and monitor the effectiveness of the plan are more of an administrative nature.

[183] It is accepted that a plan includes more than just "implementation" details, but also "administrative" details. The problem here is that what is proposed by the MIG is not the inclusion of other matters which may assist with the council's functions under s.67(1)(k) (a 'catch-all' provision), but the inclusion of issues, objectives, policies and methods (being rules). They are implementation tools, not process. If s.67(1) applies, then it is paragraphs (a) – (e) which are relevant.

[184] A further relevant point by the Crown is that as s.67(1)(d) RMA already provides for rules as a method of implementing policies (and back up through the line to issues). It is not logical that exactly the same hierarchy can be included for procedural matters but with no specific identification of this except the catch-all in s.67(1)(k). A "rule" has a specific meaning in s.2 RMA, being *"a district rule or a regional rule"*. Regional rules are provided for in s.68. To suggest that a further set of rules can be included in a regional plan which are not covered by the specific reference to rules in s.67(1)(d), is not logical. And as identified, the references do not refer to any such issues.

[185] In accordance with s.68(1), a regional plan can include regional rules which *"prohibit, regulate or allow activities"*. It is accepted that by definition a rule or regulation can deal with process, but that is not the question. The question is does the RMA (primary legislation) provide that a regional rule (secondary legislation) can deal with process and, in particular, who can apply for a resource consent (in the face of s.88(1)).

[186] The purpose of rules is to control activities – it is not to provide rules on how matters are carried out from a process perspective.

[187] As submitted by the TDC, a general saving provision such as s.67(1)(k) cannot extend to creating a rule which can only arise under s.68 through deeming an application for one activity to transform itself into another.

Conclusion

[188] The deeming proposal is not intra vires the relevant provisions of the RMA.

Use of a 'Non Rule' as a Method

[189] The MIG suggests that the deeming provision and the transitional rule could be redrafted as a method which the TDC would be obliged to follow in the circumstances of its plan. The MIG cites s.67(1)(d) noting that the word **including** is by definition non exclusive and accordingly Parliament has recognised that rules are not the only methods which can be used to implement policies.

[190] There needs to be, the MIG submits, a method available which recognises the input of the MIG into the first and second stages of the hearing and the ongoing management of the

natural and physical resources in a self-regulatory way. These factors, it is suggested, the TDC may take into account when exercising its discretion to grant resource consents in the AMAs pursuant to the suggested rules in the proposed plan. It could be, submits counsel, purely an administrative technique to keep the applications going[71].

Evaluation

[191] Section 67(1)(d) allows that a regional plan made provision for such of the matters set out in Part I of the Second Schedule as are appropriate in the circumstances of the region and **the methods being or to be used to implement the policies, including any rules**. We accept s.67(1)(d) allows for non rules to implement policies. But that is not the issue.

[192] Part I of the Second Schedule sets out Matters Related to Regions.

[193] The matters identified are also inclusionary, requiring that **any matter relating to the use, development, protection** of any natural and physical resources. There is no suggestion in the phrase **any matter** that this encompasses, includes handing over to a small group of industry members deemed applications to go mussel farming. Clause 4 of the Second Schedule relates to:

> **Any matter relating to the management of any actual or potential effects of any use development etc**
> **(a) The community or any group within the community (including minorities, children and disabled people).**

[194] The meaning of effect[s] is defined in s.3 RMA but they are not directed at who many benefit from the provisions of a plan. They are directed at the natural and physical resources of the region and the environment in which they exist.

Conclusion

[195] The proposed MIG 'non rule' method is ultra vires the provisions of the RMA.

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[71] The MIG Synopsis of Submissions on Deeming, Transitional and Other Methods for Implementing Procedures and Controls in the Proposed Plan pages 16 – 17, oral interpolation.

Chapter 3: Treaty Issues

Introduction

[196] The interim findings by the Court on iwi issues provided some of the relief sought in the Ngati Tama reference and submissions. Other relief was rejected as being outside jurisdiction, whilst other findings sought to provide a steer that some recognition of iwi interests be provided for in the amended plan provisions – the nature and extent of those interests to be identified at stage II of the inquiry[72].

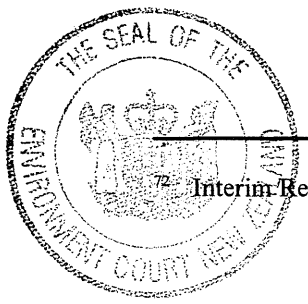
[197] The Iwi's response to the interim report was to circulate draft plan provisions based on an early MIG draft with extensive comments on Manawhenua issues.

[198] The Iwi then filed evidence from Mr S Hedley, General Manager of Totaranui Limited, a wholly owned subsidiary of Te Atiawa Manawhenua Ki Te Tau Ihu Trust, and one concerned with indigenous issues. Mr Hedley spoke not only on behalf of that trust but also on behalf of Ngati Tama and Ngati Rarua. He did not address the plan provisions previously circulated, or discuss Appendix I of his brief, which was a general document headed *Values, Issues, Objectives, Policies* and *Methods of Implementation* for the PTRMP. This effectively meant there was no evidence-in-chief to support the Iwi case on such issues in the proposed plan provisions.

[199] Submissions on various legal issues were provided through counsel who picked up the Iwi brief at short notice. Counsel acknowledged that the Iwi position in this inquiry had been one of shifting sands and he hoped he could [now] bring that to an end. He identified that the Iwi claim was no longer based on Ngati Tama's reference, submitting *the reference is not everything*, nor is it based on the Iwi claim to title of the seabed and foreshore; further it is not based upon customary/aboriginal title. It is based solely on s.6(e) RMA which requires: **the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga** be recognised and provided for. It is considered that the Iwi status as Manawhenua must be recognised and provided for as a matter of national importance (in this case in plan provisions).

[200] Such recognition, Iwi consider, must include providing an area in the CMA of the Tasman District which is to be set aside for iwi to go marine farming without having to rely on any of the resource consents which might be granted to other parties.

[201] Counsel also submits that the proposed plan should not be inconsistent with the now operative Regional Policy Statement ("RPS") for the region: see s.67(2) RMA. Iwi consider that unless the PTRMP makes an allocation of aquaculture solely to Iwi, it is inconsistent with the RPS and therefore must fail.



[72] Interim Report: **Findings** page 208.

[202] In an oral interpolation, counsel acknowledged that the Court's aspirations for Iwi may not be possible in the course of this inquiry and this is one of the great dilemmas facing the parties. In particular, Iwi consider that the Court cannot make adequate provision in PTRMP for Iwi concerns because:

- Iwi current commercial interests remain minor after stage I of the inquiry;
- future marine farming is predicated upon the fact that the current participants will get preferential treatment in the allocation of new space : Iwi query what if the current participants do not – there is no guarantee Iwi will receive an allocation;
- limiting resource consents to 10 years is helpful but such limitation itself will not allow Iwi to participate in marine farming;
- there are no changes in the objectives and policies, put forward by the parties, that go to the heart of Part II RMA provisions;
- possible s.293 amendments to the plan provisions on intertidal aquaculture have not come through in the consultation process;
- the pre stage II hearing meeting did not advance issues of concern to Iwi;
- there is uncertainty around the term *"Treaty Values"* used in the interim report – are they the same as *"Treaty Issues"*[73]?

What Iwi Seek In Their Draft Plan Provisions

[203] The following are the wide ranging insertions provided by Iwi to the plan provisions:

- Amendments to the Definitions Section (Chapter 2.2) to define **Customary Use**;
- A description of Tangata Whenua (recorded as ***"the Manawhenua Iwi"***);
- A description of Te Ao Maori (The Maori Worldview);
- A description of the Customary Fishery;
- Customary Indicators;
- Tikanga Maori Society;
- Te Ao Maori o Mahua: the principles which encompass Maori thinking;
- The instruments of Te Ao Maori and the environment;
- Tikanga Maori;
- The description of Manawhenua Iwi (Ngati Tama, Te Atiawa, Ngati Rarua).

[204] Then follow insertions to Chapter 22: **Aquaculture**. Under *Policies*, the Iwi seek:

- formal acknowledgement of the status of the three Manawhenua Iwi and their standing as Treaty partners with the Crown and its statutory agencies;
- recognition and provision for the relationship of the Iwi with their customs and traditions with their ancestral lands;
- enablement of the Iwi to actively participate in the aquaculture industry of Golden and Tasman Bays in accordance with explicit recognition of their customary use of the CMA.

[73] Interim Report: **Findings** page 208: Also see generally Iwi Submissions stage II.

[205] It is an *Objective* to:

- establish mechanisms for controlling the displacement of customary species by introduced species.

[206] Methods of Implementation include:

- rules that require applications for resource consents to be supported by comprehensive information including details of the recognition of and provision for Manawhenua Iwi;
- a deeming provision similar to that of the MIG in order to allocate straight to Iwi;
- securing access by children to significant coastal areas and customary fisheries resources;
- monitoring programmes.

[207] Under the heading *Treaty Values* is stated the following:

> *(i) A requirement of consent applications whereby, as a result of the actual or potential adverse effects of marine farming on the relationship of Manawhenua Iwi with their traditional waters, waahi tapu or waahi taonga values identified by Manawhenua Iwi, applications will need to explicitly demonstrate adequate and appropriate recognition and provision for the relationship of Manawhenua Iwi with their traditional lands, waters, waahi tapu, sites and other taonga.*
>
> *(ii) Provide advice to consent holders that Manawhenua Iwi have made a claim in the Courts [that they own] [relating to aboriginal ownership rights of] the foreshore and/or the seabed in Tasman and Golden Bays. In the event that the Courts uphold the claim it is possible that the consent holder may need to reach agreement with Iwi in relation to the exercise of consents.*
>
> *(iii) Consideration of any resulting restrictions on Manawhenua Iwi access to, and use of traditional coastal resources [such as maataitai, taiapure and taonga raranga].*
>
> *(iv) In recognition of Manawhenua status in Golden Bay and Tasman Bays, Iwi are to come to agreement amongst themselves as to the names of the various AMAs. The agreed names are to be implemented in the appropriate plan documentation and maps.*

[208] In the rules, the Iwi now seek to be actively involved in the aquaculture industry in Tasman and Golden Bays on the following basis:

> *Included in the area of application is a special provision, being a minimum of 30% of the water space in the area of application, for the use of Manawhenua Iwi in explicit recognition of their relationship with their tradition lands and waters.*

Issues Arising

- Does the Court lack jurisdiction to grant the relief now sought?
- Are the commercial interests of Iwi identified in the Court's decision minor?
- Are current arrangements for Iwi inconsistent with the RPS?
- Are there any amendments which may be made under ss.292 and 293 RMA to further issues raised by Iwi?
- The significance of s.6(e) RMA in the scheme of this inquiry.
- A Tasman Resource Management Plan Variation.
- The Iwi and the MIG plan provisions.

Does The Court Lack Jurisdiction To Grant The Relief Now Sought?

[209] In the Court's Directions of the 2 November 2001 issued before the stage II hearing, we queried whether the plan amendments sought by iwi were within the scope of the relief sought in the references.

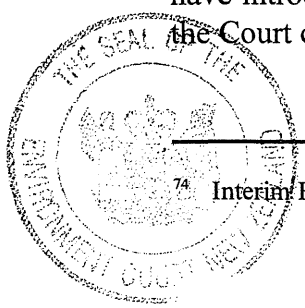
[210] All interested parties on the question of jurisdiction including, significantly, that of counsel for the three Iwi, submitted on the issue, acknowledging that the Ngati Tama reference (to which all three Iwi are affiliated) does not support the relief Iwi now seek.

[211] The observation that Iwi lack the legal protection of a reference was a significant concession by the Iwi counsel. Contrary to his oral submission, it is the Court's view that the reference **is** everything on an inquiry like this and it is one of our ***Findings*** in the Interim Report where we stated:

> - *On references interested parties are limited to matters that should be taken into account in determining the proceedings – that is matters that are within the ambit defined by the submissions and the references and reasonably within the TDC's amended plan: see* ***Vivid Holdings Ltd.***[74]

[212] The relief sought by Ngati Tama in its reference because of the TDC's decision on the 3 mile exclusion zone in the PTRMP, is to enable each application [for areas in which to go marine farming] to be treated on its merits or on the locality in the environment. This broadened the relief sought by Ngati Tama substantially over its submissions. The submissions were largely site specific and included the request that: *Any system of allocation of coastal space/seabed to recognise claimed ownership rights of iwi.* This now seems to be addressed in the Iwi plan provisions under *Treaty Values* in recognition of what Iwi perceive to be those values (as opposed to counsel's doubts about the issue). But as a result of Mr Hedley's approach to the proposed plan provisions, however, we are unable to take the matter further.

[213] Meanwhile none of the Iwi submissions on references sought allocation of the CMA in the manner suggested (a minimum of 30% in the area of application). The Iwi provisions have introduced a fundamental new issue to proceedings which has no legal foundation, and the Court clearly has no jurisdiction to grant the relief sought.



[74] Interim Report: **Findings** page 208.

Conclusion

[214] The Iwi allocation issue is not within the scope of the reference.

[215] This should be the end of the matter. But because Iwi were not legally represented at stage I of the inquiry (except on the question of Te Atiawa's ownership of customary title to the seabed)[75] we set out below what might be considered the 'new' Iwi case and whether it may have some legal validity.

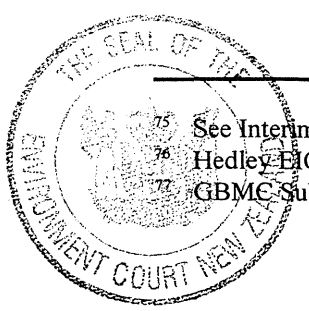
Are Commercial Interests of the Iwi Minor?

[216] Mr Hedley provided some detail on the potential water space which Iwi might be able to secure through their commercial involvement in the Ringroad and the offer of 20% of space which might be awarded to them through the resource consents of the SMW Group. Whilst appreciative of SMW's offer to participate in any space that might be granted pursuant to resource consents, Mr Hedley identifies that it comes at a price which is too high. SMW expects Iwi to meet 20% of SMW's costs in the inquiry. On current figures alone, that rules out Iwi involvement. The Court was advised however, that Tasman Mussels has made an offer similar to that of SMW, also by way of a side agreement. This agreement is stated to be in explicit recognition of Iwi customary rights.

[217] Mr Hedley's evidence-in-chief generally, gave a very negative impression of what might potentially be gained for Iwi as a result of stage I of the inquiry[76]. But under cross examination and re-examination he acknowledged:

[a] Iwi have a 23% interest in the Ringroad (this includes the 5 "Top of the South" Iwi)
[b] Iwi have an interest in the currently operating Wainui Marine Farm (through Iwi 50% interest in Sealord, which holds 2 of the Wainui sites).
[c] Iwi have an interest in the present marine farm at Waikato. Ngati Tama is a member of GBMFC and own an operating 4 hectare marine farm and a 5% share in the extension to the Waikato farm which has been granted (under appeal) and a 5% share in the GBMFC blocks applied for in AMA 1 as shown on Map ZZ.
[d] Iwi already have a 20% share in Challenger which operates scallop spat catching consents on all of the orange areas in each AMA as identified in Appendix ZZ.
[e] Iwi have an interest in the SMW Group through their 50% shareholding in Sealord (Sealord is one of the major parties in the SMW Consortium)
[f] Iwi have an interest in Tasman Mussels (60% of Tasman Mussels is owned by Sealord, and so Iwi also have a 30% share in Tasman Mussels)[77].

[218] Even more significantly, Iwi have the chance to go full production mussel farming on their own behalf (or as a joint venture) if they follow the *Fleetwing* principle (first-in-first-



[75] See Interim Report Appendix Z.
[76] Hedley EIC stage II.
[77] GBMC Submissions in Reply to Iwi Submissions stage II pages 2 – 3.

served) on resource consent applications[78]. Otherwise, they have the opportunity to participate in any of the other resource consents gained and to which they are affiliated.

Conclusion

[219] We do not consider the potential commercial Iwi interests to be minor.

Are the Current Arrangements for Iwi Inconsistent with the Regional Policy Statement?

[220] Counsel for the Iwi submits that there is a clear inconsistency between the RPS and the PTRMP – and that s.67 RMA requires that the PTRMP shall not be inconsistent with the RPS. Although the RPS was not operative at the time of relief of the Court's interim report, it is operative now, and therefore the Iwi consider that s.67(2) applies. This, Iwi opine, is a matter of some significance. Counsel draws attention to Policy 4.3 of the RPS which states:

> *The Council will ensure that tangata whenua interests in commercial uses of ...water and the coast are not disadvantaged relative to others, and will consider provisions for access to such resources where necessary and appropriate.*

[221] The explanation and reasons given for the policy are as follows:

> *Opportunities for tangata whenua to develop resources now under public administration may be constrained by historical or other circumstances. The Treaty of Waitangi means that actions may need to be taken by Council to ensure that resource opportunities can be taken up by the tangata whenua.*[79]

[222] The Iwi consider that there are two distinct threads to the policy, one neutral in that Iwi are not to be disadvantaged relative to others. The other is an affirmative direction in the policy requiring positive action to ensure that Iwi can take up marine farming opportunities. The Iwi consider that the evidence (such as Mr Riwaka's at stage I and Mr Hedley's at stage II), supports the general proposition that some positive steps are required by the TDC to ensure resource opportunities may be taken up by the Tangata Whenua.

[223] Counsel also referred to *Fleetwing*[80] and submit that it only relates to applications for resource consent and not to the setting of policy and rules. Once the latter are put in place, the case requires that where two entities are competing for the right to use space in the circumstances where the success of one party will necessarily prevent the granting of consent of the other, then fairness, combined with the legislative intent contained in the RMA dictates that the first in time should be heard first.

[224] Counsel submits (perhaps on the basis of the MIG submissions and plan provisions which form the foundation of the Iwi approach) that policies which provide the basis for rules, however, can be allocative as can the rules themselves. Counsel submits that the test is whether it is authorised by statute. In the Iwi's opinion s.5 RMA is allocative. Counsel gave as an example a provision he is working with in the Christchurch City plan (the amount of

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78 *Fleetwing Farms Limited v Marlborough District Council* [1997] NZRMA 385.
79 Tasman Regional Policy Statement operative 1 July 2001 page 27.
80 See note 12 supra.

land for urban growth). In this case, he submits, allocation to Maori may be justified by the application of s.6(e). It has been the subject of a policy decision in the RPS which has been through public scrutiny and is now binding on the TDC. Rules must be now found which essentially give effect to the policy.

[225] Finally, counsel poses the question, can the plan provisions be inconsistent with the RPS because the issue was not raised in this reference? Counsel again refers to the evidence of Mr Riwaka and Mr Hedley.

Evaluation

[226] We assessed Mr Riwaka's evidence in the interim report[81]. He required (inter alia) that space be allocated to Tangata Whenua directly, whilst Mr Hedley requires 30% of space within the AMAs to be made available for exclusive iwi control, management and occupation.

[227] Both witnesses fundamentally misunderstand the focus of this reference inquiry. It is not to allocate parts of the CMA to specified parties, but to identify areas of the CMA through zoning – after analysis of the relevant provisions of the RMA and to define activities which may be pursued within the zones. Through the plan provisions decided upon, the parties will be enabled to go marine farming in its various aspects. But that may occur only after resource consents have been implemented, obtained or renewed, and appeals have been resolved.

[228] The Iwi evidence also ignores the realities of the Tasman situation which appears somewhat unique in regional terms. Firstly, all areas within the AMAs identified by the Court are either under application for spat catching by various parties (including Iwi) with cases yet to be determined, or have existing consents for spat catching, or have coastal permits for spat catching which have expired but are operating under s.124 RMA. Some of the current Waikato space is already taken up by marine farming by the GBMFC. Only after those matters are resolved will subzones become available for full production mussel farming on a first-in-first-served basis – as the case may be.

[229] Secondly, because Court has disallowed the deeming and transitional rule, as both outside the First Wave reference and/or as being ultra vires, Iwi may well end up with 30% of allocated space under the AMAs. But only if they make application for a number of blocks on a first-in-first-served basis through the resource consents processes of the RMA – and are successful in their applications.

[230] Finally, allocation of the CMA for a specific purpose (as opposed to a specific party) whilst rejected by the Court in *Boon v Marlborough District Council*[82] has been necessary in the Tasman CMA in order to *zone* areas for marine farming only, because the CMA is public space, and because there is great industry pressure for additional sea space in which to carry out the activity. If zoning had not occurred, the CMA in both Golden and Tasman Bays would not have been able to be managed sustainably under the RMA.

[231] Turning then to the RPS itself, this provides an overview of resource management issues of a region, and in particular is concerned with their integrated management: see s.59

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81 Interim Report: **Findings** page 208.
82 [1998] NZRMA 305: see also the Interim Report page 209 para [1174].

RMA. Pursuant to s.62(1)(b) RMA the RPS is required to state matters of resource management significance to Iwi authorities. Such policies are therefore of a general nature in contrast to the more specific provisions of a plan, like those in the PTRMP.

[232] Various TDC, Crown, and industry submissions on the issue suggest that Policy 4.3 of the RPS is itself not a mandatory direction. The explanation to Policy 4.3 is only enabling and generalist. This is because the word used is *"may"* in the explanation. In fact the tangata whenua interests in commercial uses of water are not disadvantaged *relative to others*. That allegation cannot be sustained on the facts. Also, the phrase *relative to others* in the policy appears to exclude a preferential allocation to Iwi. Further, the TDC is required to consider provision for access only where *necessary and appropriate*. These are major legal qualifications and require focus on resource management reasons for providing spatial allocation at a regional plan stage[83].

[233] In this particular case, we do not consider that Iwi are disadvantaged. They have an emerging presence in the industry and the opportunity to go full production mussel farming once the plan is implemented. The TDC, in opposing the deeming provisions and some of the transitional provisions of the MIG plan, is providing Iwi with an equal opportunity to go fishing with a new net – ie with the opportunity to develop commercial aquaculture on a scale previously not available.

[234] The route to resolve the issue of inconsistency between the RPS and the PTRMP if Iwi still believe there is one, is s.82(1)(b) RMA. This provides that where there is a dispute or an inconsistency between an RPS and a regional plan on a matter of regional significance, any Minister of the Crown, regional council or territorial authority may refer the dispute to the Environment Court. This is the specialist procedure for dealing with disputes such as the Iwi allege.

[235] To date there is nothing before the Court from any of the named authorities to resolve Iwi concerns[84].

Conclusion

[236] We find the current arrangements for Iwi are not inconsistent with the RPS.

Are ss.292 and 293 RMA Able To Provide The Relief Sought By Iwi At Stage II Of The Inquiry?

[237] Under s.292 the Court is empowered to:

> *Direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of – (a) remedying any mistake, defect, or uncertainty; or (b) giving full effect to the plan.*

[238] The TDC see s.292 as a "fixing" provision only. It cannot be used to grant the substantial relief Iwi now seek – a view we share.

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[83] GBMFC Submissions in Reply to Iwi Submissions stage II page 5.
[84] TDC Submissions on Plan Amendments Sought by Iwi stage II paras 7 – 13.

[239] Turning to s.293, the Court may order that policy statements and plans to be changed as follows:

> *(1) On the hearing of any appeal against,... the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.*
> *(2) If on the hearing of any such appeal ..., the Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.*
> *(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Court shall –*
> *(a) indicate the general nature of the change or revocation proposed and specify the persons who may make submissions: and*
> *(b) indicate the manner in which those who wish to make submissions should do so: and*
> *(c) require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.*
> *(4) Where the Court finds any inconsistency between any policy statement or plan before it and any other policy statement ...the Court may, if it considers the inconsistency is of minor significance and does not affect the general intent and purpose of the policy statement or plan, allow the inconsistency to remain.*

[240] Counsel for the Iwi submits that s.293(4) RMA contemplates that there should be a change in the plan provisions unless the inconsistency is minor, which in this case it is not, and he supports the approach that the Court may remove the perceived inconsistency.

[241] As the Crown and the TDC submit however, s.293 is not an appropriate tool to achieve what is proposed, given the extent of what the Iwi request. Section 293(2) provides for changing or revoking **any provision of a plan**. What is proposed here is not intended to change or revoke a provision of the PTRMP, but to add an entirely new rule with the accompanying issue, objective, policy, explanation etc, none of which have been seen by the parties before. We do not intend to revisit the issue.

[242] The Crown also considers that inherent in the scheme of s.293, is the principle that the need for plan amendment, as well as the procedure of adjournment remains within, or flows from, the scope of relief sought in the references; or, it is the kind of relief contemplated in Clause 10(2) of the First Schedule which is consequential upon, or related to, matters raised in submissions and references[85].

[243] Such an approach, submits the Crown, enables the Court on appeal to consider consequential or related relief not clearly spelt out in the reference but necessary to grant the relief sought. It envisages that other interested parties not before the Court either have the

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[85] Crown Submissions in Response to Iwi Submissions stage II page 8.

opportunity to make submissions on what is proposed, or have the benefit of public notification of what is proposed. Section 293 is designed to deal with matters raised as part of a reference that may not have been clearly identified as one inevitable flow-on effect from a reference which requires the opportunity for further public input. It is not appropriate in the scheme of the RMA to avoid the requirements of Clause 14 of the First Schedule which is what the Iwi propose.

[244] On this and other submissions, we conclude the s.293 approach to provide a solution to earlier omissions therefore must fail. There can be no novel or wholly different form of relief introduced under that provision.

[245] As to s.293(4), we do not read that provision as do Iwi. The solution to their concerns if there is an inconsistency which is major, appears to be by way of the route outlined in s.82(1)(a) and (b). As stated above we do not believe there is an inconsistency.

[246] Finally, returning to our ***Findings*** in the interim report where we suggest that s.293 may be utilised to change some of the prior provisions to encompass intertidal aquaculture, nothing appears to have emerged from the consultation meetings to endorse that approach – on reflection for good legal reasons – but these were not specifically identified.

Conclusion

[247] Sections 292 and 293 RMA cannot provide Iwi with the relief sought

Should Te Atiawa Ngati Rarua And Ngati Tama Be Referred To In The Plan Provisions As "Manawhenua Iwi"?

[248] The term *Manawhenua Iwi* was used in a finding the Court made at stage I of the inquiry in relation to the three named Iwi. It was based on the evidence of Dr J Mitchell a respected and knowledgeable Maori consultant from Mitchell Research[86] and that of Mr Hedley, a resource management consultant on Maori issues, giving evidence under the heading ***Ka pu te whu; ka hao te rangotohi*** *– the old net is cast aside and the new net goes fishing*[87]. ***Manawhenua Iwi*** as well as ***Kaitiaki*** is how those witnesses chose to represent the three Iwi and there was no challenge at stage I of the inquiry to either description.

[249] At stage II of the inquiry however, the Crown, whilst acknowledging that the Iwi have the right to identify themselves as they wish, suggests there are difficulties with the terminology. This is partly because of the exclusive nature of the plan provisions relating only to the three Iwi as Manawhenua, (because there are two other Iwi in the top of the south) and because of the inherent (and exclusive) authority the terminology implies.

[250] The Crown provided the following information which we provide verbatim because of its importance:-

> *The use of this terminology* [Manawhenua] *is recorded in the Waitangi Tribunal's report on the Chatham Islands. At page 28 of that report it is said:*

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[86] Mitchell EIC stage I page 4.
[87] Hedley Submissions stage I page 1 EIC stage II page 3.

> The term 'mana whenua' appears to have come from a nineteenth-century Maori endeavour to conceptualise Maori authority in terms of the English legal concepts of imperium and dominium. It links mana or authority with ownership of the whenua (soil). But the linking of mana with land does not fit comfortably with Maori concepts. Recent research tends to agree that the term "mana whenua" itself does not appear in the early records about customary rights to land ...
>
> We are inclined to think the term "mana whenua" is an unhelpful nineteenth century innovation that does violence to cultural integrity. However, subject to such arrangements as may have been settled by the people themselves, our main concern is with the use of the words 'mana whenua' to imply that only one group can speak for all of a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration.

It is acknowledged that the RMA defines "tangata whenua" in terms of "in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area". The Waitangi Tribunal's Report has alerted the Crown to issues arising from the use of the term mana whenua and the inferences that may be taken from it. The use of the term as a proper noun, "Manawhenua", does not resolve this concern. It is respectfully requested that, in light of the Waitangi Tribunal's report on the Chatham Islands, that the use of this terminology be carefully considered before it is proposed for the Tasman District Council's plan. This is even more important if those that are classified as Manawhenua are to be granted a right to water space without payment, as is now sought.[88]

[251] This challenge was not answered by the Iwi at stage II. The '*new*' terminology of *Manawhenua Iwi* being substituted for *Tangata Whenua*, if we may term it that, may well be because the Iwi concerned consider they are indeed *going fishing with a new net.* They also may not have known of the findings of the Waitangi Tribunal and may wish to think differently now that they do.

[252] And as the Crown further outlines the problem, the fact that these particular Iwi have customary use status and where, should not be identified in the PTRMP provisions - at least not at this stage - for the following reasons:

> *It is known for example that Ngati Koata have made a claim to the Waitangi Tribunal, which stretches, from Durville Island to Farewell Spit. Whether this claim will succeed or not is beside the point. It does illustrate, however, that there are other iwi who may seek to claim status over the coastal marine area of Tasman and Golden Bays. Mr Hedley's statement of evidence at 3.4 and 3.8, for example, refers to both Ngati Koata and Ngati Toa as having an interest in commercial aquaculture, but, as neither the Court or Tasman District Council have recognised them as Manawhenua Iwi in Golden Bay and Tasman Bay, they do not have that status.*

[253] The PTRMP is a regional plan. It would be improper for the Court to suggest to the TDC any plan alterations which identify the three Iwi before this inquiry as holding exclusive

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[88] Crown Submissions in Reply to Iwi Submissions stage II pages 4 – 5.

customary rights to the CMA of the Tasman District in the light of the Crown's information. Part of the issue is before the Waitangi Tribunal to be resolved in that forum. The remainder of the customary title to the seabed issue is before the Court of Appeal with a decision currently reserved.

Conclusions

[254] The debates point to a future direction which may be open to the parties – that is – a variation to the plan which would open up the status issue for other Iwi to have their say if the evidence supports this approach. We return to this matter below.

[255] Meanwhile we conclude that the term 'Manawhenua Iwi' should not be a term that is appropriate to use in the proposed plans.

The Significance Of S.6(e) RMA In The Scheme Of This Inquiry

[256] The Iwi consider the relief they now seek is solely pursuant to s.6(e) RMA. This provision is singled out as the substantive provision to support their new relief of at least a 30% allocation of the CMA to Iwi. A similar argument for customary rights of use in respect of s.6(e) appears to have been developed in 1998 by the author of *Developments for Maori under the Resource Management Act* but that article is written in the context of resource use applications – not references[89].

[257] SMW identify that the nature of the Iwi claim now is that it is solely based on customary rights of use – that is, it is an allocation to satisfy Part II RMA matters including Treaty values. It is not a commercial settlement. It is not compensation for adverse effects on the relationship of Maori with land or water, and it is not a positive recognition of that relationship. It is not based on settling a Treaty of Waitangi grievance. SMW is unaware of any other situation in New Zealand where a similar type of allocation of the CMA to iwi has been made[90]. The Crown identifies that the only statutory provision for a percentage of space to be allocated to Iwi is contained in settlement legislation, eg the Ngai Tahu Claims Settlement Act 1998 , ss.315 – 320[91].

[258] In our view the Iwi proposals sideline the function of the TDC on a reference inquiry such as this, which is for the purpose of giving effect to the RMA. Under s.66(1) the TDC is required to prepare plan provisions in accordance with its functions under s.30, the provisions of Part II, its duty under s.32, and any regulations. Thus Part II matters are only one aspect of the plan process and even then s.6(e) issues inform those arising under s.5. No such analysis has been provided by Iwi.

[259] In addition, the TDC under s.30(1)(a) in order to give effect to the purpose of the RMA is required to have the following functions – the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region. The issue of 30% allocation to Iwi is not what is required here.

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89 Kapua P. Lawtalk NZLS 500 22 June 1998 page 37.
90 SMW Submissions in Reply to Iwi Submissions stage II page 3.
91 Minister of Conservation Closing Submissions stage II page 5.

[260] Iwi have made no analysis of s.6(e) in the scheme of the RMA for references. Consequentially there is no case to answer.

Conclusion

[261] The Iwi have not made out a case under the RMA or through their related reference for a 30% allocation of space in the CMA.

A Tasman Resource Management Plan Variation?

[262] The TDC through counsel indicated that it may initiate a variational plan change of its own motion to give some relief to Iwi. The TDC indicated a commitment to meet with Iwi to attempt to negotiate a mutually agreed set of plan amendments which can give further recognition of Iwi interests in the CMA.

[263] It is suggested by the TDC and the Crown that the Court may wish to give its support to such an approach, as Clause 15 of the First Schedule RMA may only operate to direct amendments within the scope of an appeal or inquiry. It cannot be used to direct the TDC to prepare a variation.

[264] We considered the wide ranging nature and extent of the Iwi provisions. They traverse issues much wider than those of ***Aquaculture*** which is what Chapter 22 of the PTRMP embraces.

[265] We came to the conclusion that a variation under Clause 16A has the advantage that what is publicly notified are the actual words of the proposed variation and not the general nature of the change or revocation proposed by Mr Hedley. It allows for submissions and cross submissions in a hearing process before the TDC. Such a process in accordance with the provisions First Schedule to the RMA will ensure that everyone interested in the Iwi approach now has an opportunity to be involved.

Conclusion

[266] We recommend a variation as to a way forward to achieve some relief for Iwi.

The Iwi and the MIG Plan Provisions

[267] There are some Iwi plan provisions which appear possible to include in Chapter 22 of the PTRMP but they are few. There are also plan provisions provided by the MIG relating to the recognition and provision for issues of significance to Iwi. Policies relating to these issues have been included, as well as methods of implementation. The provisions also address issues related to ss.6(e), 7(a) and 8 RMA.

[268] From the proposed plan provisions the parties are to decide which may be intra vires and include them by consent. It is not for the Court to unravel what the Iwi seek. The Court is not a planning authority with executive functions of identifying and promoting specific provisions for a planning instrument. It would not be appropriate for us to attempt to craft our

own amendments and attribute them retrospectively to relief sought by the referrer: see *Leith v Auckland City Council*[92].

Conclusion

[269] The relevant parties are to convene to see what may be included in the plan provisions of interest to Iwi.

Draft Recommendation

[270] We recommend that the TDC initiate a variational plan change to further accommodate Iwi concerns.

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[92] Planning Tribunal Decision A 37/95.

Chapter 4: Spat Catching in the Blue Subzones of the AMAs in Appendix ZZ?

Draft Plan Provisions

[271] The TDC and Challenger in their draft plan provisions have prohibited spat catching in the blue subzones in Appendix ZZ.

Background

[272] The possible exclusion of mussel spat catching from the blue subzones in the AMAs is said to arise as a consequence of the map key contained in Appendix ZZ to the interim report and Findings from stage I of the inquiry. This contains the notation for the blue areas: *mussel farming and mussel spat holding: mussel spat catching* is provided for otherwise on a seasonal and rotational basis in the red areas in the map key: permanent spat catching sites are not seen to be specifically provided for.

[273] It is not clear to the industry whether the key in Appendix ZZ was deliberately intended to exclude spat catching in the blue areas, or whether this is an incidental consequence.

[274] The industry considers that the Court made *no findings* that spat catching be allowed in the blue blocks or that it is not an appropriate activity in those areas. Rather, it is submitted, the Court *assumed* that the cases presented by the parties did not envisage spat catching in zones for mussel farming. In the event, the only way in which the issue is dealt with in the decision, is by notation on the plans in Appendix ZZ.

[275] Consequently, the industry considers there is no basis on which the Court is precluded from considering the issue afresh, and if it considers the point meritorious, adopting the MIG industry proposed plan provisions which deal with the issue accordingly.

[276] The industry says there is a recognised lack of adverse effects from spat catching in the blue subzones in the interim report so why preclude it?

[277] This approach is strongly contended by the TDC and Challenger, which consider the Court is functus officio as to the allocation of space and naming of activities in Appendix ZZ.

The Agreed Industry Position

[278] In the Interim Report under the heading ***Questions of How Much*** [Aquaculture] ***and Where to Enable Further Economic Well Being*** the following statements were made:

> (c) Spat Requirements – Marine Farmers require spat (juvenile mussels) in order to feed their lines. Spat are grown in a separate operation and transferred to culture lines to be further grown and eventually harvested. …
>
> *Industry representatives agree that additional areas for spat catching / holding are required at a rate of 50% of the areas provided for marine farming.*

> This statement is partially reinforced by resolution 11 of Annexure 4 to the brief of evidence (17 December meeting) and which is the Resolution 11 reads:
>
> *That spat catching holdings to be provided for and to be one third of the total area and excluded from tonnage (e.g. if 1000 hectares for marine farming then a further 500 hectares for spat catching or 2:1 ratio).*[93]

[279] Several issues arose from the AIP, the first being that tonnage does not emanate from the activity of spat catching. Secondly, initially spat catching and holding were grouped together as an activity in the industry cases. As stage I of the inquiry progressed it became clear that Dr Gillespie, as scientific adviser to SMW[94] favoured a distinction between marine farming/holding and spat catching, because the latter had potentially no significant adverse benthic effects, whereas spat holding did[95]. Mr Nicolle, an experienced marine farmer, noted the clear physical difference between the two activities – spat holding (as opposed to spat catching) being identified as an activity *akin to growing full crop mussels*[96] (an activity we now refer to throughout this report as full production mussel farming). Such evidence was to formulate part of the basis for the coloured areas in Appendix ZZ in the interim report.

[280] No findings on spat catching in the blue areas in fact were made – for a number of reasons:

- The issues arising from the definitions of *aquaculture,* were not directly before the Court at stage I of the inquiry, with plan provisions being developed at stage II;
- The submission of the referrer First Wave in respect of the TDC's proposed plan, with which the SMW Group, Tasman Mussels and the Ringroad are affiliated, sought as its relief:

  That Council zone the following areas as controlled for aquaculture purposes, using definitions, conditions and terms similar to those adopted for this purpose by Marlborough District Council in Coastal Plan: ...

  This definition was not explored by any party at stage I because plan provisions were deferred[97].

Issues Arising

- What is the evidential basis for the notations in Appendix ZZ at stage I of the inquiry?
- Did the Court find spat catching is prohibited in the blue sub-zones?
- Should spat catching be prohibited in the blue subzones?

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93 Interim Report page 184 paras [1048] – [1049].
94 Gillespie EIC stage I page 3.
95 Gillespie NOE stage I page 1974.
96 Nicolle NOE stage I page 2193.
97 TDC Submissions in Reply on the Issues of (i) Staged Development of Mussel Farming; and (ii) Spat Catching in Areas Zoned for Mussel Farming Stage II page 6 para 23.

What is the Evidential Basis at Stage I for the Notations in Appendix ZZ?

[281] Mr Kyle, one of the planning consultants to the industry, in his evidence-in-chief at stage II of the inquiry correctly identified the position taken by the Court at stage I as follows:

> *... that the IR zones separate areas for spat catching and mussel farming. The Court has endeavoured to provide sufficient spat catching space within the ... zones to meet the spat catching/mussel farming ratio stated by the industry to be necessary.*[98]

[282] In our view, the issue arising, at stage I, was how much space and where the Court considers should be alienated from the public domain while the effects of marine farming activities are still uncertain[99]. It became clear to us as the hearing progressed that space for production mussel farming (as opposed to seasonal and rotational spat catching) was going to be considerably restricted for RMA reasons (navigation, natural character, etc).

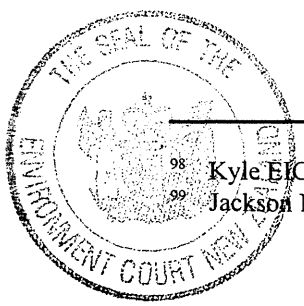
[283] In writing this decision, we revisited the original evidence which shaped the decision to notate the maps in Appendix ZZ the way we did. We addressed it in the context of sustainability and efficiency as required by s.32 of the Act. The evidence of the relevant witnesses is briefly summarised under the name of the industry party which produced it in Appendix 1.

[284] By way of introduction, we note as stage I progressed several key witnesses demonstrated inconsistencies in the way they viewed spat catching and mussel farming as a combined operation. This evidence was confusing.

[285] We note too the outline in Appendix 1 is set in the context of general stage I evidence from the industry. This impressed upon the Court the pressures for further development of marine (mussel) farming in the Tasman District.

[286] Some of the key conclusions from the evidence which contributed to our decision regarding spat catching areas were:

- as to which spat catching sites are desirable, apart from Wainui, Collingwood/Waikato and Mr Goulding's site in the Ringroad, we remained unclear for only the Ringroad, Collingwood and Wainui sites had attracted a certain amount of research;
- commercial quantities appear to be available in Golden Bay;
- Wainui was presented as a high quality and quantity spat producer: as we recommended in our interim report it be phased out because of the natural character values of the inshore areas of Golden Bay: this factor and how it might affect the AIP ratio had to be considered;
- several witnesses supported independent choice for farmers to go either spat catching or marine farming or both;



[98] Kyle EIC stage II page 9.
[99] Jackson NOE stage II page 43.

- water quality was raised as an issue: we considered that if space was to be restricted, it might not necessarily be efficient to take up [potentially] classified waters with large spat catching activities;
- convenience was also raised: moving spat around is apparently harmful to its survival – so there should be *"local"* spat supply;
- because production mussel farming areas seem to be at a 'premium' in Tasman District, productive sites like Collingwood/Waikato and the Tasman Mussels could be fully utilised for production mussel farming as opposed to a mix of spat catching/holding/farming – when spat catching was uncertain (as in the 1995 year cited by Mr Wallace);
- the urgency for further production mussel farming space in the CMA is such that as soon as the references have been completed *lines in the water* will be implemented immediately;
- we calculated that if spat holding became part of production mussel farming, at least an extra 10 tonnes per hectare could be obtained if there was no provision for spat catching in the mussel farming areas: Mr Pooley confirmed the AIP position that spat catching and holding were to be separately provided for, and that that was the AIP position on a 2:1 ratio;
- spat catching is a very uncertain science in the Tasman District – the results have been patchy in both bays despite the industry's best endeavours – perhaps because marine farming has not been undertaken in the area to any great extent;
- we were urged to recognise existing consent holders: we considered this approach to have a measure of efficiency, as the existing coastal permits exist and cannot be removed by the plan (other than at renewal);
- early on in the inquiry, spat holding was seen as having the same effect as spat catching, with marine/mussel farming separated out: this was later reviewed by Dr Gillespie: it became clear that structures for spat holding should be subject to the same controls as mussel farming (not spat catching);
- we noted that *"tonnes production"* does not come from spat catching: and, if staging was not necessary for some spat catching areas, then they could be set aside outside the full production mussel farming areas;
- it seemed more efficient to allow the marine farming industry to begin full production mussel farming immediately the plan became operative and any mussel farm resource consent applications had been resolved;
- we were conscious of two matters of particular relevance: the requirement for spat as the driver of the industry and the overall viability of the marine farming industry through the provision of enough space for five production mussel farming/spat holding;
- integrated management of spat catching with spat holding and production mussel farming was seen by some as an efficient RMA process;
- it was unclear to us where spat catching might fit in with staging – Dr Gillespie at stage I had stated after production farming is established – yet from the evidence we saw spat catching as a basic requirement for the industry, and a precursor to any other marine farming activity;
- SMW did not appear to think staging for spat catching was necessary in both bays in the areas zoned specifically for the activity – a point which had efficiency attractions also;
- securing permanent (as opposed to seasonal) spat supplies appears critical to marine farmers like Mr Goulding, but we concluded that may not be able to be

achieved until it was known where long-term, effective sites (like Wainui) are located;

- many of the industry groups have commercial links with other existing spat catching areas, particularly in the Ringroad sites which would be available for spat catching on a seasonal basis;
- we did not see spat catching in the blue areas as an advantage to the industry because a spat catching area could never be transformed into a full mussel farm production without the parties going back to the TDC for further resource consents because the effects are different;
- it is desirable to have spat from a variety of geographical sources because of their different qualities and growth characteristics;
- it was Mr Nicolle's evidence that the Ringroad has the ability to provide enough spat catch for the industry in the Tasman District for the foreseeable future;
- the status of the GBMFC, Golden Bay and Tasman Mussels spat catching sites, which are under appeal was unclear;
- we could identify more spat catching areas than the AIP required so that the industry was not unnecessarily constrained, particularly if natural events intervened;
- spat catching could occur on a seasonal basis in identified areas from the day the plan becomes operative;
- under Dr Gillespie's staged proposal, there would be more than enough spat 2 – 3 crop cycles later (given the AIP) – until at least the time when all the blue areas are in full production;
- there were a number of unknowns to be further resolved such as the status of existing consents and applications for spat catching in the blue subzones.

Evaluation

[287] A *"zone"* refers to the designation of *"a specific area"*. *"Zoned"* means *"arranged or distributed according to a zone or definite regions"*[100]. We see a zone as equated with an *AMA*. *"Subzones"* we saw as the smaller regions within an overall zone or AMA, for example, the blue, orange or red areas in Appendix ZZ. They relate to distinct activities – all of them encompassed by the definition of *Marine Farming* as in the Marlborough Plan definition, which we refer to again elsewhere.

[288] In assessing where spat catching as opposed to spat holding/mussel farming might go in the CMA, it would have been very simple for the Court to have provided for spat catching in the blue areas we earmarked for mussel farming/holding. In essence, we could have approved that 15% of each block within an AMA be set aside for spat catching on Mr Nicolle's figures. This would have diminished by approximately 38 hectares, the number available for spat holding/mussel farming in each 250 hectare block. But for some areas, we did not know whether spat could be caught there to meet the AIP requirement. Apart from Wainui, Waikato and Mr Brown's Ringroad site and some of the Ringroad sites adjacent to the Tasman Mussels' site, the parties were not at all clear about the 'best' sites. Meanwhile 38 hectares odd per 250 block would have to be found for spat catching in other areas.

[100] Gillespie EIC stage 1 section 3.2e pages 3 – 4.

[289] Further, all relevant references in various forms had asked that existing consents should be respected. If spat catching was to be provided for in the mussel farming subzones then a corresponding percentage of existing space would have to be cut back – and it was likely to be on the Ringroad sites. These were high on the reference requests for retention.

[290] What we did know as accurately as we are able to gauge, is the number of hectares which might support a certain tonnage. What we do not know, as accurately, is where and when spat catching may occur. We may never know – accurately. Spat populations under normal circumstances appear to be limited by natural settlements. We note the management of natural settlements had been built in to Challenger's CSEP and are incorporated into its management plan. We considered whether the industry could do likewise on its sites – but this issue was not explored at stage I[101].

[291] Dr Gillespie's Attachment C to the SMW's Closing Submissions under the heading *Suggested Time Line for Staged Development* (attached to this report as Appendix 2) refers to selection of stage I sites (eg 50 – 75 hectare blocks shown in Dr Gillespie's diagram). That diagram refers to farm blocks under the heading *Marine Farm Monitoring Area.* It states *No additional farms or spat catching areas should be sited within at least 500 metres of stage I sites in order to avoid compromising interpretation of monitoring results.* And under the suggested *timeline for Staged Development* 0.5 years and 3.5 years, reference is made to Appendix C to *"stocking"*. We took this to mean seeding of the lines – as opposed to spat catching on site and progressing to mussel farming. We failed to see on the Gillespie model that mussel farming was seen by SMW to be an integrated process absorbing spat catching into spat holding and onto mussel on-growing and harvesting.

[292] And then attached to SMW's Closing Submissions also, were Attachments D and E, *Schematic Diagram of SMW Proposals for Tasman and Golden Bays.* They are attached to this report marked Appendix 3. Under the heading *Activity Status* the following were identified:

> ***Activity Status (Tasman Bay)***
> *(refer para 3.8.4 (c) submissions)*
>
> *(a) Surface Floated Structures: Mussel farming, spat catching/holding on sites less than 50 ha*
>
> - *controlled*
>
> *(b) Surface Floated Structures: Mussel farming, spat catching/holding on sites 50 ha and more*
>
> - *discretionary*
>
> *(c) Sub-surface Floated Structures: Mussel spat catching*
> - *controlled*

[101] It was referred to briefly by Mr Kyle at stage II. It was ruled out as an option without much explanation.

(d) Aquaculture outside management areas

- *prohibited*

Activity Status (Golden Bay)
(refer para 3.8.5 (c) submissions)

(a) Surface Floated Structures: Mussel farming, spat catching/holding on sites less than 50 ha

- *controlled*

(b) Surface Floated Structures: Mussel farming, spat catching/holding on sites 50 ha and more

- *discretionary*

(c) Sub-surface Floated Structures: Mussel spat catching

- *controlled*

(c) Sub-surface Floated Structures (only) mussel spat catching within GBML site

- *controlled*

(e) Aquaculture outside management areas

- *prohibited*

[293] The activities were variously seen by members of the Court as either mussel farming or spat holding/catching – or – mussel farming as an integrated process with spat catching and holding. The *"Notes"* at the end of the diagram indicated to the Court as a whole, that mussel farming areas and spat catching areas were to be allocated on a 2:1 ratio. We concluded the Schematic Diagram was not clear. And the emphasis in the Attachment was on the *Activity Status*, not matters of integrated management. The activity statuses themselves seemed to distinguish between activities with subsurface or surface floated structures and areas taken up. As the diagram came in with closing submissions, at the request of the Court, it was not the subject of further discussion.

[294] As against all these issues, and our conclusions reached in respect of the evidence (above), the question of integrated management of a mussel farm – moving from spat catching to harvesting of mussels, whilst obviously desirable, was left unresolved. Spat catching subzones (in both bays) were allocated on a scale to provide for mussel farming on the basis that all the blue subzones would eventually be in full mussel farming production. It seemed to us that when spat holding was placed as an activity alongside mussel farming because of its adverse effects, the most efficient way the Court could see to proceed was separating out the activities of spat holding/mussel farming on the one hand, and spat catching in the other. This appeared to be the basis of the AIP position. Once the decision was made to separate out the activities, the Court was generous in providing spat catching areas we considered sufficient to allow for every contingency.

[295] Finally, at the first stage of the inquiry, which was focussed on the question of *"how much and where"* some matters were not addressed due to lack of evidence. They were:

- the status of the existing applications for spat catching in the blue subzones;
- the status of the existing consents for spat catching in the blue subzones identified for mussel farming;
- the status of the expired consents for spat catching operating under s.124 RMA pending decisions on applications for replacement consents.

Conclusion

[296] The Court made no clear findings in respect of spat catching in the blue subzones. It allocated areas of the CMA chiefly on the basis of the AIP and the evidence as at stage I.

Did the Court Find Spat Catching in the Blue Subzones Should Be Prohibited?

[297] The short answer to this question is no. The Court assessed and determined the activity statuses for each zone and subzone shown in Appendix ZZ. Given the demand for space in the Tasman District for full production mussel farming and the allocation of what the Court considered sufficient spat catching area, the Court did not consider it necessary at stage I to allocate an activity status to spat catching in the blue zones.

[298] Definitions of each activity were also not set out. The future of remaining spat catching applications was also very unclear. Further, the Court had not been told at stage I how the industry was going to progress from spat catching to full production mussel farming and this was an issue of some significance.

Should Spat Catching Be Prohibited in the Blue Subzones?

[299] The transitional provisions of the MIG plan are predicated on spat catching being provided for in the AMA blue subzones. The transitional rule requires that prior to making an application for a mussel farming consent within any AMA blue block, an applicant must already have a consent for the occupation and disturbance of the CMA by structures and for the use of those for mussel spat catching. Prior to utilising the mussel spat catching consent a baseline assessment of benthic conditions must be undertaken. Any applicant must undertake mussel spat catching pursuant to that consent for at least one spat catching season to enable monitoring data of the effects of spat catching on the benthic environment to be obtained[102].

[300] The MIG proposed provisions allow spat catching in the blue blocks as a controlled activity for six months of the year only (Rule 25.1.X3) and otherwise as a restricted discretionary activity (Rule 25.1.X4).

[301] The transitional provisions are supported by the evidence of Dr Gillespie at stage II. He now sees some ecological benefit in having a season of spat catching before full production mussel farming is undertaken in the blue subzones instead of after. He indicates the monitoring data obtained would provide some information about the effects of structures and the activity on the benthic environment. But he stresses it is important that baseline

[102] Kyle EIC stage II.

conditions are determined before spat catching structures are installed – that the scientists would have to think not only of spat but also biomass and filtration capacity. And he also considers sufficient buffer zones/separation distances would need to be maintained around areas developed for mussel on-growing. He considers spat catching will have some effect – less than mussel farming/holding – but cannot say precisely what – until the work is done[103]. Dr Gillespie also explained he had assumed that spat catching would be permitted as a controlled activity in all subzones in which mussel farming was permitted, which is why he made the distinction between marine farming and spat catching and spat holding[104]. This clarified some of the difficulties we had with Attachments C, D and E to the SMW submissions mentioned earlier.

[302] Between stages I and II of the inquiry, one issue which came to prominence and of which we took particular note, was that *Gymnodium catendum* (algal bloom) put an embargo on the movement of spat from contaminated areas of the country. This resulted in s.116 applications by GBMFC to allow it to spat catch on the sites for which permits had been granted by the TDC at Collingwood/Waikato but which were under appeal awaiting resolution. Mr Goulding, at stage II, considered that extra space for spat catching over and above what the Court allocated at stage I, gives flexibility in times of a ban of supply of Kaitaia spat. There was a necessity to ensure a constant supply to the industry.

[303] It was also restated by Mr Goulding that for integrated marine farm management the ability to catch spat is important. He touched on the issue of the various activities for which the Court was zoning thus:

> *Although it is recognised by marine farmers that spat catching is a separately identifiable activity from marine farming, the fact of the matter is that the activity of spat catching is also an integral part of an integrated process: when marine farmers asked in their submissions or references for marine farming to be permitted in the areas identified, the expression "marine farming" was intended and assumed to automatically include spat catching.*[105]

[304] The MIG considers that it would be contrary to the principles of the RMA to zone subzones only for mussel farming without allowing spat catching as part of that process. The activity has no adverse effects and it enables a farmer to integrate his farm from a management perspective. In terms of efficiency the advantages of being able to catch spat as part of an integrated marine farming process are, it considers, of major significance.

[305] The further evidence from Messrs Goulding and Nicolle at stage II, considered that the factors which result in a farmer utilising the blue areas for spat catching and harvesting might be year round availability of the resource, post season retention rate, crop cycles, or longline availability. The most important reason, it was stated, is to take advantage of the alternative for catching mussel spat during the period when access is not permitted on the seasonal sites. It is not practical to lay spat catching gear during the last month of the season because it has to be removed before a viable settlement has occurred. Delays may also occur at the start of the season in getting longlines and anchoring systems reinstalled.

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[103] Gillespie NOE stage II page 119.
[104] Gillespie EIC stage II page 9.
[105] Goulding EIC stage II page 9.

[306] It is submitted by counsel that the MIG definition of *mussel farming* in its plan provisions recognises and gives effect to the full marine farming process. It is submitted that it is Mr Goulding's unchallenged evidence that mussel farming as an activity involves all aspects of the mussel growth process from spat catching (where that is possible and it is not always possible on all sites – eg Marlborough Sounds) through to harvesting. It was submitted that the Court did not address this aspect of mussel farming in its initial considerations.

[307] It is Mr Goulding's evidence that just because scallop spat is settling in the November – April period does not necessarily mean that that is when the mussel spat is settling. In fact, if the Wainui example is analysed, very successful settlements and survival rates are achieved during the winter season (April – June). During the summer very high settlements are recorded but often their survival is quite low. In Tasman Bay commercial quantities outside the seasonal areas may occur in July – August. Further, the likelihood of heavy over-settlement of green shell mussel spat may require an additional seeding process where the over-settled mussels would be separated from the main crop and reseeded as spat for later crop production.

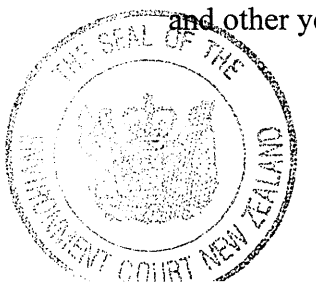
[308] Another of the major difficulties Mr Goulding has is that spat catching is a process which will happen in any event as part of marine farming. When lines are put in the water to on-grow seeded spat to harvestable size, it is unavoidable that they will continue to catch new spat. There is an awareness that spat catching is a legitimate bi-catch to marine farming operations in any event.

[309] At stage II also, much was made by the industry participants generally, that as either holders of or applicants for spat catching consents in the CMA of both bays, the Court should recognise their commitment to the process and the research required for a viable industry, by providing for spat catching in the blue subzones.

[310] Otherwise, it was stated the evidence of stage II indicated that spat is available in the blue zones in commercial quantities and on a year-round basis. The NZMFA have a monitoring site on the Ringroad block next to Tasman Mussels in AMA 3B; this shows that there is a viable commercial spat fall which occurs in this area throughout the winter period.

[311] The [new] NIWA data also represents a potential level of over-settlement on mussel farm crop lines and indicates that the spat over-settlement will be significant at certain times of the year. The ability to catch this spat it was stated enables the industry to provide for its needs at times of the year when spat would otherwise not necessarily be available (because of seasonal issues with Challenger).

[312] Further, the industry considers the Court acknowledges the lesser impacts of spat catching in the interim report and in these circumstances it is difficult to see any environmental reason why spat catching should not be permitted in the blue zones. Also, spat catching occurs the minute lines go in the water and cannot be prevented. The industry emphasised spat catching is not a precise science – some years spat will be there to be caught and other years it will not be.



[313] Finally the industry considered the effect of separating out the activities would require additional space and GBMFC submitted there is no evidence or otherwise that the Ringroad blocks are successful for spat catching[106].

Evaluation

[314] We looked at all the issues raised at stage II, some of which we had heard before. For example, when Mr Nicolle gave evidence at stage I, a voluntary ban of Kaitaia spat was in place by the industry so that was a factor we had taken into account at that time[107]. Mr Nicolle also stated that the 2:1 mussel farming/spat catching ratio of the AIP position *includes the need to take spat to other regions*[108] – hence his figures had calculated enough spat not only for the mussel farming activity within the Tasman District but for the other areas outside (the exact amount required was not specified). So that issue we put to one side also.

[315] Further, there was no evidence that separating out the activities would require further space – the planning evidence of Dr Mitchell was to the contrary. And as far as spat catching on the Ringroad blocks is concerned, Mr Nicolle's earlier evidence was uncontroverted on the subject, whilst the evidence at stage II verified that some Ringroad sites (at least) were very successful – namely that of Messr Brown, Goulding and NZMFA.

[316] What did change at stage II was the confirmation by Dr Gillespie, firstly, that spat catching could begin production mussel farming within the 250 hectares as part of a seamless integrated process (as opposed to being relegated to stage 2 as at Waikato). At stage II too, there was the acknowledgement by all the planners that with no significant adverse effects anticipated from the spat catching activities there was no reason for spat catching to be excluded from the blue subzones.

[317] Mr Jackson for the TDC acknowledged that there was no marine farming practice as to why spat catching should not be part of an integrated process[109]. Mr Nugent, for Challenger, also acknowledged that spat catching in the blue area could be part of an integrated marine farming operation as long as it was ancillary to the overall operation and this should be the test. He saw spat catching as part of the initial 50 hectare stage I development with spat holding for the ongoing stages[110]. This was a major concession from a witness for a party which was opposed to spat catching in the blue subzones. Mr Nugent explained he was concerned that if the 3000 hectares was consumed for spat catching alone, it would preclude development of marine farming and be an inefficient use of the CMA and its resources. We finally do not see this occurring.

[318] In re-examination, Mr Nugent acknowledged he did not know that the Court had received similar evidence to that given in stage II by Mr Goulding at stage I of the inquiry, and that the Court had made a distinction between mussel farming and spat catching in spite of it. But, as we stated, we had made no findings in respect of spat catching in the blue subzones at stage I. And in assessing the interpretation put by Mr Nugent on the issue of spat catching in the blue subzones as part of an integrated process for mussel farming, we saw his

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106 Ibid.
107 Nicolle NOE stage I page 2187.
108 Ibid page 2244.
109 Jackson NOE stage II page 48.
110 Nugent NOE stage II page 90.

acknowledgement in the context of the proposed plan provisions now put forward by the MIG, as essentially very practical. It was an acknowledgement by a senior planner in the context of the stage II evidence in resource management terms. We considered the notion of spat catching as an *ancillary* activity in the context of whole block development as part of a particularly efficient process. We considered if spat catching could be restrained within the production mussel farming process in some way, then it should be allowed. The key was clearly an appropriate plan provision to prevent an unnecessary and inefficient alienation of public space.

[319] There remained the issue of the existing spat catching consents and applications. Under the present spat catching applications (if granted), and existing consents, no areas would be left over for marine farming applications. And consents for mussel farming will not take effect until the spat catching consents have either expired or have been relinquished by the holder. We considered therefore prohibiting spat catching in the blue subzones on the specific sites with current consents is unrealistic:

- GBMFC may go spat catching on the Collingwood/Waikato site until its permit expires, is relinquished or is varied;
- Tasman Mussels may go spat catching over its whole 250 hectare block if its appeals are settled and if it reaches an accommodation with Challenger;
- the Ringroad permit holders with sites earmarked for mussel farming and operating under s.124 consents, may apply for new consents for spat catching if they wish and continue spat catching for the length of the permit;

In essence therefore, spat catching should not be prohibited in the blue subzones.

[320] There are other reasons why spat catching should not be a prohibited activity in the blue areas. Most parties to the references in some form or another supported the Ringroad parties continuing to use their spat catching consents. A number of the Ringroad areas have now been zoned as mussel farming subzone areas. One of these, on the seaward side of the Tasman Mussels' site has been identified as a significant spat catching area. We have no difficulty in supporting that area for spat catching to service the Tasman Mussels' site if that is what the Ringroad parties (particularly Goulding and NZMFA) require. It will mean that AMA 3 A will lose a number of hectares for full production mussel farming but this may be compensated for elsewhere – for example in the Marlborough Aquaculture block which we intend to support for mussel farming. The same approach may be taken for other Ringroad areas also zoned for mussel farming if they are significant spat catching sites.

[321] As to the other existing consents, if spat catching is what Tasman Mussels and GBMFC (Waikato) wish to pursue, instead of full production mussel farming, then the Court has no jurisdiction to force them otherwise. Realistically we do not consider they will. We note that Tasman Mussels identified that:

> *Realistically, the prospect of the marine farming industry having undertaken the plan process before the Court in order to establish marine farming and then not establishing full marine farming seems remote to say the least. Obviously the industry will make best economic use of the consent. To suggest*

> *the industry may use the entire area to catch spat then have no area in which to on grow this spat is unrealistic.*[111]

The Ringroad submitted similarly.

[322] We turned to the remaining applications. The subzones identified for mussel farming in Appendix ZZ are only there because there has been an industry agreement that other applications outside the AMAs are to be withdrawn. The areas that remain will help form a viable industry once mussel farm applications take effect. *How* that happens is up to the industry and is not for the Court. We concluded that any unresolved applications may either be finalised or withdrawn. The permit holders may go spat catching for the life of the permit should they wish or they may seek short term consents. But they will not be able to go mussel farming unless they relinquish their permits and make fresh applications for mussel farming.

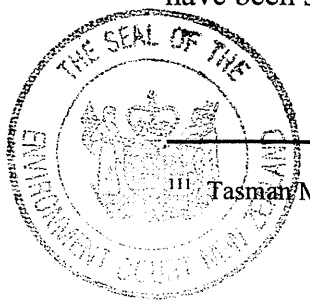
[323] Should the former happen, the mussel farmers will be precluded from mussel farming until those consents expire, are surrendered or provided for as short term consents. This will render the AIP ratio meaningless because this will reduce the marine farming area and increase the spat catching areas. The choice is in the industry's hands. The Court has no jurisdiction to bring about the transformation of spat catching applications into mussel farming ones. It would need a Consent Order, as in the Waikato model, or legislative intervention for that to occur.

[324] Spat catching as a stand alone activity is therefore accepted in the blue subzones if it is utilised as part of an existing consent, a replacement to s.124 consents or obtained by way of applications before the proposed plan becomes operative and even after. This approach recognises and affirms the industry parties' involvement in this inquiry – an issue we consider of importance in this case.

[325] Importantly too, we see reference to the *"harvesting"* of spat in any definition of *"spat catching"* as the key to distinguishing the stand alone activity of spat catching from that which is a (legitimate) part of the process of mussel farming.

[326] As to the issue of the integrated management of the blocks, the spatial position promoted by the AIP could logically be tempered by some acknowledgement from the Court, that we can accept spat catching in the blue zones as efficient – but only as an integral part of marine farming, and only at the spatial scale that has been agreed to, for mussel farming, by the EAG. The results of monitoring, however, from at least two growing cycles is required, from a number of 50 hectare mussel farming blocks at full intensity before the industry can move to stage II.

[327] There is no reason why lines cannot be utilised for catching of spat which will subsequently be on-grown as part of the mussel farming process. We see this as a legitimate and sensible option for a mussel farmer. Because the lines will not be harvested of spat, we do not see this to be the separate (stand alone) activity for which other subzones of the CMA have been separately allocated.



[111] Tasman Mussels Submissions stage II page 11.

[328] Successful applicants for mussel farming consents will be able to choose whether to seed their lines with spat from another source/site, or catch them on site and proceed to on-grow them. But the only way a farmer can move beyond 50 – 75 hectares mussel farming in any 250 hectare subzone, is to farm 50 hectares at full intensity for two crop cycles without significant adverse ecological effects.

[329] It is also our conclusion, as pointed out by the industry, that spat catching in the blue zones therefore should not and could not be prohibited, because such a decision would not sustain any s.32 analysis due to the activity's lack of adverse effects. We accept that some mussel farmers will catch spat as part of their mussel farming process.

[330] And as we have previously noted the industry (generally) sought areas of the CMA for mussel farming and separate areas for the catching of spat – to seed the mussel farming lines. For this reason we do not anticipate the use of the blue subzone areas for the harvesting of spat, despite the fact that the activity does not attract prohibited status. To do otherwise would render our interim report and findings unworkable and be an inefficient use of the CMA.

[331] Were this phenomena to occur we would anticipate the TDC issuing short term consents and/or instigating a plan change, seeking to reduce the total area of the CMA available for spat harvesting.

Conclusion

[332] There is no resource management reason to prevent mussel spat catching in the blue subzones.

Do Any of the Plan Provisions Support Spat Catching as an Integral Part of the Mussel Farming Process?

[333] We see the answer to this question centred in the various definitions of mussel farming in the various plan provisions provided by the parties.

TDC Plan Provisions

[334] Marine farm means:

> *All that part of the area that as being or has been developed into a farm for the farming of fish or marine vegetation: and includes all structures, whether floating or submerged, and rafts used in the area in connection with the farm, and all boundary markings, and all fish or marine vegetation for the time being farmed.*

[335] Marine farming means:

> *Marine Farming, In Relation to Any Species of Fish or Marine Vegetation, Breeding, Cultivating and Rearing of Any Such Fish Including Spat Catching or the Cultivating of Any Such Vegetation, as the Case May Be Whether for Commercial or Research Purposes.*

[336] We find this a very general definition and for the purposes of the planning provisions required to give effect to our decision, we require more specific definitions and in particular one that provides for spat catching and harvesting as a stand alone activity.

[337] As noted, we see reference to the *harvesting* of either spat or mussels as pivotal in distinguishing between the component activities making up the full mussel farming process and accordingly allow for efficient use in the CMA.

Challenger

[338] Challenger used the definition of aquaculture as in the plan with an additional heading: *"Longline Marine Farming"* means aquaculture for the purpose of farming shellfish on structures suspended in the water column from floated backbone lines, with a surface or subsurface, and includes spat holding.

[339] Again, our comments in respect of the TDC definitions hold for Challenger as spat catching as a stand alone activity is not separated out.

Manawhenua Iwi

Spat Catching:	*is aquaculture that is limited to the obtaining or retention of a juvenile mussel or scallop species up to an average size of 40mm.*
Mussel Farming:	*is the obtaining or retention of mussel spat and its on growing to harvestable size.*

[340] This is a more useful set of definitions in that spat catching is separately identified, however, there is no specific mention of the harvesting of spat although we acknowledge the word *"obtain"* could possibly be read as *"harvest"*.

MIG

Spat Catching:	*is aquaculture that is limited to the obtaining or retention of a mussel or scallop spat and harvesting thereof.*
Mussel Farming:	*is the obtaining and/or retention of mussel spat and its on growing to harvestable size and harvesting thereof.*

[341] We find the MIG definitions best suit the findings of this report for two reasons:

[a] The activities of spat catching and harvesting are clearly separated from mussel farming;

[b] The definition of mussel farming clearly describes the full process (including the catching of spat and the harvesting of mussels).

Conclusion

[342] The MIG definitions for spat catching and mussel farming are the most suitable to be included in the plan provisions.

Do the MIG Definitions Fall Within the Scope of the References?

[343] Finally, we looked to see if the MIG definitions fell within the scope of the references – namely that of First Wave.

[344] The submissions of the referrers, First Wave, in respect of TDC proposed plan with which SMW, Tasman Mussels and Ringroads are affiliated, sought as its relief:

> *That Council zone the following areas as controlled for aquaculture purposes, using definitions, conditions and terms similar to those adopted for this purpose by Marlborough District Council in its Coastal Plan: ...*

[345] In the Court's Further Directions of 7 June 2001, we stated:

> *Whether the spat holding/marine farming sites may be used for spat catching was not an issue raised in the references. We proceeded on the basis (as sought) that some areas were for marine farming and some for spat catching.*

[346] On close examination, we note the definition from the Proposed Marlborough Sounds Resource Management Plan defined *Marine Farm* as follows:

> *MARINE FARM* — *means any form of aquaculture characterised by the use of surface and/or sub-surface structures located in the coastal marine area.*
>
> *MARINE FARMING* — *Marine farming means the activity of breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest (and includes spat catching and spat holding) when carried out on a marine farm; but does not include -:*
>
> *a) Any such activity where fish, aquatic life, or seaweed are not within the exclusive and continuous possession or control of the holder of a marine farming permit; or*
> *b) Any such activity where the fish, aquatic life, or seaweed being farmed cannot be distinguished, or kept separate, from naturally occurring fish, aquatic life, or seaweed.*

[347] We accept, therefore, as Tasman Mussels submit, the ambit of the First Wave reference is wide enough to encompass what that company and the MIG require.

[348] As the MIG definition includes spat catching for harvest, then the general definition provided above allows us to contemplate spat catching (and harvesting) as a stand alone activity, or spat catching as part of mussel farming.

[349] In retrospect, it would have been more efficient for the Court to have identified key definitions at stage I of the inquiry rather than leave them to stage II. They were pivotal to how the activities should be managed and areas allocated in the CMA. But factual matters dominated at stage I and the decision to defer plan provisions to stage II was unanimous.

Conclusion

[350] we now conclude that the definitions of marine farming and spat catching attached to the MIG plan provisions are a refinement of the proposed Marlborough plan definition and not an extension of what was intended by First Wave.

Bi-catch of Mussel Spat

[351] Over settlement of green shell mussel spat onto lines being used for the on-growing of mussels is another reason why prohibited status for spat catching is inappropriate in the Blue Areas.

[352] Mr Goulding says:

- *The likelihood of heavy over settlement of green shell mussel spat at certain times of the year may require an additional seeding process where the over settled mussels would be separated from the main crop and reseeded as spat for later crop production.*[112]

[353] We see the utilisation of this *"bi-catch"* arising from an authorised mussel farming process as efficient in both marine farming and resource management terms. It will not impact on the allocated areas for mussel farming and spat catching – known now as the AIP.

Appendix ZZ

[354] In the light of our discussion and conclusions above and in order to remove any ambiguity in the interpretation of Appendix ZZ of our interim report, we add the following to the *"code"* relating to that appendix:

> The terms *"mussel farming"* and *"mussel spat catching"* are to be defined as follows:
>
> *Mussel Spat Catching:* *is aquaculture that is limited to the obtaining or retention of mussel spat and harvesting thereof.*
>
> *Mussel Farming:* *is the obtaining and/or retention of mussel spat and its on growing to harvestable size and harvesting thereof.*
>
> For completeness, scallop spat catching will be defined in Appendix ZZ as:

[112] Goulding EIC stage I page 5.

Scallop Spat Catching: *is aquaculture that is limited to the obtaining or retention of scallop spat and harvesting thereof.*

Activity Status of Spat Catching in the Blue Subzones

[355] Having determined that mussel spat catching as defined above should not be prohibited in the blue subzones, the Court turned its mind to the activity status to be given mussel spat catching in the blue subzones.

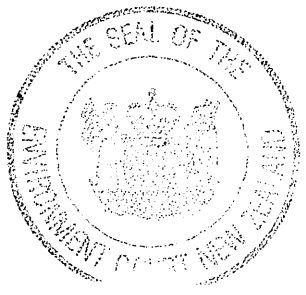
[356] We determined that because the effects of mussel spat catching were less than the effects of spat holding and full production mussel farming (which we grouped together in terms of effects in Stage I) mussel spat catching cannot be given an activity status which is any more stringent than the activity statuses given mussel farming in our interim report. Therefore, we will recommend that mussel spat catching as defined in the section above is a controlled activity for areas up to 50 hectares and a restricted discretionary use at 50 hectares or greater within a block. Matters for control and specific plan provisions will need to be formulated by the parties.

[357] The practical consequence of this finding for the industry participants' current spat catching applications in the blue subzones, and our finding in respect of the industry's proposed deeming and transitional and "non-rule" method, is that existing applications for mussel spat catching will have *Fleetwing* priority for mussel spat catching only. If the applicants wish to proceed with their mussel spat catching applications in the blue subzones then, if granted, those consents would prevent the take up of affected mussel farming blocks until the mussel spat catching consents expired.

[358] We note that it is not anticipated that the plan provisions proposed by any party will allow mussel spat catching and mussel farming activities to occur in the same 250 hectare block in the blue subzones. This is an almost inevitable consequence of the way staging for Stage 1 mussel farming will proceed.

[359] It is anticipated elsewhere in this decision that in order to meet the criteria for a restricted discretionary use for mussel farming at 50 hectares, and then the criteria for development to Stage 2, blocks will be developed as a whole.

[360] The definition of *mussel farming* that we have focussed on will therefore allow marine farmers to decide whether or not to use an integrated mussel farming method, incorporating mussel spat catching, on-growing to full size and eventual harvesting. The definition also allows farmers to source spat elsewhere and on-grow and harvest full size mussels.



Chapter 5: The Way Forward

Introduction

[361] In our interim report, the Court concluded on the basis of the scientific evidence that the most appropriate method of utilisation of the identified zones (AMAs) for the expansion of aquaculture in the CMA of Tasman and Golden Bays was by way of a progressive (staged) uptake. We anticipated any initial intense marine farming development to total no more than 50 hectares in any one 250 hectare block in the AMAs. This was to be known as stage 1. At the completion of 2 – 3 crop cycles (three to four years) and subject to the ecological health of the CMA affected by the activity, the industry would be able to utilise further space within an AMA. We anticipated that any decision to release further area for marine farming would be on the advice of the Ecological Advisory Group (EAG) – a panel of independent expert scientists convened by the TDC, this further area to be known as stage 2.

[362] Our report indicated that marine farms less than 50 hectares would be a controlled activity and those 50 hectares and over would be a restricted discretionary activity. We noted a potential difficulty arising from successive applications for less than 50 hectares[113].

[363] Our interim report further directed that the parties work together to draft plan provisions reflecting the findings contained in the report and, in particular, plan provisions enabling the staged take-up of marine farming in the AMAs.

[364] The Court has now received four sets of plan provisions which essentially reflect the approaches from the TDC, Challenger (a modified plan was also produced), MIG and a variation on the MIG plan by Iwi. In this part of the decision, we only take a broad brush approach to what has been proposed, leaving the detail until later.

The Approach of the TDC

[365] The TDC have formulated a controlled activity rule for mussel farming on sites up to 50 hectares. A restricted activity consent is only available after stage 1 if a deferment of further development proposed by the TDC is lifted by council decision (see below).

[366] The TDC advocates an initial consent application for 50 hectares in each block or subzone (250 hectares) with three crop cycles proposed. The remainder of each block (200 hectares) is unavailable for further development with aquaculture possibly prohibited. The TDC's amendments do not attempt to set out the form, scale, duration or intensity of development beyond stage 1.

[367] What happens beyond stage 1 is dependent on the results of the monitoring of development carried out in that first stage. This monitoring is assured through the set of conditions of consent, and environmental monitoring carried out after an expert evaluation of these results. Stage 2 may be an expansion of areas beyond that of stage 1 or it may allow greater intensity of development within the stage 1 area. Such staging is seen as a form of adaptive management of aquaculture development.

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[113] Interim Report page 216 para [1212].

[368] The TDC's preferred method of progressing from stage 1 to stage 2 (changing some of the remainder of the prohibited block to controlled/discretionary activities) is either by way of granting additional consents known as deferred 'zoning', or passing a council resolution, possibly on advice from an EAG, or, after an independent analysis when the results of the monitoring show that aqua-farming the first 50 hectares of a 250 hectare block is not causing any adverse ecological effects. The TDC's proposal for moving beyond stage 1 is by means of a special consultative procedure within the Local Government Act 1974. The TDC does not favour a plan change for progression between stages.

[369] The TDC has reservations about whether the EAG would act in an expert or lay capacity, and what its status might be. It also has concerns about the plan provisions relating to an entity like this should any of the represented parties not participate at some time in the future, for whatever reasons. It is noted that the TDC has the ability to establish advisory committees without such entities needing to be authorised by plan provisions, and without needing a plan change to alter the composition or functions of any such committee.

The Challenger Approach

[370] Challenger interpret the interim report as limiting initial development to one 50 hectare site in each AMA, not in each block within the AMAs[114]. The Challenger provisions anticipate an initial area or areas of 50 hectares as being a restricted discretion activity rule that is available for immediate consent. Secondly, they provide an area which is closed to immediate development, but where a restricted discretionary or discretionary activity status could apply in the future. Finally, they provide a third area where aquaculture is a prohibited activity until 75% of the first two areas has been developed, farms have been installed, and cumulative effects have been shown to be acceptable. The size and location of the areas for stages 2 and 3 would be determined on advice from the EAG.

[371] The Challenger approach therefore supports an EAG and sees the function of such a group as to consider information on the ecological environment available from all sources and to advise the council whether the environment is being adversely affected by the development. The composition and functions of the EAG are to be spelt out in a statement.

[372] Challenger consider there is a need for the TDC to promulgate the plan changes at each stage of development, acknowledging that there is a public cost to that. These changes should also follow on from the advice of the EAG. Mr Nugent suggests that specific provisions should be provided in the PTRMP which will detail only the matters to be dealt with in the plan change – ie the plan change itself will be 'scoped' in the PTRMP. Such a method would avoid any anticipated extensive litigation. Mr Nugent expects the wide-ranging representativeness of the EAG would mean there would be little controversy in such a change, thus minimising costs[115].

[373] Challenger is critical that the MIG approach, particularly for whole block consents, takes the rate and direction of development away from the TDC. Conversely, it is critical of the cost implications of the TDC approach because it encourages a multiplicity of applications and a lower level of certainty about the outcome (apart from any controlled activity

[114] This was clarified by the Court during the stage II inquiry as being an incorrect interpretation. The Court determined 50 hectares initial development in each block/subzone.

[115] Nugent EIC stage II pages 3 – 9.

applications). Further, there is an added risk that even such applications could be located over sensitive areas but because they have controlled activity status they require consent.

[374] Mr Nugent (and Mr Stewart for RFBPS) also have concerns in terms of the time it may take for adverse effects (from marine farming) to demonstrate themselves in the CMA. Their concerns relate to the possibility that the industry may have further developed (proceeded to another stage) before any adverse effects demonstrate themselves. Their evidence is that any process that is chosen, needs to be able to take account of the potentially long gestation period in which adverse effects might become apparent, and which may result in having to stop or reverse activities.

The Industry (MIG) Approach

[375] The alternative approach to that of the TDC and Challenger is suggested by the MIG. This suggests a management regime for those AMAs identified by the Court which allows an input from the industry's own self-regulatory initiatives into the regulatory management regime used by the TDC for the CMA. This is identified as a "co-regulatory" approach to resource management.

[376] The regime allows for applicants to apply for resource consent over a part of, or a whole block, with an Assessment of Environmental Effects (AEE) able to disclose the likelihood of actual and potential effects of the proposed activity on the environment. Any resulting effects would be addressed by varying elements of the farm management regime (such as stocking density), through a technique known as *"adaptive management"*.

[377] The following aspects of the suggested plan provisions will complement the recommended adaptive management proposal as follows:

[a] Agreed Ecological Guidelines;
[b] Management Plans;
[c] Monitoring (including holistic monitoring);
[d] Reporting and Assessment of Information [integration of information];
[e] Reviews;
[f] Financial Contributions;
[g] Community Participation.

[378] Staging is an important aspect of adaptive management. It was an issue raised at stage I by both Dr Gillespie and Mrs Allan for SMW, supported by the Ringroad and the Court. It is further clarified here.

[379] Mr Kyle describes how MIG planning provisions allow for a range of different ways in achieve staging. At one end of the spectrum is the development of one third of a block (up to 83 hectares in the largest blocks) at a maximum line density the industry considers to be sustainable in the long term for that AMA. At the other end of the spectrum, the full area of the block may be developed, but to a line density that is equivalent to only one third of the final development anticipated as being sustainable for the block (such as AMA 3). Staging options between these two alternatives are also provided for. Progression to successive stages is to be subject to monitoring results.

[380] The MIG anticipate that the EAG would be set up with the TDC's support, and that it would be representative of the interests involved in the Environment Court process. It is anticipated it would act as a monitoring and integrating group, and its funding would come from consent holders through consent conditions or other charges.

[381] The MIG also anticipate the use of ecological guidelines which have been developed by the scientists in the Ecological Workshop. The MIG has developed a suitable schedule to incorporate matters of concern. This schedule sets out:

- a detailed description of the types of ecological information that applicants for mussel farming activities are to supply;
- the monitoring expected and the reporting and assessment to be undertaken;
- an outline of possible conditions of consent; and
- details of the criteria relating to natural character for development in the central part of Golden Bay, as a matter of discretion in the rules.

[382] The purpose of the schedule is to assist the applicants, the council and other parties in the application process.

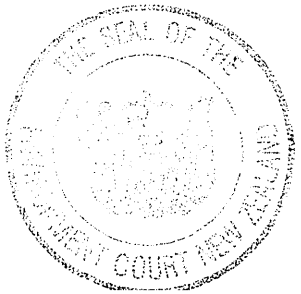
[383] The MIG provisions also incorporate a requirement for review conditions to be attached to consent. At any stage the TDC would *"have the ability to bring development back into line with expected outcomes"*, if warning signs became apparent for monitoring, by way of these conditions.

[384] In terms of moving from stage 1 to the further uptake of the AMA, the MIG approach to the plan is based on:

- the use of the principles of adaptive management to guide progressive development of aquaculture within the AMAs;
- utilisation of management plans to guide staging of development, coupled with comprehensive ecological monitoring and ongoing adaptation of standards as more is learned;
- utilisation of results of monitoring to guide subsequent decision making about the progressive uptake of water space for aquaculture.

[385] Mr Kyle explained that an applicant under this system is required to provide significant amounts of high quality information, particularly in the initial establishment stages of mussel farming; and to assemble appropriate scientific expertise to prepare modelling protocols, ecological criteria and procedures for developing ecological sustainability in the two bays.

[386] The approach requires monitoring programmes to be implemented in order to assist, firstly, in obtaining information about the ecology of the bay and, secondly, in reviewing information about any effects. This information is then linked with the rate and manner of the intended development.



[387] The MIG approach *"seeks to identify the end state"*, at the time of lodging the initial application for a 250 hectare block. In cross-examination, Mr Kyle did not concede that the AEE attached to the original consent application for 250 hectares could not adequately address *"the end state"*. Rather he says:

> *What the assessment will convey is as much ecological and other information as is available at the time application is made. We need to reflect upon the fact that in a coastal environment uncertainty about impact and consequences of human influence can really be regarded as the norm rather than something that is exceptional.*[116]

[388] Mr Kyle envisages a consent with conditions which deals with issues of staging, which requires consent holders to undertake monitoring and which demonstrates that certain thresholds which would first be determined in the management plan, can be achieved. Overall, consent holders will need to show the consented activities are not having a significant adverse effect on the environment. He states that the first stage of development of any block could be viewed as an experiment in many ways and utilised to set out the methods and issues of concern so that meaningful ecological results could be obtained to guide the extent and timing of subsequent stages of development. The witness envisages that steps towards reducing intensity of development or the removal of lines or a stay of development in some areas may need to be invoked. He does not see this as necessarily being permanent and he likened it to leaving one production paddock lying fallow, as happens in land farming.

[389] Mr Kyle considers also that the TDC approach to staging (where TDC determines when deferment may be lifted) is unnecessarily cautious and somewhat cumbersome, and argues that this method may well lead to litigation. He was, however, unaware of any other examples of the use of management plans for informing consents for the occupation of the CMA at the similar scale intended by MIG. In his opinion, in the event of unforeseen adverse effects, adaptive management is able to be used to address these issues. We took this to mean that the applicant could reduce the intensity of the farming operation. We did not interpret this statement as suggesting the removal of all lines from the water, and we address this issue elsewhere.

[390] Mrs Allan, for the SMW group, gives similar evidence saying *given initial investigation sufficient to put in an adequate application and assessment of effects* ... if the monitoring demonstrates that there were no significant adverse effects, staging would be able to proceed as proposed in the original application. The witness suggests that applicants with whole block consents would need to be particularly careful to comply with conditions of consent in order to be able to proceed with the staged development. Mrs Allan's evidence clearly demonstrates her preference for whole block consent at the outset, rather than deferred zoning whereby staged development was triggered by council resolution as proposed by the TDC. She considered that this latter process was potentially subject to excessive prevarication by council or political interference.

[391] Mrs Allan describes the MIG proposed process as an intended development plan, with timing and other details on the basis of the best information available at the time, rather than a predetermined process in circumstances where no valid scientific predetermination can

[116] Kyle NOE stage II page 4.

be carried out. It is a significant difference of interpretation from that of TDC, Challenger and one of which we took particular note (and were eventually to support).

[392] Mrs Allan considered that subject to adequate applications and provisions:

> *It's an appropriate precautionary approach for the plan to contain a restricted discretionary activity rule, the operation of which potentially allows consent to be sought for 3000 hectares of sea space on day one of the plan becoming operative.*

[393] Mrs Allan, however, makes the point that this approach is subject to staging proposals within each individual block of the AMA, so that the effect of the provisions, coupled with the TDC's consent process that has been carried out, is considerably less, and any blocks fully taken up would be at a very low density[117].

[394] The staging process proposed by MIG is set out in part in a document referred to as Table YY and appended to this decision as Appendix 4.

The Iwi Alternative

[395] We address the Iwi's plan provisions along with other Iwi issues in a separate chapter. The Iwi option is essentially that of an earlier proposal by MIG but requiring the allocation of space specifically to the three iwi groups the entity represents.

Issues Arising

- Adaptive management as an adequate resource management tool;
- Whole block management;
- Stopping or reversing development;
- Mechanisms for progression beyond stage 1;
- Table YY;
- Ecological Advisory Group;
- Other species in AMAs;
- Specific planning provisions;
- Planning map ZZ issues.

- **Adaptive Management as an Adequate Resource Management Tool**

[396] The precautionary approach incorporated into the MIG proposed plan provisions involves the use of adaptive management techniques that:

- address the risk of future significant adverse effects from aquaculture which are not predictable or expected;
- are applied because of uncertainty and absence of information at the time the plan is prepared and resource consents are sought.

[117] Allan NOE stage II page 66.

[397] The MIG proposals embody the elements of adaptive management through management plans, monitoring, reviews, financial contributions, environmental audits, environmental standards and community participation.

[398] The opposition to the adaptive management techniques proposed come chiefly from Challenger and RFBPS, and at a lesser level the TDC. The latter is stated to have concerns with the process because it:

(i) avoids the need to assess any actual and potential adverse effects to the environment for the whole area sought to be occupied over the life of a resource consent at the time the resource consent is applied for – referred to by Mr Ironside as the *"end state situation"*; and

(ii) means the TDC will lose regulatory control over the AMAs if environmental process standards as suggested by MIG are incorporated into the proposed plan[118].

[399] The RFBPS identifies from its point of view, the basic concept of adaptive management has been defined as to learn about natural populations and sustainable harvesting through experience with management itself, rather than through basic research or the development of general ecological theory[119]. The concept is labelled by that group as a concept which has been developed to accommodate human exploitation of natural resources rather than to conserve or protect them against unanticipated effects. It views the implementation of policies as experiments (in this case with the CMA) and acknowledges that resource management itself is a source of experiments upon natural systems.

[400] Adaptive management is also seen by the RFBPS as a refinement of the traditional *"learning as you go"* approach. It is open to scientific uncertainty more explicitly but it is not an insurance against potential impacts of large scale marine farming. Large scale marine farming requires an effective and firmly controlled staging regime.

[401] Implementation of adaptive management systems is further seen by RFBPS as problematic. From the problems experienced elsewhere, such as difficulties in developing acceptable predictive models, this may compromise its application in this case. Like traditional approaches, adaptive management assumes that nature can recover, but caution is required. RFBPS considers that New Zealand is at a time where the intensity and extensiveness of trials can generate errors which are potentially larger than any society can afford. It submits that New Zealand can no longer assume the paradigm *of the infinitely forgiving nature that seems implicitly to have been assumed in the past.*

[402] RFBPS points out that the MIG proposals do not have a monopoly on adaptive management. Deferred zoning and the release of further space through council resolution or a plan change are equally valid ways of implementing the process: *The first essential characteristic of adaptive management is that a direct feedback loop exists between science and management. This allows for management and policy decisions to be modified in the*

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[118] Ringroad Closing Submissions stage II page 22.

[119] RFBPS Closing Submissions stage II page 8 citing Walters J (1986) *Adaptive Management of Renewable Resources* New York Macmillan in Halbert (1993).

light of the new scientific information[120]. RFBPS consider, like Challenger, that releasing further space, such as through a plan change, provides a clear and more useful feedback mechanism.

[403] RFBPS identify that one of the troubling aspects of *adaptive management* has been the potential for experiments to be derailed by political pressure[121]. The economic and commercial gains from an expanding aquaculture industry can drive this pressure, which is a reason why large scale marine farming effects may be reversible in theory, but less so in practice.

[404] Challenger is very critical of the adaptive management regime provided by MIG, seeing Table YY, in particular, as a method to maximise opportunities as soon as possible for full scale marine farming. It considers this is not the language of the interim report and yet it is the principal influence driving the MIG provisions. Several specific points were made:

- marine farming development will continue in a manner which is unassailable until the science establishes that development or uptake cannot continue. This is not adaptive management; there are no sensors or sensitivity mechanisms in the MIG proposal; this does not represent precautionary adaptation to circumstances and consequently the likelihood of uncertainty is high.
- a truly adaptive management technique is one which responds to *decreasing* uncertainty and the adaptation is linked to the results of monitoring which Drs Gillespie and Grange both have advocated; monitoring over time will allow the trigger levels to be set and the management regime to be adapted and refined accordingly.
- the method of co-operation advocated generally is the requirement that everybody co-operate with the MIG parties to allow development to continue under the umbrella of an initial full block consent until there is a *"red light"*: this is not an adaptive management technique and it was rejected by the scientists.
- it was Challenger which introduced into the inquiry a specific example of adaptive management – and that management regime is now at the cutting edge of international fisheries management with investment in science necessarily significant in order that science may permit the development[122]: Challenger implies its method in that case should be followed in this.

Evaluation

[405] The term *"adaptive management"* has been defined as follows:

> ***Adaptive Management**: An experimental approach to management, or "structured learning by doing". It is based on developing dynamic models that attempt to make predictions or hypotheses about the impacts of alternative management policies. Management learning then proceeds by systematic*

[120] RFBPS Closing Submissions stage II page 9 citing Hilborn et al (1979) quoted in Cindy Halbert (1993). "How Adaptive is Adaptive Management? Implementing Adaptive Management in Washington State, British Columbia", Reviews in Fisheries Science, 1: 261 – 283.
[121] RFBPS Closing Submissions page 9 again quoting Halbert (1993).
[122] Challenger Submissions In Reply stage II pages 16 – 18.

testing of these models, rather than by random trial and error. Adaptive management is most useful when large complex ecological systems are being managed and management decisions cannot wait for final research results.[123]

[406] For the purpose of this case we adopt this definition. And in relation to the concept of adaptive management, we make the point that neither Challenger nor RFBPS provide sufficient evidence to allege that what is proposed by the MIG is not a legitimate form of adaptive management. The adaptive management approach outlined may not include some of the aspects considered by Mr Arbuckle for Challenger, but the evidence, cross-examination and re-examination of Mr Kyle, Mrs Allan and Drs James, Gillespie and Grange in particular[124], stress throughout a need for;

- baseline surveys;
- staging and the flexibility of staging;
- a need for extensive monitoring and guidelines;
- monitoring to be integrated with process bases which is to be undertaken by the Public Good Science Funded programmes in the next 2 – 3 years (now 1 – 2 years);
- monitoring over time which will allow trigger levels to be set and the management regime refined accordingly;
- a series of checks and balances that would protect against significant adverse effects;
- removal of structures should indicators show significant adverse effects;
- identification of appropriate sites for the long term;
- ecological controls incorporated into the draft rules based on other scientific work carried out;
- acknowledgement that locations for monitoring are based on predictive modelling and within blocks there will need to be some modification;
- benthic surveys within and along transects extending outside the blocks, along with a time series of water column monitoring at 5 sites around each block;
- a good overall management plan covering all the AMA and a management plan for each block with details of staging, a description of reporting and review requirements, along with resource consent conditions;
- reasons for considering density as another possible mechanism of staging because it would increase the flexibility to provide necessary feedback information about risk reduction;
- each stage is to be dependent on reviewed information so some flexibility has to be built in for it to be workable;
- a look at development of the whole AMA rather than trying to isolate the 250 hectare blocks entirely;
- continuity of monitoring, which will be more easily achieved with whole block management;
- feedback of monitoring information so that risk may be reduced in succeeding stages[125].

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[123] Ringroad Opening Submissions stage II page 4, citing Department of Conservation and Ministry for the Environment, the New Zealand Biodiversity Strategy, Wellington, February 2000.
[124] See generally Mr Kyle and Mrs Allan, Dr James and Dr Gillespie, evidence-in-chief, and NOE stage II.
[125] Gillespie NOE stage II page 118. This was an issue specifically criticised by Challenger as not happening.

[407] The need for disclosure in a transparent way, of any discoveries about the ecosystem or changing information so that the TDC can ensure steps are taken before significant adverse effects eventuate, is an important benchmark of adaptive management[126]. This will be introduced by the industry report at the staging levels, be processed through EAG with the TDC then making a decision to advance to another stage or otherwise. It is intended to be a vital part of the process.

[408] Another benchmark in adaptive management is the co-regulatory approach between the industry and the TDC. As the Ringroad points out:

> *Traditionally, the developer has wished to control what happens with the utilisation of physical resources (managing the structures), and the regulatory authority has focussed on managing the natural resources (water quality and the ecosystem in the coastal marine area). However, adaptive management requires a co-regulatory approach, where the self-regulatory management procedures involving physical resources and their sustainability are integrated with the regulatory responses for managing the natural resources and their sustainability.*[127]

[409] It is anticipated that the management plans, condition review provisions, monitoring programmes and staged development are all controlled by enforceable resource consent conditions[128]. The TDC is therefore involved as co-regulator at every stage in the process.

[410] The industry identifies that it was through recommendations from the ecological advisers that a detailed management plan should be provided. Their intent was that a monitoring programme could be designed with some confidence and detail as to what was to be thought the additional stages of development could be.

[411] In our view, management plans have a central place in large developments like this. The impact and the scrutiny they receive not only by a consent authority but by the Environment Court on appeal should not be underestimated. They may be included as conditions of consent, or to provide more flexibility as anticipated here, providing information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by conditions of consent: see *New Zealand Rail Ltd v Marlborough District Council*[129].

[412] Mr Jackson, for the TDC, has not had a great deal of experience with management plans for large projects in the past[130]. He was questioned at some length as to a Waikato Regional Council example for managing large scale marine farms[131]. In the course of that exchange he acknowledged:

- the use of management plans at various stages in large scale developments;

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[126] Ringroad Closing Submissions stage II page 26.
[127] Ibid pages 26 – 29.
[128] Ibid pages 26 – 29.
[129] *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449.
[130] Jackson NOE stage II pages 63 – 75.
[131] Jackson NOE stage II pages 106-107: see also Consent Order *Te Kapa Moana Enterprises* Exhibit 4.

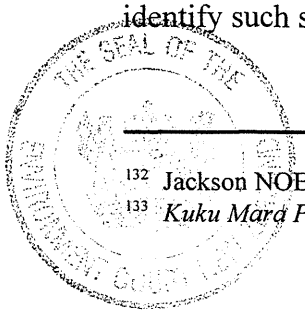
- the contents a management plan (location, proposed layout, timing of development within first five years – timing of staging, etc) might include;
- the kind and extent of monitoring information required for large scale development;
- the potential suite of indicators of the effects on the benthos and the water column to be incorporated in conditions;
- the 14 requirements and methods or techniques for sign-off on effects that are not covered by environmental standards;
- the need for an overall MIG management plan setting out proposals, and the co-ordination of farms within each block;
- a 75% development of the relevant stage before any progression forward;
- the ability of the industry to cut back on development;
- the ability to change conditions;
- the mechanism for review;
- the role of a bond;
- that the TDC is the authority which certifies that there haven't been adverse effects which might breach of the conditions of consent.

[413] At the end of that exchange, Mr Jackson agreed that such provisions for the MIG proposals *should satisfy the management of ... the marine environment*. And he also agreed, in terms of the efficiency of the MIG proposal, that one consent [could] be applied for each block. He further agreed that within that consent, a management plan and staging plan could allow development without the need for further consents. Finally, Mr Jackson accepted that such an approach is not contrary to the principles of the RMA[132].

[414] They were significant acknowledgements by the TDC's policy analyst for the coastal environment in view of the arguments to the contrary.

[415] The Court has already endorsed the principles of adaptive management in *Kuku Mara (Forsyth Bay) v Marlborough District Council*, a s.120 resource consent appeal concerning a midbay marine farm of 42.25 hectares in the Marlborough Sounds. The issues and facts on ecological matters described in that decision are on all fours with the practice of adaptive management as described here for similar matters and we endorsed them fully (the appeal was disallowed for non-ecological reasons)[133]. We, of course, acknowledge the large increase in scale between the number of hectares in that case and the subzones in the AMAs in this, but that is no reason at all why the same principles cannot be applied here successfully.

[416] We conclude that those in opposition to the concept of adaptive management in this case are approaching the issue too rigidly, without adequately weighing the other issues which control the consent process overall. This includes the requirement for a restricted discretionary activity application for proposals over 50 hectares and all the tests required under the legislation for such activities generally. For example, Mr Nugent was concerned that 49 hectare developments will automatically allow marine farms over sensitive benthic sites. But surely this is not so? The dive surveys required on such applications would identify such sites and conditions may provide for their protection accordingly. This may be a



[132] Jackson NOE stage II pages 66 – 75.
[133] *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* W 25/2002, pages 113 – 118.

matter for control. Further, if it is anticipated that such an approach would offend Challenger's scallop enhancement programme, that is for the Ministry of Fisheries.

[417] Mr Kyle considers that in the absence of whole block consents and a process of adaptive management, the burden of gathering information and managing development through the respective AMAs could fall on the TDC. In his opinion, marine farmers are unlikely to commit to the extensive scientific research required without the ability to participate through a series of stages of development. He argues that without that certainty to participate in future stages, no-one in the industry would be encouraged to do the ecological investigation and experimentation required (nor sustain its expense).

[418] We have some reservations about this conclusion. Kuku Mara, a small company in the Forsyth Bay case, established a very important benchmark for RMA – based ecological issues to be assessed in industry marine farm applications. And, of course, if the industry choose not to carry out the research, parties may well fail on application.

[419] Nevertheless, where the TDC may have difficulty, is in sustaining the monitoring costs. The RFBPS questioning of Mr A D Fenemor, Manager Environmental Information, with the Environment and Planning Department for the TDC, about funding for monitoring, discloses very slender budgets for such matters[134]. The industry reporting system and existence of the EAG should therefore assist markedly. Bonds may also be put in place to assist compliance.

[420] Mr Kyle's opinion, that there is a compelling incentive for the marine farmers to identify any adverse effects as they are entirely reliant on a healthy ecosystem for an acceptable product, was one worth noting. He concedes that this is not a regulatory procedure – he believes it is important for the industry to *"get it right"*. We agree – it is as vitally important for the industry as for the environment.

[421] We are satisfied that the incentives to move on from each stage are such that the industry cannot afford to fudge ecological results, having to then determine that significant adverse effects are to be avoided. The argument cuts both ways. As well as the professional advisers to the industry, individual parties will be able to have scientific representatives on EAG (see our conclusions on that issue post).

[422] The Ringroad also focused on the Halbert article referred to by RFBPS. In discussing *"Management as an Experiment"*, the Ringroad observes that all management practices are experiments but to determine causality (*"to determine why"*), it is vital to incorporate an experimental component into monitoring and management itself. Sometimes shifts in emphasis are required. It is submitted a regime which focuses on one particular method of mussel farming does not permit an adequate adaptive management regime. We accept that proposition. There will be uncertainties, but the management of them will have to adapt accordingly.

[423] Challenger, in the course of explaining its scallop enhancement (adaptive management) programme, admitted to making mistakes and of having to go back and rectify them. There is recognition in its case that if the environment is not adequately protected, then

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[134] Fenemor NOE stage II page 171.

ultimately the fishery, the product, and the environment would suffer. The involvement of scientists throughout the Challenger process and the financial contributions the company makes to research, endorse the adaptiveness necessary to meet the tough demands of sustainably managing the scallop fishery.

[424] We therefore see no difference from what is proposed in this case. The emphasis now being placed on research by the industry, the financial contributions implicitly required by the MIG in that process, and the adaptations made in ongoing management of the resource, are no different from that of Challenger's in the pursuit of its own programme.

[425] The principles of adaptive management, as an example in fisheries matters was put to Mr Hannah at stage I of the inquiry and a relevant document introduced in evidence. We note a quotation from that document is relevant to what is suggested by the industry here, bearing in mind all of the distinctions we have already made between the fisheries legislation and the RMA:

> *... the statutory obligation to act in a precautionary manner does not require total risk avoidance. In practice it is not possible to eliminate all risk with respect to fisheries management. A practical balance is to be achieved between being cautious and providing for the purpose of the Act that includes where possible providing for utilisation. The test is to determine what level of risk is considered reasonable. The best available information must support an assessment that the stock/fishery is likely to be able sustain an increase to the TAC/TACC. The extent of the increase proposed by a stakeholder may as a result be reduced following consideration of all the factors outlined above.*[135]

[426] The MIG proposal openly identifies the need to reduce or deter development if the monitoring results are negative. This may be considered appropriately precautionary. We therefore agree with counsel for the Minister of Conservation that there is a degree of the parties talking past each other on this issue[136].

[427] Finally, under this heading, we have taken some note of the advancement in scientific understanding and methods of measurement and monitoring since stage I of the inquiry. It is Dr Gillespie, Dr Mark Gibbs (Oceanographer and Coastal Modeller at Cawthron), and Mr Fenemor who largely focus on this issue. Unless we record this information, it is difficult to understand why the MIG's approach to the staging of proposals has advanced so far. Dr Gillespie, for example at stage II, openly acknowledged that the modelling work has progressed much further than he had actually anticipated[137].

[428] As at March 2002, such were the following significant developments:

- the Court had stated in the course of the stage I inquiry that an interactive ecological model is needed of Nelson Bays to provide the TDC with the ability

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[135] Hannah NOE stage I Reference Q Draft Frameworks for Exploratory, Developing and Established Fisheries Under the Adaptive Management Programme Overview Document: Ministry of Fisheries, December 1999, page 6 para 15.
[136] Minister of Conservation Submission in Reply stage II page 7.
[137] Gillespie NOE stage II page 116.

to safeguard the ecosystem and its intrinsic values: This model is now in the process of being developed;

- Dr Gillespie and Mr Fenemor identified a collaborative (LCR/TDC) programme known as the Motueka Integrated Catchment Management (ICM) Programme, which is in the initial stages of achieving such a model, one managed by Landcare Research: part of Cawthron's work has been two surveys of water column characteristics on the western side of Tasman Bay which has added to the scientists' understanding of the patterns of nutrient phytoplankton distributions that occur in the bay as well as the main controlling factors;
- Cawthron's team research, under Dr Gillespie, has assessed the effects of the Motueka River flows on the planktonic and benthic communities, salinity, water clarity and nutrients in Tasman Bay;
- Cawthron and NIWA have developed and applied methodologies for predictive modelling of sedimentation patterns and flushing and depletion characteristics of farm blocks: these have considerably improved over the past 18 months: these methods are used in predicting the effects of mussel farms proposed for the sites in a number of North and South Island locations;
- Cawthron has recently developed a stand-alone high resolution hydrodynamic and ecosystem model (the New Zealand Aquaculture Management Model, or NZAMM) capable of assessing the impacts of individual, or groups of, mussel farms[138]: it is particularly useful for predicting phytoplankton depletion zones around proposed marine farms[139];
- in addition, Dr Gibbs has developed a monitoring technique (hydrodynamic model) to assess the Nelson Bays, which can be used within marine farms and which is slightly different from the one used in the past: it allows a very rapid snapshot of the water mass within the farm as it flows through a point, in order to determine what the effects are from marine farming on food depletion at a bay wide scale[140].

[429] Such advancements cannot but assist in identifying the necessary components of sustainability in the CMA of the Tasman District. The benefits to the community and the industry are obvious.

Conclusion

[430] The adaptive management system proposed by the MIG and supported to a large extent by the TDC is an appropriate technique for the management of marine farming in the CMA of the Tasman District.

- **Whole Block Management**

[431] The general tenor of the industry evidence, cross-examination and submissions at stage II indicates that it favours whole block applications at the outset. The witnesses and submissions from the MIG sought to convince us that this approach has all the philosophical, resource management and practical advantages envisaged by the legislation and that it

[138] Fenemor EIC stage II page 5.
[139] Gibbs EIC Cawthron Report No 694, October 2001. Gillespie NOE stage II pages 116 – 117.
[140] Gillespie NOE stage II page 117.

achieves a balance between s.74 issues, efficiency, and environmental management including effects.

[432] A whole block application seeks to identify an *"end stage"*, the achievement of which is dependent upon achieving the necessary safeguards and environmental controls which will form an integral part of the adaptive approach. There is a need to address a series of environmental statistics and there are links between scientific investigation and the management approach for the various blocks. Approaches and responses are to be adapted to ensure that ecological *"bottom lines"* and significant ecological issues are not impinged upon. It is proposed as a proper precautionary approach[141].

[433] In its criticism of whole block management, the TDC had this to say:

> *The Mussel Industry Parties' proposals imply that consent can be granted for whole Aquaculture Management Area blocks, for the maximum intensity of development envisaged, but subject to a condition that limits the intensity of development initially in order that monitoring can be carried out to establish what effects the activity generates. There is a problem with this concept. In order to grant consent, a council needs to be satisfied that likely effects of the activity have been identified, along with any measures needed to manage those effects. If that can be achieved, it is difficult to see why it should then be necessary to restrict the implementation of the consent (limiting the intensity of development, or the area that can be utilised within the block for which the consent has been granted), and require monitoring to establish whether the remainder of the consent can be implemented. If those measures are necessary the consent should not have been granted in the first place. This in turn raises the real practical difficulty with the Mussel Industry Parties' proposal that applications are able to be made for consent to develop an entire block under the restricted discretionary activity rule prior to an initial stage of development.*[142]

[434] The TDC therefore asks the following:

[a] did the Court intend by its stage I findings that there should be an initial stage of development at a limited scale within the AMAs prior to there being ecologically informed decision-making about subsequent stages of development; or

[b] did the Court intend that full development of the Aquaculture Management Areas could be consented to at the outset; and that the plan should provide for decision-making which anticipates full development of the AMAs prior to there being ecological information available from an initial stage of development[143]?

[435] Challenger consider that development continuing (ie continued uptake of the block) *"unless the science establishes to the contrary"* is not a precautionary approach as intended

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[141] Kyle EIC stage II page 4.
[142] TDC Closing Submissions stage II pages 14 – 15.
[143] TDC Closing Submissions stage II page 6.

by the NZCPS[144]. Challenger and the Minister of Conservation also focus on the issue of cumulative effects and the Court of Appeal's decision in *Dye v Auckland Regional Council*[145]. In *Dye*, the Court observed that a *"cumulative effect"* (which arises within the definition of *"effect"* and is therefore relevant in a general sense to the drafting of plan provisions), is not the same as a potential effect. In *Dye* the Court held:

> *A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect.*
>
> ...
>
> *The concept of cumulative effect arising over time is one of a gradual build-up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words "regardless of the scale, intensity, duration or frequency of the effect".*[146]

[436] Challenger notes that the decision in *Arrigato Investments Ltd v Auckland Regional Council*[147] endorses this approach as does the High Court decision in *Queenstown Lakes District Council v Lakes District Rural Land Owner Society Inc*[148].

[437] Challenger considers that the decision in *Dye* reinforces the proposition that cumulative and potential effects of activities should be considered at the plan stage, particularly where there remains some uncertainty as to how far they can be considered at the resource consent stage. This, it is submitted, becomes absolutely critical in the context of a one consent whole block development proposal which characterises the MIG parties' approach. Accordingly, the objectives and policies, backed up by the rules, in the TDC's plan must address both cumulative and potential effects of the activities as defined in the RMA. In Challenger's submission, the only way in which this can be done in a manner which achieves the object and principles of the RMA is by the staged development proposed by TDC and Challenger depending on which uptake mechanism – council resolution or plan change – the Court considers most appropriate.

[438] Mr Kyle, for the MIG, did not agree with this approach, arguing that because the Court has established AMAs and excluded aquaculture in any other area in the CMA, the Court itself had *embodied an appropriate degree of caution in establishing the location and extent of the AMAs ...*[149]

Evaluation

[439] In answering the questions posed by the TDC, first of all, the Court did intend that there should be an *initial stage* of development (50 hectares) within the AMA, prior to there

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144 Challenger Submissions In Reply stage II page 39.
145 [2002] 1 NZLR 337.
146 [2002] 1 NZLR 337, 348 – 349.
147 [2002] 1 NZLR 323.
148 [2002] NZRMA 81 (see particularly [24].
149 Kyle NOE stage II page 36.

being ecologically informed decision-making about subsequent stages. The Court did not have a view as to whether *full development* of the AMA could be consented to prior to there being ecological information available from an initial stage because it was not in issue at stage I.

[440] But the two are not mutually exclusive – because of the staging process – and also the constraints that will apply through the raft of detailed planning provisions proposed by the MIG together with the provisions of the RMA.

[441] There is no hint in the interim report that the Court disapproved of whole block applications. Such was not the focus of that stage of inquiry. And there is no evidence that 250 hectares could not be applied for all at once, for that is not what Dr Gillespie stated. Dr Gillespie said 250 hectares should not be *developed* all at once. He did not say it could not be *applied* for all at once[150]. And at stage II of the inquiry he said this:

> *I see consents as covering the whole block – must give a feeling of continuity if you don't know next stage might be occurring and if don't have control over that then the results of the initial monitoring programme might not have continuity and that worries me.*

[442] But, he added, the caution that unless the background work was done, there could be no provisions for such an approach or feedback[151].

[443] As Mr Kyle observes, if an applicant cannot satisfy the TDC at the resource consent application stage that there will not be unacceptable adverse effects, then it risks failure[152]. Staging is an important part of this.

[444] We believe we should not underestimate what is imposed on an applicant for a resource consent at the time of the application. As Tasman Mussels identify, the MIG plan proposals contain a template for the information which will be provided as part of that process. And s.88 RMA provides its own specific requirements. If the TDC is then not satisfied it can require the applicant to look further[153].

[445] Mr Nugent for Challenger in fact conceded that if the scientific information is available by the time the plan is operational, an applicant should have an opportunity to apply for a restricted discretionary activity over the whole block and there are no planning reasons as to why not[154]. Dr Grange, also for Challenger, accepted that if monitoring results are acceptable, then there is no reason why there should be a delay in progressing to the next stage of the development – a slightly different focus we acknowledge, but an important statement from an expert nevertheless[155]. Dr Grange is a key witness for Challenger, the ecologists' role in the planning process given strong emphasis in Challenger's submissions[156].

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150 Gillespie NOE stage I page 2018.
151 Gillespie NOE stage II pages 129, 112.
152 Kyle NOE stage II page 64.
153 Tasman Mussels Submissions stage II pages 7 – 8.
154 Nugent NOE stage II page 80.
155 Challenger Legal Submissions stage II pages 32 – 39.
156 Grange for Challenger NOE stage II page 161.

[446] In assessing the practicalities of what the industry propose, we note that the scientists do not consider trigger levels for advancing each stage of development would be available until baseline studies and one or two monitoring surveys had been completed. Instead the MIG approach has under its plan provision *"C Reporting and Assessment Information"* provided that:

> *the ecological guidelines require that prior to going to the next stage of mussel farm development, a comprehensive expert report would be produced bringing together the information produced by the monitoring, and assessing the importance of any monitored changes to the benthos or water column.*[157]

[447] It is intended, as we understand the process, that this report would then inform the TDC as to whether to allow the subsequent stages on a site by site basis. The TDC might then seek independent advice of its own or that of EAG. This acknowledgement, as Challenger points out, recognises that development simply cannot proceed on the *"red light"* approach foreshadowed by some of the industry parties[158]. The staging of each block is to be determined by the ecological data and ecological opinion on a site by site basis.

[448] We note, however, that when Mrs Allan was questioned about who makes the decision about use of the area or no further development, she replies:

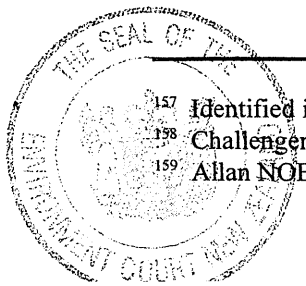
> *the Council would have to make that decision but it may be able to be codified as a standard and the information on which the Council makes the decision will obviously need to be available to the Applicant, in fact in the regime that we are proposing the Council would be reliant on the Applicant's information and possibly its own review of it.*[159]

[449] We suggest that codification of the process in planning terms may be an option in order to give surety and that this should be looked at further by the planners and the scientists.

[450] Meanwhile, the TDC has a range of options (and the discretion) to pursue overseeing the conduct of whole block management. It could:

- approve advancement to the next stage (through council resolution);
- enforce the conditions of consent;
- require the review of the conditions of consent; and
- halt development.

[451] We consider that whole block management in fact avoids the hurdle mussel farmers will face in having to prove the absence of future adverse effects before proceeding with future development – or as the Ringroad put it, *having to prove the negative*. If an applicant can satisfy the TDC on application that it can *sustain* the potential of the CMA while meeting the reasonably foreseeable needs of future generations – (s.5(2)(a) RMA): and *safeguard* the life supporting capacity of the water and ecosystem of the CMA (s.5(2)(b)): and, by whatever means, (management plans, monitoring, conditions, reviews) *avoid* adverse effects (s.5(2)(c))



[157] Identified in GBMFC Closing Submissions pages 16 – 17.
[158] Challenger Legal Submissions In Reply stage II page 7.
[159] Allan NOE stage II page 69.

through that means, then it is not a question of focusing on initial development and not providing for the rest at stage I. The limitations in fact are achieved through the staging.

[452] With whole block management, however, we consider more thought needs to be given to the issue of cumulative effects. The Minister of Conservation identifies that it is the plan provisions which will govern the subsequent grant of consents[160]. The essential question is whether the cumulative effects of a proposal are contrary to the objectives and policies of the plan properly construed[161]. It is submitted the *Dye* decision makes it clear that the opportunity to address such matters at the resource consent stage is limited. They need to be addressed at the plan stage. As the TDC submit, if whole block applications are filed at once and a large number of them are unable to be developed immediately, it becomes difficult to identify what adverse cumulative effects might be.

[453] As to the areas of a block or subzone in an AMA consented to for mussel farming, but awaiting the TDC/EAG *"go ahead"*:

> *There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so.*[162]

[454] As the Minister of Conservation indicates, this quotation serves to indicate some of the complexities that can occur at the resource consent stage. It was pointed out that in the SMW's opinion, unimplemented controlled activity consents will be relevant – at least for AMA 2. If that is so, it may be very hard for the issue of progressive effects to be reasonably considered. The interim report found that mussel spat catching structures are the same as for marine farms[163]. As all blocks are under application for spat catching surface consents, then natural character values may not easily be able to be accounted for. Ecological matters will be different because there is a world of difference between spat catching and mussel farming.

[455] Mr Jackson, under the heading **Natural Character**, identifies that Ms Lucas produced a set of criteria for considering consent applications and that MIG had included this in a Schedule (not a rule). It is in Appendix 3 to Mr Jackson's evidence. Ms Lucas requires the need to address potential cumulative effects on natural character. We are unsure how these requirements are met – and whether the plan provisions included are in agreement with the case law. This area needs to be revisited and we need to be advised further.

[456] Meanwhile, in terms of s.32(1) RMA, we see the holistic approach to managing the AMAs as considerably more efficient, but not necessarily cost effective. We consider, like Mr Nugent for Challenger and counsel for the Minister of Conservation, the cost options are much the same in terms of cost effectiveness[164].

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160 Minister of Conservation Submissions in Reply stage II pages 2 – 6.
161 *Dye* supra paras 14 and 23.
162 *Arrigato* para 35.
163 Although we acknowledge this may well change as technology develops.
164 Nugent EIC stage II page 14: Minister of Conservation Closing Submissions stage II page 26.

[457] In conclusion on whole block management, we note that Dr Gillespie had some concerns in respect of total block development at stage I. These concerns were closely intertwined with staging Table YY, which we address further below.

Conclusion

[458] We support whole block management of the subzones. Issues such as an accumulation of effects of development in the CMA need revisiting.

- **Stopping or Reversing Developments**

[459] Mr Kyle and Mrs Allan for the MIG give similar evidence as to the industry's intent to incorporate review conditions as provided for in s.128 to enable the TDC to bring the development *back into line* with expected outcomes if ecological warning signs become apparent.

[460] Other parties such as the TDC, Challenger, the Minister of Conservation and RFBPS expressed serious reservations about any reliance on such mechanisms. First of all, the question is whether any such review condition can stop further development or reduce already authorised activities? Whilst s.126 RMA provides for the cancellation of a consent if it is not exercised for a period of two years, there is no ability to cancel a consent because of adverse effects on the environment. Section 127 RMA provides that a holder of a consent can apply to change or cancel a condition of a consent but this section provides no certainty for the TDC.

[461] It is therefore important that other parties feel that the power of review is certain enough to achieve stopping or reversal of developments on large scale projects such as this.

[462] The Ringroad suggest that if there is concern by non-MIG parties that there may be a lack of transparency in the process suggested it would be appropriate to insert into the plan a requirement that a resource consent condition review is required to be notified. We endorse that suggestion also.

[463] Section 128 is the only section which provides for a review of conditions and given its specificity, this does not empower the TDC to amend existing conditions or impose new ones which have the effect of preventing the activity. It is considered by the opposing groups that s.128 does not provide authority to cancel the consent nor can the duration of consent be altered (s.132(1)). In *Barrett v Wellington City Council* (Chisholm J), it was held that:

> *My interpretation is that s.128(1)(c) was intended to confer a limited power for a consent authority to review* [the conditions] *of the resource consent but that it was not intended to open the door to cancellation of the consent itself.*[165]

[464] Counsel for the Minister submit that a review of conditions under s.128 is limited simply to reviewing them and that the impacts on the resource consent cannot be such as to effectively cancel it. The purpose of the review may [and in this case] need to be specified in the consent, but the existing case law indicates that giving effect to such review conditions as

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[165] [2002] NZRMA 481 at page 491 para 23.

MIG proposes could be problematic. For example, no review clause can reduce the total area of development: see *Medical Officer of Health v Canterbury Regional Council*[166].

[465] The Minister considers that the only existing mechanism under the Act which allows the consent holders' rights to be reduced is in relation to water, coastal or discharge permits. In the case of maximum and minimum flows, the existing consents for water quality standards, for example, can be reviewed as a result of rules in the plan. This mechanism, however, has a specific statutory basis and it is implemented through a plan process (ss.68(7) and 128(1)(b)).

[466] The Minister submits that if the consent process is to manage staging then given the limitations on the review process, the only realistic option is to provide for short term consents initially, to enable a full assessment of the effects to be made before further and potentially larger consents are granted. Dr Gillespie, for example, considers five years as adequate time to gather sufficient information to model such large scale development[167].

Evaluation

[467] Assessing these points one by one, we note the conditions will be set after a hearing before the TDC and possibly an appeal to this Court. According to Dr Gillespie, the information on the future sustainability of the CMA is advancing more quickly than expected. It is very likely that by the time any full block application in the Tasman District comes to be heard, there will be a much greater understanding again. The information base will therefore be much broader and deeper.

[468] The chief consideration of the TDC to ensure in any review of the conditions is that stated by His Honour Judge Sheppard in *PVL Proteins Limited and Anor v Auckland Regional Council*[168]. In that case His Honour found the consent could not be terminated. And in changing the conditions, the consent authority would have to have regard to whether the consents would continue to be viable after the change[169]. He emphasises that *While the consent authority is required to have regard to continued viability of the consent after the conditions are changed, there is no other limit on the extent to which conditions may be changed, save the consent authority's judgement of what is appropriate*[170]. It is a view we endorse and apply in the context of this case.

[469] As to the reduction in consent holders' rights, we see no legal bar to providing a condition to reduce the extent of a marine farm if the EAG advise its preference for this course. Such a condition does not affect the consent holders' rights. Marine farmers will still have an overall permit to marine farm. Mr Kyle uses the analogy of the land farmer who leaves paddocks fallow for sustainable management reasons. The marine farmers still have occupation rights which would continue across the whole block if granted. It is inferred by s.12 RMA that such rights would not be extinguished.

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166 [1995] NZRMA 49.
167 Gillespie NOE stage II pages 125 – 126.
168 A 61/2001.
169 Page 1 para [79].
170 Ibid para [80].

[470] In that regard we note that s.12(4)(a) specifies as follows:

> **In this area—**
> **(a) 'Occupy' means the activity of occupying any part of the coastal marine area—**
> **(i) Where that occupation is reasonably necessary for another activity; and**
> **(ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and**
> **(iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense—**
> **and 'occupation' has a corresponding meaning:**

[471] The definition of occupation in s.12(4)(a)(i) requires that occupation takes place in conjunction with an activity. The phrase **whether in a physical or legal sense** in s.12(4)(a)(iii) indicates however that the option provides a legal right to occupy, even if the space is not physically occupied[171].

[472] The Ringroad also drew a distinction between the regulation of use and occupation in s.12(1) and (2), while the resource consent to occupy can be issued over an area, the resource consent to use the same area may be subject to different conditions and restrictions. A condition or review of a resource consent can, as part of the overall management, reduce the ability to use the area of occupation in accordance with a sustainable purpose[172].

[473] Contrary to what some of the parties submitted, we could find nothing in *Medical Officer of Health v Canterbury Regional Council*[173] to support the contention that monitoring and the review of the conditions could only affect the density and not the area for the development. The dicta requires only that the consent authority is not entitled to amend those conditions or impose new ones which have the effect of preventing the activity for which the resource consent was granted. A requirement formulated to leave an area of the CMA fallow, for example, even a large one, we see as not untoward. In *Feltex Carpets Ltd v Canterbury Regional Council*, His Honour Judge Jackson held:

> *... the power to change conditions is wide and flexible. Provided that certain preconditions are met (s.128(1)) then any new or amended condition can be added to or substituted in the resource consent. That is the combined effect of section 132(2) and section 108(2) empowering any appropriate condition. There is no obvious limit on how far a resource consent could be subtracted from or qualified by new conditions. Thirdly the notice of review under section 129 is a significant part of reviewing conditions because it starts the process.*[174]

We concur with the Judge's view.

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[171] Kyle NOE stage II pages 32 – 33.
[172] Ringroad Submissions In Reply, stage II page 16.
[173] [1995] NZRMA 49, 54.
[174] (2000) 6 ELRNZ 275, C 103/00, paragraph [20].

[474] It is worth noting too that s.132(4) states as follows:

> **(4) Notwithstanding sections 128 to 131 and subsections (1) to (3), where -**
> **(a) A consent authority reviews a resource consent under section 128(1)(c); and**
> **(b) The application contained inaccuracies which the consent authority considers materially influenced the decision made on the application; and**
> **(c) There are significant adverse effects on the environment resulting from the exercise of the consent –**
> **the consent authority may cancel the resource consent.**

This provision implies there will be a strong onus on applicants to *get it right*.

[475] Much can be achieved with the term of the consent. Mrs Allan would nominate a minimum of 10 years because that would allow full development of a block without having to require a further consent. She could (probably) accept a term somewhere between 10 – 25 years, but emphasised that it is neither necessary or particularly desirable for a plan to tie down a consent's duration at this stage[175].

[476] This is a conclusion we too have now come to. Two – three crop cycles will take up to 3 to 5 years to implement. The stage 2 development of any marine farm cannot be implemented until after that time. The state of knowledge will be developing and management practices will change or adapt as circumstances do. It may be some time before a full subzone is available for full production mussel farming and there should be monitoring results available from stage 3 before final development.

[477] We consider, therefore, the term of the consent should be determined at the time the application is made. We note, however, that the Iwi have their own reasons for limiting the term of consents and this will require adjustment between the parties when it comes to resource consent applications.

Conclusion

[478] We are satisfied marine farming developments may be halted or reversed if necessary through the various legal mechanisms which exist in the RMA.

- **Mechanisms for Progression Beyond Stage I: Deferred Zoning, Plan Change, or Technical Decision?**

Deferred Zoning

[479] It was Mr Jackson's evidence that:

> *... we started with the proposition from the interim report that the Court wished to see marine farming commence at 50 hectares in each of the 250 hectare blocks zoned for mussel farming and it appeared to us the converse of that was that there was to be no activity occurring in the remaining 200 hectares within each of those blocks, the only effective way we could see to achieve that second aspect was through a rule prohibiting applications for*

[175] Allan NOE stage II page 135.

> *marine farming in that area. If we include a prohibited activity rule we then needed some mechanism by which to uplift that prohibition in whole or in part if the results of monitoring the activity on the initial 50 hectares of development showed that further development of aquaculture could occur without adverse effects. The default position .... is the plan change mechanism by the Act.*[176]

[480] Mr Jackson stated that the TDC has made use of deferred management in a number of zones in Section 17.12 of the PTRMP, mainly to defer residential, rural residential or commercial zonings. The triggers for uplifting the deferment is the provision of some service (water supply, sewerage reticulation, etc). The options for uplifting a deferment appear to be a purely technical decision at one end of the resource management process, and one with a high policy content, at the other. The TDC considers a plan change in this case was not considered necessary because practically all the policy content had been decided by the Court at stage I. In the stage 2 deferment, a prohibited activity rule will apply. The TDC proposes an uplifting of the deferral by council resolution.

[481] After the November 2001 stage II hearing, the TDC amended its proposal to overlay the RMA process, with a second one under the Local Government Act for the council to make a decision uplifting the deferred zoning. The Challenger plan proposed deferred zoning is the same, except uplifting would be by way of plan change.

[482] The MIG plan does not attempt to draft into the rules set prescriptive standards as trigger levels for a next stage of the development. This is because the ecologists working group concluded that at this time they are unable to develop any such useful prescriptive provisions. Dr Gillespie states as follows:

> *... the rationale for trigger levels was a difficult one and there are some different considerations for water column effects and benthic effects ... and although we could identify trigger levels I don't think that they would be appropriate at this stage until we have that base line and one or two monitoring surveys to give us the spatial and temporal variation, as we go through the monitoring program over a period of years it will be possible to develop these trigger levels to a point where they are useable in terms of conditions but at this stage I would say no.*[177]

[483] In the Plan (again under the heading *"C. Reporting and Assessment Information"*) the ecological guidelines require that prior to going to the next stage of mussel farm development, a comprehensive expert report be produced bringing together the information produced by the monitoring, and assessing the importance of any monitored changes to the benthos or water column.

[484] The MIG plan is accordingly based on proceeding to the next stage of mussel farm development unless significant adverse effects are found. Mrs Allan identified that the MIG planners had spent some time considering likely conditions of one resource consent for a whole block; and the industry envisaged a consent would contain such an *"unless"* condition.

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[176] Jackson NOE stage II page 10.
[177] Gillespie NOE stage II page 10.

Plan Change

[485] The MIG provisions have been criticised by several parties for not providing for a sufficiently positive decision by the TDC[178]. They consider a plan change as to be both efficient and protective of the values they hold dear. The RFBPS submits as follows[179]:

- in other parts of the PTRMP, date, finite or other objective matters which the parties are in no doubt of achieving, set the parameters for development;
- the CMA is public open space with high public interest values;
- no performance criteria or triggers have been established – these may be qualitative and open to different interpretations;
- it is appropriate that the planning regime for a public resource is less enabling than for private land and leaves the TDC with a greater degree of control over its occupation and use;
- it provides wider opportunities to reconsider the impacts and merits of large scale aquaculture than a review of individual consent conditions;
- it enables an assessment of environmental effects (including cumulative ones) of existing operations before further space is released;
- interested parties have better rights of participation – under s.130(3) review of consent conditions may not be publicly notified;
- if monitoring indicates broad and large scale changes occurring it would be appropriate for the TDC to review all consents together, and a plan change is a more administratively efficient way of dealing with this;
- staging by management plan has no precedent anywhere else in New Zealand – in the Waikato example the further allocation of space for aquaculture – in Wilsons Bay is to be made available through a variation or plan change;

[486] The plan change approach is supported also by the Minister of Conservation, who stresses the cost effectiveness of such an approach. In the Minister's opinion, it promotes certainty, clarity and efficiency and reduces the costs for the iwi and public interest groups who would otherwise have to participate in numerous individual consent and review processes[180]. It also enables appropriate conditions to be set for stages 2 and 3 consents.

[487] The Minister believes that such an approach, as modified by Challenger and RFBPS, is preferable to the MIG option because it is more precautionary, conservative and legally certain. It strikes the appropriate balance between maximising the flexibility for the applicant while minimising the applicant's transaction costs, as well as the ability of the consent authority to manage development while minimising the transaction costs to the Council and community. It is also consistent with Dr Gillespie's view that moving from stage to stage involves a positive decision of the Council[181].

[488] The Minister acknowledges the plan change process, however, provides the minimum flexibility to marine farmers and would probably be the most time consuming option. The TDC suggestion of using a Local Government Act 1974 process would possibly offer a quicker route. However, if appeal only lay to the High Court, Iwi and public interest

[178] SMW Submissions In Reply pages 12 – 14.
[179] RFBPS Closing Submissions stage II page 6.
[180] Nugent NOE stage II page 90.
[181] Gillespie NOE stage II page 118.

groups (as well as marine farmers) may well have concerns about the scope and cost of appeal rights under such a process. Further, it provides no parties with certainty about their ability to participate[182].

Evaluation

[489] The MIG consider that there is no evidential or other material in the TDC's case for deferment. Mr Jackson makes mention of the method and makes some further brief references. But it is not in the TDC's s.32 analysis at stage II of the inquiry, and does not therefore deal with the TDC's plan amendments incorporating rules for a deferred zone.

[490] Mrs Allan, as an experienced planning consultant who has worked closely with the TDC, has never come across the uplifting of the deferment of a zone by council resolution other than in Tasman District. She states she has always queried its validity. In all other circumstances in which she has come across deferments they *'have been indicated in the plan but they have been uplifted by plan change.'*[183]

[491] The term deferred 'zoning' is in fact a misnomer. What should be addressed is actually deferred 'development', otherwise the TDC is undermining the object and intent of the AMA proposals set up by the Court at stage I of the inquiry. If the TDC is in a co-regulatory role as the MIG envisage, and the process has a high degree of transparency, then deferment is unnecessary[184].

[492] We do not favour the use of the Local Government Act 1974 to process the progression in staging either. This was urged upon us by the TDC which identified the Act had the following features:

(i) independent evaluation of the monitoring results from the initial stage of development by an expert ecologist and further advice;
(ii) independent peer review of that evaluation and advice;
(iii) a proposed council resolution based on the expert ecological advice received and subsequent public notification of that proposed resolution;
(iv) opportunity for public scrutiny of the ecological advice received by the TDC and for members of the public to make written submissions on the TDC's proposed resolution and to be heard in support of those submissions;
(v) a prescribed timeframe within which to finalise any resolution[185].

[493] In our opinion, it is not simply the case of obtaining the reports, passing the appropriate resolution and allowing the period of between one month and three months for public submissions. The Local Government Act 1974 limits the rights of participation by the public in the decision-making process to what the local authority considers 'reasonable'. No express powers are contained within the proposed rule to call evidence and to cross-examine. There is a power to suppress evidence from other parties. There is a power to exclude the public from any hearing. There is no right of appeal to the Environment Court[186].

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182 Minister of Conservation Closing Submissions stage II pages 5 – 9.
183 Allan NOE stage II page 70.
184 Kyle NOE stage II page 12.
185 TDC Submissions in Reply stage II page 14.
186 Ringroad Submissions In Reply stage II pages 8 – 12.

[494] We therefore accept the Ringroad's submission that the RMA is the relevant legislative code, with s.64 and Part II of the First Schedule to the Act dictating the way in which coastal plans are changed. The process suggested by the TDC is outside the RMA with the point of undeferment open to lengthy discussion and debate, both inside and outside the TDC. It also leaves the action of 'undeferment' entirely at the TDC's discretion.

[495] As the MIG parties and the TDC identify similar difficulties face Challenger's proposal for releasing further water space by subsequent plan changes[187]. Consensus by the parties identified:

[a] that there will be costs and delays associated with plan change procedures: Mr Nugent concedes a plan change process is likely to take considerable time[188];
[b] the difficulties of removing prohibited activity status for areas outside stage I without re-litigating the issues decided in these references;
[c] the fact that there is no way the TDC could restrict issues under Clause 14 of the First Schedule to the RMA; this clause enables the parties to refer not only to the matter included in the proposal but any other matter and risks relitigation of matters at issue, both at stage I and onwards[189];
[d] the effect of s.88(2) RMA: this would prevent the TDC from receiving applications for a stage 2 development whilst the prohibited activity status of marine farming, which would be the dominant plan provision, applied in each block.

[496] The staging proposal we have identified for full block development, is predicated on a stage 1 baseline study and two crop cycles at 50 – 75 hectare developed blocks depending on density. The Court considers that the results from 50 hectares of full intensity are of more value than 75 hectares at reduced intensity but Dr James supports some flexibility as did Dr Grange in the end. We conclude there is no precautionary reason at all why a plan change should be required for applicants to move from stage 1 to stage 2 to stage 3 if no adverse effects are identified from the monitoring results. It was significant that Dr Grange saw there was no value in having a division of time between the end of stage 1 and movement to stage 2 if the monitoring indicated no unacceptable adverse effects. He was referring to the plan change process[190].

[497] What should effectively occur with full block applications is deferred development, each stage requiring a reassessment and confirmation from the TDC that the next stage may be proceeded with. In the Court's view, this does not require a plan change. Why require it, if stage 1 meets all the monitoring requirements and standards to progress? The industry should simply move to stage 2 on the go-ahead from the TDC after advice from the EAG.

[498] Mr Kyle acknowledges that if a regulatory procedure is required, then a condition giving the TDC the final say on the progression of development through the stages should be added. He concedes that a situation may rise where, notwithstanding that a consent to occupy

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187 TDC Closing Submissions stage II pages 8 – 9. GBMFC Closing Submissions stage II page 12. SMW Submissions In Reply stage II page 6.
188 Nugent NOE stage II pages 85 – 86.
189 Ibid pages 86 – 88.
190 Grange NOE stage II page 161.

the whole block has been granted, the TDC has the power to prevent the whole block being occupied. He suggests a condition of resource consent that involves the TDC having the final word and the progression of development through stages. This may be considered at the application stage. We conclude that is a worthwhile suggestion.

[499] Finally we consider the review procedure as very efficient because it is only needed if mussel farmers do not voluntarily adjust farming operations to respond to monitoring results and after advice from the EAG to the TDC.

[500] The Court recognises that the possibility could preclude further development in a 250 hectare block within an AMA.

[501] Because movement to stage 2 marine farming is dependent on fulfilling these criteria, and the approval of the EAG, if the criteria are not met then stage 2 may not be reached in any particular 250 hectare block in an AMA.

[502] For example, the parties might create rules to allow the EAG to extrapolate data from neighbouring blocks to allow stage 2 development in the affected block; or the parties may consider it necessary, in these circumstances, to require a plan change to allow stage 2 development in the affected block.

[503] The solution the parties propose should differentiate between temporary setbacks to the timetable for development, and situations which are likely to continue and prevent stage 2 development of a block permanently. It is the Court's view that rules or other solutions proposed by the parties should address only the latter situation.

Conclusion

[504] We conclude a council decision on the advice of the EAG is the best practicable option in the various alternatives to advance staging.

- **Table YY**

Introduction

[505] Table YY is a document introduced to the Court by MIG to indicate a range of possible line densities and spatial developments for the staging of both mussel farming and spat catching in the various AMAs.

[506] The table divided development of AMAs into three. Stage 1 for AMA 3, for example, showed options of whole block coverage, two thirds block coverage and one third block coverage at densities of 150 metre spacings between each longline, respectively.

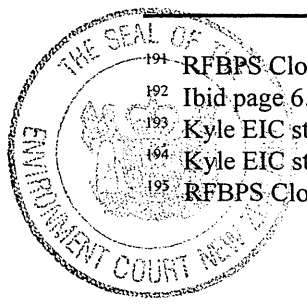
[507] Under this heading we discuss staging and staging options in Table YY, such as development by density and spatial definition. All versions of the plan amendments include provision for adaptive management of aquaculture development through staging. The principal difference, says Mr Jackson, is in the spatial scale of consents available at the initial stage.

[508] Much was made by some of the parties that the scientists had not been involved in the formulation of Table YY – that it had been dictated by the planners[191]. In the Minister of Conservation's opinion, Table YY does not in fact provide any certainty of the parameters of staging through the plan process. And Challenger and the RFBPS conclude that *Table YY assumes a certain sort of development without necessarily gathering the information first*[192].

[509] Mr Kyle indicates that Table YY was inserted into the plan provisions to meet concerns from those involved in the workshops about leaving the staging mechanism entirely to the resource consent process[193]. Rule 25.1.X4(d)(i) provides for staging to be in *general accordance* with Table YY and then gives a range of options. It is intended as a guide only to the framework to staging. Mr Kyle identifies that the plan effectively enables the development of each block to proceed in increments of one third of a block to its maximum line density or the development of the entire block at one third of its maximum line density or a scenario in between[194].

[510] Criticisms of Table YY from other parties include:

- Table YY is prescriptive;
- Table YY does not include the 50 hectare stage I development foreshadowed by Dr Gillespie;
- Table YY being introduced to express the staging element is problematic because it predetermines what intensity and scale of development should occur in stages 2 and 3 without considering the results of monitoring or additional base line information on the ecosystems;
- Drs Gillespie and Grange expressed concern about large areas being farmed at low density because of the potential for benthic effects as the activity does not implement a precautionary approach;
- Table YY describes the density of development in relation to separation distances; it takes no account of the length depth of dropper lines; the potential for larger dropper lines to increase mussel biomass and consequent phytoplankton depletion has not been considered;
- Table YY allows marine farming to expand unless, or until, monitoring shows adverse effects and the TDC effects a review of consent conditions; this creates an incentive against development of comprehensive monitoring and the prompt analysis and release of monitoring information; the less information available to the TDC or the slower it is able to be provided the more difficult it is to establish whether adverse impacts are occurring[195].



[191] RFBPS Closing Submissions stage II page 7.
[192] Ibid page 6.
[193] Kyle EIC stage II page 19 Appendix A.
[194] Kyle EIC stage II page 18.
[195] RFBPS Closing Submissions stage II pages 6 – 7.

[511] We were informed the MIG approach to the issue of staging was approved by the Environment Court in *Tikapa Moana Enterprises Ltd v Waikato Regional Council* (RMA 287A/97), a consent order of the Court introduced as Exhibit 4. Condition 10 of that order states as follows:

> *This consent relates to Stage 2 of the development of Area A as identified in the plan forming part of the Management Plan, and shall be exercised only after 75% of the total stage one area has been development and it has been demonstrated that there are no significant adverse effects due to the stage one development (stages as defined in the Management Plan). The occurrence of significant adverse effects will be determined by reviewing the results of the environmental monitoring programme undertaken for the stage one development area.*

[512] Mr Kyle identifies that he thought that stage I development of that consent was up to 80 hectares. The Court was urged to look upon the Waikato example as at the cutting edge of industry development.

[513] Dr Gillespie, when talking of Table YY, stated that the concept of using density as another staging mechanism was a concept he had not addressed in the earlier proceedings. He considered low density development doesn't provide enough rationale for feedback to allow the scientist to arrive at an understanding of what full block development at full density might generate in terms of effects. And he considered that if the marine farmer starts with one block at one density there will be less flexibility at the next stage than if the process starts with different blocks at different densities – that to him would increase flexibility of staging[196].

[514] Dr Gillespie does not support the concept of development across an entire 250 hectare block at low density at stage I, but he reiterated *In terms of the way the AMA has been allocated I feel that we can look at 50 hectare blocks within each of these 250 hectare applications safely.* The way the AMAs have been determined does not give Dr Gillespie the geographic variation he originally had anticipated. AMA 3, for example, is a square box so it is difficult to obtain comparisons of effects in different areas[197]. And he considers the stages that may actually eventuate through the consent process may be entirely different and the table is not intended to be mandatory[198].

[515] Dr James was also asked questions in respect of the provisions of Table YY and how it would *"guide"* the staging process. In principle he would accept the staging set out in the Table in conjunction with the other parts of the rules. He also agreed that in the event of unforeseen adverse effects, the removal of structures was one option. He considered, however, *I would not foresee removing all structures as ever being necessary based on the work we have been carrying out*[199].

[516] Dr James identifies that the concept of staged development as one third, one third, and one third over the 250 hectare blocks evolved from conversations between himself and

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[196] Gillespie EIC page 13.
[197] Gillespie NOE stage II pages 111 – 114, 120 – 123, 125 – 128.
[198] Gillespie NOE stage II page 122.
[199] James NOE stage II page 106.

the MIG planners. (The guidelines and framework for Table YY were put out by the industry planners for others to work from).

[517] Dr Grange was not asked to review Table YY (except for AMA 1) seeing it for the first time in a meeting with GBMFC advisers in October 2001[200]. In Dr Grange's opinion Table YY puts the management of the development before the information gathering:

> *Q. Doesn't Table YY give all the options?*
> *A. No Table YY assumes a certain sort of development without necessarily gathering the information first, it may be that at the end of stage I something totally different pops up from the results of that initial development which allows the industry to expand or develop in a totally different way than the relatively prescribed planning in Table YY.*[201]

[518] Challenger accordingly is concerned that TDC's approach is one 'where process and outcome is dependent upon the science justifying in sustainability terms progression [whereas the] MIG proposal would allow for progression even when the science remained uncertain as to adverse effects or controversial or otherwise arguable'.

[519] In terms of variation and farming intensities, Dr Grange considers that the most meaningful way of deriving results from stage I release of space for mussel farming with a view to arriving at that end state is to develop intensively a smaller area – say 50 hectares within a block. But he considered it would also be useful to have some areas at a less intensive development not necessarily larger than 50 hectares.

[520] Dr Grange's evidence was that the options for experimentation in data-gathering outlined in Table YY may not allow the TDC to adequately assess whether development should proceed or not. He goes on to say that:

> *Because information is being used to almost control the development may be control is too strong a word but to help the development along and it will be peer reviewed it must have integrity, it must evaluate the needs of the TDC to make an informed decision and it must be independent of any desire to either restrict or expand the activity without that information.*[202]

[521] The witness builds on the analogy of traffic lights used by SMW where the MIG proposal allows staged progression unless there is a red light, whilst the TDC requires a green light before proceeding. Dr Grange considers that when all the lights were out (ie insufficient information) a precautionary approach would dictate *you would stop, assess what other information you could gather and then proceed cautiously through the intersection, if you assume the light was green there could be quite serious consequences and in the case of the staged development of the AMAs which is what we're talking about here I believe that expansion must occur based on adequate information.*[203]

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200 Grange for Challenger NOE stage II page 152.
201 Ibid page 164.
202 Ibid.
203 Ibid page 165.

[522] More importantly, Dr Grange states if we allow a range of options at stage I, which is what Table YY indicates, then the ecological information becomes fragmented and would actually reduce the scientific certainty we are required to provide to the TDC. When questioned about whether it was possible without the initial level of development to properly analyse and evaluate the effects of that end state consent Dr Grange replies that he does not think the scientists can scale up from their existing knowledge to 250 hectares[204]. Earlier on he had emphasised it would reduce the scientists' predictive ability to have full scale development[205].

[523] GBMFC for its part considers Table YY should state more clearly that the options are non-exhaustive.

Issues Arising

- Is Table YY prescriptive?
- What spatial area should constitute stage I and should a whole block be staged at low density?
- Should stage 1 mussel farming be limited to 50 hectares or 75 hectares?
- No requirement for Table YY?

Evaluation

Is Table YY Prescriptive?

[524] The answer is yes. We consider that Table YY is problematic because it predetermines what intensity of scale and development should occur in stages 2 and 3. Mr Kyle acknowledges that the wording was possibly too prescriptive and requires amelioration. In fact, he goes further, acknowledging that with so many unknowns in the process, even general accordance with Table YY may not be feasible[206]. Mr Kyle's advice throughout has been essentially very practical.

[525] We concluded that Table YY may not give the certainty some of the parties require and nor should it. We consider too it is at odds with the principles of adaptive management.

[526] We conclude it is not necessary at all.

Conclusion

[527] We direct that Table YY be removed from the proposed plan provisions.

What Spatial Area Should Constitute Stage I?

[528] The MIG proposal by the planners in some of its aspects fudges some of the findings of the Court in relation to staged development. The necessity for a 50 hectare intense development at stage I is a baseline assessment in Rule 25.1X(4)d(i). In the opinion of one party, (Tasman Mussels), Table YY omits the 50 hectare intensive development option

[204] Grange NOE stage II page 154.
[205] Ibid page 156.
[206] Kyle NOE stage II pages 59 – 60.

because Rule 25.1X3 provides for mussel farming and spat catching for the first new area of less than 50 hectares within any block as a controlled activity. For that reason, it is stated it did not need to be included specifically in Table YY which is orientated only to full block development[207].

[529] In the interim report, the Court found that Dr Gillespie advocated a 50 hectare staged development. We noted this particularly because it was an important issue. He was asked the question twice[208]. And when questioned by the Court at the stage 2 of the inquiry, he stated that he was happy with the Court's findings in the interim report[209]. Yet the MIG planners, perhaps based on the GBMFC development, which showed no effects after ten years, or the Waikato consent order allowing developments of 80 hectares at stage 1 (with no evidence before this Court on what that figure was based), persisted in indicating various sizes and intensity of the stage I development ranging from intense development at 50 hectares in limited areas only, to full block development of low intensity. 50 hectare development is relegated to controlled activities as suitable only for some blocks. This is indicated in Table YY.

[530] In order that the Court's interim report provides a soundly based recommendation to the Minister in our final report for staged development, we revisited the whole question of the 50 hectare development tracking Dr Gillespie's opinions [again] throughout the various briefs of evidence and notes of evidence at both stages of the inquiry. At stage I, the witness states variously as follows:

- 80 hectares (as in Collingwood) would be sufficient to investigate the larger scale effects, the intention being to start small and scale up[210];
- seconds later, in the same cross-examination, Dr Gillespie indicates for the first time his concern to have an area of at least 50 hectares at full intensity (this appeared to be without spat catching)[211];
- on being asked whether he had recommended the 250 AMA blocks to SMW, he responds that the concept came about through discussion and makes the point that a large scale farm development would be needed of at least 50 hectares in order to investigate large scale effects[212];
- on being questioned by the RFBPS suggesting that he had mentioned 50 hectare farms [as an entity], he responds he had not suggested 50 hectare blocks necessarily, but that would be the minimum size in order to investigate large scale effects: with regards to staging, *aside from having 50 hectare development areas*, there is a need to consider areas around that zone as part of the monitoring programme[213];
- when discussing Golden Bay models necessary for adopting the precautionary approach, he was asked whether that included identifying three lots *of 50 hectares* in Golden Bay [in three blocks], he answered in the affirmative[214];

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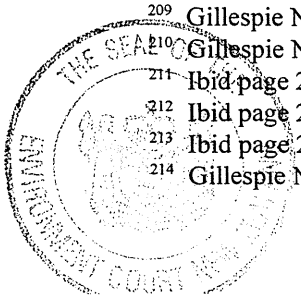
[207] Tasman Mussels Submissions stage II pages 22 – 23.
[208] Interim Report page 171 citing Gillespie NOE stage I page 2018.
[209] Gillespie NOE stage II page 129
[210] Gillespie NOE stage I page 1975.
[211] Ibid page 2016.
[212] Ibid page 2007.
[213] Ibid page 2007.
[214] Gillespie NOE stage I page 2018.



- he again asked whether 50 [hectares] was a desirable figure or a minimal figure and he replied [again] that 50 hectares was considered not necessarily a desirable figure, it was the minimum figure, to be suitable for assessing large scale marine farming effects – *I wouldn't suggest it necessarily a minimum figure, it could be a larger area and there might be some discussion on the size of the basic unit*[215];
- when asked what areas within a 250 hectare block or zone would he be comfortable with for the purpose of monitoring programmes, he reaffirmed *I would be comfortable with 50 hectares*[216];
- 250 hectare developments Dr Gillespie would not be comfortable with because they do not give enough flexibility: being precautionary the scale with which the programme is begun is the key to being able to reverse adverse effects[217].

[531] Our conclusion after carefully analysing this evidence [again] is that overall Dr Gillespie had settled for 50 hectares intense development as a basis for stage I. It was a constant he focussed on more often than not. There was a suggestion, however, that a larger area might be suitable (75 hectares was put to him at one point by SMW's counsel) and this theme carried into the stage II hearing. We found Dr Gillespie's evidence remarkably consistent throughout both hearings.

[532] At stage II of the inquiry, we carefully assessed the further scientific evidence of the witnesses who were called to give support to the various plan proposals including Table YY. The question arises whether this evidence justifies the departure from the Court's findings of that level of development (50 hectares within a 250 hectare block) and would this be the most appropriate precautionary approach?

[533] Dr Gillespie makes the point that the parties are now looking at fixed AMAs and dealing with development within those areas, whereas previously they had been thinking about more or less the whole of Tasman and Golden Bays being available for marine farming. He observes the [initial] 50 hectares intensely developed farms are now brought within close proximity [to each other] within the AMAs but ... *he is comfortable with that development.*

[534] In Dr Gillespie's opinion, the difficulty may be, however, in actually siting the locations for those blocks giving enough buffer areas around them in order to identify proper monitoring sites. Since the 250 blocks are [now] right up against one another [see Appendix ZZ], the development plan will have to have some co-ordination. The 50 hectare blocks will need to be spread out by necessity. This would give the best feedback for the development of the future stages because the scientists would have information on all the proposed densities and it would give the most flexibility for management to respond in an appropriate way[218].

[535] Asked whether some 50 hectare areas could be utilised and put closer together, he responds We needed a large *enuf area to mk an appropriate area to scale up so that's why I said 50 and I did not really want that be limited to 50 ha*[219]. But he was not willing to support development of whole areas, however, as a staging exercise: *It would be appropriate to look*

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[215] Ibid page 2018.
[216] Ibid.
[217] Ibid page 1936.
[218] Gillespie NOE stage II pages 126 – 128.
[219] Ibid page 114.

at 250 hectare blocks and look at 50 hectare blocks within each of those 250 hectare applications safely relative to where we are now and where we were a couple of years ago[220]. Finally, when asked by the Court about some of the inconsistencies it perceived in his cross-examination, Dr Gillespie again states: *I'm still comfortable with starting out with 50 hectare blocks, monitoring those for full density ...*[221]

[536] Dr Grange for Challenger expressed throughout his evidence, the view that he was still happy with the initial 50 hectare development in each 250 block. However, he suggested the converse from Dr Gillespie about the spatial spread of 50 hectares. He considered it would be possible for two, three or even four 50 hectare blocks very close together in each of the 250 hectare blocks to scale up even to 250 hectare development site over four 250 hectare blocks without compromising the boundaries beyond the AMA[222]. We have difficulty with that approach as it appears to be the opposite of what Dr Gillespie is seeking to achieve.

[537] All scientists did, however, acknowledge that if the densities in stage I are varied, then the data available for monitoring will be improved and that if a flow intensity development is trialled, 75 hectares might be an appropriate figure to contemplate in various locations[223]. We return to the issue of 75 hectares later in this decision.

[538] The integrity of the controlled sites at this figure would not be comprised according to Dr Grange. It would effectively would be a *"stage and a half"* development[224].

[539] Whether whole blocks should be staged at low density was a point of debate. Dr Gillespie considers that with whole block areas covered by less dense development, the availability of information to provide feedback is lost[225]. There would also have to be co-ordination with larger blocks whilst the TDC would be required to determine each block on its merits. Thirdly, staging over a large area by reduced intensity would be required to be complemented by the requirement that other blocks be developed at higher intensity over a reduced area and this comes back to a question of co-ordination and integration[226].

[540] Dr Grange, for his part, sees Table YY outside much of the ecological group discussion. He said this about end point consents:

> *As we spread out over larger areas with lower scaled intensity we reduce our ability to have replicate particularly in space, we also don't know where the end point ecologically may be, we may know where the end stage consent but we won't know whether ecologically we could get there unless we understand the effects of that intensity, it's too risky I think to go to that intensity of 250 ha, and a lower intensity to may be infill every second line and in the next stage every second line again but there are confounding* [sic] *effects of which happens at the end of each of those experiments. ...*[227]

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[220] Ibid
[221] Gillespie NOE stage II page 131.
[222] Ibid page 156.
[223] Gillespie NOE stage II page 131.
[224] Grange for Challenger NOE stage II pages 156 – 157, 153.
[225] Gillespie NOE stage II page 130.
[226] Ibid.
[227] Grange for Challenger NOE stage II page 155.

[541] Dr Gillespie was asked by the Court whether full block development at low intensity was now part of his brief. He responded:

> *... would I be comfortable with developing a whole 250 ha block at low density if there were another block nearby which gives the information of the different densities to extrapolate is something I hadn't really considered*[228] – [the rest of his statement was hypothesis].

There was no ecological benthic scientific opinion at this inquiry to support whole block development at low intensity.

Should Stage 1 Mussel Farming be Limited to 50 Hectares or 75 Hectares?

[542] At stage II of the inquiry, Dr Gillespie conceded he would be *"comfortable"* for stage 1 development to proceed in some of the 250 hectare blocks in stage 1 to 75 hectares at a reduced intensity. Dr Grange agreed.

[543] For this reason we do not limit stage I to 50 hectares, and accept that some initial developments may go to 75 hectares provided it is at a reduced intensity.

[544] We recognise this may give rise to some difficulties when a farmer who has farmed at 75 hectares at reduced intensity, applies to develop beyond this area. The criteria for moving to stage 2 clearly require two – three crop cycles at 50 hectares full intensity showing no adverse effects. This is something that will have to be *"worked through"* in the management plan process.

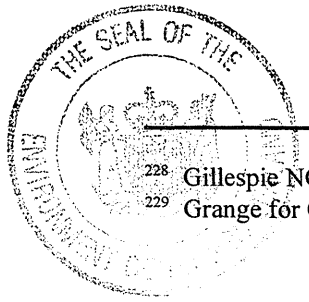
Conclusion

[545] We conclude that staged development should proceed of 50 hectares intense development at stage 1 or 75 hectares less intense development. This should be by way of two – three crop cycles as advised by the scientists.

No Requirement for Table YY?

[546] We consider that a Table YY appended to the planning documents should not be necessary. It was sought by those requiring more certainty around the staging elements. But that certainty can be now provided for in other ways. We consider that there is a grave danger of introducing too much prescription into what is essentially a management process.

[547] We consider that prescription should only relate to stage 1. Drs Grange and Gillespie are quite clear about the negative aspects of trying to provide a guide as to the timing and intensity of the stages beyond stage 1[229].



[228] Gillespie NOE stage II page 131.
[229] Grange for Challenger NOE stage II page 164: Gillespie NOE stage II page 131.

[548] Instead we suggest a rule along the lines of the following:

> *With the exception of AMA 1 in any 250 hectare subzone a maximum of 50 hectares intense development or 75 hectares less intense development is a requisite for stage I. Further stages will be agreed after the monitoring results from two growing cycles at full intensity have been reported on by the industry and analysed by the TDC. ...*

unless the parties by consensus come to another rule or solution. Progression will be made by way of monitoring results and the TDC's 'tick off' after the advice of EAG.

[549] In coming to this conclusion we were persuaded by Dr Grange's evidence that it is easier to scale back from smaller blocks at lower density if it is found the carrying capacity of the ecosystem is being exceeded at stage 1. If there are no difficulties, there is no need to leave the existing 50 hectare blocks at lower density thereafter[230].

[550] As we see it, there is considerable pressure on the industry to ensure its applications are comprehensive when lodged at the beginning of the application process. The interest groups will have their input into such a process and the TDC at all times remain in overall control[231]. There is no certainty that an application will be granted. If it is declined then this, according to Mr Kyle, would leave a block at large for other individuals to apply and who may undertake the application process better.

Conclusion

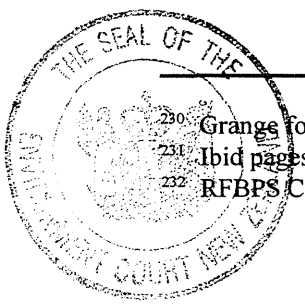
[551] The plan provisions should incorporate a rule setting the limits of development at stage 1. Otherwise Table YY is not necessary.

- **Ecological Advisory Group**

[552] At Stage I of the inquiry we noted with approval a Ringroad proposal to identify a body of reputable scientists to oversee the staged/forward progression options promoted by the industry. This was supported by several of the scientists.

[553] The Ringroad now favour an EAG inclusive of non-scientists. Mrs Allan for the MIG confirms that such a group is a central part of their proposal.

[554] RFBPS consider that an absence of any requirement for EAG to be comprised of scientists, potentially limits the ability of such a group to provide technical advice to the TDC. It also submits that an advisory group is no substitute for full public scrutiny and consultation. The Society's experience with other advisory groups is *that they can have a very limited role in influencing decision makers, that effective participation requires considerable voluntary time, and that they can be used to create the impression of public consultation while providing little of its substance*[232].



[230] Grange for Challenger NOE stage II.
[231] Ibid pages 7 – 8.
[232] RFBPS Closing Submissions stage II page 10.

[555] Mr Stewart, for RFBPS, makes the point that the *"client"* of the EAG should be the TDC[233]. It is his evidence that the role of the group is *not to obtain information. ...* [if] *role should be to review information provided to it in order to assist the Council to perform its regulatory function.*

[556] It is also Mr Stewart's evidence that the role of the group should be to provide a range of advice to the TDC and not be limited to ecological advice. We return to this point.

[557] The TDC submits that the role or even the need for an EAG depends on resolving the decision-making process that the group may link into[234]. However, the TDC's clear view was that if such a committee was to be convened, its membership should be limited to experts in marine ecology.

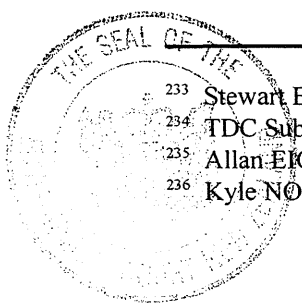
[558] Mrs Allan, Planning Consultant for MIG, sees the EAG as *"a cornerstone of its own* [MIG's] *sustainable management proposal."*[235] She sees the writing of such a group into the plan in some detail as the only valid way of ensuring the TDC's commitment to such a group.

[559] We note also the comments of Mr Kyle, who stated:

> *The intent of the group is not so, not intended to be a regulatory one, it's available to a consent authority to provide technical input, scientific input and perhaps convey a number of the community's aspirations in terms of development that is unfolding in the bays, care needs to be taken to ensure that the role of that group is clearly defined at the outset so that it doesn't have a role as a pseudo consent authority rather in an advisory capacity only.*[236]

[560] As a result of the evidence and submissions of the parties, we make the following observations:

- there should be an EAG;
- the purpose of the EAG is to receive and analyse the results of the ecological monitoring of marine farming in the CMA of Tasman and Golden Bays
- the EAG should be restricted to marine ecologists with expertise in either benthic or water column sustainability;
- the EAG will make recommendations to the TDC in respect of any changes in area or intensity of marine farming that the members deem appropriate in the light of the above analysis;
- the EAG should be convened by and be for the benefit of the TDC;
- the final decision on size and make-up of the EAG is for TDC;
- parties to stage II of the inquiry including the MIG, Challenger, Iwi, RFBPS, Minister for Conservation, and the Friends will be entitled (although not required) to scientific representation on the EAG;
- EAG is an advisory group only, any decision taken as a result of its advice will be by TDC;



[233] Stewart EIC stage II page 13.
[234] TDC Submission in Reply stage II page 29.
[235] Allan EIC stage II page 12.
[236] Kyle NOE stage II page 12.

- TDC have an option to have any analysis or recommendation of the EAG, peer reviewed;
- consent holders will be required to forward results of any monitoring to both TDC and EAG;
- EAG will analyse and make recommendations for the benefit of the TDC on the information they have received;
- in the interests of accountability and transparency we envisage any recommendations coming from the EAG to be in the public domain.

[561] In the event that EAG are unable to reach consensus on future changes in intensity or area of marine farming, we would expect the TDC to rely on the best evidence. We note that any individual or entity has the ability to apply for a private plan change, and the TDC has the ability to review consent conditions.

[562] We further anticipate the TDC to have the ability (should it be deemed appropriate) to require the consent holder to either remove mussel culture lines or reduce the intensity or the area of the farming operation.

Conclusion

[563] The EAG proposed is an integral part of the management of marine farming in the CMA of the Tasman District.

- **Other Species in AMAs**

Plan Provisions

[564] The MIG Policy 22.1.5 differs from many other policies in the MIG plan in that it deals with farming for other species. It reads:

> *22.1.5 To enable other forms of aquaculture in the AMAs only if adverse environmental effects are fully investigated and can be shown to be adequately managed.*

[565] Rule 25.1.X6 reads:

> ***25.1.X6 Non-complying Activities (Specified Activities and Areas)***
>
> *(a) The occupation and disturbance by structures, the use of those structures, and the discharge of contaminants naturally associated with these activities for aquaculture of any species other than bivalves.*
>
> ***A consent is required. Consent may be refused or conditions imposed to manage any likely effect of the activity.***

[566] MIG sees the above as a catch-all rule rather than having other species declared innominate.

Should Species of Aquaculture Other than Spat Catching for Scallops and Mussels and Mussel Farming be Provided for in the PTRMP?

Background

[567] The parties approached the first stage of the inquiry with a particular focus on spat catching (both scallop and mussels) and mussel farming. No other species were contemplated despite the large range of industry and ecological witnesses who gave evidence.

[568] The AMAs were finally predicated on the AIP which required a certain ratio of spat catching space to that of mussels. And on that basis, space was allocated after natural character issues etc had been decided. The AIP was not predicated on requirements for other species.

[569] Mr Kyle was questioned by Friends GB as to whether the MIG plan took account of any other species. Mr Kyle initially said:

> *... From the discussions that occurred thru th workshop process it became very clear that any endeavour to catch by way of spat settlement anyway or farm other species raises its own set of questions that were not really the focus of the courts first stage of the enquiry, on that basis a decision was taken, it seemed to me at least on a collective basis thru that workshop process that these plan provisions should be confined to dealing with mussel spat catching and farming and scallop spat catching.*[237]

[570] Despite this apparently clear statement, Mr Kyle nevertheless went on to state later on in his cross-examination to Friends NH, that through the workshop process, discussion also focussed on other forms of aquaculture, particularly when those activities entailed the use of structures. He notes on balance the workshop had decided there was insufficient evidence about such activities – but nevertheless set them down as non-complying activities so such any such proposal could be assessed on its merits[238].

Evaluation

[571] The Minister of Conservation made the point with Mr Kyle that all the space is currently applied for spat catching or mussel farming and queries why would the Court need to provide for other forms of aquaculture when this is the case? From the Department's experience in the Marlborough Sounds, counsel also sees the non-complying category for other species of aquaculture as an inefficient way to proceed, given that it is costly to interested parties[239].

[572] The Court is concerned to find that species other than scallops and mussels are being contemplated for the AMAs given the species-specific focus at stage I of the inquiry *and with no evidence whatsoever* to support their inclusion – just a general planning assertion emanating from a workshop outside the Court inquiry that other species might utilise the structures.

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[237] Kyle NOE stage II page 42.
[238] Ibid page 43.
[239] Ibid page 59.

[573] We therefore decline the MIG's provision as suitable for inclusion in the plan for the following reasons:

- no evidence was available of what the other species might be and their effects;
- all the AMAs identified have been given approval for spat catching (scallop or mussel) and mussel farming or are under application for spat catching;
- one of our findings at stage I of the inquiry that the AMAs specifically dedicated to the species sought would give certainty as to activity location of the AMAs to all parties;
- other species introduces uncertainty: Mr Kyle agrees Rule 25.1.X6 could be criticised for giving rise to uncertainty because it deals with species and structures unforeseen[240];
- the MIG focus seeks full block consents for mussel farming for all AMAs: there is therefore no room for the inclusion of other species;
- staging as a precautionary approach to development of CMA is specifically provided for by the scientists on the basis of spat and mussel farming and is now a focus for all proposed plans;

[574] As with other issues, we consider that if mussel farming in the CMA of Tasman and Golden Bays is found not to be a viable proposition at 3 nautical miles, then a plan change at some later stage in time may facilitate the introduction of other species.

Conclusion

[575] Species other than mussels and scallops (spat catching) should have no part in the AMAs of the Tasman District as non-complying activities. Their elimination will remove any risk that another form of aquaculture (involving structures) might be applied for[241].

Directions

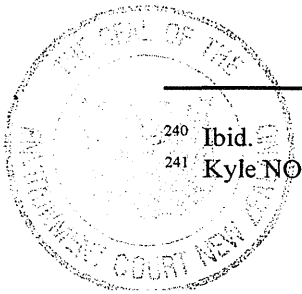
[576] MIG Policy 22.1.5 should be deleted from consideration as should Rule 22.1.5. Unforeseen activities should be structured to drop down into the prohibited activity rule.

[577] The definition of *Aquaculture* in plan provisions will also therefore have to be modified.

- **Specific Planning Provisions**

[578] Elsewhere in this Second Interim Report we have acknowledged the work done by the various planning witnesses on behalf of their clients in providing us with several sets of comprehensive planning provisions. We have already commented on some aspects of these.

[579] Although we could have attempted to *"pick and choose"* from the various sets of provisions in order to give effect to our findings, we have chosen not to do so.



[240] Ibid.
[241] Kyle NOE stage II page 59.

[580] We are mindful that a set of planning provisions is a coherent and interrelated instrument. Any attempt to merge two or more of them runs the risk of upsetting this coherence and possibly skewing some of the intended outcomes.

[581] For this reason we resist any such temptation to attempt to amend them ourselves. We require the parties to produce an agreed set of planning provisions giving effect to our findings in this report.

[582] We have identified a number of preferences with respect to some of the 'smaller' planning provisions mentioned and consider that they could be indicated by way of a memorandum circulated to the parties after this report has been issued.

[583] We have no intention of hearing further evidence on any matter. Outstanding issues may be dealt with only by way of memoranda or conference.

- **Planning Map ZZ Issues (Appendix ZZ)**

Subzone Boundaries

[584] Several amendments to the Planning Maps are required arising from the informal (and inconclusive) way in which Appendix ZZ was put together. In March 2002, the TDC circulated a memorandum enclosing planning maps showing block boundary options for AMAs 1, 2 and 3B. We are informed there is considerable consistency between the TDC and the MIG as to how parts of the AMAs should be subdivided[242]. The TDC's approach is also that rules proposed as to mussel farming Rules 25.1.5 and 25.1.5a apply to the area shown.

[585] The TDC proffers four options for the division of AMA 1 into four blocks. GBMFC submit that these are unnecessarily complicated and ignore existing consents and complete applications. GBMFC instead put forward two survey maps to which there was no challenge at the time they were introduced.

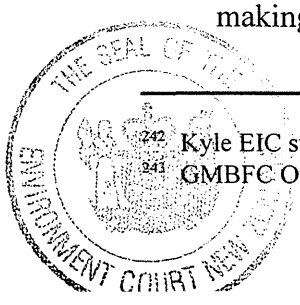
[586] GBMFC point out that the overall area in AMA 1 breaks mostly into three subzones made up of[243]:

(1) The existing marine farms at Waikato plus 600 metres to the east which is approximately a subzone of 290 hectares (GBMFC Block I);
(2) The area running eastwards of that subzone running to the boundary of the Sanford application site (GBMFC Block II);
(3) The area contained in Sanford's spat catching application made up of 253.5 hectares.

to which we now add

(4) the Marlborough Aquaculture subzone

making four subzones. We support this configuration.



[242] Kyle EIC stage II page 17.
[243] GMBFC OS stage II page 11.

[587] Marlborough Aquaculture notes that TDC provides various options of the ultimate block configurations in AMA 1 but proffers the opinion that option 3 creates an additional block which overlies both the proposed Sanford and Marlborough Aquaculture blocks and might bring the parties into conflict where none exists. This needs to be clarified[244].

Separation Distances

[588] In Appendix ZZ which was a draft only, we showed white laneways in AMA 1 in the blue subzones. These were taken copy from Appendix A in the interim report illustrating separation distances between various spat catching farms on the relevant site. This illustrates a spat catching layout identifying potential "laneways" running between the individual farm sites.

[589] TDC now suggest that a separation strip be drawn between the two GBMFC subzones in AMA 1 and between the other subzones.

[590] Dr Grange's evidence at stage II shows that phytoplankton may occur in mussel farms and with large ones, there is likely to be a greater likelihood of depleted water forming a patch that moves outside farms in a worst case situation[245]. His conclusion is that individual farms should have a space between the least equal to the size of the neighbouring farms. This evidence was not available at stage I of the inquiry.

[591] We accept, however, that there is no reason to prescribe separation distances between the two subzones in AMA 1 in the Zoning Map. Separation distances between actual farm developments are one of the matters to be worked through on ecological evidence and advice under the management/staging plan[246].

[592] We may have missed an issue of importance to the TDC in respect of separation distances however, and remain to be advised further.

Amendments to the Planning Maps

[593] The maps now identified for the proposed plan should be amended in respect of the AMAs as follows:

AMA 1

[594] AMA 1: the indicative lane ways are to be filled in so that the blue blocks are solid blue in colour.

[595] The GBMFC subzones are to be divided into two as per the Cotton and Light Survey Map of November 2001 produced to the Court on 6 November 2001[247].

[596] AMA 1 Sanford site is to be changed to a solid blue subzone.

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244 Marlborough Aquaculture Submissions in Reply stage II page 9.
245 Grange for GBMFC EIC stage II pages 5 – 9. See also Ogilvie, Hatton and Mason Report.
246 GMBFC Submissions in Reply pages 2 – 3.
247 GBMFC Closing Submissions stage II page 1.

[597] AMA 1 Marlborough Aquaculture site is to be changed to a solid blue subzone.

AMA 2

[598] Exhibit 14 produced by the TDC at stage II of the hearing indicates that the inshore mussel farming subzone which is shown in Appendix ZZ as a single large subzone is to be divided into two for management purposes.

[599] The outer Ringroad is counted as two subzones in order to be consistent with the size of the other subzones in the overall zone.

AMA 3

[600] In AMA 3, TDC and the MIG has suggested there be four equally sized blocks within the blue part of this subzone. The TDC suggests that a north – south or east – west division may be optimal for longline farming deployment in relation to current flow otherwise a north – south, east – west quartering of the site is an option.

[601] Tasman Mussels acknowledge that there may be four subzones in AMA 3B and the TDC potential layout it is generally acceptable.

[602] But SMW (part of MIG) appears to come to a different conclusion again. It was submitted:

[a] these options were not circulated during the hearing and have not been the subject of consideration or evidence by SMW or the other two parties concerned;
[b] all the respondent's options are contrary to the Court's diagram of AMA 3B as shown in Appendix ZZ to the Interim Decision. Amongst other things, that diagram clearly shows a buffer zone between the SMW block and the Tasman Mussels and Ringroad blocks.

[603] Given that Appendix ZZ was a very preliminary indication of the location and size of the AMAs with the details to be settled at stage II, the idea of a buffer zone being attributed to the thin break lines marking the sites identified by the various parties was far from our reflection. The full implications of buffer zones only became a focus at stage II.

[604] We are now considering this issue after our assessment of whole block management and staging issues. Given that there is a strong commercial inter-relationship between Tasman Mussels, SMW and the Ringroad at AMA 3B, the issue should ideally be resolved between the parties.

[605] We consider the site should be divided into four equally sized blocks for more integrated management purposes. It will also allow for four 50 hectare odd production mussel farm developments at stage I, or 75 hectare less intense developments, given that we do not intend the whole of AMA 3B to be developed at once.

Conclusion

[606] Apart from the submissions from GBMFC, a paucity of evidence on the Planning Maps. There may be issues we have not clearly identified. If so, these will need to be advised.

[607] TDC's Memorandum of Co-ordinates is attached to this report marked Appendix C.

Chapter 6: The Status of Onekaka Licence 371

Introduction

[607] In the Court's Further Directions of 7 June 2001 it was noted that Marine Farm Licence 371 ("Onekaka Licence 371") had been inadvertently omitted from Zoning Maps ZZ in the interim report, and would be included in the final maps. This was on the basis that the permit for spat catching at the time of the conclusion of stage I of the inquiry was valid, and the intention was to provide for the existing activity to have discretionary activity status.

[608] The TDC draft Rule 25.1.5B(b) provides for spat catching or mussel farming at the site of Marine Farm Licence 371 Onekaka as a discretionary activity. The notes state that the intention is to provide for applications to replace existing Marine Farming Licence 371 at Onekaka. The MIG and Iwi proposed plans (Rule 25.1 X5(a)) provide for mussel farming and/or spat catching to be a discretionary activity at site 371. The Challenger provision provides for Marine Farming Licence 371 to be included under Rule 25.1.5C. This relates to the site of the licence and provides for any form of aquaculture as a discretionary activity.

[609] The draft provisions for Licence 371 all have subtle differences which require close attention.

[610] When the issue was raised at stage II of the inquiry admitted in evidence was a copy of the Department of Conservation's Structures Permit dated 10 September 1988 was admitted into evidence. This was attached to the evidence-in-chief of Mr Wynne-Jones[248]. This shows the location of the site and the proposed structured layout for longlines or spat lines.

[611] The Marine Farming Licence issued under the Marine Farming Act 1971, also attached to Mr Wynne-Jones' evidence[249], demonstrates that the site relates to an area of 4 hectares described as *all that area of Golden Bay containing 4.0 hectares, more or less, situated in Block I and Block II, Waitapu Survey District shown marked "A" on SO plan 13904.* This is an area at Pariwhakaoho, offshore Onekaka, between Patons Rock and Tupurua Point. It is also an area (inside the VTL) which the Court excluded from marine farming and spat catching in the interim report.

[612] The permit was originally approved by the Minister of Conservation under s.178(b) of the Harbours Act 1950. It provides for a single mussel longline and spat catching equipment[250] and contains the following special conditions:

> *(a) Approval to remain valid until MAF transfer the licence to the north west end of the Pariwhakaoho marine farm site.*
> *(b)* ...[251]

[613] Thus, prior to 1991 the activity on the site was authorised on the site under two controls[252]. GBMFC submits that as a result of the interim decision, which excludes the north

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248 Exhibit 11.
249 Exhibit 10.
250 GBMFC Closing Submissions stage I, page 31/Parris NOE stage 1, page 1128, line 33.
251 Exhibit 11 Special Conditions page 2.

west end of Pariwhakaoho from marine farming, transfer of the licence will now never occur, and thus, on its face, the permit remains valid in perpetuity. He submits that the issue is, however, the zoning of the 4 hectare site and not the activity which occurs within it. That will be the subject of a Ministry of Fisheries permit.

[614] GBMFC now seek to provide for full scale permanent marine farming at the site at 4 hectares. In an oral interpolation to his formal submissions on the issue, counsel submits that accommodation should be provided for existing use rights.

[615] The Minister of Conversation's counsel submits to the contrary – that the proposed rules in the PTRMP would result in a much greater scale marine farming operation than currently exists under Licence 371, and with different effects.

Issues

- what does the existing permit allow?
- should the proposed plan provision be amended?

What Does the Existing Permit Allow?

[616] The evidence of Mr Wynne-Jones at stage II indicates the extent of the activities currently authorised on the site. He attached two copies of letters to his evidence containing the Department's final comments to the Ministry of Fisheries and another to Mr C R Parris, a more recent holder of the licence under s.13(5) Marine Farming Act 1971, dated 14 June 2001. The licence expired on 30 June 2001 and at the time of the stage II hearing was not renewed.

[617] This information and counsel's submissions show that:

- there has been a long history of dissent surrounding Licence 371 emanating from Maori cultural and natural character issues[253];
- the approval granted in 1988 by the Minister of Conservation only provided for one longline and spat catching equipment and included a special condition (a) relating to a transfer of the licence to the northwest end of the Pariwhakaoho site to take it away from the contentious area;
- in July 2000 an application to increase the number of lines from 1 to 10 was made to the TDC for spat catching, growing and holding;
- on 24 April 2001 the Department of Conservation advised the Ministry of Fisheries that it had no initial concerns about the renewal of Licence 371, subject to minor conditions but by 14 June 2001 it had changed its mind[254];
- the Department of Conservation was approached for a s.94 RMA approval to an extension of the term of the licence, but it declined: information provided with the application notes that the structures approval describes the operation

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[252] Minister of Conversation. Submissions on Issue (C) Pursuant to Council's Directions 2 November 2001, page 2.

[253] Exhibit 9, pages 1-3. Letter dated 14 June 2001 to Ministry of Fisheries Ibid page 1.

[254] Wynne-Jones NOE Stage II page 102.

with only one longline as technically "infeasible" [sic] in relation to spat catching; and only authorised to the deployment of one line[255];

- the farm is not in a block of farms but is isolated by virtue of marine farming prohibited elsewhere in the future;
- the licence has no right of renewal; if renewed it will be under s.426 or s.418(6) RMA[256];
- although stated in special condition (a) to the Minister of Conservation's original approval, the licence cannot be transferred to another site: such sites must be subject to separate applications: there is, therefore, no point in retaining the licence in order to allow it to be transferred, as noted by MAF in 1991;
- Mr Parris had agreed with Iwi and the TDC not to develop the site.

[618] Mr Wynne-Jones considers that to recognise the existence of Licence 371 and its history, suggests to him that it would be more appropriate for the plan rules to provide for the renewal of existing activities within Licence 371 as a discretionary activity rather than provide for the activity as some of the parties have indicated.

[619] The Department of Conservation appears to have given approval to special condition (a) of the 1988 licence under s.178 of the Harbours Act on a false premise – that eventually the site of the licence could be located at the north west end of Pariwhakaoho. But MAF considered such a transfer to be invalid. GBMFC considers that because marine farming inshore is now prohibited, the second part of condition (a) may be severed. In this case Mr Parris could, on the GBMFC analysis, obtain a further 4 lines in an area where aquaculture is now prohibited. Licence 371 is located at a site inside the VTL at Onekaka. A copy of Exhibit 11 the Proposed Layout of Licence 371 is attached to this report as Appendix 5.

Evaluation

[620] In the interim report we set out at some length why we think Onekaka is inappropriate for the location of the marine farms[257]. The site mentioned in special condition (a) therefore no longer exists for marine farming. Prima facie it appears this special condition could be severed, but it is not within the Court's jurisdiction to make such a decision on this reference inquiry.

[621] Within the coastal marine area there is a presumption that the activities require authorisation either by a resource consent or a rule in a regional coastal plan. An activity can't contravene a rule in a proposed or operative regional coastal plan unless it is expressly allowed by a resource consent or s.20 (s.12(3)) RMA.

[622] Section 20 RMA relates to existing activities which were formally permitted or which could have been carried out without a resource consent. The activities referred to are those where the effects are the same. Section 20 is not intended to apply where the effects are greater.

[255] Letter dated 14 June 2001 to Ministry of Fisheries page 2, penultimate paragraph.
[256] Minister of Conservation Synopsis of Submissions on Issue (c).
[257] Interim Report and Findings, pages 31-32 - paras [180] – [183], pages 138 – 142, paras [785] – [803].

[623] Since 1991 the structures approvals have been deemed to be coastal permits on the same conditions – s.384(1) RMA. In the case of Licence 371 the structures approval provides for only a single permanent longline and the special conditions appear to indicate that the occupation was not intended to be permanent. In 1988 the Department of Conservation appears to have intended the licence to be replaced by one relating to a further offshore site[258].

[624] The existing use rights of a Marine Farming Act licence such as Licence 371 are covered in the transitional provisions of s.426(1) RMA. It remains in force on the same conditions and with the same effect as if the RMA had not been enacted. If it is to be varied, the variation of the existing approval is to be subject to the RMA: see *Marlborough District Council v Southern Ocean Seafoods Ltd*[259].

[625] Any extension of time involves the Minister of Fisheries and comment from (inter alia) the Director-General of Conservation (s.13(5)(b) MFA) and the concurrence of the Ministers of Conservation and Transport (s.13(9)(a)).

[626] The Director-General provided the Ministry of Fisheries with a letter outlining a number of concerns (Exhibit 9). At the time of the stage II hearing, the extension process had not yet been completed and the Minister of Conservation's concurrence had not been sought.

[627] If a time extension for Licence 371 is granted, then the licensee will be able to continue to farm at the site in accordance with the Marine Farm Licence and the structures permit approval.

[628] The structures permit approval was issued by the Minister of Conservation in September 1988 pursuant to s.178(b) Harbours Act 1950[260]. On the evidence before the Court, it is now limited to a single longline. Under s.384(1)(c) RMA this is deemed to be a coastal permit on the same terms and conditions.

[629] If the marine farm extension is not granted, condition 1(f) of the licence would require the removal of all the structures. As the activity is to be discretionary, the licensee could apply for a resource consent. The issue is, therefore, the definition of the activity to be provided for.

[630] The Minister considers that if the Court's intention is to provide for the existing scale of activity, it would be appropriate to provide that the plan provision for this activity should include a standard requiring that the structures and anchoring systems on this farm are those authorised by the current coastal permit. This would be consistent with the provision in the Marlborough Sounds Consent Order[261]. It would also be consistent with the Waikato Regional Coastal Plan provisions[262].

[631] In the case of the Wainui Farms, their licences were renewed at the time of stage I of the inquiry and will now expire in 2008. At that point any new applications will need to be made as if for discretionary activities. In the case of Licence 371, it appears it only had 2

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[258] Exhibit 9.
[259] W 6/95.
[260] Exhibit 11.
[261] Decision W 11/99, Schedule D, page 2, paragraph 9.
[262] Exhibit 3, page 15, Standard and Terms iii-v.

months to run before it expired at the time we issued the interim report, a matter which we did not know at the time. It is now currently an expired marine farm licence with existing use rights. If it is renewed it will be subject to s.426 RMA. If it is not renewed it will be covered by s.418(6). Either way, the amount of the activity of marine farming that can be undertaken is still limited by the terms of the deemed coastal permit.

Should the Plan Provisions be Amended?

[632] It is the Minister's submission that if we wish to provide for marine farming of the same scale and intensity as provided for in Licence 371 that we could do so in a similar way to that provided for existing farms in the Marlborough Sounds Consent Order[263]. This restricts farms to the same structures and anchoring systems as their existing permits. The Minister does not suggest, however, the activity in Licence 371 should be a controlled activity in this case as it is in that.

[633] Mr Kyle confirms that it is feasible for the rules dealing with the Wainui farms to refer to current structures[264]. There is no reason why this principle therefore cannot be applied in this case. Therefore, reference is required to be made to existing activities on the same scale, and intensity and species.

[634] Thus the activity does not relate to the broad scale of activities identified under the definition of aquaculture specified by Challenger in its Rule 25.1.5C. And the existing activity can only relate to spat catching as the current Moratorium imposed prohibits marine farming[265].

Conclusion

[635] Onekaka Licence 371 should be restricted to the same structures and anchoring system and scale as its existing permit and included in the Planning Map.

Direction

[636] The parties are required to draft a plan provision which allows Licence 371 to be included as a discretionary activity on the same terms and conditions as authorised in its deemed coastal permit.

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[263] W 11/99, Schedule D, page 2.
[264] Kyle NOE stage II page 57, line 1.
[265] Minister of Conservation Additional Submissions stage II, page 2.

Chapter 7: The Status of the Marlborough Aquaculture Site

Introduction

[637] In the interim report, the Court found on broad ecological grounds that the Marlborough/ Nelson Ranger site should be included in AMA 1 for spat catching. Marlborough Aquaculture considers that the site described as the Marlborough Aquaculture site in AMA 1 should have the status of its activity changed so that marine farming and/or spat holding may be included on the site. It is zoned red in Appendix ZZ and identified as for seasonal and rotational spat catching only. The site is currently the subject of a spat catching application to the TDC.

[638] This conclusion was despite the fact that Mr S R Acton-Adams had stated in his evidence-in-chief:

> *12. In addition to spat catching I believe that this site will be good from a marine farming prospective. The application was made after the October 1998 decisions on the Proposed Plan and in the obvious knowledge that the area was (subject to these References) available for marine farming.*[266]

Marlborough Aquaculture Position

[639] The company's overall position[267] is summarised as follows:

- the only reason that has been advanced as to the necessity for a spat catching restriction is to fulfil the AIP as justification for the spat catching restriction then it would amount to management of the fishery by means of quota[268];
- this, it is submitted, would run foul of the restriction of jurisdiction contained in s.30(2) RMA and would be an undue restriction of the flexibility of the industry;
- there is an absence of any planning and resource management reason why that part of AMA 1 *Waikato* which is the Marlborough Aquaculture site should be restricted to spat catching activity only[269];
- if spat catching is allowed in the blue subzones to enable integrated farming operations then the AIP needs will be met in any event;
- Mr Jackson for the TDC acknowledges in cross-examination that even if both the Sanford and Marlborough Aquaculture site are zoned blue, this is not be fatal to the spatial extent of what was foreshadowed in the AIP;
- the Marlborough Aquaculture's position is supported by the TDC[270];
- there is an inherent undesirability in having to create rules in relation to a one-off area as a "halfway house" in any one block – referring to the necessity for having a single set of spat catching rules in AMA 1[271].

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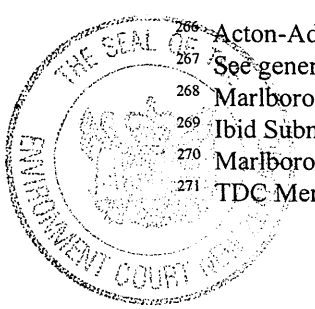
266 Acton-Adams EIC stage I, para 12.
267 See generally Marlborough Aquaculture Submissions in Reply stage II.
268 Marlborough Aquaculture Closing Submissions stage II page 5.
269 Ibid Submissions in Reply stage II page 4.
270 Marlborough Aquaculture Submissions in Reply stage II page 8.
271 TDC Memorandum to the Court 17 December 2001.



[640] Affidavit evidence was filed in support by Mr Garland, planning consultant to Marlborough Aquaculture, who gave evidence-in-chief for the company at stage I.

Challenger's Opposition to this Approach

[641] Challenger Challenged Marlborough Aquaculture. Challenger considers that the planning witnesses involved (Mr Garland for Marlborough Aquaculture and Mr Kyle for MIG) in their support for the Marlborough Aquaculture site in AMA 1 as a marine farming and spat holding site, are unable to provide an environmental effects analysis between spat catching on the one hand, and marine farming/spat holding on the other. It was suggested the planners have no expertise to comment on the ecological safeguards which might be provided in the planning provisions for the site.

[642] Challenger consider it is not good enough to say there is no planning or resource management reason why this site should not have its marine farming activities extended[272]. Nor is it good enough for the Court to say that this site is suitable because it happens to be a site which is seaward of the already existing marine farm activities of GBMFC. Dr Grange, it is submitted, provides no scientific foundation to support the Marlborough Aquaculture proposition as advocated by Messrs Garland and Kyle.

[643] Challenger also submitted another *functus officio* argument considering that because the Court had issued Directions pursuant to clause 15(3)(b) of the First Schedule to the Act at the end of Stage I of the inquiry it could not revisit Appendix ZZ.

Issues

[644] Issues identified include:

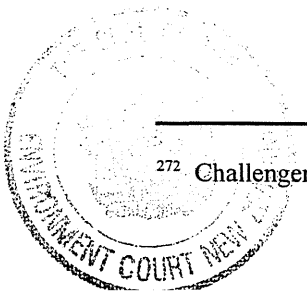
- is the Court's determination in the interim report on spat catching as the only activity on the Marlborough Aquaculture site final?
- is there sufficient scientific evidence to support the Marlborough Aquaculture site for anything other than spat catching?

Is the Court's Determination on the Marlborough Aquaculture Site in the Interim Report Final?

[645] Section 295 of the Act states as follows:

> **295. Environment Court decisions are final---A decision of the Environment Court under this Act, or another Act, or regulation on any matter other than an inquiry, is final unless it is reheard under section 294 or appealed under section 299.**

[646] The operative phrase for this determination is that a 'decision' of the Court is final on any matter **other than an inquiry**. We consider such is the case because the Minister of Conservation has the final say on these plans.



[272] Challenger Submissions stage II page 44.

[647] The proceedings are also an inquiry under clause 15(3) of the First Schedule to the Act, which states as follows:

> **(3) Where the Court hears a reference into a regional coastal plan, that reference is an inquiry and the Court**
> **(a) Shall report its findings to the applicant, the local authority concerned, and the Minister of Conservation; and**
> **(b) May include a direction to the regional council to make modifications to, deletions from, or additions to, the regional coastal plan.**

[648] At the end of stage I of the inquiry, we more or less completed findings of fact in terms of Clause 15(3)(a) and reported upon them to the appropriate authorities and parties. What we did not do was provide specific *Findings* on why we allocated some areas of the CMA for spat catching and some for mussel farming and holding. Nor did we give directions under clause 15(3)(b) as to Appendix ZZ, because at the very least there were a number of other uncertainties surrounding the drafting of Appendix ZZ which was indicative only.

[649] And there was a much more fundamental issue[273]. No party at stage I had given any clear directions as to how the legal implications of the spat catching applications or existing resource consents were to be resolved in the light of the AIP. Until we were clear about these matters, we could not direct the TDC to make modifications to its planning maps. There was also the nature of the rotational aspects at mussel spat catching which were confirmed and agreed to by Mr Nicolle for the Ringroad in cross-examination as suitable for inclusion in the proposed plan but identified in the text of the interim report as a matter of law[274].

[650] We accept, therefore, the Marlborough Aquaculture submissions opposing Challenger's which state the Court could hardly have discharged its function under s.15(3)(b). The absence of such a direction means there is no final determination in relation to the ultimate plan provisions including maps: see *Wellington City Council v Australian Mutual Providence Society*[275].

[651] In our view, given that the interim decision covered many very complex issues of fact and law over a 18 week inquiry it is open to the Court to modify or amend matters of fact where additional matters are brought to its attention as a result of the interim report. This approach appears foreshadowed in the submissions of Challenger, where it is accepted that *when the AMAs are finally fixed by the Court that step will not provide for allocation of space ...*[276].

[652] AMA 1 originally arose from Mr Wallace's general support for an area for aquaculture in Golden Bay. The Marlborough Aquaculture site was included because it is seaward of the GBMFC site at Waikato and could reasonably be included, given the analysis made throughout the interim decision, pursuant to the provisions of s.293(1) RMA. Mention was made in the interim report under the heading *Parties* that Marlborough Aquaculture sought to establish a separate spat catching facility from the Kaitairi spat supply [through an

273 Coates NOE stage I page 1027.
274 Interim Report page 55 para [306].
275 (Unreported) High Court Wellington 13 May 19991 AP 47/91 Jeffries J.
276 Challenger Submissions stage II page 45.

application before the TDC] and to pursue offshore marine farming. We took spat catching to be a preferred option during the life of the proposed plan which, it emerges, was wrong[277].

[653] Unlike some other parties to the inquiry, Marlborough Aquaculture provided a full benthic survey to substantiate its choice of site. The evidence was provided through the evidence-in-chief of the company's principal, Mr Acton Adams. The report by a group of scientists from the Cawthron Institute (Exhibit VI) was attached to his evidence[278]. But the scientists themselves did not give evidence and were not available for cross-examination.

[654] Earlier, in the interim decision, the Court set out under ***The Existing Benthic Ecology of Tasman and Golden Bays – An Overview***, the conclusion by Dr Gillespie based on work by other scientists that marine farming is a suitable activity for the type of seabed environment in both Tasman and Golden Bays. He concludes that the benthic fauna inhabiting these seabeds and the major factors influencing them are not likely to vary greatly from his general description[279].

[655] We also recorded under the heading ***Ecological Suitability of Specific Sites for Inclusion in an AMA***, that Dr Grange states that the proximity of Golden Bay to the nutrient rich Continental Shelf waters is likely to lead to a good supply of nutrients for phytoplankton growth in the area[280].

[656] The Court has the power to accept whatever evidence it considers appropriate to receive, s.276(1)(a), and is not bound by the rules of law about evidence which apply to judicial proceedings in s.276(2). On this basis, we came to the conclusion, based on the expert's generalist statements, and the scientific report attached to Mr Acton Adams evidence, that the Marlborough Aquaculture site was suitable for inclusion in AMA 1 for spat catching. Spat catching on that site was particularly an equation which fitted the 2:1 ratio of the AIP. The site was in close proximity to the GBMFC sites and proposed extensions and could further spat supply to AMA 1 and AMA 2.

Conclusion

[657] We conclude our decision on the Marlborough Aquaculture site may be amended.

Is There Sufficient Evidence Now to Include this as a Mussel Farming Site?

[658] At stage II of the inquiry however, for GBMFC, Dr Grange gave specific ecological evidence in relation to AMA 1, and over a 253.5 hectare site 4.5 kilometres offshore Waikato in particular. This is approximately 1.7 kilometres due east of the existing Collingwood marine farms within the area defined as AMA 1 in the interim report[281]. In the additional evidence we note Dr Grange records that of the benthic species he identified, none are generally considered rare or unusual. He observes species which are identified as ecologically significant and potentially susceptible to environmental disturbance in the DOC guidelines for marine farm investigation, are as widespread and abundant as they are elsewhere throughout

277 Confirmed Judicial Telephone Conference 25 May 2001.
278 Such evidence is cited in the Interim Report, pages 157 – 158.
279 Interim Report page 153 para [856].
280 Ibid page 155 para [868].
281 Grange for GBMFC EIC pages 2 – 4.

Bay. They occur not only in the 'natural' areas (which have been dredged) but also occur beneath the existing mussel farms at Collingwood.

[659] Dr Grange also spoke to a August 2000 Ogilvie Hatton and Mason Report on water currents, and nutrient concentrations of the Collingwood farms. He also identified that in September and October 2001, current and phytoplankton measurements were carried out on the two further sites he had surveyed[282].

[660] In cross-examination, Dr Grange concluded that the AMA 1 (overall) is closer to the second stage of development than AMAs 2 and 3. It is different informationally[283] – *with a relatively small amount of sampling I think the application to go to stage 2 would be feasible off-shore the Collingwood marine farm to build a database for AMA 1*[284]. Dr Grange makes the point that because of the specific available information concerning AMA 1, it is different from AMA 2.

[661] In addition, at the stage II inquiry, Mr Garland on analysing our findings on AMA 1 in general, and the Marlborough Aquaculture site in particular, concluded in a sworn affidavit filed with the Court, that there were no good resource management or planning reasons why this site could not be zoned for marine farming. This conclusion, importantly, had the support of the TDC[285].

[662] Challenger, however, is critical of Mr Garland's expertise to make statements on the environmental effects of mussel spat catching and mussel farming. Reliance is placed only on the expertise of Drs Grange and Gillespie. This is a nonsense approach to the expertise planners bring to the proposed plan provisions. Planners based their approach on the science provided. If we were to accept Challenger's pronouncements as serious on this issue, Mr Nugent's evidence would also have to be discredited – something we do not intend to do for very good reason.

[663] Challenger also queries whether there is adequate resource management information to draw any of the Marlborough Aquaculture conclusions, maintaining that Dr Grange only gave evidence on the GBMFC proposed extensions. We disagree with that conclusion. Dr Grange's evidence as a matter of fact is not limited to the GBMFC extensions, but extends to the whole of AMA 1 and this includes the Marlborough Aquaculture site. The notes of evidence make that very clear[286].

[664] But in analysing this new evidence, we did not wish to disrupt the overall AIP spatial apportionment for all the reasons we mention in our discussion on spat catching in the blue zones. In the course of revisiting that evidence in order to clarify findings on that issue, it became clear that we had omitted the 15% apportionment given by Mr Nicolle to spat holding as opposed to spat catching in his analysis of the 2:1 ratio[287]. When we reassessed the original figures in terms of the 2783 odd hectares we made available for mussel farming, we calculated 417 hectares (15% of 2783 hectares) would be required for spat holding. This would

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282 Grange for GBMFC EIC stage II pages 4 – 6.
283 Grange EIC for GBMFC stage II pages 7 – 8.
284 NOE stage II pages 156 – 157.
285 See note 2.
286 Grange NOE stage II page 157.
287 Nicolle NOE stage I page 2241.

obviously question the ability of the industry to meet the general total production targets outlined in the AIP and referred to in our conclusions in the interim report. It would also skew (slightly) the ratio of areas we have allocated for spat catching in relation to the area allocated for mussel farming.

[665] We concluded a reconsideration of the Marlborough Aquaculture site as a full production mussel farming site instead of a spat catching one would go some way in the long term to restoring both the total potential production capacity of the industry and the AIP spat catching / marine farming ratio.

[666] Mr Jackson variously responded on this issue in reply to questions asked. He agreed that a change in status of the aquaculture block from spat catching to marine farming would change the balance between the two[288] and which would reduce the spat catching ratio thus.

> *Q.* *Mr Feenie* [sic] *was talking to you about the ratio 2:1, mussel farming to spat catching, and you agreed that if the Marlborough Aquaculture, for want of a better description, area, was upgraded from mussel farming, sorry, spat catching to mussel farming, that that 2:1 ratio would be skewed, I think you will agree with that.*
>
> *A.* *Yes.*
>
> *Q.* *I'm interested to know, given the care the Court took to deliver, if you like, that ratio that the industry found to be so important, whether you feel it would be prudent in planning terms to allow that to happen?*
>
> *A.* *The ratio has been expressed in very simple aerial terms, and as yet there is uncertainty about the intensity at which both marine farming and spat catching operations might occur in the zoned areas, and to my mind it seems possible that although the relative areas are located to the two activities might be skewed, a more intensive lease of the spat catching area might make up the difference in output that you might get from the area.*
>
> *Q.* *So you're suggesting really that it's the skewing would be marginal?*
>
> *A.* *It may not be fatal.*[289]

Conclusion

[667] There is sufficient evidence in resource management terms to include the Aquaculture site in AMA 1 as a site for production mussel farming.

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[288] Jackson NOE Stage II pages 25-26.
[289] Jackson NOE Stage II pages 106-107.

Chapter 8: Navigation

Introduction

[668] Navigation is one of the matters for discretion under the restricted discretionary rule for mussel farming at greater than 50 hectares: see interim report[290]. This was further clarified by the Court's Further Directions of 7 June 2001:

> *Our concerns are with all blocks and how they may be managed to provide safety for the boating public, both when partially and fully developed. 'Navigation' per se is an issue for the Tasman Mussels site. It may also be for AMA1 but not within the GBMFC site etc. It is a matter for the experts to advise and for final assessment by the Court.*

We noted our concerns about navigational issues and that safety was of importance.

[669] Before the stage II inquiry, the navigation workshop drafted navigation guidelines, which have been incorporated into the MIG plan as standards and terms. These appear as standards under the restricted discretionary Rule 25.1.X4 at (c) – (g); under the controlled activity Rule 25.1.X3 at (c) – (e); and under the controlled activity (seasonable/rotational spat catching) Rule 25.1.X2 at (d) – (f).

[670] Under the restricted discretionary Rule 25.1.X4, discretion is reserved under item 5 (page 18) for:

- *The layout of the initial development stages of navigational purposes (AMA3B Tasman Mussels Ltd blocks only).*
- *Lighting or marking requirements.*

[671] Mr Tear provided evidence in stage II on the development of navigational standards and terms, and their appropriateness. His evidence also covers navigation on the Tasman Mussels' site AMA 3. In separate evidence for Marlborough Aquaculture, he covers navigation on the outer AMA 1 site of Marlborough Aquaculture.

[672] Mr Tear's evidence was that navigation concerns might appropriately be dealt with by incorporation of the IALA guidelines into the plan and this is reflected in the MIG plan proposals. Tasman Mussels submits that the issue of navigation in respect of the Tasman Mussels site has accordingly be adequately provided for. The TDC made no challenge to that evidence.

[673] Friends NH considered that there was no navigational evidence adduced by the industry, addressing the potential effects of seasonal and rotational spat catching structures. It was considered that there was no evidence adduced suggesting marine charts are able to adequately address seasonal and rotational site use. For this reason, Mr Fenney suggests the possibility of the entire AMA area being a navigational *"no-go"* area. It was suggested that if *"out of zone"* activities were given discretionary or non-complying status as reflected in the

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[290] Interim Report Page 217 (*Findings*) and page 218 (*Summary*): see also GBMFC Closing Submissions stage II pages 33 – 34.

proposed MIG and TDC rules, then this will lead to individual and cumulative adverse navigational effects[291].

[674] Mr Stewart, the planning consultant advising RFBPS, observed from his personal sailing experience that freedom of access of the CMA is greatly diminished for the public, by the introduction of structures whether from marine farming or spat catching – *for most mariners a marine farm is an obstruction to navigation.*

[675] Mr Stewart concedes that while he may sail through a spat catching area by day when visibility was good. *As a prudent sailor I would not attempt to travel through a spat catching area if weather conditions were bad and/or visibility was restricted eg at night. I certainly would not go through a spat catching area if I were motoring.*

[676] Mr Stewart deposes that both marine farm and spat catching areas should be marked on a nautical chart as a hazard to be avoided. He does not address the issue of marking seasonal rotational spat catching areas on nautical charts.

[677] GBMFC considers that the guidelines drafted as a result of the navigational workshop were incorporated into the MIG plan as standards and rules. And both GBMFC and SMW identify that the evidence of Mr Tear in respect of Marlborough Aquaculture site and the Tasman Mussels' site (which also supports the MIG plan) was not challenged by any of the parties. It was suggested that the navigational guidelines set out in the MIG Plan standards and terms otherwise adequately deal with navigation.

Should Seasonal Rotational Spat Catching Areas Receive Some Navigational Recognition?

[678] We note the only outstanding issue is that raised by Friends NH in respect of the charting of seasonal rotational spat catching areas.

[679] We accept that this issue was not addressed in evidence or submission. The Court understand that there are examples of other hazards to navigation being charted albeit on an irregular basis. The actual status of the hazard at any particular time or any changes could be communicated by way of *"notice to mariners"* by radio/fax/website, etc.

[680] We put this consideration forward on the basis that some account might be taken of the issue in the plan provisions – perhaps by way of a note?

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[291] Friends NH Closing Submissions stage II page 14.

Chapter 9: Natural Character Issues

[681] In the interim report, the Court reserved the question of natural character as one of the matters on which plan provisions will be required.

[682] The Court's only concern was with central Golden Bay and potential cumulative adverse effects as the scale of development increases. The interest was directed particularly to the two SMW blocks adjacent to the northern Challenger site in Golden Bay. These two blocks, when added to the Ringroad and the more southerly SMW blocks, were identified as presenting the possibility of adverse cumulative effects on natural character[292].

[683] The first of these two sensitive blocks is the Golden Bay Mussels site. Originally, SMW requested that this block be available for permanent surface floated structures for mussel farming. Subsequently, SMW proposed that the block be made available for spat catching only. The block is hatched in red in Appendix ZZ and has been identified by the Court as available for spat catching only. Golden Bay Mussels Limited currently holds a consent for spat catching over the block (subject to appeal). Under the MIG proposed plan provisions spat catching on this block is now seasonal. In light of these factors, natural character does not now appear to be an issue for this block.

[684] This leaves the westernmost SMW blue block. In order to comply with the report, plan provisions are required to identify offshore natural values and enable the assessment of the cumulative effects of the development of this block on natural character in central Golden Bay.

[685] The MIG plan provisions address this issue as follows:

[a] Natural character values are recognised in the Introduction to Chapter 22, in Issue 22.1 and in Objective 22.1.0.

[b] The requirement to assess and manage adverse effects on natural character is addressed in Policies 22.1.1 and 22.1.14 and at 22.2 Environmental Results Anticipated.

[c] Rule 25.1.X4 governs mussel farming and/or mussel spat catching as a restricted discretionary activity. Amongst the matters on which the council has reserved its discretion (item 4 Natural Character Values) is included natural character values in relation to the development of structures in the westernmost SMW blue block.

[d] Assessment criteria for natural character are provided in Part III of the Schedule attached to Chapter 25. The criteria in the Schedule are advisory only and are not, therefore, exhaustive. They provide a guide whilst, at the same time, allowing the TDC to consider any aspect of natural character that might be appropriate in respect of any particular application[293].

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[292] Interim Report pages 147 – 148 paras [830] and [835].

[293] The introductory paragraph to those criteria should refer to item 4 (not item 3) of the matters referred to in Rule 25.1.X4.

[686] Any assessment of the cumulative effects on natural character of development in the westernmost SMW blue block would necessarily involve an assessment of development in the rest of AMA 2.

[687] We accept that the MIG proposals address the Court's concern about natural character and provide a suitable framework for ensuring that the impacts of mussel farming as a restricted discretionary activity in central Golden Bay can be assessed and controlled.

Farewell Spit

[688] Direction number 5 of the interim report directs the TDC and Friends of Golden Bay to determine what further protection, if any, is required for Farewell Spit, given the prohibition status which exists outside the AMAs zoned. At paragraph 15 of the Court's Further Directions of 7 June 2001, it is stated:

> *But given the prohibition (of aquaculture) status outside the designated zones in the CMA, the Court only wishes the experts to confirm (or otherwise) that adequate protection is provided for Farewell Spit.*

[689] The question was addressed by GBMFC advising the consensus that no further protection was required for Farewell Spit. Accordingly, this issue has been resolved[294].

Outstanding Landscapes

[690] The RFPBS and the Friends were anxious that our finding that Golden Bay was an outstanding landscape be reflected in the plan provisions.

[691] We suggest the issue should be addressed should be part of a plan change on landscape issues. As GBMFC point out the chapter we are addressing is on Aquaculture and no submissions or references referred to the need to provide for outstanding landscapes in this context.

Undaria

[692] The fact that this subject was not canvassed in any detail at stage II of our inquiry should not suggest that the Court view this problem as anything other than a very serious one.

[693] For this reason we consider a provision in the plan requiring *"best practice"* to limit the spread of this invasive plant as a result of mussel farming or its ancillary processes may be included in the plan provisions. Best practice should detail all practical steps that can be taken and all practices which can be reasonably avoided to limit the spread.

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[294] GBMFC Closing Submissions stage II [page 36].

Chapter 10: Major Findings

The Deeming and Transitional Provisions

- **None of the references to the inquiry provide an adequate foundation for the MIG deeming provisions.**

- **Neither the references or the relevant RMA provisions envisage creating priorities to allow parties to substitute one activity (spat catching) for another (marine farming) in order to be first in time with mussel farming applications.**

- **The MIG deeming and transitional provisions are ultra vires the RMA.**

Treaty Issues

- **The focus of the reference inquiry is to identify areas of the CMA through zoning after analysis under the relevant provisions of the RMA, not to allocate parts of the CMA to specified parties.**

- **The commercial interests of the Iwi are more than minor, due to their affiliations with the various groups identified in Mr Hedley's cross-examination and re-examination.**

- **The Iwi have an emerging presence in the marine farming industry and will have the opportunity to go full production mussel farming once the plan is implemented.**

- **The correct statutory path for resolving alleged inconsistencies between the RPS and the PTRMP is s.82(1)(b) RMA.**

- **Section 292 is a 'fixing' provision, designed to amend slight inconsistencies in the plan, and may not be applied to achieve what Iwi require.**

- **Section 293 is not an appropriate provision to apply in the circumstances to provide the Iwi with such far reaching relief, outside the scope of any reference.**

- **It is not appropriate to use s.6(e) to provide Iwi with a 30% allocation of space in the CMA.**

- **The term "Manawhenua Iwi", used throughout the plan provisions, implies inherent and exclusive authority: it would be inappropriate for the Court to confirm these three particular Iwi as the Manawhenua Iwi of the area, since there is evidence of other iwi with interests in Golden Bay and Tasman Bay – yet to be resolved.**

A plan variation under Clause 16A of the First Schedule of the RMA is a process which will offer the opportunity for Iwi to perhaps achieve what they require and for everyone interested to be involved.

Spat Catching in the Blue Subzones

- **The Court made no absolute findings in respect of mussel spat catching in the blue subzones.**

- **The Court did not prohibit mussel spat catching in the blue subzones.**

- **The industry may choose to go mussel spat catching in the blue subzones, or spat catch in the blue subzones as part of an application for mussel farming.**

The Way Forward

- **The following issues are suitable for inclusion in the TDC's final documentation:**

    - **Whole block management.**
    - **Mechanisms for stopping or reversing development as set out in this report.**
    - **Recognition of a TDC decision on the advice of EAG to provide for progression beyond stage 1.**
    - **The EAG to be made up of scientific advisers.**
    - **A rule to define stage 1 development at 50 hectares intense development or 75 hectares less intense.**

- **The following matters are not suitable for inclusion in any proposed plan provisions:**

    - **Table YY**
    - **Species other than mussels and scallops**

Onekaka Licence

- **Licence 371 has existing use rights.**

- **These rights are limited to the use of one longline and spat catching structures as a deemed coastal permit under s 384(1)(c) RMA.**

- **Licence 371 is to be provided for in a Schedule attached to the PTRMP provisions on the same terms and conditions as currently exist.**

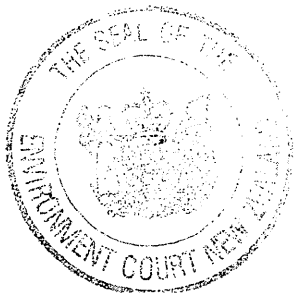
- **The position of Licence 371 should be noted on the planning map of Golden Bay.**

Marlborough Aquaculture

- **The Marlborough Aquaculture site is suitable for zoning as a mussel spat catching and mussel farming site.**

Other Findings

- **All smaller issues are resolved in the text of the report.**



Chapter 11: Directions

- **The MIG plan provisions found to be outside the Court's jurisdiction or ultra vires are to be deleted.**

- **Any fresh plan provisions to take their place are to be prepared by the parties in consultation with the TDC.**

- **The memorandum on specific plan provisions to be issued by the Court is to be considered and its recommendations applied, if at all possible. If not applied, the Court is required to be advised by way of memorandum (we note at this point we have very few further suggestions to make).**

- **A fresh Appendix ZZ is to be prepared reflecting:**

    - **mussel spat catching in the blue subzones;**
    - **boundary divisions of the subzones;**
    - **co-ordinates supplied by the TDC.**

- **The final report and recommendation to the Minister of Conservation will be completed as soon as possible after these matters are attended to.**

- **The parties have leave to apply for further directions or conferences should they be required.**

DATED at WELLINGTON this 27th day of March 2003

For the Court:

S E Kenderdine
Environment Judge

APPENDIX 1

Spat Catching Evidence

GBMFC

[1] Mr M G S Brown, marine farmer, had this to say in his evidence-in-chief:

> *A large percentage of the space at Wainui is used for capture of local spat (approximately 11 hectares) and the balance is used for the on-growing of Kaitaia spat (approximately 7 hectares). No spat is caught on my Collingwood farm, simply because marine farm space for the on-growing of product through to maturity, is, in the context of Golden Bay, at a premium. For completeness, I should add that I have also had space in what is known as the "Ring-road" for some years.*[1]

[2] In cross-examination, Mr Brown stated that he believed that the Wainui site which was permitted until 2008 supplied approximately 17% of the industry's existing spat requirements for the Sounds and Golden Bay[2]. Mr Arbuckle for Challenger identified it is more likely to be about 20%[3]. Mr Wallace, like Mr Brown, a witness for GBMFC did not believe Wainui would ever again be used for on-growing mussels[4] – he considered that the 16 hectares needs to be removed from any mussel production equation put forward by the industry – as *Wainui is all spat catch now*[5]. The ability of the Wainui site to produce high quality and quantity spat was reinforced by Mr Goulding for Tasman Mussels[6].

[3] Mr Brown discussed the inability to properly monitor the spat catching site which he had been operating on the Ringroad. From his experience, the Ringroad monitoring figures do not necessarily stack up against the spat catching ability of [his] particular area. Often he would obtain a low count reading on his monitoring gear, yet there could be commercial catches available at the same time – obvious because of the spat settlement on the lines[7]. He concluded the current data for spat catching on the line he was operating on his Ringroad site in Golden Bay was – 'indifferent'.

[4] Mr Wallace for his part indicated that he had not utilised his Collingwood site for spat catching until recently, being in the fortunate position of being able to access his supply from Wainui. But spat had been monitored over the last few years in Collingwood and it showed *awesome results, second only to Wainui so it was a shame to see* [such an] *awesome site only for ongrowing mussels*[8]. He had applied to the TDC for (and been granted) consents for a 200 metre extension to the north and east for spat catching only which fulfils his current spat requirements (88 hectares). These consents are under appeal by Challenger. (Challenger's objections were waived at the time of a s.116 application for commencement of consent because of a biotoxin scare in Kaitaia and the Marlborough Sounds). GBMFC has also a completed application for spat catching from the seaward boundary of the spat catching consents it holds to the inner boundary of the Sanford site. This application has been suspended by the TDC pending a final decision in this inquiry.

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1 Brown EIC stage I paragraph 2.
2 Brown NOE stage I page 1119.
3 Arbuckle EIC stage I paragraph 54.
4 Wallace NOE stage I page 1080.
5 Ibid page 1088.
6 Goulding NOE stage I page 2097.
7 Brown NOE stage I page 1122.
8 Wallace NOE stage I page 1078.

[5] Mr Wallace considers that if his reference is successful, he will be able to carry out the activity for which the TDC has granted consent – namely spat catching, but also *"full scale"* marine farming on these sites. He considers which of the two activities is commercial (spat catching or mussel farming) should be the choice of the individual farmers as some may choose to grow spat only, others to provide mussels, and yet others a mix of the two. In that way space is able to be used efficiently and for the benefit not only of the individual marine farmer, but also the district and beyond. He commented that whilst the industry relies on nature's cycles for spat catching, that doesn't prevent it from *"filling in gaps"* – from which we took it that spat catching as an ancillary activity on mussel farming sites was one view.

[6] Currently, GBMFC sources its spat from Golden Bay, Kaitaia and Marlborough. Mr Wallace spoke of the difficulty in getting hold of spat over the last 9 years. In 1995 some of his lines were close to empty for up to 17 months. Nevertheless, he was asked:

> *Q. If more space ws alloc for aquaculture in sep zones do you think there shd be scallop enhancement plan areas identif for spat catching and other areas identif for marine farming in terms of ongrowing or shd tht decision be left to the individual farmer?*
> *A. ... I think fine to be a farmers decision.*
> *Q. Cd tht thn leave us in the same sitn were in today where if theres a prefer by marine farmers for ongrow rather than spat catch theres a signif call for more areas of space to be alloc for spat catch because of inadeq supply?*
> *A. Its conceiv, but maybe the plan cn address tht but industry at the mom needs spat. Golden Bay is good source and I believe a signif proportion of the sites will be used for spat catch whn monitor shows theyre present.*[9]

[7] When being questioned about spat catching as a process having fewer lines involved and whether it was different from a full scale production farm, Mr Wallace, basing his experience on the Wainui farms, stated that if spat is in short supply an area will be utilised just as heavily as any marine farm site. When questioned by the Court about his own spat catching activities, Mr Wallace had this to say however:

> *Hv caught spat in the past but it interferes with yr operation. Much easier to harvest a line and re seed it immediat in an area like ours which is classif rather than leav a line empty wait for monitor to show you spat and put spat catching gear in the water.*[10]

[8] Mr Wallace was the only marine farmer during the stage I hearing to address the question of water classification as an important (and expensive) ingredient for production mussel farming sites[11].

[9] In other discussion, Mr Wallace saw journeying to Tasman Bay to obtain spat as a *"neighbouring supply"* rather than a *"local"* one – that is it would be a boat trip away[12]. Golden Bay should be able to produce spat for the Golden Bay mussel farmers and Tasman Bay should be able to do likewise.

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9 Wallace NOE stage I page 1089.
10 Wallace NOE stage I page 1097.
11 Ibid page 1078.
12 Ibid page 1081.

[10] It was also clear from Mr Brown's statement above, however, that production farming space for the on-growing of product (ie spat holding and mussel farming) through to maturity was, in the context of Golden Bay, at a premium[13]. He indicated, for example, that crop growing returns had almost doubled in the last 2 years, whilst spat returns had virtually stayed the same for the last 20 years. On being questioned as to whether a farmer from an economic point of view would retain some of his space for spat catching, when marine farming was [already] a very high percentage of that space, Mr Brown replied:

> *A. Think marine farm*[er] *will use wisdom ... in tht good grow areas eg Collingwood always used grow crop ... lesser grow areas used for catching or holding spat, if one hs 4ha at Collingwood v much doubt sacrifice 1/3 of hs farm for holding spat.*
> *Q. IF PRov md for considerable expan of marine farming is it not now the industry position fm annex.4 to Mr Coates evid tht a 2:1 rtio is necessary and therefore will be expectd tht marine farmers will keep 1/3 of sites for spat catch purposes?*
> *A. No, as time evolves better areas get for grow crop and poorer areas kept for hold spat.*[14]

[11] If spat catching was to be separated from spat holding, the Collingwood/Waikato area was clearly not one of the 'poorer' production farming areas. As we observed in the interim report, Dr Grange, scientific adviser to GBMFC, considered both the growth and yield of mussel farms at Collingwood was substantially higher than those recorded in Pelorous Sound, Marlborough[15]. We noted from his evidence and others that the Collingwood farms are in close proximity to the plume of the Aorere River. And according to Dr Gillespie, scientific advisor to SMW, the entire area would be influenced by the nutrients associated with the river, making it very valuable for full production mussel farming[16].

[12] The GBMFC witnesses generally extolled the very high quality of mussels from Collingwood producing high tonnage figures[17].

[13] In the meantime Mr Wallace had been granted a permit to catch spat in the area. We noted that once the Marlborough Sounds plan became operative, it applied to existing coastal permits on the same terms and conditions. Mr Wallace's permit would allow him to continue spat catching on 88 hectares for the term of the permit. But at stage I of the inquiry the issue was very much how much space should be allocated. And the question for what activity was more complex as there were a number of issues remaining unexplored – namely existing consents, existing applications and expired permits operating under s.124 – all for spat catching.

[14] In terms of suitable areas for marine farming, Mr Wallace considered that if the Court saw fit to expand the Waikato area seaward another 300 hectares for *mussel farming*, this would not be a problem in those CMA conditions if the farms were properly managed. In fact, he considered it is possible to create a viable marine farm industry in Golden Bay by a seaward expansion of the existing Waikato block.

13 Brown NOE stage I page 1119.
14 Ibid NOE stage I page 1125
15 Grange EIC stage I page 6.
16 Gillespie NOE stage I page 2020.
17 Nicolle NOE stage I page 2228.

[15] In Mr Wallace's 35 – 40 tonnes per hectare calculation, however, he acknowledged the need to take into account the fact that a certain amount of space needs in the *"full blown"* mussel areas to have a spat supply. He then was asked:

> *Q.* *... Is it the case tht the 35-40 tonnes/ha calc tak into account the fact tht a certain amount of space needs to be tkn out of account of full blown mus f of need to hv a spat supply?*
> *A.* *Thats correct.*
> *Q.* *So tht if we assume for mom spat sourcd fm elsewhere eg a ring road site and tht area available within Waikato block used exclus for on growing, the fig of 35-40 tonnes/ha wd increase?*
> *A.* *Thats correct, the calc yr refer to you wd hv to use the 20 tonnes in the first para.*
> *Q.* *So 20 tonnes/line at 10 lines/farm x 20 = 200 tonnes/4 ha or 50 tonnes/ha?*
> *A.* *Tht is wht is currently being achievd at Collingwood with absence – with no prov for spat catch and holding.*[18]

[16] He believed that 6,000 tonnes is the maximum productive capacity of the Collingwood area, *but only if sourcing spat from other areas*[19].

[17] Mr Pooley, also a GBMFC witness, in cross-examination confirmed the AIP position, namely Resolution 11, that spat catching and spat holding were to be separately provided for – and that that was the AIP position on a 2:1 ratio. If 1000 hectares were provided for marine farming then a further 500 hectares was required for spat catching. He accepted the proposition that the tonnage/hectare figures set out in Resolution 6 of the AIP *were independent of the requirements of the industry* – by which we concluded that the AIP had been formulated above specific industry requirements and had focussed on a simple spatial equation to resolve the *how much and where* questions in an effort to assist the parties and the Court[20].

[18] At this early stage of the inquiry, we also identified a need to have spat catching areas either within or close to production mussel farming areas so that the spat could be easily accessed, transported and on-grown.

NZMFA

[19] Mr Coates gave the relevant NZMFA evidence. The Association owns 13 marine farms in the Marlborough Sounds which it leases space to marine farmers for the purposes of spat catching and spat holding. The Association is also a member of the Ringroad Consortium with consents to catch spat in both Tasman and Golden Bays. Spat catching areas in these bays are leased to farmers in the same manner as in the Marlborough Sounds. In discussing the spat catching *"issue"*, Mr Coates stated that:

- currently 60% – 70% of the national spat requirements come from the Kaitaia spat;
- the occurrence of spat from Kaitaia is sporadic and unpredictable;
- Kaitaia spat is supplemented by spat from Golden Bay (Wainui) (20%) and approximately 5% – 10% from the Marlborough Sounds;

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18 Wallace NOE stage I pages 1077 – 1078.
19 Wallace NOE stage I page 1078.
20 Pooley NOE stage I pages 1101 – 2.

- Golden Bay spat is highly sought after because it can be grown out of season compared with the spat derived from other locations.

[20] Mr Coates stated that to have a viable industry, the NZMFA considers that there should be sufficient space to enable economies of scale, and for marine farming areas to be located in areas capable of optimum mussel growth.

[21] On specifics, Mr Coates identified that there was a poor spat catching season in Tasman Bay in 2000, whilst spat catching permits were not issued in Golden Bay at that time so that Challenger could go fishing occupying 30% of a proposed aquaculture zone[21]. He identified the spat catching season in the Tasman District as November – January. He made it clear also that the NZMFA supported the Ringroad blocks as spat catching areas and [any] extensions to those[22].

[22] NZMFA submitted that the existing consent holders, whether for spat catching or marine farming structures, should be recognised because they had statutory consents in place at the time the proposed plan commenced. It was explained it would cause grave hardship to individual farmers if they were to lose longstanding or existing rights as a result of any new provisions in the plan. Furthermore, the reality of their coastal permits exist and cannot be removed by the provisions of the plan (other than at renewal) so that it makes good common sense in a legal sense, to recognise the existence of those coastal permits by making plan provision for them to continue.

[23] At the time the proposed plan was first notified (1996), the consents in place were those relating to the Wainui Licence, Onekaka Licence 371, Waikato/Collingwood in Golden Bay, the Challenger scallop spat catching consents and the Ringroad mussel spat catching consents in both bays. Clearly these consents had to be a factor in terms of *how much and where*. But whether all the Ringroad sites could be termed as high spat producers remained a mystery.

SMW

[24] SMW proposed a zoning approach which identified aquacultural management areas (AMAs) in both bays. This was to involve the extent and location of any zones and activities permitted within aquacultural management zones **or different parts of them** (this involved the definition of "aquaculture") (emphasis added)[23].

[25] SMW was to produce the lengthiest, most innovative, and most important evidence on the industry's overall requirements. Marine farming activities and staging for large scale marine farming were identified throughout. A great deal of the cross-examination of its witnesses, particularly of Dr Gillespie and Mr Brierley, was exploratory as to what was intended in respect of zoning, and staging in particular.

[26] Mr Brierley promoted an aquaculture zone for Golden Bay which consisted of, inter alia, permanent marine farming in four 250 hectare subzones offshore the outer Ringroad, the entire 1000 hectare outer Ringroad, the existing Wainui farms, and the GBMFC areas for permanent marine farming. For the total permanent marine farming, the area was 3000 hectares, and for rotational seasonal spat catching, the area was 2000 hectares – the latter involving lines being pulled in and out of the water each year.

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21 Coates NOE stage I page 1031.
22 Coates NOE stage I pages 1031, 1046.
23 SMW stage I Closing Submissions page 1.

[27] In Golden Bay the areas with permanent marine farm status were to be used for permanent structures or spat catching. A similar arrangement was proposed in Tasman Bay with 3600 hectares for permanent marine farming or spat catching[24]. In other cross-examination Mr Brierley indicated that some areas applied for were appropriate for spat catching, and others for marine farming. He also indicated some spat catching areas were likely to be good marine farming areas which is why they were chosen. When he first gave evidence, Mr Brierley had not undertaken an analysis of the AIP in terms of what he was proposing[25].

[28] On being questioned about some of SMW's [earlier] staging proposals, Mr Brierley later said this:

> *Q.* *So the proposal is 400 ha* [at the] *marine farming stage 1 ?*
> *A.* *Corr.*
> *Q.* *How much spat catching and hold in stage 1?*
> *A.* *Subj to further discuss we wd like to nominate the rest of our sites for eiother* (sic) *spat catching or set aside within the plan as stage 2.*
> *Q.* *So at the outset under the SMW propos as you put it in stage 1 SMW wd hv 400 ha of full blown marine farm* [and] *1099 ha of spat space?*
> *A.* *Spat or poss sm of tht area dedicatd to stage 2.*[26]

[29] The term *"full blown marine farm"* appeared to us to be a full production mussel farm site.

[30] In relation to staging, Dr Gillespie said this:

> *A staged approach could be adopted. Three separate areas (subzones) of approximately 250 hectares each are proposed for marine farming in each bay. Four areas (subzones) of approximately 250 hectares each are proposed for spat catching and holding activities in each bay. Further development of the zones could be linked to satisfactory achievement of performance criteria as defined following interpretation of monitoring results during the initial, say, 5 year period.*

[31] Later on in the same evidence Dr Gillespie stated:

> *Because the proposed zones are relatively large, and have the potential to cause adverse impacts to marine ecosystems the SMW Group has suggested a staged development of the Aquaculture Zones whereby only a portion of each zone will be developed, initially, for mussel farming (see Section 3.2e).*[27]

[32] Thus at this stage in the inquiry, spat holding was seen as having the same effect as spat catching with marine/mussel farming separated out. This, as noted in the interim report, was to be later reviewed by Dr Gillespie. In opening submissions, SMW interestingly refers only to 3 x 250 ha areas of mussel farming in each bay and up to 4 x 250 ha areas for mussel spat catching in each bay[28]. The distinction between mussel farming and mussel spat catching/ holding in Golden Bay and Tasman Bay is carried through into submissions on

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24 Brierley NOE stage I pages 5 – 7.
25 Brierly NOE stage I pages 1509, 1544.
26 Ibid page 1819.
27 Gillespie EIC stage I page 3.
28 SMW Opening Submissions stage I page 27.

Other Fisheries in the same document[29]. We concluded that if SMW was equating spat holding with spat catching as one activity, then mussel farming (simpliciter) might be considered another.

[33] SMW produced figures as to how the amended SMW proposal related to the AIP:

> *(iii) Applying the agreed industry production rate of 15 tonnes per hectare beyond 3nm, the space now sought by SMW in Golden Bay would produce approximately 15,000 tonnes. ... On this basis, the spave required by SMW can be calculated as follows:*

5,000 tonnes [sic]	÷ *15 tonnes/ha*	=	*1000 ha*
spat catching/spat holding : 50% of area for mussel farming		=	*500 ha*
			1500 ha

> *(iv) Similarly, in Tasman Bay, the 1020 ha sought by SMW can be approximately calculated as follows:*

10,000 tonnes	÷ *15 tonnes/ha*	=	*666 ha*
spat catching/spat holding : 50% of area for mussel farming		=	*333 ha*
			1000 ha

Mr Hannah confirmed this position in re-examination[30].

[34] We continued to note the distinctions made between mussel farming, spat catching and spat holding. Spat holding, however, was not linked to mussel farming in those submissions but to spat catching, despite Dr Gillespie's evidence.

[35] In closing submissions SMW acknowledged however this position was now different for spat holding. We were informed that SMW accepted that the concentrations and size of mussels on spat holding lines means that the structures for spat holding should be subject to the same controls as structures for mussel farming [not spat catching]. In addition, it was acknowledged that additional water space would be required to produce the tonnages required by the AIP over and above that sought by SMW[31].

[36] In closing submissions discussing *"controls"*, it was submitted by SMW that there be no need for staging in any of the spat catching areas. Dr Gillespie had considered that up to 1000 hectares of water space could be developed for spat catching in each bay without presenting any threat to the marine environment.

[37] We were also told SMW did not oppose recognition in the proposed plan of the terms of Challenger's existing resource consents in Tasman and Golden Bays for seasonal, rotational scallop spat catching.

[38] Two types of AMA were proposed in Golden Bay. Surface floated marine farming structures (suitable for mussel farming, mussel spat holding or mussel spat catching) to be controlled activities on sites of up to 50 hectares. Subsurface floated structures (suitable for

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29 SMW Opening Submissions stage I page 33.
30 Hannah NOE stage I page 1766: see also Hannah Additional Evidence stage I.
31 SMW Closing Submissions stage I page 13.

spat catching) were to be a controlled activity in Golden Bay. The Golden Bay Mussels' site was to have subsurface floated structures for spat catching as a controlled activity.

[39] The remaining 3 x 250 hectare SMW blocks plus the Golden Bay Mussels site (250 hectares) would be available for spat catching as required. A 500 metre buffer strip between stage I mussel farming and spat catching would apply.

[40] We revisited the further evidence of Mr Hannah, who presented SMW's reconciliation with the AIP position mentioned earlier thus:

> *SMW seeks, firstly, sufficient water space to be able to grow 25,000 tonnes production per annum by the end of the planning period, and secondly, sufficient water space to adequately provide for the catching and holding of mussel spat.*
>
> *Of this 25,000 tonnes, SMW seeks 15,000 tonnes in Golden Bay and 10,000 tonnes in Tasman Bay.*
>
> *SMW is proposing a staged development along the lines outlined by Dr Gillespie, who proposes that the first stage consists of three 250 hectare marine farming sites in each Bay, and four 250 spat catching and holding sites in each Bay. Obviously the location of these sites will depend on both the zones adopted and the parties involved. Recognising these points, SMW proposes:*
>
> *(a) Golden Bay*
>
> *(i) marine farming: two of the three sites to come from the six SMW areas*
> *(ii) spat catching and holding: at least two of the four sites to come from the six SMW areas*
>
> *Note: SMW is now proposing that the Golden Bay Mussels site becomes a spat catching and holding site.*
>
> *(b) Tasman Bay*
>
> *(i) marine farming: at least one of the three sites to come from the two SMW areas (for this purpose the two SMW sites adjoining the Tasman Mussels site are regarded as one area).*
> *(ii) spat catching and holding: at least two of the four sites to come from the two SMW areas (for this purpose the two SMW sites adjoining the Tasman Mussels site are regarded as one area).*
>
> *(c) Stage 2 could only be implemented with the approval of the Council (see Integrated Management Proposal). The criteria for assessing the impact of stage 1 would be developed by the Management Committee, approved by the Court and included in the plan. The criteria are likely to include sustainability, and any adverse ecological effects on areas both within and beyond the areas already developed.*[32]

[32] Hannah Further Evidence stage I pages 5 – 6.

[41] Thus the location of the sites for the various activities was seen as dependent on the zones adopted and the parties involved.

[42] Mr Hannah indicated that SMW would wish to retain flexibility of choice as to what part of a zone, if any at all, would be dedicated to spat catching and for how long. He states:

> *... the thing that makes it difficult to be absolutely precise is that until we know whether there will be a certain area and where it will be and what conditions attached to it, its pruded* [sic] *to retain flexibility but if an area not part of SMW proposal that is approved but only for spat catching then possibly we could use some of that area and swap our area with someone else part of neg*[otiations] *i see down track.*[33]

[43] This interchange was of interest. Mr Hannah was identifying a need for flexibility on behalf of SMW. He appeared to anticipate there may be areas identified for spat catching which the Group did not control but which it could utilise on exchange basis – in essence a production mussel/marine farming site exchanged for a spat catching area further down the track – at least that was our interpretation.

[44] In being questioned about the extent of the anticipated stage I mussel farm development, Dr Gillespie reminded the Ringroad counsel that spat collecting (catching) was also to be considered – *to sm extent* [it is] *sep fm marine farming and the areas of spat catching are considerably larger so ths* (spat collecting areas) *will hv to be factored into the staging as well*[34]. SMW returned to the issue of three 250 hectare blocks in Golden Bay being zoned for development *for mussel farms* later in the same re-examination[35].

[45] In discussing the zoning of block A in Golden Bay for aquaculture purposes so that spat catching could continue; and whether it would be possible for the EAG to assist in identifying how a staged process involving 250 hectare blocks could occur or be developed with the overall block A aquaculture zone, Dr Gillespie replied:

> *Tht wd be my impress of how we could look at it ... you brought up spat catching as well ... think its impt these activities be considered sep. within the monitoring programme.*[36]

Thus spat catching was anticipated in the 250 blocks to be considered separately within any monitoring regime to be proposed.

[46] Meanwhile, Mr Hannah stated that Sealord had put effort into sourcing spat from Golden Bay in order to be less dependent on Kaitaia spat, and to take advantage of the different behavioural characteristics of the Golden Bay spat resource[37]. But he said *the results had been inconsistent, ranging from very good - to quite disappointing and nor is spat catching in Golden Bay an easy task*[38]. He explained that Sealord had spoken urgently in support of more spat catching at the Tasman Mussels council hearing in Tasman Bay[39], and he stated:

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33 Hannah NOE stage I page 1713.
34 Gillespie NOE stage I page 2016.
35 Ibid pages 2016, 2018, 2019.
36 Gillespie NOE stage I page 2003.
37 Hannah EIC, stage I paragraph (h).
38 Ibid Supplementary Brief of Evidence stage I page 15.
39 Sealord and its associates hold 62% of shares in Tasman Mussels.

> *It is most important to recognise the need to make adequate provision to catch and to hold spat. Given the inherent variability in spat supply from season to season, responsible management requires industry to effectively "over provide" for the forecast requirements for the following two years (the required lead time for spat). Sensible provision would be for 130-150% of forecast requirements. For example, if projected crop production was 20,000 gwt then spat catching efforts should be targeted at up to 30,000 gwt to ensure adequate supply.*[40]

[47] We carefully heeded Mr Hannah's warning for the need for an oversupply of spat. But equally we were conscious of the AIP requirement that for every 1000 hectares for marine (mussel) farming, a further 500 hectares was required for spat catching to bring about the 2:1 ratio.

Tasman Mussels

[48] Mr Goulding for Tasman Mussels, like Mr Wallace, considered that it was important to have available various locations throughout Golden Bay for spat because there was variation in quantity and quality of supply, but with Wainui being the most favourable site. He identified[41]:

- the resource consent application for the Tasman Mussels site granted by the TDC was for spat catching on a permanent basis;
- spat mortality could be avoided if marine farm structures could be kept in the water for 12 months of the year and *"full"* marine farming processes undertaken on site (ie spat catching, spat holding and mussel farming);
- spat could be removed from catching lines and re-seeded onto the intermediate growing lines, and returned to the water in less than an hour: this would have a substantial impact on the mortality rate of the spat;
- if the Tasman Mussels site became available for marine farming, it would be used for that purpose – in addition to spat catching[42];
- on the Golden Bay Mussels' and Tasman Mussels' sites, spat could be caught now and a one-to-one seed out rate achieved on those sites[43];
- an integrated growing process where spat catching, spat holding and on-growing were undertaken as part of a farming process on the same site, and in conjunction with one another represents a number of the very real benefits;
- integrated growing goes some way to offset the recognised disadvantages of farming in the more exposed waters of Tasman and Golden Bays.
- it is not possible to carry out this integrated growing process in the Marlborough Sounds as there it is unusual to catch spat on marine farm sites – 95% of farm sites in the Sounds do not catch spat at all.

[49] But Mr Goulding's cross-examination identified some other issues. In summary, he made the following points:

- it is incredibly important that the industry has spat catching ability in both Tasman and Golden Bays: but whilst spat catching is a major concern to the industry, further space for marine farms in the Marlborough Sounds is close to

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40 Hannah Further Evidence stage I.
41 Goulding EIC stage I.
42 Goulding NOE stage I pages 2078 – 2079.
43 Ibid page 2082.

being fully developed – existing marine farms or licences are probably close to being fully developed on an industry scale – thus implying urgency for mussel farms[44];

- if the Court is going to allocate areas, it is not essential, but sound work, to designate, in the first instance, which areas can be used for marine farming and which are to be used for spat catching[45];
- in Tasman Bay (unlike Golden Bay) the industry has been unable to do spat monitoring other than on the Ringroad because there are no areas of permanent occupancy;
- the industry would need to indicate to the Court which areas are suitable for spat catching purposes in Tasman Bay – but leaving the industry to identify areas or zones for securing permanent spat supplies might be difficult because of its inability to reach agreement on the issue[46];
- securing permanent spat supplies or areas to catch spat is paramount: there are difficulties in having to move longlines off a spat catching site each year;
- previous Block A of the Ringroad in Tasman Bay had a very successful spat settlement 1998/99 – in an area of strong water currents – better than many of the Goulding farm sites in the Sounds[47];
- assessment of mussel tonnage at the Tasman Mussels site is very high and the Moutere River has high nutrient values in relation to the proposed marine farming area.

[50] Dr Gillespie had also emphasised the importance of the Motueka plume in terms of carrying nutrients to the Tasman Mussels site[48]. The similarities with the Collingwood/ Waikato site were obvious in terms of possible high production for mussel farms.

[51] Mrs McNae who gave planning evidence in support of Tasman Mussels had this to say:

> *I see a zone around the Tasman Mussels site that wld include that site, the Ring Road sites and may be approp to include other parties. But that is, a zone in Tasman Bay for marine farming. In addition I see zones on either side, as on plan, which wld provide for zoning also, with provision for spat catching and spat holding on a permanent basis.*
>
> *Q. Are u there referring to the Ring Road sites either side of Tasman Mussels?*
>
> *A. No I believe the Ring Road site and Tasman Mussels site shld be [a] concentrated point of permanent marine farming, either side shld be some distance which are Challenger sites and Ring Road sites – it is the middle area I see as concentrated marine farming zone (coloured blue on SMW map). The two areas, north and south, being the bases for zones that wld provide for permanent spat catching and spat holding.*[49]

[52] If spat holding was to become part of permanent production farming (because mussel farming and holding are very similar – they have same amount of weight and requirement for float)[50] – and space in the CMA was limited, then we seriously questioned whether additional

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44 Goulding NOE stage I pages 2097, 2088.
45 Ibid page 2097.
46 Ibid.
47 Goulding NOE stage I page 2089.
48 Gillespie NOE stage I page 2000.
49 McNae NOE stage I.
50 Nicolle NOE stage I page 2243.

space should be provided in the mussel farming sites for spat catching as long as there were spat catching sites close by. In the Tasman Mussels case there were – in AMA 3C.

[53] Meanwhile we noted Tasman Mussels had a resource consent for spat catching on a permanent basis – subject to two appeals yet to be resolved.

The Ringroad

[54] In his supplementary brief of evidence in response to other evidence presented, Mr Nicolle sought that in Golden Bay only the inner Ringroad be zoned as an AMA allowing for marine farming all the year round, and that the outer Ringroad be zoned for rotational spat catching all the year round. In Tasman Bay Mr Nicolle requested that both the inner and outer Ringroad on block 'A' (which includes the Tasman Bay Mussels site), and the inner Ringroad on blocks 'B' and 'C' be zoned for AMAs allowing marine farming all year round: and that the outer Ringroad in blocks B and C be zoned for rotational spat catching all the year round[51].

[55] In cross-examination, the following interchange took place:

> *Q. In any event, the Ringroad proposal is that the spat catching zone or area be carried out on a seasonal basis*
> *A. That is correct.*
> *Q. By that do we understand the Ringroad proposal comprehends spat catching structures will be removed from the water for a certain period in any 12 month period*
> *A. That is correct.*
>
> *Q. As I understand it from Mr Somerville's opening, in the absence of agreement to the contrary that seasonal use of the spat catching sites will be along the lines of current procedures or the current situation*
> *A. That is correct.*
>
> *Q. Do those same considerations apply to the rotational aspects of the use of the AMA 1 areas*
> *A. That is correct.*

[56] Further, in response to questions from the Court, Mr Nicolle replied:

> *Q. So if looking first at a full farming situation only you deduct 1/3 for spat catching, then 15% for spat holding...The whole zoning. If talking of production of marine farming only, if we want an annualised figure we need to subtract 1/3 for spat catching and a further 15% for spat holding, is that correct.*
> *A. I don't believe that is right. If we are talking about AMA 2 area, full marine farming, we are deducting just the 15% for spat holding occurring in that area.*
> *Q. You have put aside in another area, spat catching, is that a ratio to 1:2 for the full-blown marine farming area.*
> *A. Yes.*

[51] Nicolle Supplementary Evidence stage I pages 1 – 2.

Q. When talking of the spat requirements for the whole industry, you have assured us there is plenty of capacity in the Ringroads for that, it is irrespective of how many hectares are allocated for marine farming ...
A. I believe it [the Ringroad] *has the ability to cater for spat catching in our foreseeable future.*[52]

[57] As to the issue of ratio between spat catching and marine farming, Mr Nicolle deposed that there was general agreement at an industry meeting in December 1999 (at which all industry parties were represented), typically that there should be one area of spat catching available for every two of marine farming[53].

[58] When further questioned as to what the implication of this ratio for the Ringroad's proposal in Golden and Tasman Bay might be, Mr Nicolle replied:

For Golden Bay this would effectively require the Ringroad consortium to have available in Golden Bay up to 200 hectares for spat catching and in Tasman Bay up to 270 hectares available for spat catching.

Q. Is that over the life of the plan, assuming full production from the marine farming area
A. This is correct.[54]

[59] The phrase *"full production from the marine farming area"* we understood to be an area where spat holding and mussel farming took place, not spat catching.

[60] Mr Nicolle reiterated that the area he identified for spat catching could accommodate the total industry needs (as it is known today). When asked what was the consortium's view on the balance of the areas in the former Ringroad sites being available in a fair way for all marine farming interests for spat catching, he affirmed that the Ringroad members had full acceptance of this principle[55]. And in further questioning about the Ringroad proposal to zone the current sites in both Tasman and Golden Bays, for aquaculture overall, as either AMA 1 or AMA 2, he stated *AMA 1, as I understand it, is to be used for spat catching, AMA 2 for spat holding or marine farming*[56] by which we assumed that AMA 2 could potentially be used for production marine farming not spat catching. Later on in cross-examination he observed that the Kaitaia spat was to be held in AMA 2 *"the full marine farming area"* thus emphasising, in our minds, that there was a distinction to be made between the spat catching area and that for mussel farming, holding, and on-growing[57].

[61] There was also, as we understood it, also an issue as to the different flotation for marine farming and spat catching. He was asked:

Q. Is it possible to locate smaller floats below the surface for marine farming
A. Technically it is possible, but the size and flotation of those currently available in spat catching do not have sufficient flotation to suspend the equipment used in mussel farming.[58]

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52 Nicolle NOE stage I page 2243.
53 Nicolle NOE stage I page 2187.
54 Ibid page 2187.
55 Ibid page 2187.
56 Ibid page 2189.
57 Ibid NOE stage I page 2242.
58 Ibid page 2188.

[62] But, the witness stated, that structurally there is no difference between marine farming, spat holding and spat catching with the structures using the same longlines and as the holding advances as many floats if not more than on-growing or crops[59]. Surface manifestation of flotation devices for spat catching, however, is of less intensity than marine farming or spat holding[60].

[63] Mr Nicolle (as did other marine farming witnesses) also raised the issue of Challenger's spat catching operation pointing out there is difficulty accessing sites because of the rotational element and because Challenger defers decisions until it feels it can avoid the over-settlement of mussel spat. Challenger, it appears, is now catching spat more randomly, selecting sites to best advantage. This, Mr Nicolle stated, results in rather haphazard access – there may be some sites available for two years running but in 1999 no sites were used and there was no spat catching in the Ringroad in 2000 either. Only 25 hectares in any one season had been used on the Ringroad in six years in both bays[61].

[64] In being asked if the Ringroad were granted the amount of space they sought for marine farming and spat catching and would it make sense to seek more space for spat catching areas, he replied *We are asking* [for] *a clear demarcation of zoning, between spat catching and marine farming/spat holding*[62]. He reiterated he had made a 15% spatial allowance for spat holding in the farming areas[63].

[65] There was another aspect which had to be considered. In being questioned as to whether Kaitaia spat might still be used because it is less expensive, Mr Nicolle considered that the rationale of the need to catch other strains of spat from other areas is that they perform in different ways in their growth, conditioning and cycle. Together they form a critical component in making the industry operate on a year round basis. They fatten and spawn at different times of the year. Mr Nicolle would expect to rely on Kaitaia spat up to 50% as a farm estimate[64].

[66] In other words the Ringroad farmers would continue to rely on spat other than from the Tasman District for their operations in Golden and Tasman Bays. Mr Wallace (who sources his spat through Mr Brown) had earlier stated that his supply comes from Golden Bay, Kaitaia and the Marlborough Sounds. But the caveat on Kaitaia spat revolves around the presence of biotoxins in the collecting waters. This results in a ban on that source and has an extensive effect on the industry's ability to grow mussels in any forthcoming years.

[67] Dr P Mitchell, overall environmental consultant to the Ringroad, was happy to have spat catching on a seasonable but not a rotational basis, the latter he noted being specified originally for fisheries purposes[65]. He also considered it would not be helpful to have the activity of spat catching in close proximity to any production farming because it would compromise monitoring[66]. He further saw no resource management difficulty in excluding spat catching within a marine (mussel) farming zone as a matter of principle. He considered a [full production] marine farming zone could be considered as *a scarce resource* in the context of the Tasman District. He stated this was a proper resource management consideration for

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[59] Ibid page 2189.
[60] Ibid page 2190.
[61] Ibid page 2226.
[62] Ibid page 2240.
[63] Ibid page 2241.
[64] Ibid page 2258.
[65] P Mitchell NOE stage I page 2260.
[66] Ibid page 2257.

according priority to the activity of marine farming as opposed to that of spat catching[67]. He considered it might be possible to provide for spat catching in the remainder of a zone which was not utilised for marine farming but stressed that only *"might"* be possible[68]. In his opinion, the primary management objective should be to accord priority to the activity of marine farming – which we took to be full production mussel farming:

> *I think there may well be some benefits in specifying a spat catching area and rather than rotating year to year, concentrating those activities at one site. I am referring to the Ringroad proposal when I say that, and am not suggesting all spat catching activities in all bays need to be located at the one site. I am saying where there is a zone established for that* [spat catching] *purpose, from a resource management point of view it appears to me to be more efficient and effective to hv one area where that is known to occur, rather than occurring in different places at different times, with the subsequent uncertainty that might create.*[69]

[68] Dr Mitchell agreed that from a monitoring and compliance point of view that an effective and efficient means of ensuring compliance was to the require spat catching equipment to be taken out of the water for a certain time in any twelve month period – it was to him a practical way of addressing the issue. He considered inspection and monitoring of actual areas for spat catching within an integrated marine farm site was likely to be time consuming, costly and probably inefficient. For an area zoned for spat catching, it was a reasonable and appropriate requirement to impose[70]. Thus a key witness for the Ringroad and a widely experienced environmental consultant saw spat catching as separated out from production farming areas.

[69] In dealing with definitions, it was Mr Kyle's evidence, as planning consultant to the Ringroad, that if the industry was to have separate areas for spat catching and marine farming, the critical distinction to be made is between spat catching and spat holding and in terms of spat catching the need for the gear to be out of the water for a certain period is the most effective way of ensuring spat catching does not become spat holding and/or marine farming. He emphasised that from a monitoring point of view, it is practically impossible to monitor unless the gear is required to be lifted out of the water.

[70] In terms of requiring less space if all the marine farming activities (the constituent parts of spat catching, spat holding and *full blown* marine farming) took place within a defined area (rather than split activities), Mr Kyle considered that less space may not necessarily be required. He states:

> *If one was able to adequately gauge the amount of space required for each activity and put in place appropriately zoned areas, I cant see a great deal of difference.*[71]

[71] Mr Kyle agrees with Mr Nicolle that 10 year term for resource consents is sufficient for the reasonable needs of the industry[72]. Otherwise Mr Kyle confirmed Dr Mitchell's

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67 Ibid page 2266.
68 Ibid page 2258.
69 Ibid page 2266.
70 Ibid page 2254.
71 Kyle NOE stage I page 2293.
72 Ibid page 2274.

approach and that great care needs to be taken to ensure effects inherent in the more intensive activities (spat holding and marine farming) are adequately provided for[73].

Department of Conservation

[72] Mr Wynne Jones, in his evidence-in-chief, commented on the suggestion in the MacLab Group proposal that an area in the CMA be identified as being available only for subsurface marine farming. He notes and agrees with the TDC's view that there may be practical difficulties in devising a rule to give effect to this concept. An alternative option could be to make provision in suitable areas for spat catching but not for *"full production"* marine farming. He notes *spat catching has an accepted and reasonably easily precise and certain definition.* Such a distinction has been used in resource consents which he was aware of in the Marlborough Sounds. A second alternative remedy, he noted, could be restrictions on the term of a permit[74].

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[73] Ibid page 2293.
[74] Wynne Jones.

APPENDIX 2

CAWTHRON

P. Gillespie, Cawthron Institute July 2000

SUGGESTED TIME LINE FOR STAGED DEVELOPMENT AND MONITORING OF LARGE-SCALE MUSSEL FARMS IN TASMAN & GOLDEN BAYS

After preliminary site characterisation (location, depth, current velocity, seabed habitat) & suitability assessment

T=0 yrs

A. Selection of stage 1 sites *(e.g. 50-75 ha blocks as shown in diagram)*

- Measurement of current speed & direction
- Gear deployment
- Baseline survey of water column and seabed characteristics

B. Stocking

T=0.5 yrs

C. Monitoring during years 1-3 of production (*interim reports provided after each harvest*)

- Water column (phytoplankton/nutrients)-*monthly throughout stage 1*
- Farm management related (mussel size/condition, biofouling of lines)-*monthly throughout stage 1*
- Seabed-year 1: (*prior to 1st harvest, e.g. 12 months, with abbreviated post-harvest survey*)
- Seabed-year 2: (*prior to 2nd harvest, e.g. 24 months, with abbreviated post-harvest survey*)
- Seabed-year 3: (*prior to 3rd harvest, e.g. 36 months, with abbreviated post-harvest survey*)

T=3.5 yrs

D. Assessment re stage 2 development

- Option 1: Develop further site(s) with appropriate buffer zones and reduced monitoring
- Option 2: Maintain farm with some modification (*e.g. line spacing, stocking densities, etc to reduce/avoid effects)* and continued monitoring
- Option 3: Review consent mechanisms if impacts are unacceptable

T=4 yrs

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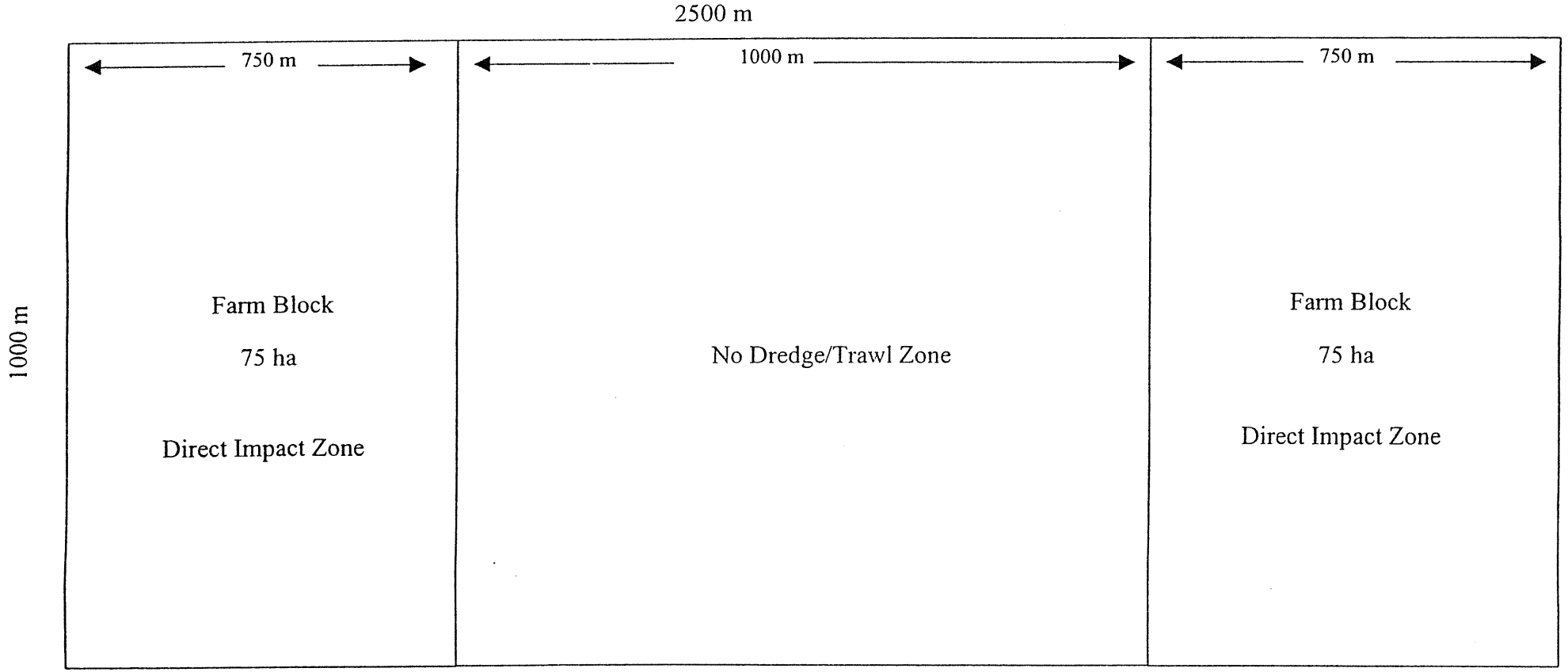
Notes re timeline:

Yearly pre-harvest seabed monitoring would constitute a repeat of the initial baseline benthic survey comprised of analyses of epifauna and infauna and sediment physical and chemical characteristics.

Yearly post-harvest seabed monitoring would assess shell and biofouling deposition during harvesting operations.

MARINE FARM MONITORING AREA

One or two blocks of 50-75 ha could be sited within a 250 ha zoned area, however two blocks (as shown below) would require a considerably greater monitoring effort. Monitoring will include potentially impacted regions within and adjacent to each block and non impacted 'control' sites outside the influence of the farm. No additional farms or spat collecting areas should be sited within at least 500 m of stage 1 sites in order to avoid compromising interpretation of monitoring results. The following diagram shows one possible design, however there are numerous alternative designs depending on the location and dimensions of the zoned area.



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P. Gillespie, Cawthron Institute July 2000

ECOSYSTEM COMPONENTS INTERACTING WITH MUSSEL FARM EFFECTS

The following ecosystem components are Public Good Science Fund (PGSF) research topics to be undertaken by Cawthron and NIWA in collaboration with TDC. Such research, in conjunction with monitoring results, will provide a basis for modeling of marine farming impacts in the Nelson Bays. Some of the studies are presently in progress, and others are planned for addition over the next 5 years. A long term research goal is to develop a numerical integrated ecosystem model for the Nelson Bays. A preliminary conceptual box model is not presently available, but will be prepared as a first step. ***(See the attached diagram showing mussel farm effects and interacting ecosystem components.)***

1. **Hydrodynamics**
   - Water column structure (stratification)
   - Circulation patterns/current velocities & directions
   - Freshwater/marine influences
   - Residence times
   - Controlling factors (short & long term)

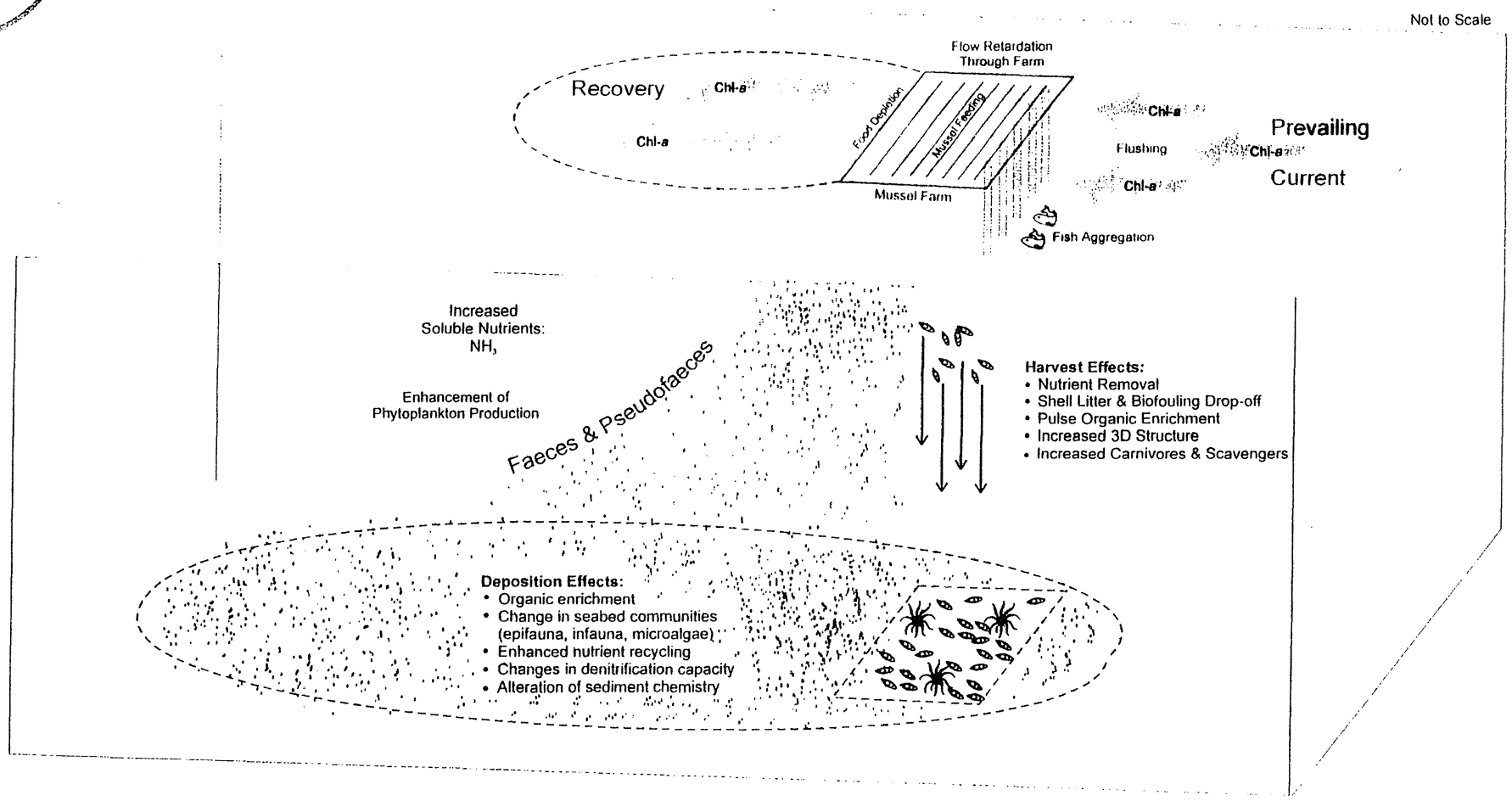
2. **Nutrient dynamics**
   - Distribution
   - Sources/sinks (*e.g.* freshwater/marine/recycling)
   - Budgets
   - Controlling factors (short & long term)

3. **Primary production** (phytoplankton/benthic macro-and microalgal dynamics)
   - Community structure/ecology
   - Biomass distribution
   - Controlling factors (short & long term)

4. **Food web interaction**
   - Zooplankton/phytoplankton/nekton (*e.g.* fish)
   - Seabed biota
   - Larval distributions (timing/survival)
   - Controlling factors (short & long term)

Mussel Farm Effects & Interactive Ecosystem Components

CAWTHRON



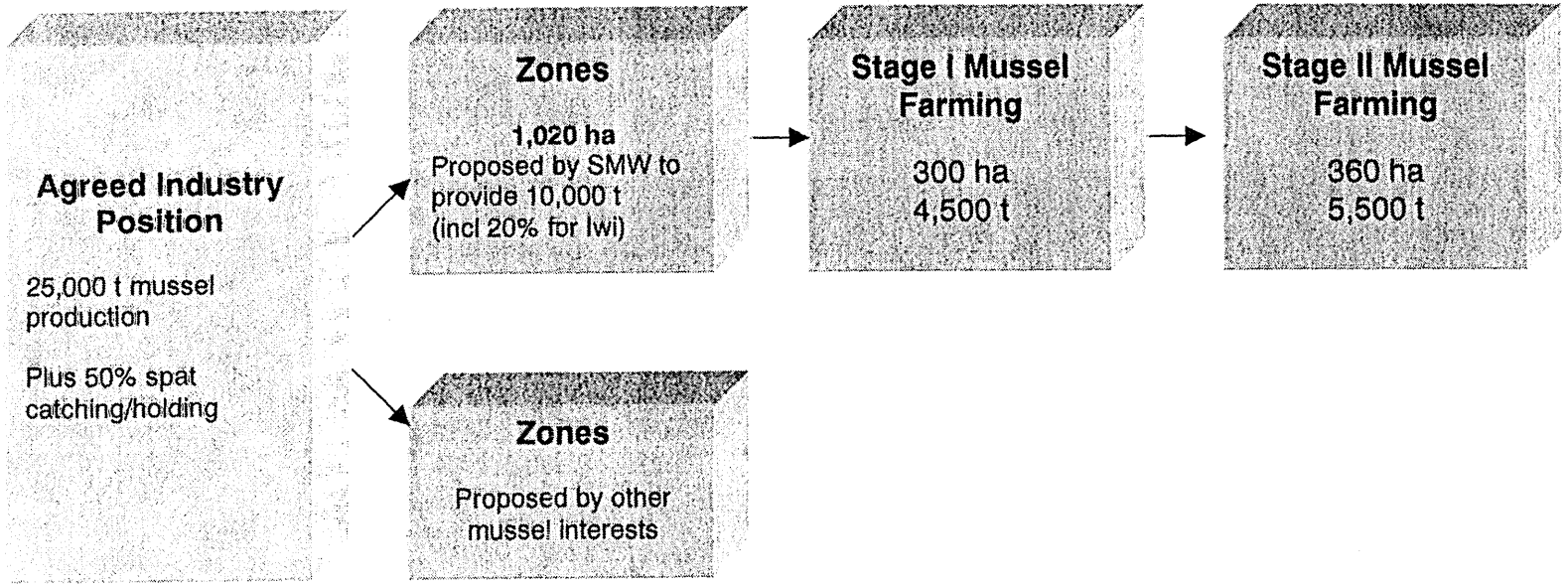
Interactive Ecosystem Components:

Hydrodynamics Nutrient Dynamics Primary Production Food Web Interaction

Development of a numerical model containing the ecosystem components illustrated, along with monitoring data describing impacts, will facilitate prediction of the effects of further stages of mussel farm development on ecosystem values.

SCHEMATIC DIAGRAM OF SMW PROPOSALS FOR TASMAN BAY

Refer paragraphs 3.8.4 and 3.10 of submissions



Activity Status
(refer para 3.8.4 (c) submissions)

(a) Surface Floated Structures:
Mussel farming, spat catching/ holding on sites less than 50 ha
- controlled

(b) Surface Floated Structures:
Mussel farming, spat catching/ holding on sites 50 ha and more
- discretionary

(c) Sub-surface Floated Structures
Mussel spat catching
- controlled

(d) Aquaculture outside management areas
- prohibited

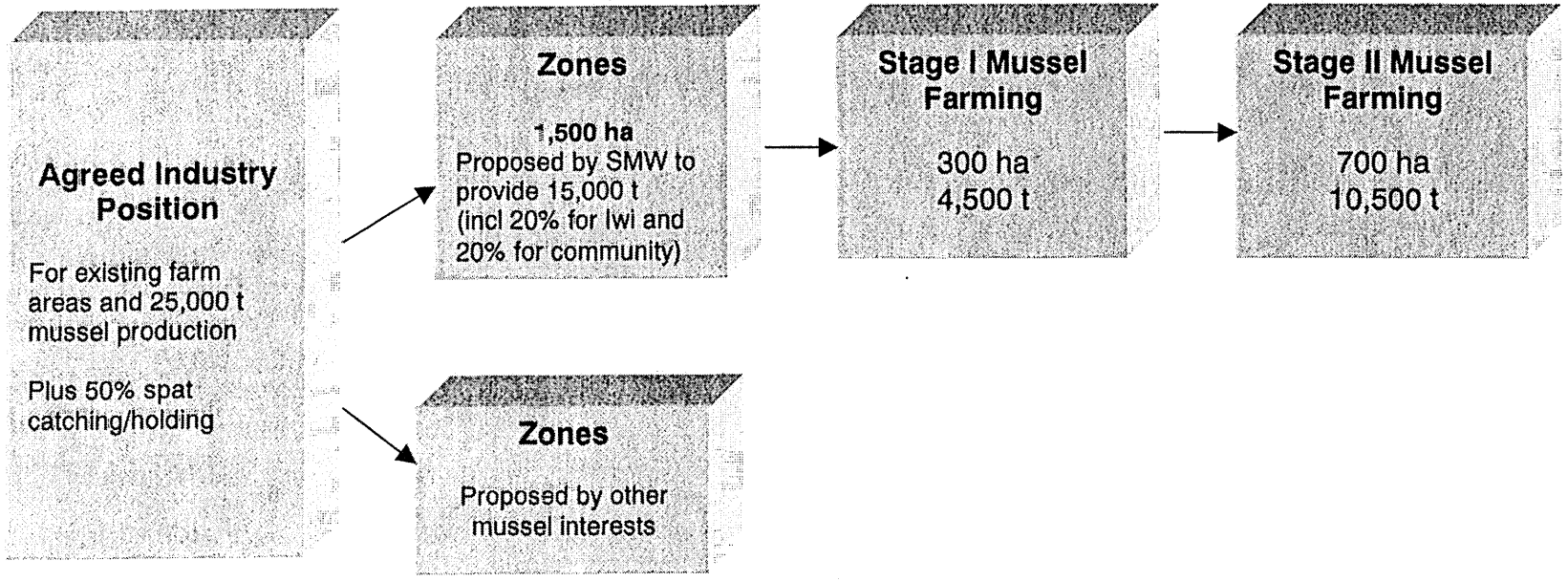
NOTES:

1. An additional 50% of the mussel farming area is required for spat catching and spat holding.
2. Dr Gillespie agreed that up to 1,000 ha (4 x 250 ha sites) of space be zoned in each Bay for spat catching.
3. The Management Areas apply to both Stage I and Stage II mussel farming, and spat catching/holding.

APPENDIX 3

SCHEMATIC DIAGRAM OF SMW PROPOSALS FOR GOLDEN BAY

Refer paragraphs 3.8.5 and 3.10 of submissions



Activity Status
(refer para 3.8.5 (c) submissions)

(a) Surface Floated Structures: Mussel farming, spat catching/ holding on sites less than 50 ha
- controlled

(b) Surface Floated Structures: Mussel farming, spat catching/ holding on sites 50 ha and more
- discretionary

(c) Sub-surface Floated Structures Mussel spat catching
- controlled

(c) Sub-surface Floated Structures (only) mussel spat catching within GBML site
- controlled

(e) Aquaculture outside management areas
- prohibited

NOTES:

1. An additional 50% of the mussel farming area is required for spat catching and spat holding.
2. Dr Gillespie agreed that up to 1,000 ha (4 x 250 ha sites) of space be zoned in each Bay for spat catching.
3. The Management Areas apply to both Stage I and Stage II mussel farming, and spat catching/holding.

Table (yy)

Staging of Aquaculture Development AMA

Notes

1. Site layouts will be based on a maximum long line length of 200m (between end buoys).
2. For the purpose of staging, there will be no distinction between mussel farming and spat catching.
3. Development within any block for Stages 1 and 2 may occur as a combination of the options set out in the table, subject to the overall line density set down for the block for the stage in question not being exceeded at any time.

AMA	ULTIMATE DENSITY OF LONG LINE DEVELOPMENT	STAGE 1 shall comprise any one of the following options	STAGE 2 shall comprise	STAGE 3 shall comprise the following in conjunction with the existing stage 1 and 2 development
3	50m separation between long lines	Long lines placed over the whole block area at 150m separation or Long lines placed over 2/3 of the block area at 100m separation or Long lines placed over 1/3 of the block area at 50m separation	One or any of the options outlined for stage 1 provided that the density of long line development does not exceed 2/3 of the ultimate density of the block.	Long lines placed over the whole block at 50m separation
2	35m separation between long lines	Long lines placed over the whole block area at 105m separation or Long lines placed over 2/3 of the block area at 70m separation or Long lines placed over 1/3 of the block area at 35m separation	One or any of the options outlined for stage 1 provided that the density of long line development does not exceed 2/3 of the ultimate density of the block.	Long lines placed over the whole block at 35m separation

AMA1 Inner 2 blocks NOTE: Existing marine farm licences and resource consents are dealt with as Controlled activities to renew consents	20m separation between long lines	Long lines placed over the whole block at 60m separation or Long lines placed over 2/3 of the block at 40m separation or Long lines placed over 1/3 of the block at 20m separation	One or any of the options outlined for stage 1 provided that the density of long line development does not exceed 2/3 of the ultimate density of the block.	Long lines placed over the whole block at 20m separation
AMA1 Middle Block	25m separation between long lines	Long lines placed over the whole block at 75m separation or Long lines placed over 2/3 of the block at 50m separation or Long lines placed over 1/3 of the block at 25m separation	One or any of the options outlined for stage 1 provided that the density of long line development does not exceed 2/3 of the ultimate density of the block.	Long lines placed over the whole block at 25m separation
AMA1 Outer Block	35m separation between long lines	Long lines placed over the whole block at 105m separation or Long lines placed over 1/3 of the block at 70m separation or Long lines placed over 1/3 of the block at 35m separation	One or any of the options outlined for stage 1 provided that the density of long line development does not exceed 2/3 of the ultimate density of the block.	Long lines placed over the whole block at 35m separation

MINISTRY OF AGRICULTURE & FISHERIES (Nelson) **APPENDIX 5**

Map dr by Dept. of Lands & Survey Nelson

PLAN RECORDED

No 58/30

Date 19.7.88

RELEVANT PARTICULARS APPROVED PURSUANT TO SECTION 178 (b) OF THE HARBOURS ACT 1950

DOC (CM) NE

SEEN/APPROVED
MINISTER OF CONSERVATION
26 SEP 1988

Sheet (2) of (2)

Figure 2

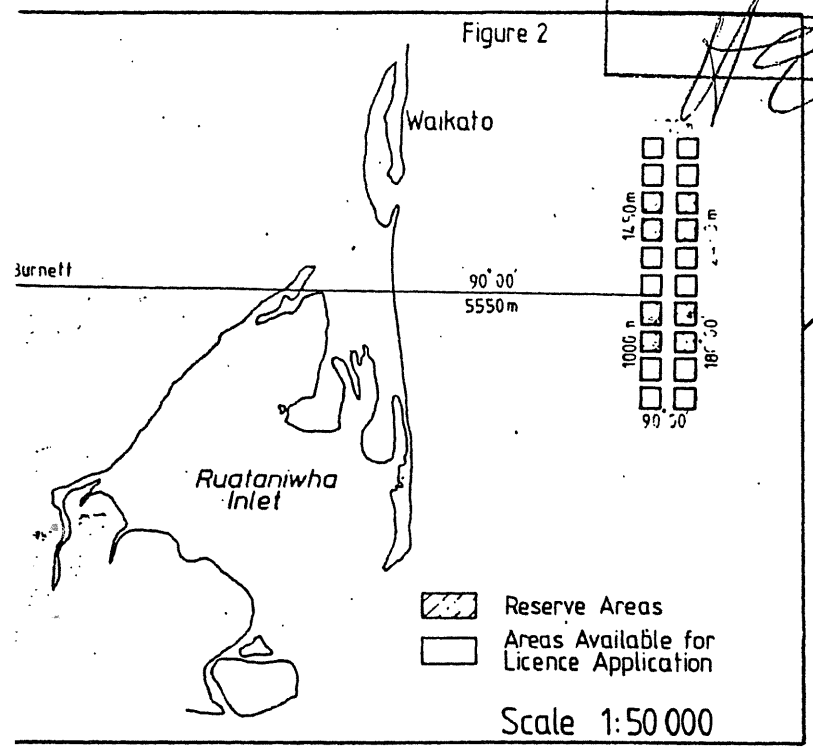
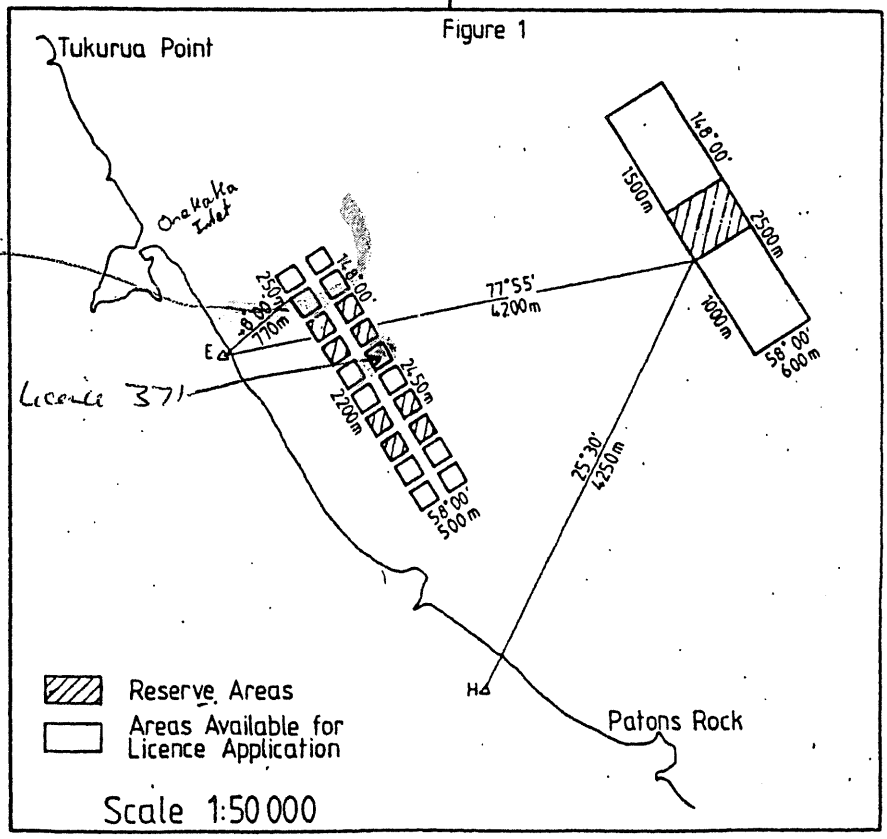
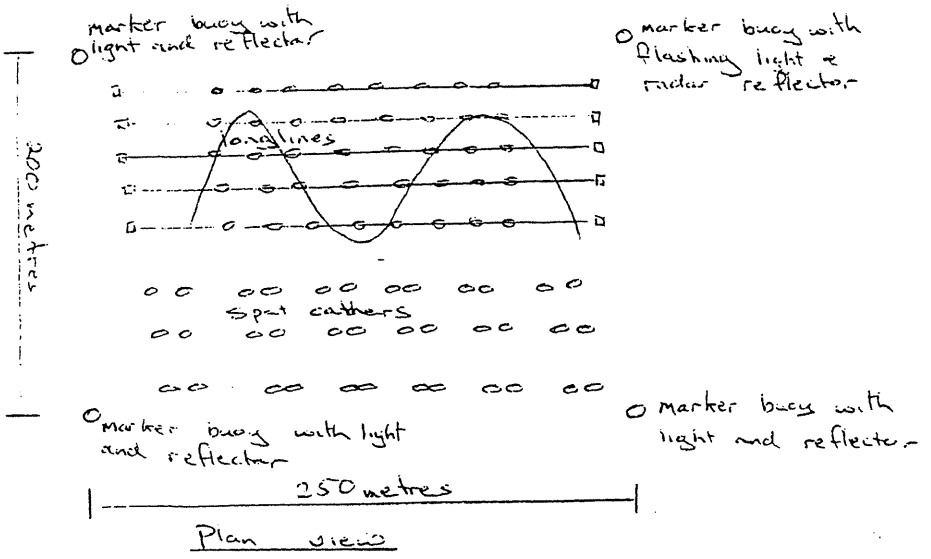


Figure 1





Specification

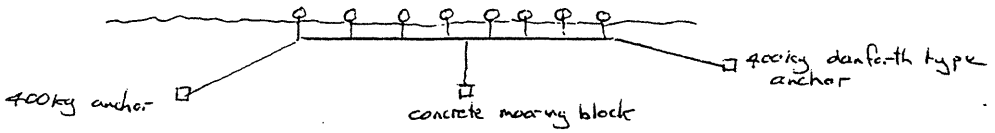
All anchor ropes and backbones 24mm superfilm.

All chain and schackles minimum diam 20mm

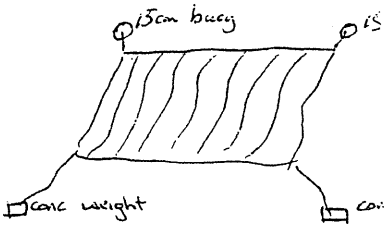
Longline buoys will be a com of standard mussel buoys a Dan buoys

Spat catcher buoys will be approx 15cm diam

Marker buoys on each corn will be anchored with con mooring blocks and chain



Longline detail



Spat catcher deta

Proposed Layout Licence 371 Golden Bay
RM and DW Dawber

PLAN RECORDED { No 88/30 Date 10/9/88

RELEVANT PARTICULARS APPROVED PURSUANT TO SECTION 178 (b) OF THE HARBOURS ACT 1950

~~SEEN~~/APPROVED/~~DECLINED~~ MINISTER OF CONSERVATION
26 SEP 1988

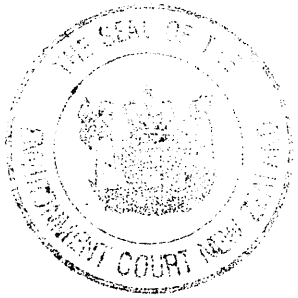
DOC (CM) NE

Sheet (1) of (2)

SPECIAL CONDITIONS

(a) Approval to remain valid until MAF transfer the licence to the North West end of the Pariwhakaoho Marine Farm site.

(b) The licensee shall take immediate steps to recover the longline or any spat lines or part of the longline or spat lines (including weights, buoys and anchors) if the longline or any part of the longline or spat lines are removed from their positions or breaks adrift or sinks.



APPENDIX 6

1

IN THE MATTER	of the Resource Management Act 1991
A N D	
IN THE MATTER	of references pursuant to clause 14 of the First Schedule to the Act
BETWEEN	**GOLDEN BAY MARINE FARMERS (RMA 1735/98)**
	WILLIAM J. WALLACE (RMA 1740/98)
	CHALLENGER SCALLOP ENHANCEMENT COMPANY LIMITED (RMA 1758/98)
	FIRST WAVE LIMITED (RMA 1759/98)
	NEW ZEALAND MARINE FARMING ASSOCIATION (RMA 1780/98)
	NGATI TAMA MANAWHENUA KI TE TAU IHU TRUST (RMA 1781/98)
	Appellants
A N D	**TASMAN DISTRICT COUNCIL**
	Respondent

Respondent's Memorandum concerning co-ordinates of spat catching sites and marine farms in Tasman Bay and Golden Bay

---

2

1 At the conclusion of the Stage II hearing on 1 February 2002 the Respondent produced a schedule containing the easting and northing co-ordinates of spat catching and marine farm sites in Tasman Bay and Golden Bay referenced to planning maps of the Aquaculture Management Areas shown at Appendix ZZ of the Interim Report.

2 It has since been pointed out that the map identification number shown in the co-ordinates schedule does not correctly cross-reference to the planning maps produced. It was also pointed out that confusion could arise between the co-ordinates presented, which are based on the New Zealand Map Projection system, and co-ordinates determined according to the WGS 84 Projection (which is the international system).

3 Accordingly, the Respondent attaches a further schedule of co-ordinates showing the correct map reference identification numbers. The new schedule contains the following information:

(i) The easting and northing co-ordinates based on the New Zealand Map Projection.

(ii) The grid reference based on the New Zealand Map Projection.

(iii) Latitude and longitude based on the New Zealand Map Projection in decimal degrees.

(iv) Latitude and longitude based on the New Zealand Map Projection in degrees, minutes and seconds.

(v) Latitude and longitude based on the WGS 84 Projection in degrees, minutes and seconds.

4 The Respondent apologies for any inconvenience caused.

.....

J C Ironside
Counsel for Respondent
15 February 2002

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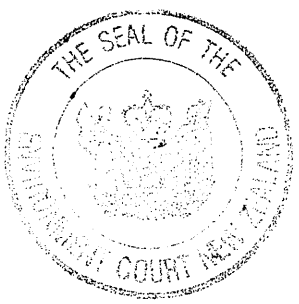

COORDINATES OF SPAT CATCHING AND MARINE FARM SITES

AMA1

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS
1	2485144	6064698	M25851647	-40.62551421	172.7062311	-40 37' 31.85"	172 42' 22.43"	-40 37' 25.61"	172 42' 22.94"
2	2486144	6064698	M25861647	-40.62554309	172.7180485	-40 37' 31.96"	172 43' 04.97"	-40 37' 25.72"	172 43' 05.48"
3	2486244	6064698	M25862647	-40.62554596	172.7192308	-40 37' 31.97"	172 43' 09.23"	-40 37' 25.73"	172 43' 09.74"
4	2487244	6064698	M25872647	-40.62557393	172.731048	-40 37' 32.07"	172 43' 51.77"	-40 37' 25.83"	172 43' 52.28"
5	2487444	6064698	M25874647	-40.62557900	172.7334116	-40 37' 32.08"	172 44' 00.28"	-40 37' 25.85"	172 44' 00.79"
6	2488395	6064698	M25884647	-40.62560353	172.7446497	-40 37' 32.17"	172 44' 40.74"	-40 37' 25.94"	172 44' 41.25"
7	2488595	6064698	M25886647	-40.62560886	172.7470137	-40 37' 32.19"	172 44' 49.25"	-40 37' 25.96"	172 44' 49.76"
8	2489695	6064698	M25897647	-40.62563567	172.7600132	-40 37' 32.29"	172 45' 36.05"	-40 37' 26.05"	172 45' 36.56"
9	2489695	6061998	M25897620	-40.64994762	172.7599282	-40 38' 59.81"	172 45' 35.74"	-40 38' 53.58"	172 45' 36.25"
10	2488595	6061998	M25886620	-40.64992062	172.7469237	-40 38' 59.71"	172 44' 48.93"	-40 38' 53.48"	172 44' 49.43"
11	2488398	6061995	M25884620	-40.64994025	172.7445994	-40 38' 59.78"	172 44' 40.56"	-40 38' 53.55"	172 44' 41.07"
12	2487444	6061998	M25874620	-40.64989031	172.7333168	-40 38' 59.61"	172 43' 59.94"	-40 38' 53.37"	172 44' 00.45"
13	2487244	6061998	M25872620	-40.64988493	172.7309522	-40 38' 59.59"	172 43' 51.43"	-40 38' 53.35"	172 43' 51.94"
14	2486244	6061998	M25862620	-40.64985722	172.7191305	-40 38' 59.49"	172 43' 08.87"	-40 38' 53.25"	172 43' 09.38"
15	2486144	6061998	M25861620	-40.64985474	172.7179481	-40 38' 59.48"	172 43' 04.61"	-40 38' 53.24"	172 43' 05.12"
16	2485144	6061998	M25851620	-40.64982582	172.7061265	-40 38' 59.37"	172 42' 22.06"	-40 38' 53.14"	172 42' 22.56"

AMA 2

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS
17	2488375	6057269	M25884573	-40.69249996	172.7441674	-40 41' 33.00"	172 44' 39.00"	-40 41' 26.77"	172 44' 39.51"
18	2490067	6056811	N25901568	-40.69666659	172.7641667	-40 41' 48.00"	172 45' 51.00"	-40 41' 41.77"	172 45' 51.51"
19	2490866	6056597	N25909566	-40.69861094	172.7736102	-40 41' 55.00"	172 46' 25.00"	-40 41' 48.77"	172 46' 25.51"
20	2491401	6056449	N25914564	-40.69995021	172.7799419	-40 41' 59.82"	172 46' 47.79"	-40 41' 53.59"	172 46' 48.30"
21	2492458	6056163	N25925562	-40.70254821	172.7924333	-40 42' 09.17"	172 47' 32.76"	-40 42' 02.94"	172 47' 33.27"
22	2491786	6053979	N25918540	-40.72220244	172.7844219	-40 43' 19.93"	172 47' 03.92"	-40 43' 13.70"	172 47' 04.43"
23	2492842	6053693	N25928537	-40.72479997	172.7969166	-40 43' 29.28"	172 47' 48.90"	-40 43' 23.05"	172 47' 49.41"
24	2493484	6053338	N25935533	-40.72800781	172.8045047	-40 43' 40.83"	172 48' 16.22"	-40 43' 34.60"	172 48' 16.73"
25	2488948	6054031	M25889540	-40.72166659	172.7508335	-40 43' 18.00"	172 45' 03.00"	-40 43' 11.77"	172 45' 03.51"
26	2490569	6053573	N25906536	-40.72583305	172.7700003	-40 43' 33.00"	172 46' 12.00"	-40 43' 26.77"	172 46' 12.51"
27	2491341	6053529	N25913535	-40.72624535	172.779138	-40 43' 34.48"	172 46' 44.90"	-40 43' 28.26"	172 46' 45.41"

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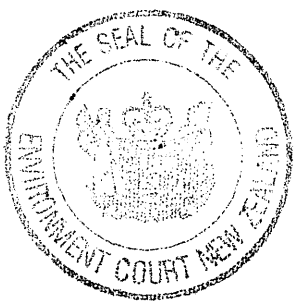

28	2491197	6053391	N25912534	-40.72748562	172.7774353	-40 43' 38.95"	172 46' 38.77"	-40 43' 32.72"	172 46' 39.28"

COORDINATES OF SPAT CATCHING AND MARINE FARM SITES

AMA 2 cont ...

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS
29	2490700	6052760	N25907528	-40.73315327	172.7715316	-40 43' 59.35"	172 46' 17.51"	-40 43' 53.12"	172 46' 18.02"
30	2489650	6051480	M25897515	-40.74465486	172.7590621	-40 44' 40.76"	172 45' 32.62"	-40 44' 34.53"	172 45' 33.13"
31	2489040	6050680	M25890507	-40.7518434	172.7518135	-40 45' 06.64"	172 45' 06.53"	-40 45' 00.41"	172 45' 07.04"
32	2492160	6049370	N25922494	-40.76371036	172.7887185	-40 45' 49.36"	172 47' 19.39"	-40 45' 43.13"	172 47' 19.90"
33	2492780	6050160	N25928502	-40.75660985	172.7960814	-40 45' 23.80"	172 47' 45.89"	-40 45' 17.57"	172 47' 46.40"
34	2493750	6051410	N25938514	-40.74537514	172.8076005	-40 44' 43.35"	172 48' 27.36"	-40 44' 37.12"	172 48' 27.87"
35	2494370	6052200	N25944522	-40.73827175	172.8149588	-40 44' 17.78"	172 48' 53.85"	-40 44' 11.55"	172 48' 54.36"
36	2494970	6047630	N25950476	-40.77943334	172.8219554	-40 46' 45.96"	172 49' 19.04"	-40 46' 39.74"	172 49' 19.55"
37	2495580	6048420	N25956484	-40.77233161	172.8291982	-40 46' 20.39"	172 49' 45.11"	-40 46' 14.17"	172 49' 45.62"
38	2495150	6050560	N25952506	-40.75305268	172.8241561	-40 45' 10.99"	172 49' 26.96"	-40 45' 04.76"	172 49' 27.47"
39	2495770	6051350	N25958513	-40.74595156	172.8315135	-40 44' 45.43"	172 49' 53.45"	-40 44' 39.20"	172 49' 53.96"
40	2497806	6050118	N25978501	-40.75707295	172.8555948	-40 45' 25.46"	172 51' 20.14"	-40 45' 19.24"	172 51' 20.65"
41	2497790	6045870	N25978459	-40.79532668	172.855325	-40 47' 43.18"	172 51' 19.17"	-40 47' 36.95"	172 51'19.68'
42	2498410	6046670	N25984467	-40.78813376	172.8626859	-40 47' 17.28"	172 51' 45.67"	-40 47' 11.06"	172 51' 46.18"
43	2499350	6048010	N25994480	-40.77607813	172.8738434	-40 46' 33.88"	172 52' 25.84"	-40 46' 27.66"	172 52' 26.35"
44	2499970	6048800	N25000488	-40.76897337	172.8811999	-40 46' 08.30"	172 52' 52.32"	-40 46' 02.08"	172 52' 52.83"
45	2496550	6049710	N25965497	-40.76073187	172.8407136	-40 45' 38.63"	172 50' 26.57"	-40 45' 32.41"	172 50' 27.08"
46	2497255	6049279	N25973493	-40.76462535	172.8490536	-40 45' 52.65"	172 50' 56.59"	-40 45' 46.43"	172 50' 57.10"
47	2500230	6049227	N25002492	-40.76513128	172.8842879	-40 45' 54.47"	172 53' 03.44"	-40 45' 48.25"	172 53' 03.95"
48	2500751	6050081	N25008501	-40.75744894	172.8904633	-40 45' 26.82"	172 53' 25.67"	-40 45' 20.59"	172 53' 26.18"
49	2498616	6051382	N25986514	-40.74570845	172.8652067	-40 44' 44.55"	172 51' 54.74"	-40 44' 38.32"	172 51' 55.26"
50	2498095	6050528	N25981505	-40.75339011	172.8590301	-40 45' 12.20"	172 51' 32.51"	-40 45' 05.98"	172 51' 33.02"
51	2498445	6051486	N25984515	-40.74476854	172.8631861	-40 44' 41.17"	172 51' 47.47"	-40 44' 34.94"	172 51' 47.98"
52	2497925	6050632	N25979506	-40.75244996	172.8570100	-40 45' 08.82"	172 51' 25.24"	-40 45' 02.59"	172 51' 25.75"
53	2495790	6051933	N25958519	-40.7407012	172.8317605	-40 44' 26.52"	172 49' 54.34"	-40 44' 20.30"	172 49' 54.85"
54	2496310	6052787	N25963528	-40.73302139	172.8379403	-40 43' 58.88"	172 50' 16.58"	-40 43' 52.65"	172 50' 17.10"
55	2496139	6052891	N25961529	-40.73208155	172.8359200	-40 43' 55.49"	172 50' 09.31"	-40 43' 49.27"	172 50' 09.82"
56	2495619	6052037	N25956520	-40.73976137	172.8297417	-40 44' 23.14"	172 49' 47.07"	-40 44' 16.91"	172 49' 47.58"
57	2494005	6054192	N25940542	-40.72033154	172.8106831	-40 43' 13.19"	172 48' 38.46"	-40 43' 06.97"	172 48' 38.97"

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COORDINATES OF SPAT CATCHING AND MARINE FARM SITES

ONEKAKA

Map ID

Easting

Northing

GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS			
58	2487775	6049917	M25878499	-40. 75867555	172. 7368032	-40 45' 31.23"	172 44' 12. 49"	-40 45' 25.01"	172 44' 13.00"
59	2487605	6049812	M25876498	-40. 75962504	172. 7347910	-40 45' 34. 65"	172 44' 05. 25"	-40 45' 28. 42"	172 44' 05. 75"
60	2487711	6049642	M25877496	-40. 76115534	172. 7360401	-40 45' 40. 16"	172 44' 09.74"	-40 45' 33. 93"	172 44' 10.25"
61	2487881	6049748	M25879497	-40. 76020559	172. 7380523	-40 45' 36. 74"	172 44' 16. 99"	-40 45' 30. 51"	172 44' 17. 50"

WAINUI BAY

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS
62	2503473	6045231	N25035452	-40.80114134	172.9226521	-40 48' 04.11"	172 55' 21.55"	-40 47' 57.89"	172 55' 22.06"
63	2503923	6045471	N25039455	-40.79898888	172.9279901	-40 47' 56.36"	172 55' 40.76"	-40 47' 50.14"	172 55' 41.28"
64	2504137	6045069	N25041451	-40.80260740	172.9305175	-40 48' 09.39"	172 55' 49.86"	-40 48' 03.17"	172 55' 50.38"
65	2503687	6044830	N25037448	-40.80476054	172.9251797	-40 48' 17.14"	172 55' 30.65"	-40 48' 10.92"	172 55' 31.16"

COORDINATES OF SPAT CATCHING AND MARINE FARM SITES

AMA 3A

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS

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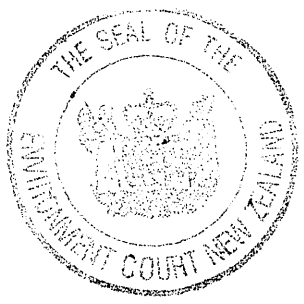


66	2515749	6022963	N26157230	-41.00166693	173.0683336	-41 0' 06."	173 4' 06."	-40 59' 59.8"	173 4' 06.52"
67	2517712	6022406	N26177224	-41.00666665	173.0916665	-41 0' 24."	173 5' 30."	-41 0' 17.8"	173 5' 30.52"
68	2516280	6020278	N26163203	-41.02583303	173.0746664	-41 1' 33."	173 4' 28.8"	-41 1' 26.8"	173 4' 29.32"
69	2518340	6019814	N26183198	-41.02999959	173.0991665	-41 1' 48."	173 5' 57."	-41 1' 41.8"	173 5' 57.52"
70	2517426	6017594	N26174176	-41.04999986	173.0883338	-41 2' 60."	173 5' 18."	-41 2' 53.8"	173 5' 18.52"
71	2519457	6017036	N26195170	-41.0549997	173.1124995	-41 3' 18."	173 6' 45."	-41 3' 11.8"	173 6' 45.52"

AMA 3B

Map ID

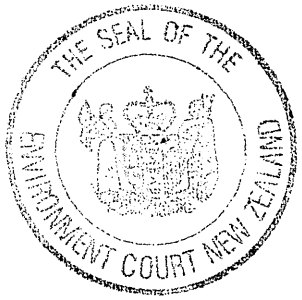
Easting

Northing

GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS			
72	2516840	6014850	N26168149	-41.07470974	173.0813868	-41 4' 28.96"	173 4' 52.99"	-41 4' 22.76"	173 4' 53.51"
73	2517700	6015360	N26177154	-41.07011000	173.0916139	-41 4' 12.4"	173 5' 29.81"	-41 4' 06.20"	173 5' 30.33"
74	2519240	6016280	N26192163	-41.06181016	173.1099258	-41 3' 42.52"	173 6' 35.73"	-41 3' 36.32"	173 6' 36.25"
75	2520090	6016810	N26201168	-41.05702678	173.1200279	-41 3' 25.30"	173 7' 12.10"	-41 3' 19.10"	173 7' 12.62"
76	2521520	6014530	N26215145	-41.07753833	173.1370807	-41 4' 39.14"	173 8' 13.49"	-41 4' 32.94"	173 8' 14.01"
77	2520670	6014000	N26207140	-41.08232349	173.1269752	-41 4' 56.36"	173 7' 37.11"	-41 4' 50.17"	173 7' 37.63"
78	2521812	6014064	N26218141	-41.08173145	173.140565	-41 4' 54.23"	173 8' 26.03"	-41 4' 48.04"	173 8' 26.55"
79	2519408	6012648	N26194126	-41.09451127	173.1119831	-41 5' 40.24"	173 6' 43.14"	-41 5' 34.05"	173 6' 43.66"
80	2519120	6013110	N26191131	-41.09035665	173.108542	-41 5' 25.28"	173 6' 30.75"	-41 5' 19.09"	173 6' 31.27"
81	2518270	6012580	N26183126	-41.09513685	173.0984336	-41 5' 42.49"			

AMA 3C

Map ID	Easting	Northing	GridRef	Lat	Lon	Lat DMS	Lon DMS	Lat WGS84 DMS	Lon WGS84 DMS



	2523050	6011750	N26230118	-41.10254897	173.1553451	-41 6' 09.18"	173 9' 19.24"	-41 6' 02.98"	173 9' 19.76"
	2525230	6010090	N26252101	-41.11745808	173.1813360	-41 7' 02.85"	173 10' 52.81"	-41 6' 56.66"	173 10' 53.33"
84	2527310	6008340	N27273083	-41.13317641	173.2061526	-41 7' 59.44"	173 12' 22.15"	-41 7' 53.24"	173 12' 22.67"
85	2522400	6010980	N26224110	-41.10949357	173.1476254	-41 6' 34.18"	173 8' 51.45"	-41 6' 27.98"	173 8' 51.97"
86	2524580	6009320	N27246093	-41.12440455	173.1736164	-41 7' 27.86"	173 10' 25.02"	-41 7' 21.66"	173 10' 25.54"
87	2526670	6007580	N27267076	-41.14003313	173.1985500	-41 8' 24.12"	173 11' 54.78"	-41 8' 17.93"	173 11' 55.3"
88	2521250	6009650	N27212097	-41.12148501	173.1339567	-41 7' 17.35"	173 8' 02.24"	-41 7' 11.15"	173 8' 02.76"
89	2523430	6007960	N27234080	-41.13667009	173.1599525	-41 8' 12.01"	173 9' 35.83"	-41 8' 05.82"	173 9' 36.35"
90	2525530	6006250	N27255062	-41.15203196	173.1850068	-41 9' 07.32"	173 11' 06.02"	-41 9' 01.13"	173 11' 06.54"
91	2520620	6008860	N27206089	-41.12860852	173.1264681	-41 7' 42.99"	173 7' 35.28"	-41 7' 36.8"	173 7' 35.8"
92	2522800	6007170	N27228072	-41.14379471	173.1524645	-41 8' 37.66"	173 9' 08.87"	-41 8' 31.47"	173 9' 09.39"
93	2524900	6005460	N27249055	-41.15915637	173.1775197	-41 9' 32.96"	173 10' 39.07"	-41 9' 26.77"	173 10' 39.59"

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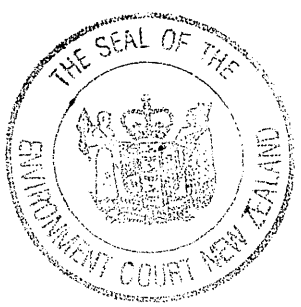

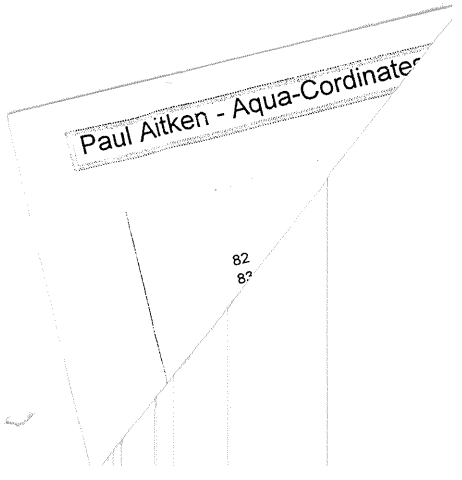
Paul Aitken - Aqua-Cordinater
82
8²