

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ

Decision No. [2023] NZEnvC 150

IN THE MATTER

of the Resource Management Act 1991

AND

appeals under clause 14 of the First
Schedule of the Act

BETWEEN

PORT MARLBOROUGH NEW
ZEALAND LIMITED

(ENV-2020-CHC-49)

(... continued on separate page)

Appellants

AND

MARLBOROUGH DISTRICT
COUNCIL

Respondent

Environment Judge J J M Hassan – sitting alone under s279 of the Act

In Chambers at Christchurch

Date of Consent Order: 17 July 2023

CONSENT ORDER

A: Under s279(1)(b) RMA,¹ it is ordered that:

¹ Resource Management Act 1991.



- (1) the appeals are allowed to the extent that the Marlborough District Council is directed to amend the proposed Marlborough Environment Plan by making the changes set out in Appendix 1, attached to and forming part of this order; and
- (2) the related appeal points are otherwise dismissed.

B: Under s285 RMA, there is no order as to costs.

REASONS

Introduction

[1] This proceeding concerns appeals by Port Marlborough New Zealand Limited² and others³ against parts of the decision of the Marlborough District Council in relation to the proposed Marlborough Environment Plan. The appeals were allocated to Topic 3 – Natural Character.

[2] The court has now read and considered the consent memorandum of the parties dated 8 March 2023 which sets out the agreement reached between the parties to resolve a number of appeal points by:

- (a) amending several policies in Volume 1, Chapter 6;
- (b) amending Volume 3, Appendix 2, so the map for the Coastal Marine

² ENV-2020-CHC-49.

³ Port Marlborough New Zealand Limited ENV-2020-CHC-49; The New Zealand King Salmon Company Limited ENV-2020-CHC-51; Beleve Ltd, RJ Davidson Family Trust & Treble Tree Holdings Ltd ENV-2020-CHC-44; Apex Marine Farm Limited ENV-2020-CHC-63; Just Mussels Limited, Tawhitinui Greenshell Limited & Waimana Marine Limited ENV-2020-CHC-77; Minister of Conservation ENV-2020-CHC-42; East Bay Conservation Society Incorporated ENV-2020-CHC-78; Sanford Limited ENV-2020-CHC-60; Goulding Trustees Limited & Shellfish Marine Farms Limited ENV-2020-CHC-47; Marine Farming Association Incorporated & Aquaculture New Zealand ENV-2020-CHC-74; Manawa Energy Limited (formerly Trustpower Limited) ENV-2020-CHC-50; AJ King Family Trust & SA King Family Trust ENV-2020-CHC-73; Aroma NZ Ltd & Aroma Aquaculture Limited ENV-2020-CHC-45; KPF Investments Limited & United Fisheries Limited ENV-2020-CHC-41; Oldham & Others ENV-2020-CHC-62; Meachen ENV-2020-CHC-69; Clearwater Mussels Limited & Talley's Group Limited ENV-2020-CHC-55; and Transpower NZ Ltd ENV-2020-CHC-68.

Area H: Te Koko-o-kupe/Cloudy Bay & Clifford Bay includes the omitted Wairau Lagoons as H2; and

- (c) replacing Volume 3, Appendix 4 – Factors for Assessing Adverse Effects on Natural Character, with a new appendix.

Other relevant matters

[3] A number of parties have given notice of an intention to become a party to these appeals under s274 RMA. As is recorded in the consent memorandum, several subsequently withdrew their interest in this topic.

[4] The memorandum was not signed on behalf of appellants Sanford Limited,⁴ East Bay Conservation Society Inc,⁵ and two s274 parties to an appeal by the Minister of Conservation,⁶ Ngāti Koata Trust and Te Rūnanga a Rangitāne o Wairau. A Minute dated 5 July 2023 was issued affording those parties who had not signed the memorandum the ability to seek leave to inform the court of any impediment to the court making a consent order on the terms sought by the consent memorandum dated 8 March 2023. No response was received.

[5] I am satisfied all relevant appellants and s274 parties whose interest extends to this topic, have signed the consent memorandum setting out the relief sought or have been afforded adequate opportunity to participate in this process.⁷ As a reminder, I record that if a party no longer has an interest in a topic or appeal it has a duty to formally withdraw its interest, as failing to do so can lead to delay and costs for other parties.

[6] No party seeks costs; all parties agreeing that costs should lie where they

⁴ ENV-2020-CHC-60.

⁵ ENV-2020-CHC-78.

⁶ ENV-2020-CHC-42.

⁷ Email of K McIlveney to the Registry confirming parties given opportunity to sign (30 May 2023).

fall.

[7] The consent memorandum records that the appeal points resolved by this order are sufficiently discrete and will not affect the resolution of any other appeal. Further, it records the parties' assurance that there are no issues of scope or jurisdiction.

Orders

[8] The court makes this order under s279(1) RMA, such order being by consent, rather than representing a decision or determination on the merits pursuant to s297. The court understands for present purposes that:

- (a) all relevant parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction, and conform to the relevant requirements and objectives of the RMA including, in particular, pt 2.



J J M Hassan
Environment Judge



List of Appellants

ENV-2020-CHC-49	Port Marlborough New Zealand Limited
ENV-2020-CHC-51	The New Zealand King Salmon Company Limited
ENV-2020-CHC-44	Beleve Ltd, RJ Davidson Family Trust and Treble Tree Holdings Ltd
ENV-2020-CHC-63	Apex Marine Farm Limited
ENV-2020-CHC-77	Just Mussels Limited, Tawhitinui Greenshell Limited and Waimana Marine Limited
ENV-2020-CHC-42	Minister of Conservation
ENV-2020-CHC-78	East Bay Conservation Society Incorporated
ENV-2020-CHC-60	Sanford Limited
ENV-2020-CHC-47	Goulding Trustees Limited & Shellfish Marine Farms Limited
ENV-2020-CHC-74	Marine Farming Association Incorporated & Aquaculture New Zealand
ENV-2020-CHC-50	Manawa Energy Limited (formerly Trustpower Limited)
ENV-2020-CHC-73	AJ King Family Trust & SA King Family Trust
ENV-2020-CHC-45	Aroma NZ Ltd & Aroma Aquaculture Limited
ENV-2020-CHC-41	KPF Investments Limited & United Fisheries Limited
ENV-2020-CHC-62	Oldham & Others
ENV-2020-CHC-69	Meachen
ENV-2020-CHC-55	Clearwater Mussels Limited & Talley's Group Limited
ENV-2020-CHC-68	Transpower NZ Ltd

Appendix 1

Volume 1

Chapter 6. Natural Character

1. Amend the Introduction to Chapter 6 as follows:

Introduction

‘Natural character’ is the term used to describe the degree of naturalness in an area, and includes the natural elements, patterns, processes and experiential attributes of an environment. The natural character of the coastal environment, and freshwater bodies and their margins, is comprised of a number of attributes which include:

- abiotic systems - physical processes, geomorphology, topography, landform, fresh and coastal water bodies, movement of water and sediment, water quantity/quality, and natural darkness of the night sky;
- biotic systems - species, communities, habitats, and ecological processes; and
- experiential attributes - the way in which people including tangata whenua experience the natural elements, patterns and processes, including sounds and smell, and also in the case Marlborough’s tangata whenua iwi, natural character attributes form part of their cultural and spiritual values.

...

2. Amend Policy 6.1.1 as follows:

[RPS]

Policy 6.1.1 – Recognise that the following natural elements, patterns, processes and experiential attributes contribute to natural character:

- (a) **abiotic systems - physical processes, geomorphology, topography, landform, fresh and coastal water bodies, movement of water and sediment, and water quantity/quality, and natural darkness of the night sky;**
- (b) **biotic systems - species, communities, habitats, and ecological processes; and**
- (c) **experiential attributes - the way in which people experience those natural elements, patterns and processes in Policy 6.1.1(a) and (b), including sounds and smell, and also in the case of Marlborough’s tangata whenua iwi how natural character attributes form part of their cultural and spiritual values.**

This policy describes those matters that contribute to the natural character of coastal and river environments. This provides MEP users with a clear understanding of the meaning of natural character.

3. Amend Policy 6.1.3 as follows:

[RPS]

Policy 6.1.3 – Determine the degree of natural character in both the coastal marine and coastal terrestrial areas of the coastal environment at a range of scales by assessing the

condition of abiotic systems and biotic systems, and the experiential attributes, in Policy 6.1.1.:

- ~~(a) the degree of human-induced modification on abiotic and biotic systems, including those listed in Policy 6.1.1;~~
- ~~(b) the way in which people experience the natural elements, patterns and processes; and~~
- ~~(c) natural character at a range of scales.~~

The natural character of the coastal environment can vary significantly from place to place. An evaluation of the degree of natural character in Marlborough's coastal environment has been undertaken. ~~This comprised~~This included an assessment of the extent of human-induced modification in the coastal marine area and on land within the coastal environment. To assist this process, Marlborough's coastal environment was divided into nine distinct coastal marine areas and 17 distinct coastal terrestrial areas based on land typology. For each area, abiotic systems and biotic systems and experiential attributes were assessed. Freshwater values within the coastal environment were identified in the coastal terrestrial areas.

The analysis of natural character was undertaken at a range of scales from broad (i.e. at the Marlborough Sounds or South Marlborough level) through to a more detailed scale, which in some cases was bay-level assessment. As a result, natural character can be perceived at different levels and different scales, depending on the level of information that is available. The scales at which the assessments have been undertaken can be seen in Figure 6.2.

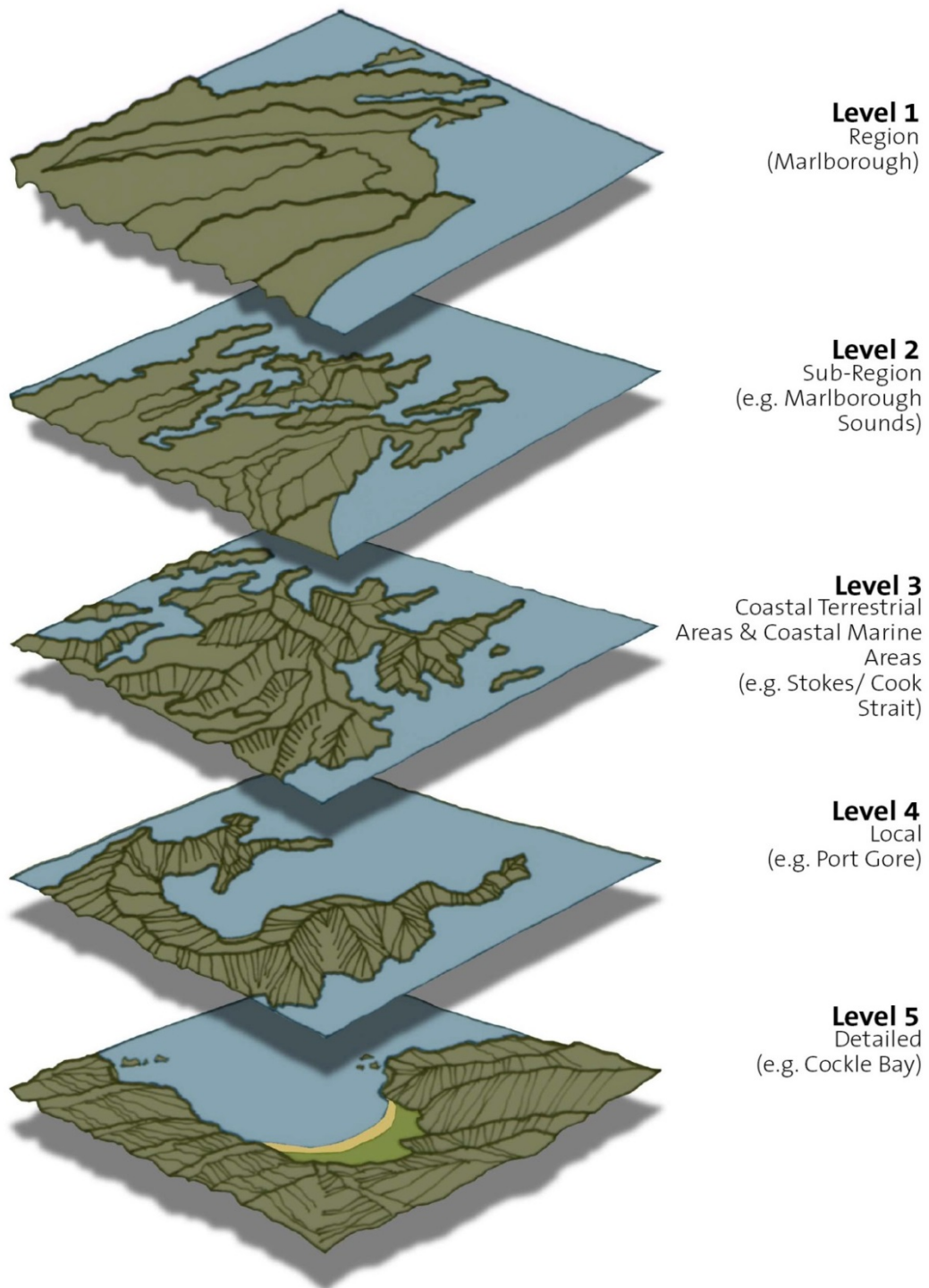


Figure 6.2: Natural Character Assessment Scale

~~Appendix 2 identifies the characteristics that contribute to high and very high coastal natural character in each of the discrete natural character areas (reaching Levels 4 to 5 on the assessment scale). The difference between areas of high natural character and very high coastal natural character is one of degree on the spectrum of assessment rather than one of legal effect. The characteristics for areas with outstanding coastal natural character are also included within Appendix 2.~~

4. Amend Policy 6.1.4 as follows:

[RPS]

Policy 6.1.4 – Identify and map those areas of the coastal environment that have high, very high or outstanding natural character and record the key characteristics of those areas.

Policy 13 of the NZCPS requires that areas of at least high natural character be mapped or otherwise identified. The Council considers that the most effective form of identification is mapping, as it provides certainty on the location and extent of those spatial areas. For this reason, the MEP identifies through mapping areas of the coastal environment that have high or very high natural character following an evaluation in accordance with Policy 6.1.3. Because of the gaps in knowledge of marine ecosystems, it is difficult to map an exact line where natural character shifts from high to very high. For this reason the maps show a 'transition' area between areas of high and very high natural character in marine areas.

Policy 13(1)(a) of the NZCPS specifies requirements for areas of outstanding natural character. For the purposes of the MEP, those areas of the coastal environment that have very high natural character and which also exhibit a combination of natural elements, patterns and processes that are exceptional in their extent, intactness, integrity and lack of built structures (and other modifications) compared to other areas in Marlborough, are identified as having outstanding coastal natural character. These areas are also mapped in the MEP.

The mapping of high, very high and outstanding natural character through this policy will enable appropriate management to be applied to relevant parts of the coastal environment to give effect to the NZCPS.

The mapping has been undertaken at Level 5 for terrestrial environments and Level 4 for marine environments.

Appendix 2 identifies the key characteristics that contribute to high and very high coastal natural character in each of the mapped natural character areas (reaching Levels 4 to 5 on the assessment scale). The difference between areas of high natural character and very high coastal natural character is one of degree on the spectrum of assessment rather than one of legal effect. The key characteristics for areas with outstanding coastal natural character are also included within Appendix 2.

5. Amend Policy 6.2.3, as follows:

[RPS, R, C, D]

Policy 6.2.3 – Where resource consent is required to undertake an activity within the coastal environment, or within freshwater environments with high, or very high ~~or outstanding~~ natural character:

- (a) have regard to the location, scale, design and operation of the proposed activity;
- (b) recognise that areas contain ongoing use and development that were present when the area was identified as high or very high natural character or have subsequently been lawfully established;
- (c) have regard to the potential adverse effects of the proposal on the elements, patterns, processes and experiential attributes that contribute to natural character identified in Policy 6.1.1, in such detail that corresponds with the scale and significance of these effects;
- (d) have regard to the interconnection of natural elements, patterns and processes within and between land, freshwater and the coastal marine area;
- (e) recognise that where policy direction requires adverse effects to be avoided, minor or transitory adverse effects may not need to be avoided;
- (f) recognise that some activities, including regionally significant infrastructure, may have a functional or operational requirement to be located within, or adjacent to the coastal environment, or areas with high or very high natural character.

~~have regard to the potential adverse effects of the proposal on the elements, patterns, processes and experiential attributes that contribute to natural character;~~

- ~~(b) — in the case of the development of the National Grid, seek to avoid adverse effects on the characteristics that contribute to natural character;~~
- ~~(c) — recognise that minor or transitory adverse effects may not need to be avoided;~~
- ~~(d) — recognise the functional and operational requirements of regionally significant infrastructure.~~

Where it is proposed that an activity will take place in an area of high, very high or outstanding natural character, it is appropriate that the applicant assesses the impact of the proposal on natural character at the site and in the surrounding environment. ~~To undertake the assessment, regard must be had to the elements, patterns, processes and experiential attributes that contribute to natural character.~~ For the coastal environment, Appendix 2 of the MEP contains information on these matters for each area, which will assist the assessment process. The level of assessment undertaken should reflect the scale of the proposed activity and the potential adverse effects on the attributes that contribute to the natural character in the coastal environment. The values of freshwater bodies, including natural character ~~values~~characteristics, can be found in Appendix 5. (The Council has not yet identified outstanding water bodies).

Existing activities in (b) includes resource consents which have been granted and are able to be implemented by the consent holder.

The Policy recognises that there are activities that have a functional need to be located in the coastal marine area, and there is a need to provide for those activities in appropriate places. The assessment of whether a place is appropriate will include consideration of the need to manage adverse effects, in accordance with the other policies of this chapter. In accordance with Policy 6.2(d) of the NZCPS, activities that do not have a functional need for location in the coastal marine area generally should not be located there.

6. Amend Policy 6.2.5 as follows:

[RPS, R, C, D]

Policy 6.2.5 – In assessing the appropriateness of subdivision, use or development in coastal or freshwater environments, regard shall be given to the potential to restore natural character in the area subject to the proposal.

It may be possible to improve the natural character of coastal environments and freshwater bodies through appropriate subdivision, use and development of natural resources. Any improvement to the natural elements, patterns, processes and those experiential attributes incorporated into the proposal will be considered in this regard. Restoration of natural character is particularly desirable where the coastal environment and freshwater bodies have been substantially modified by past resource use activities. Restoration in this context is to be used in its broadest term and can include enhancement and rehabilitation. ~~However, for the purposes of this policy it does not include addressing the effects of a proposal.~~ Any actions proposed by an applicant or imposed by the consent authority (through consent conditions) begin the process of remedying past resource use impacts on natural character. The policy also implements Policy 14 of the NZCPS.

7. Replace Policy 6.2.7 with a new policy as set out below:

[RPS, R, C, D]

Policy 6.2.7 –Manage the effects of activities adjacent to rivers, lakes and the coastal marine area to protect natural character from inappropriate subdivision, use and development, while recognising the functional and operational requirements of regionally significant infrastructure including-by:

- (a) Setting back buildings and structures;
- (b) Controlling the proximity of indigenous vegetation clearance;
- (c) Controlling the proximity of excavation and filling of land;
- (a) Ensuring consideration of the effects on natural character when assessing subdivision adjacent to lakes and rivers with high or very high natural character.

The proximity of land use activity to rivers, lakes and the coastal marine area has a significant influence on the potential for adverse effects on natural character. The closer the activity, the greater the potential for modification to the elements, patterns, processes and experiential attributes that contribute to natural character. For this reason, the above land use activities will be required to be set back from rivers, lakes and the coastal marine area, including lakes and rivers identified as having high or very high natural character mapped as RNCMA in Volume 4 of the Plan. The setback will be implemented through permitted activity standards. Subdivision adjacent to lakes and rivers with high or very high natural character may also modify the natural character present. Application can be made for resource consent to undertake a subdivision or land use activity within the setback and, resource consent for those activities in these areas will be required to consider effects on natural character. The adverse effects of any such land use or subdivision proposal will be assessed against the provisions of this chapter, specifically Policies 6.2.1 to 6.2.6.

Policy 6.2.7 – Require land use activities to be set back from rivers, lakes and the coastal marine area where practicable and reasonable to preserve natural character while recognising the functional and operational requirements of regionally significant infrastructure.

The proximity of land use activity to rivers, lakes and the coastal marine area has a significant influence on the potential for adverse effects on natural character. The closer the activity, the greater the potential for modification to the elements, patterns, processes and experiential attributes that contribute to natural character. For this reason, land use activities will be required to be set back from rivers, lakes and the coastal marine area. The setback will be implemented through permitted activity standards and application can be made for resource consent to undertake an activity within the setback. The adverse effects of any such proposal will be assessed against the provisions of this chapter.

8. Amend the 6.AER.1 and 6.AER.2, as follows:

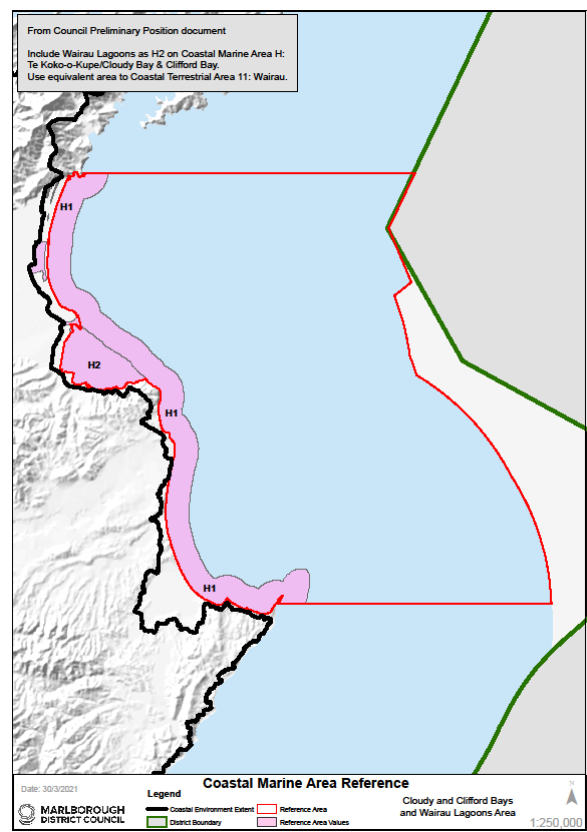
Anticipated environmental result	Monitoring effectiveness
<p>6.AER.1</p> <p>The natural character of Marlborough's coastal environment and of lakes, rivers and their margins is retained.</p> <p>The intactness of the individual coastal marine and coastal terrestrial areas of the Marlborough Sounds is retained in order to preserve the natural character of the Sounds.</p>	<p>Only appropriate development is allowed to occur within the coastal environment and in lakes, rivers and their margins, as measured by reassessment of the <u>degree of</u> natural character within these environments.</p> <p>The abiotic systems and landforms, biotic systems and experiential attributes that contribute to the natural character of the coastal environment are retained, as measured by reassessment of Marlborough's natural character.</p>
<p>6.AER.2</p> <p>The natural character of Marlborough's coastal environment and of lakes, rivers and their margins is restored, <u>to the extent practicable</u>, where it has already been degraded.</p>	<p>The number of successful restoration projects undertaken by Marlborough's tangata whenua iwi, private landowners, community groups, businesses and others to restore natural character.</p> <p>The abiotic systems, biotic systems and experiential attributes that contribute to the natural character of the coastal environment are enhanced in areas where restoration projects and efforts have occurred, as</p>

measured by reassessment of Marlborough's natural character.

Volume 3

Appendix 2

1. Amend the map for Coastal Marine Area H: Te Koko-o-Kupe/Cloudy Bay & Clifford Bay as set out below.



Appendix 4

1. Replace the content of Appendix 4 with the following:

Factors for Assessing Adverse Effects on Natural Character

The following factors assist in assessing whether a subdivision, use or development proposal will have adverse effects, and the nature and magnitude of those adverse effects, for the purposes of implementing Policies 6.2.1 and 6.2.2. The factors shall be considered by the decision maker on resource consents or plan changes.

1. **Status of resources:** The importance of the area—locally and regionally. (Effects on rare or limited resources are usually considered more significant than impacts on common or abundant resources).
2. **Proportion of resource affected/area of influence:** The size of the area affected by the activity will often influence the degree of impact (i.e. affecting a large area will generally be significant). Affecting a large proportion of a limited area or resource will tend to be significant.
3. **Persistence of effect:** The duration and frequency of effect (for example, long-term or recurring effects as permanent or long-term changes are usually more significant than temporary ones. The ability of the resource to recover after the activities are complete is related to this effect).
4. **Sensitivity of resources:** The effect on the area and its sensitivity to change. (Impacts to sensitive resources are usually more significant than impacts to those that are relatively resilient to impacts).
5. **Reversibility or irreversibility:** Whether the effect is reversible or irreversible. Irreversibility will generally be more significant (depending also on nature and scale), and reversibility the converse.
6. **Resilience to change:** the ability of the environment to resist or assimilate change without adversely affecting the conditions of abiotic and biotic systems and/or experiential attributes.
7. **Probability of effect:** The likelihood of an adverse effect resulting from the activity may affect the significance of the effect. However, an effect of low probability and of high potential impact can be significant.
8. **Cumulative effects:** The accumulation of impacts over time and space resulting from the combination of effects from one activity/development or the combination of effects from a number of activities. Cumulative effects can be greater in significance than any individual effect from an activity (for example, loss of multiple important sites).
9. **Degree of change:** The character and degree of modification, damage, loss or destruction that will result from the activity. Activities that result in a high degree of change are generally more significant.
10. **Magnitude of effect:** The scale and extent of possible effects caused by an activity (for example on the number of sites affected, on spatial distribution etc). Activities that have a large magnitude of effect are generally more significant.

