

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 105

IN THE MATTER of an appeal pursuant to clause 14(1) of
Schedule 1 of the Resource Management
Act 1991 (**the Act**) in relation to
proposed changes to the Waikato
Regional Policy Statement

BETWEEN OPOUTERE RATEPAYERS AND
RESIDENTS' ASSOCIATION
(ENV-2012-AKL-000253)

Appellant

AND WAIKATO REGIONAL COUNCIL

Respondent

Hearing at: at Hamilton, 23 October 2014; 18 November 2014
and site visit on 19 November 2014
Respondent's closing submissions filed 14 December 2014

Court: Environment Judge M Harland
Environment Commissioner O Borlase
Environment Commissioner K Edmonds

Appearances: Mr M Lloyd for the appellant.
Mr J Milne and Mr S Plant for the respondent.

Date of Decision: 9 June 2015



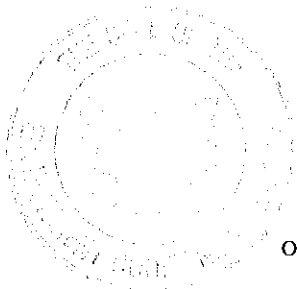
INTERIM DECISION OF THE ENVIRONMENT COURT

A. The appeal is allowed in part. The following areas are to be identified in the proposed RPS:

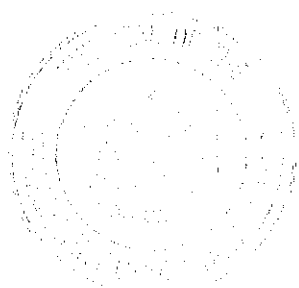
(a) The mapped area identified by Mr Kessels in Exhibit 3 is to be included in the proposed RPS as an area of ecological significance (or similar nomenclature), including any explanation thought necessary (see paragraphs [105] to [107]); and

(b) The ocean beach and spit (with the specific area to be later defined) is to be included in Table 12-1 of the proposed RPS as an ONFL.

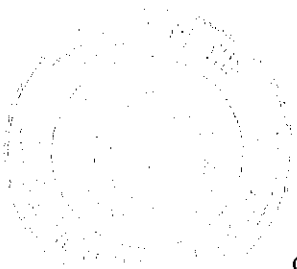
B. The parties are to confer and provide the Court with the appropriate maps to accord with this decision by 7 July 2015.



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REASONS FOR DECISION

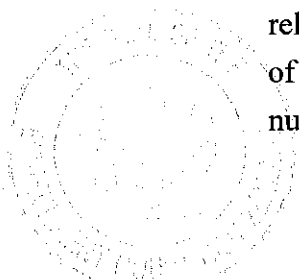
Introduction

[1] This is an appeal by Opoutere Ratepayers and Residents Association (“**ORRA**”) against the decision by the Waikato Regional Council (“**the Council**”) to refrain from specifically including Opoutere as an area of ecological significance and an outstanding natural feature and landscape (“**ONFL**”) in its proposed Regional Policy Statement (“**the proposed RPS**”). The Council accepts that Opoutere is an area of ecological significance that requires protection, but it contends that it is not required to specifically identify it by mapping because it has provided criteria and other implementation methods for the assessment of such areas in the proposed RPS, and this, together with part of it being mapped as an area of significant conservation value (“**an ASCV**”) in the Waikato Regional Coastal Plan are sufficient to protect it. The Council also contends that Opoutere does not qualify as an ONFL. This appeal raises important questions about the interpretation of the New Zealand Coastal Policy Statement 2010 (“**the NZCPS**”) and what is required to give effect to its objectives and policies in a proposed RPS. The issues for us to determine are:

- (a) Should Opoutere be included as an area of ecological significance in the proposed RPS by mapping or otherwise specifically identifying it as such? and
- (b) Should Opoutere be included as an ONFL in the proposed RPS in Table 12-1 (the accompanying Map 12-1A: Overview, and as a specific regional scale map)?

[2] We have decided that Opoutere should be identified as an area of ecological significance within the proposed RPS in accordance with the area defined by Mr Kessels within the blue line on Exhibit 3, but we have determined that only part of it (the ocean beach and spit) qualifies as an ONFL. This decision sets out our reasons for reaching these conclusions.

[3] We commence with a description and the spatial definition of Opoutere and the decision against which this appeal is made. We then provide an overview of the relevant legal and planning instruments that apply, followed by our detailed analysis of the two issues outlined above, understanding that within each of them there are a number of sub-issues that need to be determined.



Opoutere

[4] When we speak of Opoutere in this decision, we are referring to an area north of Whangamata Harbour and south of Tairua Harbour on the Coromandel Peninsula that includes not only the settlement of Opoutere, but also Wharekawa Harbour and Opoutere Ocean Beach.

[5] Opoutere Ocean Beach is an undeveloped white sand beach that does not have close settlement immediately behind it. In a Court of Appeal decision concerning the area in 1989, it was described as one of only two major such beaches on the Coromandel Peninsula.¹ The northern end of the ocean beach is known as Ohui, and situated there are the Ohui Bluffs and Motuhaua Rock. At the southern end of the ocean beach, there is a sand or distal spit and the mouth of the Wharekawa Harbour. Hikunui Island is situated just out from the estuary mouth,² and across from it is the Ruahiwihiwi Headland.

[6] The ocean beach includes a dune corridor with a maritime pine backdrop. There is no vehicular access to or near to the beach, and access to it on foot is gained by traversing a footbridge over part of the estuary to the sandspit. From there, there are access tracks through the maritime pines to the dunes and on to the beach.

[7] The estuary is overlooked by Maungaruawahine, a striking conical, bush-covered landform. The hills around the harbour include bush areas, production forestry and farmed areas near the harbour and its mouth. The small Opoutere settlement fronts onto the western side of the harbour/estuary.

[8] The estuary also comprises wetlands of national significance. The wetland (including the sandspit) has, since 1967, been a gazetted wildlife refuge under the Wildlife Act 1953. It is the only wildlife refuge in the Coromandel area.

[9] The avian values at Opoutere are nationally significant³ and it is also a significant habitat for indigenous fauna.⁴ Of the 43 native bird species that can be found at Opoutere, 21 (or 49%), are currently threatened or at risk.⁵ It is the single

¹ *Opoutere Residents & Ratepayers Association v Planning Tribunal* 13 NZTPA 446 [CA] page 447, the other being New Chums Beach

² Now an Outstanding Natural Feature (an ONF) in the proposed Thames-Coromandel District Plan

³ Joint Expert Witness Statement: Ecology, page 2, paragraph [2]

⁴ Dr Dowding, Tab F(6), page 160, paragraph [14]

⁵ *Ibid*, Tab F(6), page 159, paragraph [13] and Table 1, page 160 "EB"

most important site in the Waikato Region for the threatened New Zealand Dotterel.⁶ We will say more of this shortly, although it was accepted by the Council that Opoutere (as it is defined by Mr Kessels within the blue line on Exhibit 3) is an important area of ecological significance.⁷

The decision subject to appeal

[10] The context of this appeal is the Council's formulation of its second Regional Policy Statement which was notified in November 2010. Submissions in relation to the proposed RPS closed on 28 February 2011, and the appellant made such a submission.⁸ The appellant's submission was fulsome, and attached to it a number of documents and reports including:

- a map of the area it proposed to be protected,⁹
- a copy of the Court of Appeal decision in 1989 referred to above,¹⁰
- a report by Dr Dowding,¹¹
- an Assessment of Environmental Effects: Mangrove Seedling Control Wharekawa Harbour, July 2009 by Catherine Beard,¹²
- the Table from the Waikato Regional Coastal Policy Plan identifying Opoutere Sandspit and Wharekawa Harbour as an ASCV,¹³
- Appendix B from the Council's resource consent application in respect of mangroves identifying indigenous flora and fauna (native birds and fish) in the area,¹⁴
- a report from Dr Nicholson, a retired physician, also a member of the New Zealand Ornithological Society and homeowner in the area for approximately 36 years, which speaks of the wider ecology and values of the area,¹⁵ and

⁶ Dr Dowding, Tab F(6), page 165, paragraph [30]

⁷ Mr Milne, Closing submissions, paragraph [32]

⁸ Dated 25 February 2011

⁹ Tab 1 to the submission

¹⁰ Tab 3 to the submission

¹¹ Tab 4 to the submission

¹² Tab 5 to the submission

¹³ Tab 6 to the submission

¹⁴ Tab 7 to the submission

¹⁵ Tab 8 to the submission

- a report from Louise Furey, an archaeologist, noting a number of significant archaeological sites for tāngata whenua and pakeha.¹⁶

[11] Hearings about the proposed RPS were held between 13 February and 7 June 2012 and the hearings committee comprised some independent commissioners and some regional councillors. Their decision, which was the decision of the Council, was publicly notified on 2 November 2012 and was recorded in a Table format. The appellants submission was dealt with in the following way:

[166.1]	<p>Opoutere Residents & Ratepayers Association Inc requests amendments to the proposed RPS to expressly identify Opoutere as an area of significance. Decision: Reject Further submission: <i>Rayonier NZ Limited 63.61</i> opposes submission: Decision: Accept Reasons: The committee does not accept the submission point, which is addressed in more detail in other decisions for this submitter relating to chapter 12 (Landscape, Natural Character and Amenity).</p>
[166.2]	<p>Opoutere Residents & Ratepayers Association Inc requests to add Opoutere to Table 12-2 Decision: Reject Further submission: <i>Rayonier NZ Limited 63.61</i> opposes submission: Decision: Accept in part Reasons: The committee considered the evidence of the landscape architect and concluded that Opoutere generally did not fit the criteria used as the basis for identifying regionally significant ONFLs. However, the committee draws the submitter's attention to the criteria in section 12 that should be used as the basis for district level ONFL identification.</p>

[12] Mr Milne described the decision of the Council as *bare-boned*.¹⁷ He submitted that the decision of the Council was not to reject Opoutere as an area of ecological significance, but to reject the request to *expressly identify* it as such.¹⁸ We do not agree that the decision of the Council is clear on this point. In our view, the Council's decision could easily be interpreted as rejecting the appellant's request to expressly identify Opoutere as an area of ecological significance, because it is *not* ecologically significant.

[13] Given the quality and depth of the submission made to it by ORRA, the brevity of the decision is surprising. In relation to the submission that Opoutere be included as an ONFL, only the barest of reasons for the Council's decision are provided, with no attempt having been made to analyse the material put before it by

¹⁶ Tab 9 to the submission

¹⁷ Mr Milne, Closing submissions, paragraph [13], referring to the evidence of Mr van Voorthuysen, evidence-in-chief, Agreed Bundle of Documents, page 140

¹⁸ Mr Milne, Closing submissions, paragraph [14]

ORRA. In relation to the listing of the area as one of ecological significance there are no reasons given for the decision, in fact the committee seems to have conflated the ONFL part of ORRA's submission with its request for Opoutere to be identified as an area of ecological significance and assumed that they are the same.

[14] Under s290A of the Act we are required to have regard to the decision under appeal. Because of what we have outlined above, we are unable to give the Council's decision any weight whatsoever. Mr Milne submitted that any deficiencies in the decision-making process have now been cured on appeal. We accept that is the case; however ORRA was justified in expressing concern about the way that its submission was determined in the first instance.

Overview of relevant legal provisions and planning instruments

The Act

[15] The starting point is the Act and its purpose, which is to promote the sustainable management of natural and physical resources.¹⁹ Within the definition of sustainable management contained in s5(2), for Opoutere and in the context of this appeal, the focus is on the protection of natural and physical resources, safeguarding the life-supporting capacity of ecosystems²⁰ and avoiding any adverse effects of activities on this environment.²¹

[16] Sections 59-62 of the Act specifically apply to regional policy statements. Not surprisingly, the purpose of a regional policy statement is to achieve the purpose of the Act, and it does this in two ways:

- (a) by providing an overview of the resource management issues of the region and
- (b) by providing policies and methods to achieve the integrated management of the natural and physical resources of the whole region.²²

[17] Whilst s59 of the Act only refers to policies and methods, it is clear from s62 (which is entitled "*Contents of regional policy statements*") that such a document

¹⁹ s5(1)

²⁰ s5(2)(b)

²¹ s5(2)(c)

²² s59

must (among other things) state the objectives sought to be achieved by the statement,²³ an explanation of the policies²⁴ and methods (excluding rules) used, or to be used to implement the policies.²⁵ Whilst a policy cannot be a “rule” it may nevertheless have the effect of what in ordinary speech would be a rule.²⁶

[18] As well, the principal reasons for adopting the objectives, policies and methods of implementation set out in the statement must be stated²⁷ and the environmental results anticipated from implementing those policies and methods.²⁸ The regional policy statement must state the local authority (defined in s2 as a regional council or territorial authority) responsible in the whole or any part of the region for specifying the objectives, policies and methods for the control of the use of land to maintain indigenous biological diversity.²⁹

[19] A regional policy statement must also state the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement.³⁰ Importantly, the regional policy statement *must give effect* to the NZCPS.³¹ “Give effect to” simply means “implement,” and what is required will depend on what is being given effect to. The Supreme Court has said that a requirement to give effect to a policy that is framed in a specific and unqualified way (that is, which creates “an environmental bottom line”) may in a practical sense be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.³²

[20] As outlined above, this proposed RPS was notified in November 2010, prior to the NZCPS coming into force on 3 December 2010.

[21] The Council is required to amend a document to give effect to any provision in a national policy statement that affects the document.³³ The proposed RPS is clearly such a document. Any amendments to the proposed RPS that are required by

²³ s62(1)(c)

²⁴ s62(1)(d)

²⁵ s62(1)(e)

²⁶ *Environmental Defence Soc Inc v the New Zealand King Salmon Co Ltd* [2014] NZSC 38

²⁷ s62(1)(f)

²⁸ s62(1)(g)

²⁹ s62(1)(i)(iii)

³⁰ s62(1)(j)

³¹ s62(3)

³² *Environmental Defence Soc Inc v the New Zealand King Salmon Co Ltd* [2014] NZSC 38 at paragraph [80]

³³ s55(2B)

the proposed NZCPS 2010 are to be made as soon as practicable.³⁴ As well, the promulgation of regional policy statements is governed by Schedule 1 of the Act, with the result that the provisions of s32 concerning evaluation reports also apply.³⁵

[22] The proposed RPS was subject to a number of appeals, ten (10) of which related to the provisions concerning indigenous biodiversity (relevant to whether or not Opoutere should be identified as an area of ecological significance) and eight (8) of which related to the provisions concerning landscape (relevant to whether or not Opoutere should be identified as an ONFL). The parties to the appeals on these topics have resolved them amongst themselves and have submitted draft consent memoranda to the Court. These draft consent orders are still subject to the Court's final approval, but it is fair to say that the Court's queries relate more to drafting issues than to substance. For this reason the proposed provisions that will be referred to in this decision will identify the changes to them by strike out or underline. We have decided to give the proposed changes considerable weight. No party suggested that we should do otherwise.

The Hauraki Gulf Marine Park Act 2000

[23] The Hauraki Gulf Marine Park Act 2000 covers the Opoutere area. Counsel for the appellant drew to our attention section 7(1) of that Act, which declares that the interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.

[24] Section 8 of the Act deals with the management of the Hauraki Gulf and sets out its objectives, one of which is to protect, and where appropriate enhance, the life-supporting capacity of the environment of the Hauraki Gulf, its islands and its catchments.

[25] That Act requires that its sections 7 and 8 must be treated as a New Zealand coastal policy statement issued under the RMA and if there is a conflict between these provisions and the provisions of the NZCPS, the NZCPS prevails.³⁶ No party suggested that there was such a conflict.

³⁴ s55(2D)(a)

³⁵ s55(2C), sch 1 cls 5(1)(a), 10(2)(ab)

³⁶ s10(2)

[26] Mr Lloyd submitted that the Hauraki Gulf Marine Park Act creates a strong presumption in favour of identification of special areas within the Hauraki Gulf coastal environment.³⁷ We do not agree that the Act necessarily creates such a presumption – we did not receive sufficient argument on the point to properly determine this – but certainly sections 7 and 8 must be considered by us as in our evaluation.

The relevant planning instruments

The NZCPS

[27] As we have outlined, the proposed RPS must give effect to or implement the NZCPS. In relation to the argument that Opoutere should be identified as an area of ecological significance, Objective 1 and Policies 7 and 11 of the NZCPS are particularly relevant. In relation to whether or not Opoutere should be identified as an ONFL Objective 2 and Policies 7 and 15 of the NZCPS are particularly relevant. While Policy 1 is important for both issues as it defines the coastal environment, the proposed RPS (Maps 4-17 and 4-18) shows the Opoutere area we are considering is within the coastal environment.

[28] We recognise that there are other provisions in the NZCPS that refer or relate to ecological values. For example, Policy 3(2)(b) refers to adopting a precautionary approach to the use and management of coastal resources potentially vulnerable to effects from climate change so that natural adjustments for ecosystems, habitat and species are allowed to occur; Policy 5(1) refers to avoiding adverse effects of activities that are significant in relation to the purposes for which land or waters are held or managed under other Acts (such as the wildlife refuge here); and Policy 6(j) refers to buffering areas and sites of significant indigenous biological diversity where appropriate. As well, Objective 6 recognises the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected. We mention these provisions by way of completeness, even though they were not focussed on in argument.

[29] An issue arose as to whether or not Policy 13, which deals with the preservation of natural character, was relevant. We agree with Mr Milne that neither ORRA's original submission, nor its Notice of Appeal, deal with the matter of natural

³⁷ Transcript, page 18, lines 19 – 24

character, and for this reason we agree with him that Policy 13 is not directly relevant. It is, however, relevant by way of analogy as for example the wording of Policy 13 was compared to Policies 7 and 11 in the context of whether or not mapping of an area of ecological significance was required by the NZCPS. Policy 13 will, therefore, be referred to in this decision on that basis.

[30] We will undertake our analysis of each of these provisions in the context of the specific issues on appeal.

The Waikato Regional Coastal Plan

[31] The provisions of the Coastal Plan were referred to in the context of the argument about whether or not Opoutere should be identified as an area of ecological significance. This arises because Appendix 4 identifies it as an ASCV,³⁸ and the Council's argument is that because of this and the policies and rules, there is no need for Opoutere to be separately identified or mapped in the proposed RPS.

[32] Whether or not the above listing and the policies and rules in the Coastal Plan are sufficient to protect the significant ecological values present at Opoutere will be covered in more depth in our analysis.

Should Opoutere be included as an area of ecological significance in the proposed RPS by mapping or otherwise specifically identifying it as such?

[33] There was no dispute that the area defined by Mr Kessels within the blue line in Exhibit 3 is an area of national ecological significance in so far as its avian values are concerned. If it is an area of national ecological significance for this reason, then it follows that it is of regional significance for the same reason.

[34] Neither was there any dispute that the area defined by Mr Kessels met several of the criteria in the proposed RPS (only one need be met) to qualify as an area of significant indigenous biodiversity. In his evidence-in-chief Mr Kessels had evaluated the area proposed by ORRA for inclusion in the maps against the ecological significance criteria contained in Section 11A of the proposed RPS as amended.³⁹ He assessed the values of the Wharekawa Harbour and Opoutere beach as one contiguous system and considered the area met eight of the eleven criteria.

³⁸ ASCV 24, Appendix iv, Coastal Plan

³⁹ Mr Kessels, evidence-in-chief, paragraph [24]

[35] Whilst in most cases such agreement would mean that it was no longer necessary to traverse the subject, given the importance of the area we consider it helpful to highlight some of the key aspects of the evidence which lead to that conclusion.

The ecological significance of Opoutere

[36] In this decision we refer to the “*ecological values*” at Opoutere, which as is evident from what we have already said, are significant and also bring into play s6(c) of the Act.

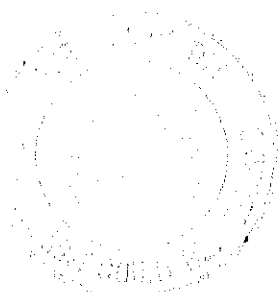
[37] Dr Dowding, an eminent independent wildlife scientist and ecological consultant, gave evidence for ORRA. Dr Dowding is an expert on New Zealand birds, particularly coastal and riverbed species. His evidence was confined to the avian values of the Opoutere area. Mr Kessels, also an ecologist, who has considerable experience in assessing sites of ecological significance on the Coromandel Peninsula, gave evidence for the Council. We note that a focus of the evidence of the ecologists was on avian values and the importance of the variety and combination of habitat available at Opoutere to support these species, which we infer has been less hampered by human development, although not entirely devoid of the potential for adverse human intervention. We also acknowledge the evidence of Mr Kessels on the key ecological values and their ecological significance and the supporting evidence received from Mr Kessels in preparing Exhibit 3 which we will refer to shortly. We did not receive any substantial evidence about marine and estuarine aquatic ecology.

[38] Both experts participated in joint expert witness conferencing and reached agreement on a number of important matters.

[39] Dr Dowding and Mr Kessels agreed that the Opoutere ecological landscape comprises both the Wharekawa Harbour and Opoutere Ocean Beach together with:⁴⁰

- Hikunui Island;
- The distal spit;
- Motuhaua Rock;

⁴⁰ Joint Expert Witness Statement : Ecology, page 2, paragraph [3]



- The harbour area and wetlands;
- The ocean beachfront and the dune corridor;
- The pine backdrop to the ocean beach;
- The hills around the harbour and related bush areas;
- The Opoutere settlement;
- Production forestry and farmed areas near the harbour and its mouth.

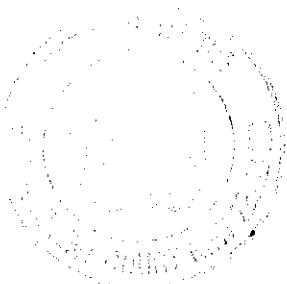
[40] The experts agreed that the physical attributes of the site that make it so important for shore birds are:⁴¹

- the beach and sandspit provide ideal breeding and roosting habitat for a number of threatened and at risk species;
- the inter-tidal areas of Wharekawa Harbour provide those resident birds and visiting migrants with a rich source of food;
- the area has no public roads close to the beach, or dense residential subdivision abutting the sand dune and estuarine wetland habitats, thus reducing the human and domestic animal usages of the beach, which is particularly sensitive to these disturbances during NZ dotterel nesting;
- the pine-dominated Recreational Reserve and the zoning of land behind it act as buffers to further subdivision along the beachfront; and

They agreed that this is the only important shorebird breeding site with this combination of features on the Coromandel Peninsula.

[41] The list of native bird species recorded at Opoutere was outlined by Dr Dowding in his Table 1. He considered that the list was not exhaustive, and noted that further observations would almost certainly add to the species list for the area. He considered the secretive spotless crane may well occur in Wharekawa Harbour (as it occurs in other Coromandel east coast estuaries) and he noted that the harbour is almost certainly visited by native water fowl, e.g. grey teal, NZ shoveler and some of

⁴¹ Joint Expert Witness Statement : Ecology, page 2, paragraph [1]



the rarer migrant waders. He noted his understanding that brown kiwi are occasionally heard in Opoutere. He concluded:⁴²

... the list clearly demonstrates the very high species diversity that exists in a relatively small area.

[42] Dr Dowding, an undoubted expert on the NZ dotterel, identified Opoutere as one of six sites nationally at which full management of NZ dotterels should be undertaken annually, such a task having been categorised as essential.⁴³ Somewhat obviously, the protection of habitat is of key importance to the continued success of the NZ Dotterel Recovery Plan, the first plan of which he was the author, and he is the senior author of the current plan.⁴⁴

[43] Dr Dowding identified Opoutere as one of ten sites of the highest importance (Priority 1 sites) during an assessment he undertook of the significance for coastal birds of sites on the east coast of the Waikato region.⁴⁵

[44] As outlined above, one notable feature of the list provided in Table 1 of Dr Dowding's evidence is the remarkably high proportion of threatened or at risk species. Forty-nine percent are currently considered threatened or at risk. We consider Dr Dowding's evidence on this point to be compelling, given that for the past nine years he has been a member of the Department of Conservation's expert panel that assesses the threat classifications of New Zealand birds, and in 2005-2006 he was a member of the expert panel that the Department of Conservation assembled to review biodiversity provisions as part of the review of the NZCPS.

[45] Dr Dowding's opinion was that Opoutere has outstanding avian values meaning that it applies to the highest possible category of wildlife and habitat values.⁴⁶ His opinion was that Opoutere must be considered a significant habitat for indigenous fauna observing that the criteria upon which he based this opinion were those at an international, national and regional level.⁴⁷ He also referred to the Coastal Plan which lists *outstanding wildlife habitat* as one of the conservation values for ASCV 24. In relation to international significance, he identified two out of nine criteria from the RAMSAR Convention 1971, an inter-governmental treaty promoting

⁴² Dr Dowding, evidence-in-chief, paragraph [12]

⁴³ Ibid, paragraph [18]

⁴⁴ Dr Dowding, evidence-in-chief, paragraph [2]

⁴⁵ Ibid, paragraph [22]

⁴⁶ Joint Expert Witness Statement : Ecology, page 2, paragraph [2]

⁴⁷ Dr Dowding, evidence-in-chief, paragraph [14]

the conservation and wise use of wetlands (especially as habitat for water birds) and the identification of wetlands of international importance,⁴⁸ as applying to Opoutere.⁴⁹

[46] Mr Kessels accepted that the avian values at Opoutere are nationally significant when assessed against the criteria contained in the proposed RPS and he also considered them to be internationally significant when ranked against the relevant RAMSAR criteria,⁵⁰ but we note that the criteria contained in the proposed RPS do not take the step of assessing whether the ecological values are internationally, nationally or regionally significant. Mr Kessels fell short of describing these values as *outstanding* however, because there is no assessment criterion which refers to this terminology. Mr Kessels acknowledged that the old Wildlife Service Sites of Special Wildlife Interest assessment criteria did use the word *outstanding* to correspond to wildlife habitats of the highest value or *top tier*.⁵¹

[47] Whilst we can understand Mr Kessels' cautious use of this word given its particular status within s6 of the Act, we have no hesitation in accepting Dr Dowding's opinion that the avian ecological values at Opoutere are outstanding because his expertise both in terms of his qualifications and experience mean that his conclusion about this is highly credible and reliable. In making this finding we do not detract from Mr Kessels expertise as an ecologist, however the qualifications, experience and knowledge of Dr Dowding about the avian values present at this and other sites in New Zealand, are superior.

[48] We do not consider it necessary to definitively determine whether or not the avian values at Opoutere mean that it is an internationally significant site. As outlined above, the experts appear to have agreed that it meets two of the nine RAMSAR criteria, but as Mr Milne rightly pointed out, it is not a RAMSAR site. We have no hesitation in finding that the avian values at Opoutere are outstanding. They may also be of international significance; however that is not for us to definitively determine. It follows however, that the protection of the habitat necessary to support these avian values is of critical importance.

[49] We also recognise that the ecological values within the significant natural area shown on Exhibit 3 include harbour systems, dune and beach systems and terrestrial systems. Mr Kessels depicted these systems on Exhibit 3 and explained

⁴⁸ NZ is a signatory to this as of December 1976

⁴⁹ Dr Dowding, evidence-in-chief, paragraph [15]

⁵⁰ Joint Expert Witness Statement: Ecology, page 2, paragraph [2]

⁵¹ Joint Expert Witness Statement: Ecology, page 2, paragraph [2]

that they are all part of the harbour ecosystem providing core habitat for important species or buffer or linkage values.⁵² He said the harbour system includes mangroves, mudflats and salt marsh rush, and the dune and beach system includes the beach, the foredune spinifex communities and the backdune dominated by pines. The terrestrial systems include the freshwater wetlands, coastal and semi-coastal forest habitats on the south side of the harbour mouth and more extensively on the north-western side of the harbour.

[50] We accept that Exhibit 3 identifies the area at Opoutere that should be protected and we will refer to it in this decision as *the site*.

The arguments and the issues

[51] Our summary of the arguments raised by the appellant is as follows:

- (a) The proposed RPS did not take into account the NZCPS because it was notified before the NZCPS came into force. The proposed RPS should have been amended to accord with the NZCPS objectives and policies regarding areas of ecological significance, but it was not so amended (the s55 argument);
- (b) The proposed RPS does not meet Objective 1 of the NZCPS because its provisions do not protect the site;
- (c) The proposed RPS is required to identify areas of the coastal environment where particular activities or forms of subdivision, use and development are inappropriate and is required to protect from such activities through objectives, policies and methods(excluding rules), which requires something more than providing assessment criteria.

[52] Our summary of the arguments raised by the Council is as follows:

- (a) The NZCPS does not require areas of ecological significance to be mapped, which was the effect of the appellant's submission.
- (b) Whilst accepting that the NZCPS requires areas of ecological significance need to be identified, the criteria for determining the significance of

⁵² Transcript, pages 102-103

indigenous biodiversity values outlined in Table 11-1 of the proposed RPS are sufficient to achieve this.

- (c) The provisions of the proposed RPS are sufficient to protect the ecological values evidence at the site.
- (d) In any event, the provisions of the Coastal Plan already provide adequate protection for the ecological values evident at the site.
- (e) If the site was identified (by mapping or otherwise) in the proposed RPS this would result in an unusual planning outcome.

[53] We distil these submissions into the following issues:

- (a) Does the NZCPS require the site to be identified to protect its ecological values, and if so, does this require mapping or something else?
- (b) Does a criteria-based approach (Table 11-1) in the proposed RPS protect the ecological values at the site, as required by the NZCPS and the Act?
- (c) If the site was identified (by mapping or otherwise) in the proposed RPS would this result in an unusual planning outcome and if so, does this matter?
- (d) Are the provisions of the Coastal Plan sufficient to protect the site and if so, does this mean it does not need to be more specifically identified in the proposed RPS?

[54] We now address each of these issues.

Does the NZCPS require the site to be identified to protect its ecological values, and if so, does this require mapping or something else?

[55] Objective 1 of the NZCPS (relevant to this appeal) provides:

Objective 1

To **safeguard** the integrity, form, functioning and resilience of the coastal environment and **sustain** its ecosystems, including marine and inter-tidal areas, estuaries, dunes and land by...

- **protecting** representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna... (**emphasis added**)

[56] Policy 1 outlines the extent and characteristics of the coastal environment and includes, relevant to this appeal, the following:

Policy 1 – Extent and characteristics of the coastal environment

...

2. Recognise that the coastal environment includes:
- (a) the coastal marine area;
 - (b) islands within the coastal marine area;
 - (c) areas where coastal processes, influence or qualities are significant, including .. tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;...
 - (e) coastal vegetation and the habitat of indigenous coastal species, including migratory birds;...
 - (h) inter-related coastal marine and terrestrial systems, including the intertidal zone...

[57] We have no difficulty finding on the evidence that the site is covered by the term *the coastal environment* (and indeed the proposed RPS maps the site as coming within the coastal environment in Maps 4-17 and 4-18) and it includes *significant natural ecosystems* and is a *site of biological importance*. The objective is therefore for the site to be safeguarded and sustained by protecting it. This objective is the goal against that which is proposed must be tested.

[58] Policy 11 is also relevant. It provides:

Policy 11 – Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

- (a) avoid adverse effects of activities on:
 - (i) indigenous taxa⁵³ that are listed as threatened or are at risk in the New Zealand Threat Classification System list;⁵⁴
 - (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
 - (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;⁵⁵
 - (iv) habitats of indigenous species where the species are at the limit of their natural range or are naturally rare;
 - (v) areas containing nationally significant examples of indigenous community type, and
 - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

⁵³ Defined in the NZCPS as “named biological classification units assigned to individuals or sets of species (e.g. species, sub-species, genus, order, variety)

⁵⁴ Those listed in the NZCPS are Maui’s dolphin, Hector’s dolphin, NZ fairy tern, southern NZ dotterel

⁵⁵ “Naturally rare” is defined in the NZCPS as “originally rare, rare before the arrival of humans in New Zealand”

- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activity on:
- (i) areas of indigenous vegetation in the coastal environment;
 - (ii) habitats in the coastal environment that are important during the vulnerable life states of indigenous species;
 - (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetland, dune lands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
 - (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;
 - (v) habitats including areas and routes important to migratory species; and
 - (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[59] The evidence establishes that the ecological values present at the site are covered by Policy 11(a) and (b),⁵⁶ with the result that adverse effects or in the case of (b), significant adverse effects on them must be avoided. The Council argues that this is achieved in the proposed RPS by Table 11-1⁵⁷ and associated objectives and policies, to which we will come shortly.

[60] Unfortunately Policy 11 does not provide any guidance on *how* the avoidance of adverse or significant adverse effects is to be achieved, unlike Policies 13 and 15 (see Policy 13(c) and (d) and Policy 15 (c), (d) and (e)), but Mr Lloyd submitted that Policy 7 must also be considered.

[61] Policy 7 provides:

Policy 7 – Strategic planning

In preparing regional policy statements, and plans:

- (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at region and district level, and
- (b) identify areas in the coastal environment where particular activities and forms of subdivision, use and development:
 - a. are inappropriate;
 - b. may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;
 and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

⁵⁶ Mr Kessels, evidence-in-chief, paragraphs [42]-[43]

⁵⁷ Mr van Voorthuysen, evidence-in-chief, paragraph [6.5]

[62] Policy 7 refers to certain things that need to be *considered* (Policy 7(1)(a)) or *identified* (Policy 7(1)(b) and 7(2)) in regional policy statements and plans when they are prepared. Given that Objective 1 and Policy 11 of the NZCPS require the site to be protected and adverse effects on it avoided, it follows that the site must be protected from inappropriate subdivision, use and development. This is because, somewhat obviously, the site will not be protected and adverse effects on it avoided, if there is inappropriate subdivision, use and development within it or near to it.

[63] We have no difficulty finding on the evidence that Policy 7 requires the ecological values at the site to be protected from inappropriate subdivision, use and development, the question is *how* this is to happen (identifying by mapping or otherwise identifying) and *where* this is to be achieved (in the proposed RPS or the Regional and /or District Plan/s).

[64] Mr Lloyd submitted that Policy 7 requires the Council to *identify areas* where particular activities and forms of subdivision, use and development are inappropriate or might be inappropriate, and *provide protection from such activities through objectives, policies and rules*.

[65] Mr van Voorthuysen (the planner for the Council) did not refer to Policy 7 in either his evidence-in-chief or rebuttal. Mr Lloyd put this to him in cross-examination⁵⁸ and Mr van Voorthuysen said that the omission was deliberate. He said:

Policy 7 is an interesting policy. It's strategic planning. When I looked at this policy – I think with any policy it's important to look at the entire policy to get its context. So policy 7(1)(a) talks about future residential, rural residential, settlement, urban development etc. At the bottom of page 14 it talks about including – provide protection for these areas through objectives and policies and rules. Rules can only be in plans, not in the RPS. Policy 7(2) talks about regional policy statements and plans but the second half of (2), with the third line, "Include provisions in plans" it goes on to say, "where practicable in plans" so to me the focus of this policy in terms of its implementation is at the plan scale, rather than at the RPS level. And then I thought to myself well what, if anything, does this policy direct an RPS to do? And my conclusion was it's more a strategic growth, an urban growth strategy type policy. So, typically, this kind of policy would sit behind and help inform urban growth strategies such as the one in the Bay of Plenty called Smart Growth, for example. So that's why, when I looked at this, I didn't think it was particularly relevant to the matters that are part of this appeal.

⁵⁸ Transcript, pages 120-123

[66] Until he was cross-examined about it, Mr van Voorthuysen did not refer to the fact that Policy 7(1)(a) also refers to *other activities in the coastal environment* as well as *future residential, rural residential, settlement, urban development*. Despite having this pointed out to him, Mr van Voorthuysen still maintained that Policy 7 was primarily to do with urban development. As well, Mr van Voorthuysen did not accept that Policy 7 could, and arguably should, be interpreted with reference to other policies in the NZCPS, for example Policies 11 and 13. His view was that Policy 11 was relatively clear and self-contained.

[67] We are mindful that ORRA did not call any expert planning witness to support its case; however whether or not Policy 7 is relevant and how it should be interpreted is a legal issue. The significant point here is that planning evidence is not necessarily required in order to interpret planning instruments. Such evidence can be helpful (bearing in mind the test under the Evidence Act is whether such evidence is *substantially helpful*) but the interpretation of such documents must, at the end of the day, be a matter for the Court. In our end analysis we disagree with Mr van Voorthuysen's interpretation of Policy 7.

[68] In our view Policy 7 is not *an urban growth strategy-type policy*; it is much wider than that. It deals with *other activities in the coastal environment* and it applies to regional policy statements and plans. Policy 7(2) deals with cumulative effects,⁵⁹ and whilst it specifically mentions that provisions in plans should be included to manage these effects, it also requires coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects to be identified in regional policy statements, and plans.

[69] The whole thrust of the strategic planning approach in Policy 7(1) is to *provide protection* from inappropriate *subdivision, use and development*. It is hard to see how such protection can be realised, if areas in coastal environments where such activities might be inappropriate are not identified. We agree with Mr Lloyd that Policy 7 should be interpreted alongside Policy 11.

[70] In his closing submissions Mr Milne appeared to accept that *identification* of areas of ecological significance was required, but he submitted that this was achieved by adopting the criteria-based approach outlined in Table 11-1 in the proposed RPS.⁶⁰ Mr Milne submitted that Policy 7 did not require *mapping* of areas of ecological

⁵⁹ Policy 7(2)

⁶⁰ Mr Milne, Closing submissions, paragraph [76]

significance in the proposed RPS, but he contended that this was the effect of Mr Lloyd's submission.

[71] We do not agree that the effect of Mr Lloyd's submission is to equate *mapping* with *identifying*, although because of the evidence in this case that may well be the conclusion. We agree with Mr Milne that *identify* has a wider meaning than *map* and that mapping is a way of identifying something, but it is not the only way in which something can be identified. An area could be identified by words for example. Expressed another way; mapping is a subset of identifying.

[72] Although not strictly relevant to this case because Policy 13 is not directly relevant to it, this approach is consistent with Policy 13(1)(c) of the NZCPS, which in relation to the preservation of the natural character of the coastal environment and protecting it from inappropriate subdivision use and development, outlines that this can be done *by mapping or otherwise identifying at least areas of high natural character*. Policy 13(1)(c) and the words we have quoted tend to suggest that mapping is a subset of identifying.

Does a criteria-based approach (Table 11-1) in the proposed RPS protect the ecological values at the site, as required by the NZCPS and the Act?

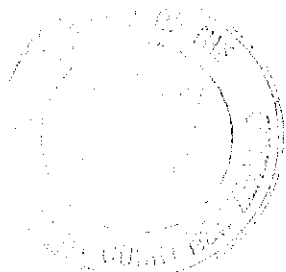
[73] We first set out the relevant parts of the proposed RPS and the evidence about them, before analysing whether not they meet the requirements of the NZCPS.

The proposed RPS provisions

[74] The first important point is that the proposed RPS provisions deal with indigenous biodiversity throughout the Waikato Region, not just indigenous biodiversity *in the coastal environment within the Waikato Region*. The relevant provisions must be considered against this background.

[75] Mr van Voorthuysen identified the relevant provisions of the proposed RPS as Issue 1.1(d), Objectives 3.7 and 3.18, Policy 11.2, Methods 11.2.1 and 11.2.3, Section 11A and Table 11-1.⁶¹ We now set these out as they appear in the draft consent order.

⁶¹ Mr van Voorthuysen, evidence-in-chief, paragraph [5.4]



[76] The Issue Statement reads:

Declining quality and quantity of natural and physical resources impacts their life-supporting capacity, reduces intrinsic values and ecosystem services and in general reduces our ability to provide for our wellbeing.

While addressing this issue generally, specific focus should be directed to addressing the following matters...

(d) indigenous biodiversity decline

[77] Mr van Voorthuysen's evidence was that Objectives 3.7 and 3.18 set out below address this issue:

3.7 Ecosystem services

The range of **ecosystem services** associated with natural resources are recognised and maintained or enhanced to enable their ongoing contribution to regional wellbeing.

3.18 Ecological integrity and indigenous biodiversity

Ensure the extent and the full range of ecosystem types that occur in the Waikato Region, their extent and the indigenous biodiversity that they contain those ecosystems can support exist in a healthy and functioning state

[78] It is surprising that given the provisions of the NZCPS and in particular Objective 1 and s55(2)(b) of the Act, that the proposed RPS contains no specific objective dealing with the protection of *significant natural ecosystems and sites of biological importance* in the coastal environment.

[79] Mr van Voorthuysen's evidence was that Chapter 11 of the proposed RPS gives effect to Objectives 3.7 and 3.18 and he identified Policy 11.2 and Implementation Methods 11.2.1 and 11.2.3 as being particularly relevant to the proceedings. These provisions provide:

Policy 11.2 – Protect significant indigenous biodiversity vegetation and significant habitats of indigenous fauna

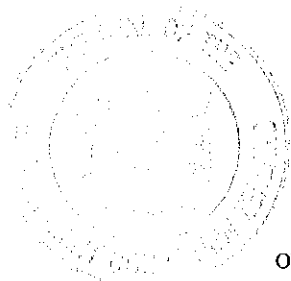
Significant indigenous vegetation and the significant habitats of indigenous fauna shall be protected ~~and enhanced~~ by ensuring ~~that the area and the~~ characteristics that contribute to its significance are not adversely affected to the extent that the significance of the vegetation or habitat is reduced.

[Implementation Method] 11.2.1 Identify areas of significant indigenous biodiversity vegetation and significant habitats of indigenous fauna

For the purposes of identifying areas of significant indigenous vegetation and significant habitats of indigenous fauna, Waikato Regional Council will identify areas of significant indigenous ~~biodiversity vegetation and significant habitats of indigenous fauna~~ at the regional scale (significant natural areas) and make this information available to territorial authorities.

[Implementation Method] 11.2.3 Assess significance

Where regional and district plans require an assessment of significant indigenous vegetation, and the significant habitats of indigenous fauna



that have not been identified as ~~significant indigenous biodiversity~~ by Waikato Regional Council as part of Method 11.2.1, the criteria in section 11A shall be used. The identification of the characteristics of any area will be undertaken prior to any modification of the area or site and will inform the decision-making process as to whether the proposed activity or modification is appropriate. The characteristics that have contributed to an area being significant should also be communicated to the relevant landowners and kept on record by the local authority.

[80] Mr van Voorthuysen's evidence was that the Council has commenced a process of identifying and mapping areas of ecological significance, but this process is yet to be completed and had therefore not yet fully implemented Method 11.2.1.⁶² He highlighted the Explanation to the provisions which reads (2nd paragraph):

The intention is for areas of significant indigenous vegetation and significant habitat of indigenous fauna to be identified either at a regional scale by Waikato Regional Council (significant natural areas project), or as a method of managing effects through regional and district plans (method 11.2.2). it is important that regional and district plan provisions provide for the identification of additional areas, including those not identified in Method 11.2.1 which are difficult to detect at the regional scale due to limitations in technology. A diagram in section 11B summarises the ~~significant indigenous biodiversity~~ respective roles and responsibilities. The identification of significant indigenous vegetation and significant habitats of indigenous fauna by the Regional Council has been undertaken in accordance with 11A and Table 11-1 criteria, through district-scale vegetation mapping, assessment and review of sites, fauna and vegetation studies, scientific research, primarily as a desktop analysis to which varying degrees of confidence are assigned. Before information is included in regional or district plans further verification and validation may be required to confirm whether the identified areas meet the criteria for significance in section 11A.

[81] Mr van Voorthuysen's evidence was that it would not be appropriate to specifically identify areas of ecological significance in the proposed RPS in what he described as the *general terms as is sought by ORRA*, as that would go against the scheme of the proposed RPS, and the Council's intended work programme.⁶³ Mr van Voorthuysen said:⁶⁴

Under that intended work programme the criteria in Section 11A will be used to verify and validate significant areas and significant habitats so they can then subsequently be included in regional or district plans, but not in the proposed RPS itself.

⁶² Mr van Voorthuysen, evidence-in-chief, paragraph [5.9]

⁶³ Ibid, paragraph [5.11]

⁶⁴ Ibid, paragraph [5.12]. The proposed RPS contains a flow chart describing the process to be used – see Figure 11B Significant indigenous biodiversity roles and responsibilities.

[82] The Council’s intention is that:⁶⁵

...in the future Opoutere would be assessed against the section 11A and the criteria in Table 11-1.

This statement is surprising given that the evidence of the ecologists called before us clearly establishes that the site qualifies *now* for inclusion as a significant area and habitat. It is hard to see how further assessment will add to that conclusion.

[83] Section 11A provides as follows:

11A Criteria for determining significant areas of indigenous biodiversity

The following criteria are to be used to identify areas of significant indigenous biodiversity and their characteristics as they exist at the time the criteria are being applied. Criteria may be specific to a habitat type including water, land or air space or may be more inclusive to address connectivity, or movement of species across habitat types.

To be identified as significant an area needs to meet one or more of the criteria identified in the table below. ~~Areas of significant indigenous biodiversity may comprise several habitat types, including water, land and air space.~~

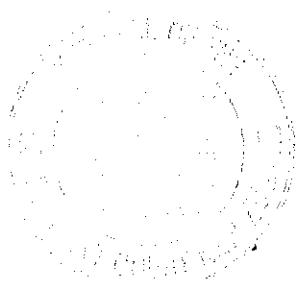
Areas of significant biodiversity shall not include areas that have been created and subsequently maintained for or in connection with:

- artificial structures (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity); or
- beach nourishment and coastal planting (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity).

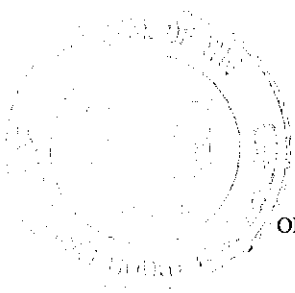
Table 11-1 outlines the criteria for determining significance of indigenous biodiversity. It provides:

Previously assessed site	
1.	It is indigenous vegetation or habitat for indigenous fauna that is currently, or is recommended to be, set aside by statute or covenant or by the Nature Heritage Fund, or Nga Whenua Rahui committees, or the Queen Elizabeth the Second National Trust Board of Directors, specifically for the protection of biodiversity, and meets at least one of criteria 3-11.
2	[Deleted]
Ecological values	
2A	In the coastal Coastal Marine Area environment, it is indigenous vegetation or habitat for <u>indigenous fauna</u> that has reduced in extent or degraded due to historic or present anthropogenic activity to a level where the ecological sustainability of the ecosystem is threatened.

⁶⁵ Ibid, evidence-in-chief, paragraph [5.13]



3.	It is vegetation or habitat <u>that is currently habitat</u> for indigenous species or associations of indigenous species that are: <ul style="list-style-type: none"> • classed as threatened or at risk, or • endemic to the Waikato region, or • <u>at the limit of their natural range.</u>
4.	It is indigenous vegetation, or habitat or <u>ecosystem</u> type that is under-represented (20% or less of its known or likely original extent remaining) in an Ecological District, or Ecological Region, or nationally.
5.	It is indigenous vegetation or habitat that is, and prior to human settlement was, nationally uncommon such as geothermal, chenier plain, or karst ecosystems, hydrothermal vents or cold seeps.
6.	It is wetland habitat for indigenous plant communities and/or indigenous fauna communities (excluding exotic rush/pasture communities) that has not been created and subsequently maintained for or in connection with: <ul style="list-style-type: none"> • waste treatment; • wastewater renovation; • hydro electric power lakes (excluding Lake Taupō); • water storage for irrigation; or • water supply storage; unless in those instances they meet the criteria in Whaley et al. (1995).
7.	It is an area of indigenous vegetation or naturally occurring habitat that is large relative to other examples in the Waikato region of similar habitat types, and which contains all or almost all indigenous species typical of that habitat type. Note this criterion is not intended to select the largest example only in the Waikato region of any habitat type.
8.	It is aquatic habitat (excluding artificial water bodies, except for those created for the maintenance and enhancement of biodiversity or as mitigation as part of a consented activity) that is within a stream, river, lake, groundwater system, wetland, intertidal mudflat or estuary, or any other part of the coastal marine area and their margins, that is critical to the self sustainability of an indigenous species within a catchment of the Waikato region, or within the coastal marine area. In this context "critical" means essential for a specific component of the life cycle and includes breeding and spawning grounds, juvenile nursery areas, important feeding areas and migratory and dispersal pathways of an indigenous species. This includes areas that maintain connectivity between habitats.
9.	It is an area of indigenous vegetation or habitat that is a healthy and representative example of its type because: <ul style="list-style-type: none"> • its structure, composition, and ecological processes are largely intact; and • if protected from the adverse effects of plant and animal pests and of adjacent land and water use (e.g. stock, discharges, erosion, sediment disturbance), can maintain its ecological sustainability over time.
10.	It is an area of indigenous vegetation or habitat that forms part of an ecological sequence , that is either not common in the Waikato region or an ecological district, or is an exceptional, representative example of its type.
Role in protecting ecologically significant area	
11.	It is an area of indigenous vegetation or habitat for indigenous species (which habitat is either naturally occurring or has been established as a mitigation measure) that forms, either on its own or in combination with other similar areas, an ecological buffer, linkage or corridor and which is necessary to protect any site identified as significant under criteria 1-10 from external adverse effects.



[84] In his evidence-in-reply Mr van Voorthuysen also provided Policy 11.4 which Dr Dowding had referred to.

Policy 11.4 Safeguard coastal/marine ecosystems

Protect indigenous biodiversity in the coastal environment by

- aa) avoiding adverse effects on:
- (i) indigenous taxa listed as 'Threatened' or 'At Risk' in the New Zealand Threat Classification System lists or taxa⁶⁶ listed as threatened by the International Union of Nature and Natural Resources;
 - (ii) habitats of indigenous species where the species are listed as Threatened or At Risk, are at the limit of their natural range, or are naturally rare; and
 - (iii) areas containing nationally significant examples of indigenous community types; and
 - (iv) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare; and
 - (v) areas set aside for full or partial protection of indigenous biological diversity under other legislation.⁶⁷
- (a) maintaining or enhancing:
- (i) areas used by marine mammals and wading/coastal birds including breeding, feeding, roosting and haul-out sites (areas where marine mammals come ashore;
 - (ii) whitebait spawning areas and shellfish beds;
 - (iii) habitats, corridors and routes important for preserving the abundance and diversity of indigenous and migratory species;
 - (iv) indigenous habitats and ecosystems that are unique to the coastal environment and vulnerable to modification and the impacts of climate change, including estuaries, lagoons, coastal wetlands, dunelands, rockyreef systems, seagrass and saltmarsh; and
 - (v) habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes.
 - (vi) areas of predominantly indigenous vegetation in the coastal environment.

[85] Mr van Voorthuysen considered this Policy to be very directive and one that must be given effect to by regional and district plans.

[86] For completeness we note the Implementation methods include the following:

11.4.1. Regional and district plans

Regional and district plans shall:

- (a) protect marine habitat in the coastal marine area that has been identified as an area of significant indigenous biodiversity in Method 11.2.1

⁶⁶ Taxa refers to named biological classification units assigned to individuals or sets of species (e.g. species, subspecies, genus) and examples of indigenous taxa listed as Threatened or At Risk within the Waikato Region include Maui's Dolphin, Bryde's Whale and Archey's Frog (nationally critical), Moehau Stag beetle and Kokako (Nationally endangered), NZ Falcon and Long-tailed bat (nationally vulnerable), and North Island Brown Kisi (Serious decline)

⁶⁷ Including, for example, the West Coast North Island Marine Mammal Sanctuary

The Explanation to Policy 11.4 records:

It is intended that areas of significant indigenous biodiversity within the coastal environment are identified within those addressed by Policy 11.2 and Method 11.4.1 and 11.4.2 identify that link as well as recognising the benefit of protecting representative marine habitats and ecosystems in a marine area network.

[87] The Council's approach in the proposed RPS is therefore that the *actual* identification of areas of significant ecological value is a matter to be undertaken *in the future* through regional and district plans.

Do the above proposed RPS provisions meet the requirements of the NZCPS in relation to the site?

[88] Mr Milne submitted that the provision of criteria and the related implementation methods was sufficient to meet the requirements of the NZCPS. To support his argument he referred to *Sustain Our Sounds Inc v NZ King Salmon Company Ltd*,⁶⁸ the Department of Conservation Guidance Notes on the NZCPS, and an analysis of how and where the word *identify* is used in the NZCPS. He also argued that the specific identification of areas in Policy 7 could only be done in regional plans, as Policy 7 refers to protection being achieved through objectives, policies and *rules*, the latter being only able to occur in plans as opposed to *regional policy statements*. We will deal with each argument in turn.

Sustain Our Sounds argument

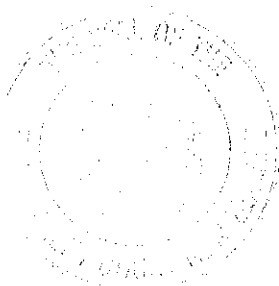
[89] Mr Milne referred specifically to paragraphs [31] to [33] of this decision, which appear under the heading *The Marlborough Regional Policy Statement*. Specifically, Mr Milne referred to paragraph [32] which provides:

[32] Resource Management Plans are required to identify criteria to indicate where subdivision use and development will be appropriate. Criteria to indicate where subdivision, use and development is inappropriate may include issues relating to water quality... [emphasis added]

[90] Mr Milne then highlighted paragraph [33] which addresses the Sounds Plan as follows:

The introduction to the plan, in chapter 1, explains that a comprehensive range of assessment criteria are included in the second volume. These

⁶⁸ [2014] NZSC 40 at paragraphs [31]-[33]



criteria are included to enable an applicant for a resource consent to understand how any particular activity will be assessed.

[91] Mr Milne submitted that:⁶⁹

it is unthinkable that the Supreme Court would not have said that the Regional Policy Statement did not give effect to the NZ Coastal Policy Statement by requiring resource management plans to identify criteria to indicate where subdivision, use and development would be appropriate, if it had not considered that identification of such areas was required in the Regional Policy Statement itself. The Supreme Court made no such comment.

[92] Furthermore, Mr Milne highlighted that it was the plans in that case which were to define the criteria, not the policy statement, which he submitted was one step further removed from the present case, given that the proposed RPS includes the detailed criteria in relation to outstanding natural features and landscapes (12A, Table 12-1) and landscape values and characteristics assessment criteria (12B, Table 12-2).

[93] We do not agree that the *Sustain our Sounds* case gives any weight to Mr Milne's submission. A close examination of that case reveals that the main issues on appeal were to do with adaptive management as opposed to the spatial definition of the outstanding natural landscape into which the activity was proposed to be placed. We are not convinced that the arguments presented to the Supreme Court were specifically addressed to the interpretation of Policy 7, which we are now being asked to interpret.

[94] Furthermore, we are not able to determine from the *Sustain our Sounds* decision, at paragraph [32], what it was that enabled the Supreme Court to determine that *resource management plans are required to identify criteria to indicate where subdivision, use and development will be appropriate*. Section 67 of the Act outlines the contents of regional plans, which include that a regional plan *may state the methods, other than rules, for implementing the policies for the region (s67(2)(b))* which could include outlining criteria. Certainly we can find no support in the Act or the NZCPS to *require* criteria to be used as a preferred method for achieving the policy intent of a plan.

⁶⁹ Mr Milne, Closing submissions, paragraph [47]

Department of Conservation Guidance Notes

[95] Mr Milne then referred to the Department of Conservation Guidance Notes on the NZCPS. He referred specifically to the notes concerning Policy 7. At paragraph [51] of his submissions, Mr Milne quoted from the Guidance Note at page 11 as follows:

Policy 7 does not explicitly require councils to identify such areas in policy statements and plans. The direction is to provide protection for them from inappropriate subdivision, use and development. Identification can be useful to identify the important places and values and for this reason a number of other NZCPS 2010 policies do promote this approach.

Where areas are to be identified, the task can be addressed in a variety of ways. A judgement call is required as to which approach to use to achieve the protection from inappropriate uses. This decision will require a judgement call that considers matters such as the significance of the values, the threat to them, and other methods available to be used in combination (eg incentives) or as alternatives.

Commonly used approaches include scheduling specific high-value areas, the identification of *character areas*, through to more general criteria-based provisions.

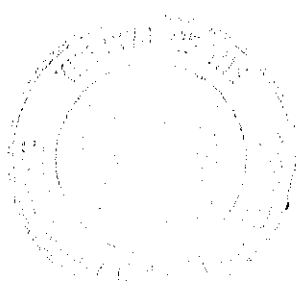
[96] Mr Milne then highlighted Table 1 which follows⁷⁰ entitled *Examples of the Resource Management Act 1991 (RMA) approaches to the identification of areas*, which lists three examples:

1. Schedule specific areas; places are identified in an Appendix to a regional policy statement and/or plan.
2. Characterise management areas; management areas are identified in regional policy statements and/or plans as requiring particular considerations and decision-making.
3. General rules triggered by criteria.

Mr Milne submitted that the third example is the approach taken by the respondent.

[97] The first question is what status should be given to the Department of Conservation's Guidance Notes. It is clear that they have no statutory basis, and that whilst helpful, they are not legally binding on the Court as necessarily properly interpreting the provisions of either the Act or the NZCPS. Whilst the Supreme Court may have referred to the Guidance Notes, not surprisingly it did not determine that the Guidance Notes are determinative, and indeed the Guidance Notes themselves include a disclaimer that they are not a substitute for legal advice, neither are they official government policy.

⁷⁰ Mr Milne, Closing submissions, paragraph [52]



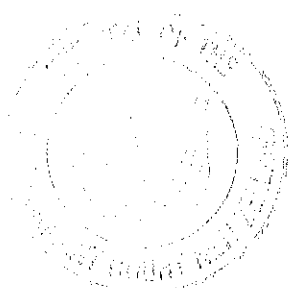
[98] We do not agree with the Guidance Note when it states that Policy 7 of the NZCPS does not *explicitly* require Councils to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are or may be inappropriate. The wording of Policy 7(1)(b) is clear that this is exactly what is required. We agree that *the way in which* the area is identified is not specified, and we accept that the *process* of identification will lead to a conclusion about whether an area *should* be identified, but the two are not the same. In our view, *areas* where particular activities and forms of subdivision, use and development are or may be inappropriate are required to be *identified* to accord with Policy 7. It follows that, whilst there are a number of ways in which such areas can be identified, this does not mean that a choice can be made *not* to identify them. The reason for this, in our view, is obvious given the purpose of the Act, and the requirement in s6(c) that all persons exercising functions and power under the Act in relation to managing the use, development and protection of natural physical resources are required to recognise and provide for *the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance*.

[99] In our view the provision of criteria in the proposed RPS does no more than to require the assessment of an area to be identified as significant or otherwise *at a later date*. In this case the assessment of the site *has* been undertaken and the conclusion is that the ecological values there are nationally and therefore regionally significant. The site has therefore been assessed as suitable for *identification* at a *regional* level and it follows that the site is required to be *identified* at a regional level. The question is whether this can be left to the Regional Plan or whether it needs to be identified in the proposed RPS.

Does Policy 7(1) (b) apply to Regional Plans only?

[100] Mr Milne highlighted that the *protection* of identified areas in Policy 7(1)(b) is to be provided through *objectives, policies and rules*. He submitted that Policy 7(1)(b) cannot apply to regional policy statements because regional policy statements cannot provide protection through rules because of section 62(1)(e) of the Act, By way of comparison a regional plan *may* include rules in accordance with section 68 of the Act, and a district plan *must* include rules pursuant to section 75(1)(c).

[101] Mr Lloyd's argument was that the inclusion of the comma in the introduction to Policy 7 after the words *regional policy statements* and before the



words *and plans* means that the identification required by the policies must occur in both documents. Mr Milne submitted that if this were correct then it would simply not be legally possible to give effect to that direction.

[102] We are not persuaded by either argument. Sub-paragraphs (a) and (b) are both part of Policy 7(1), which in our view means that both equally apply to regional policy statements and plans, rather than to regional policy statements *or* plans. However, we do not read this as requiring both documents to duplicate the provisions of the other. Neither does it mean that it is not legally possible to include provisions in the RPS that give strong direction. Clearly, a regional policy statement cannot include rules (although as the Supreme Court has identified some policies can come relatively close to being like rules if they are prescriptive). In the end it may come down to a matter of timing in terms of the document that can give effect to the NZCPS and, as in this case, better protection to a known area of ecological significance.

[103] In our view, identifying areas is very different from providing criteria for the assessment of them. The assessment criteria provided in Table 11-1 of the proposed RPS deal with the quality of the area proposed to be identified, and the evaluation of them is necessary in order to reach a conclusion about whether or not an area should be identified as one of ecological significance. This in our view is consistent with Policy 11 of the NZCPS, but if, after such an evaluation a conclusion is reached that the area is a representative or significant natural ecosystem and site of biological importance, then it must be *protected* in order to meet Objective 1. Then what is required is for the area to be protected from inappropriate subdivision, use and development, and to do this, such areas need to be *identified* in accordance with Policy 7.

Conclusion

[104] We conclude that in this case, the site has been assessed by the ecologists as one of national and therefore regional ecological significance, with the result that further assessment under Table 11-1 of the proposed RPS is not necessary. For the reasons we have expressed, we find that the proposed RPS is required to identify the site in order to give effect to Objective 1 and Policies 7 and 11 of the NZCPS and has not done so.

If the site was identified (by mapping or otherwise) in the proposed RPS would this result in an unusual planning outcome and if so, does this matter?

[105] We asked the Council about the possibility of specifically identifying the site in the proposed RPS as an ecologically significant site. We suggested that the proposed RPS could explain that its worth had been subject to rigorous testing through an Environment Court process.⁷¹

[106] Mr van Voorthuysen agreed that this would be possible, but he considered that it would create a precedent insofar as it would be the only map of a s6(c) area in the proposed RPS. He described this as *a really odd planning outcome*, particularly given that the Coastal Plan addresses the Opoutere area *in terms of its ASCV*, and he imagined District Plans in the region were undertaking mapping exercises in relation to s6(c) areas in any event. He referred to being aware that the South Waikato District Plan was undertaking that task. He said that, were Opoutere to be mapped in this way, he would ask himself *why is this being done?* And he would instantly, if he came afresh to it, think *well, this must be the most special and unique area in the region as the sole map of significant natural area in the proposed RPS.*⁷²

[107] We do not agree that Mr van Voorthuysen's opinion is the inevitable response, particularly if the reason is clearly articulated in the proposed RPS. The reason is clear – ORRA has mounted a successful case in the Environment Court for the inclusion of the site as an ecologically significant area.

[108] Mr van Voorthuysen did not know what the Council's work programme in terms of indigenous biodiversity was, but he did know from speaking to the Council staff that they are only part-way through the process captured in the flowchart in the proposed RPS, and that progress varied from place to place within the region.⁷³ From talking to the staff, he gained the impression that it was a task that would be left for another day because of the numbers of areas involved, and because the mapping, ground-truthing and talking to land owners takes a lot of time.⁷⁴ Mr Milne submitted that there are too many sites in the region, and it would be an impossible task to map them all in the proposed RPS, however the NZCPS only covers those in the coastal environment and the Council is doing the mapping anyway.

⁷¹ Transcript, page 141, lines 10 - 14

⁷² Transcript, page 141, lines 1-23

⁷³ Ibid, page 142, lines 1 – 8

⁷⁴ Ibid, page 142, lines 21 – 31

[109] Mr van Voorthuysen also addressed this issue via his s32 analysis. He said it would not be efficient or effective to specifically identify the site as of ecological significance in the proposed RPS as that is not the planning approach adopted by the Council.⁷⁵ He said that the policy and the criteria in the proposed RPS would allow areas of significant indigenous vegetation and significant habitat of indigenous fauna to be identified in the future and thereafter included in regional and district plans. He considered that to be a sensible way to achieve Objective 3.18 of the proposed RPS and that it was a similar approach to that adopted by other RPS's with which he is familiar. We received no evidence about the approach taken to this issue in other regional policy statements, but in any case we find it to be beside the point. The fact that a particular planning approach to a specific issue is taken elsewhere, does not mean that it is the correct approach either in the generality or for the specific fact situation that we have before us.

[110] It is four years since the NZCPS 2010 came into force and we understand that the Council has yet to review its proposed RPS to give effect to the NZCPS, although we were not provided with any evidence about the proposed timeframe over which this is projected to occur. Similarly, we were not provided with any evidence about when the Council itself and the District Councils within its region are likely to implement the requirements of the proposed RPS about areas of significant indigenous vegetation and habitats of indigenous fauna. As against that, the ecological significance of the site, including the assessment of it against the criteria in the proposed RPS, has been thoroughly tested during this hearing; indeed Mr Kessels, the Council's witness on the topic, substantiated its ecological significance.

[111] We do not accept that it would be an odd planning outcome or that it would not be efficient or effective to specifically identify Opoutere as an area of ecological significance in the proposed RPS. To the contrary, we find that to do so would achieve the objectives and policies of the proposed RPS directed at protecting indigenous biodiversity values in the coastal environment, and would go some way towards achieving the objectives and policies of the NZCPS and the relevant objectives of the Hauraki Gulf Marine Park Act 2000.

⁷⁵Mr van Voorthuysen, evidence-in-chief, page 16, paragraph [7.3]

Are the provisions of the Coastal Plan sufficient to protect the site and if so, does this mean it does not need to be more specifically identified in the proposed RPS?

[112] Mr Milne submitted that the Coastal Plan, in any event, provides sufficient protection for the site which means that it does not need to be more specifically identified in the proposed RPS. We do not agree with this submission because:

- (a) The Coastal Plan was promulgated in 2004, well before the NZCPS 2010, and there is nothing to suggest that the NZCPS 2010 provisions, apart from those relating to restricted coastal activities, have been changed as a result of the NZCPS 2010; and
- (b) The area covered by the Coastal Plan is not the same as the area sought to be identified by ORRA. That area extends well beyond the coastal marine area in places.

NCZPS 2010 preceded the Coastal Plan

[113] The Coastal Plan was adopted by the Council in July 2004 and has been updated at various times since, one of which was to respond to Policy 29 in the NZCPS 2010 to remove all references to restricted coastal activities, making them discretionary activities.⁷⁶

[114] As we have already outlined, Opoutere is identified as an ASCV (ASCV24) in the Coastal Plan. Mr van Voorthuysen's opinion was that the ASCV already affords what he described as strong, but not absolute protection of the area identified.⁷⁷ He said that the Coastal Plan imposes a very high threshold in terms of doing anything within an ASCV, and it would be very difficult for there to be development within it or adjacent to it.⁷⁸

[115] A question for the Court is whether that degree of protection provided by the ASCV accords with the degree of protection afforded by the NZCPS 2010.

⁷⁶ Effective as of 24 February 2011

⁷⁷ Transcript, page 148

⁷⁸ Ibid, page 147, lines 10 – 35

[116] Mr van Voorthuysen referred to the following:

Policy 3.2.1 – Protection of Significant Vegetation and Habitat

(b) Identify areas of significant indigenous vegetation and significant habits of indigenous fauna and protect by:

- (i) avoiding any adverse effects of subdivision, use and development on the areas listed in Policy 1.1.2(a) of the NZCPS;
- (ii) avoiding or remedying any adverse effects of subdivision, use and development on the areas listed in Policy 1.1.2(b) of the NZCPS.

(c) Identify the conservation values (described in Appendix IV of this Plan) other than significant indigenous vegetation and significant habitat of indigenous fauna identified under Policy 3.2.1a above, in areas of significant conservation value (ASCV) (as indicated by maps in Appendix III of this Plan), and protect by **avoiding as far as practicable** any adverse effects of subdivision, use and development on those values, and **if avoidance is not practicable, adverse effects on those values are mitigated and provision made for remedying those effects, to the extent practicable.**

(Our emphasis)

[117] These policy measures do not give effect to (or equate to) those provided to protect indigenous biodiversity in the coastal environment in the NZCPS 2010. The significant indigenous vegetation and significant habitats for which *avoiding any adverse effects of subdivision, use and development* is required in Policy 1.1.2(a) of the NZCPS 1994⁷⁹ are not the same as those in Policy 11(1)(a) of the NZCPS 2010. On top of that, some of the areas in Policy 1.1.2(b) of the NZCPS 1994 carried through into the NZCPS 2010 require significant adverse effects on them to be *avoided* and not *remedied* as an alternative. As well, the lists of types of indigenous biodiversity (both flora and fauna) in Policy 11(1) and (2) of the NZCPS 2010 are more comprehensive than those that appear in Policy 1.1.2 of the NZCPS 1994.

[118] On top of that for conservation values other than significant indigenous vegetation and significant habitats of significant indigenous fauna identified under Policy 3.2.1a, the protection is much weaker than that which is required under Policy 11 of the NZCPS 2010. Policy 11 does not qualify the requirement to *avoid, remedy*” or *mitigate as far as practicable* or *to the extent practicable*, which is the wording included in Policy 3.2.1a. The explanation to the Policy is also not encouraging. It states:

This policy does not preclude appropriate use of development within the ASCV, rather it requires that the conservation values identified within these areas should be carefully managed.

⁷⁹ Exhibit 5

[119] Perhaps none of this is surprising given the timing of the NZCPS 2010 relative to the notification of the proposed RPS.

Coastal Plan identifies different area than that sought by ORRA

[120] ASCV 24 is described as *Opoutere Sandspit and Wharekawa Harbour* and Map 24 depicts it.⁸⁰ As ASCV 24 is in the Coastal Plan it only covers the coastal marine area and it does not cover the ocean beach, or that part of the spit and other areas that are above the line of mean high water springs.⁸¹ The conservation values of the ASCV are identified as follows:

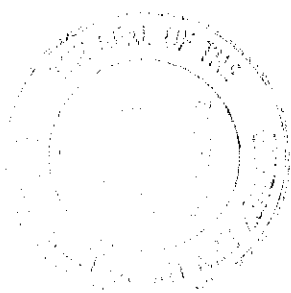
- Site of significance to Hauraki iwi
- Large breeding population of NZ dotterel
- Resident and frequenting rare and threatened waders and coastal bird species, including variable oystercatcher, banded rail and bittern
- Significant saltmarsh, eel grass and mangrove communities
- Gathering of shellfish
- Wildlife Refuge, gazetted 1967

[121] The boundary of ASCV24 is not the same as that sought in the ORRA appeal which extends along and inland from Opoutere Beach beyond the Coastal Marine Area, as well as on to other land outside the Coastal Marine Area, particularly to the north-east and the south-east from the eastern end of the Opoutere settlement. Nor is it the same as the areas identified by Mr Kessels as having significant ecological values in Exhibit 3. ASCV24 is much more limited in area which is not surprising given that the Coastal Plan deals with the Coastal Marine Area and not land outside it.

[122] The Coastal Plan therefore does not cover the entire area that the proposed RPS could and afford the necessary degree of protection. That would need to await protection through provisions in a District Plan and we had no evidence on whether such provisions existed, or their adequacy in terms of the requirements of the NZCPS.

⁸⁰ The boundary of the ASCV 24 (shown in blue) is slightly short of the inland boundary for the Coastal Marine Area and extends from Ruahiwihiwi Point in the south, north to intersect with the beach just beyond the spit. Wharekawa Harbour has bird roosting shown, with the spit having a symbol for bird roosting and bird nesting and there are also symbols for feeding (waders) shown in the Harbour areas of marshlands and mangroves in the southern part of the harbour with the latter appearing to extend outside the ASCV. Wharekawa Sandspit Wildlife Refuge is also marked but it is unclear how much (if any) of it is within the ASCV. Opoutere Beach and the spit are shown with a hatched area in yellow for sand dunes, but only the spit is within the ASCV.

⁸¹ Transcript, page 136, lines 15 - 25



Conclusion

[123] As outlined above, we do not agree that the provisions of the Coastal Plan will provide the degree of protection that identifying the site in the proposed RPS will provide. The best protection available would be for it to be specifically identified in the proposed RPS because the more subordinate planning instruments are then required to give effect to its provisions. The specific identification of the site in the proposed RPS would also mean that decision-making on resource consent applications and designations (and potential applicants and submitters) would be clear on the ecological values of the area and the policy to be applied to protect those ecological values.

[124] As well, we were provided with no evidence about the timeframe for the review of the Coastal Plan, or indeed the timetable for the review of the Regional Plan. This means that for a period of time there would be a potential interregnum where the entire area of ecological significance might be potentially at a greater risk than it need be, if not from subdivision or development, then from use. On the evidence we have had before us, particularly the avian values present at this nationally ecologically significant site require the highest level of protection that is able to be given to it as soon as possible and in a way that holistically manages all of the area the ecologists have identified as being significant.

Overall conclusion

[125] We conclude for the reasons expressed above that the mapped area identified by Mr Kessels in Exhibit 3 should be included in the proposed RPS as this is necessary to protect the ecological values that are present there. We find that Table 11-1 and the relevant implementation methods outlined in the proposed RPS and ASCV24 in the Coastal Plan do not of themselves protect this area, which is required by the NZCPS, s 8(a) of the Hauraki Gulf Marine Park Act and the RMA. Furthermore they are not the most appropriate way to achieve the objectives. Whilst this decision means that at this time the area will be the only one listed in the proposed RPS, we do not see this as a reason to not do it.

Should Opoutere be identified as an ONFL?

[126] This part of the argument for ORRA focussed more on the respective assessments undertaken by each of the landscape experts, who were Mr Stephen

Brown for the Council and Mr Mark Lockhart for ORRA. The issue for determination is whether the area defined by Mr Lockhart, (delineated with a dark blue line in Annexure 1 to his evidence), qualifies as an ONFL and should be mapped and included in Table 12-2 of the proposed RPS.⁸² Despite this being the main focus of the argument, Mr Lloyd during the course of his submissions raised an issue about the interpretation of Policy 15 of the NZCPS. Because the proposed RPS is required to give effect to the provisions of the NZCPS we start by outlining the relevant provisions of the NZCPS and reiterating the point that the proposed RPS was notified before the NZCPS came into force.

The NZCPS

[127] Objective 2 and Policy 15 are particularly relevant to this part of our decision. Mr Lloyd also referred to Policies 1 and 7, which have general application. We have already outlined our findings in relation to them.

[128] Objective 2 of the NZCPS provides:

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

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

[129] Objective 2 deals with the preservation of the natural character of the coastal environment (s6(a) of the Act), *and* the protection of natural features and landscape values. Policy 13(2) clarifies that both concepts are not the same. We have already determined that as ORRA's original submission and notice of appeal did not raise natural character as an issue, so that it is precluded from raising it now, but in any event it makes no real difference to the outcome of this case as the evidence focussed on the landscape values of Opoutere. Accordingly we concentrate on the part of Objective 2 that deals with the protection of natural features and landscape values.

⁸² Mr Lockhart's area covered Ohui/Opoutere Beach from the Ohui Bluffs in the north, including Motehaua Rock, to the ridgeline of Ruahiwihiwi Point (a former Maori pa site) on the southern side of the estuary mouth, including Hikinui Island, and inland including the Department of Conservation reserve that runs the length of the beach and the Wharekawa estuary and Maungaruawahine. He visually identified the above area on a map that appears as Annexure 1 to his evidence-in-chief.

[130] Policy 15 deals specifically with natural features and natural landscapes. It provides:

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
- (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; including by:
- (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
 - (i) natural science factors, including geological, topographical, ecological and dynamic components;
 - (ii) the presence of water including in seas, lakes, rivers and streams;
 - (iii) legibility or expressiveness—how obviously the feature or landscape demonstrates its formative processes;
 - (iv) aesthetic values including memorability and naturalness;
 - (v) vegetation (native and exotic);
 - (vi) transient values, including presence of wildlife or other values at certain times of the day or year;
 - (vii) whether the values are shared and recognised;
 - (viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
 - (ix) historical and heritage associations; and
 - (x) wild or scenic values;
- (d) ensuring that regional policy statements, and plans, maps or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
- (e) including the objectives, policies and rules required by (d) in plans.

[131] Mr Lloyd submitted that Policy 15(d) requires the proposed RPS to identify areas where the protection of natural features and natural landscapes require objectives and policies, and he highlighted that the omission of the adjective *outstanding* was significant and must have been by design. The conclusion he asked us to draw from its omission was that the drafters of the NZCPS did not want the natural features and natural landscapes identified and protected in regional policy statements to be limited to only those that are *outstanding*. In other words, they were requiring the bar to be set lower for landscapes and features in the coastal area.

[132] In *Environmental Defence Society v King Salmon*⁸³ the Supreme Court considered various policies in the NZCPS, albeit in the context of the facts before it, which clearly established (and about which there was no dispute) that the landscape in issue was *outstanding*. The Supreme Court noted that the NZCPS was a carefully expressed document, whose contents had been the result of a rigorous process of formulation and evaluation.⁸⁴ It was also noted that the NZCPS 2010 provided clearer direction on protecting and managing New Zealand's coastal environment than its predecessor.⁸⁵

[133] As well, the Supreme Court said the following:⁸⁶

[129] When dealing with a plan change application, the decision-maker must first identify those policies (meaning of the NZCPS) that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it...

[132] **Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line...** The RMA contemplates that District Plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

(Emphasis added)

[134] Mr Lloyd's submission on this point was slightly confusing, given that ORRA's evidence was presented with the intention of persuading the Court that Opoutere is *outstanding*, and therefore should be listed as an ONFL. The effect of Mr Lloyd's submission on Policy 15(d) and his reference to the *EDS v King Salmon* decision appears to be that the requirement to identify natural features and landscapes in the coastal environment is *not* limited to those that are outstanding. However, the case he ran and the evidence of Mr Lockhart, ORRA's landscape witness, was directed at whether Opoutere is an ONFL that is required to be identified and protected under Policy 15(b). Mr Milne did not cover this point in any detail in his reply submissions filed after the hearing, rather he contended that the issue for the Court to determine was essentially factual; that is an evaluation of the conflicting experts opinions, informed by the Court's site visit. As Mr Lloyd's submission does

⁸³ *Environmental Defence Soc Inc v the New Zealand King Salmon Co Ltd* [2014] NZSC 38, at paragraph [80]

⁸⁴ *Ibid*, paragraph [90]

⁸⁵ *Ibid*, paragraph [134]

⁸⁶ *Ibid*, paragraphs [129]-[132]

not accord with the evidence called in support of his case, we take the point no further.

The arguments and the issues

[135] The appellant submitted that the large volume of evidence on this issue could be boiled down to two quite simple competing positions:

- (a) Mr Brown says that Opoutere is too modified by surrounding production forestry and farmland to qualify as an ONFL.
- (b) Mr Lockhart disagrees. He says that Mr Brown (and other landscape assessments) place too much emphasis on the surrounding production forestry and farming and insufficient emphasis on other aspects of Opoutere, particularly the ecological, but also socio-cultural and heritage factors.⁸⁷

[136] Another issue arose during the hearing largely as a result of the Court's questioning. This concerned whether or not there was a distinction between outstanding natural features (ONFs) and outstanding natural landscapes (ONLs) given that the proposed RPS deals with both together as ONFLs.

[137] From the above and from our previous analysis of Mr Lloyd's arguments, we distil the following issues that need to be determined:

- (a) Is there a distinction between ONFs, ONLs and ONFLs that is important, and if there is, has this affected the assessments undertaken by the experts?
- (b) What parts of the landscape should be assessed?
- (c) Does all or part of Opoutere qualify under the assessment criteria as an ONFL?

ONF, ONL or ONFL?

[138] Section 6(b) of the Act refers to the protection of *outstanding natural features and landscapes*, but Policy 15 of the NZCPS refers to *outstanding natural features* and *outstanding natural landscape*. However as we have outlined above, the

⁸⁷ Mr Lockhart, evidence-in-chief, paragraph [23]

timing of the notification of the proposed RPS meant that this preceded the NZCPS coming into force.

[139] The Court was keen to understand the reasoning of the Council in not distinguishing between ONF's and ONL's in the proposed RPS, and in particular to understand whether parts of Opoutere could be treated as ONF and parts as ONL; for example whether the Wharekawa Harbour could be treated as an ONF and the beach, sandspit and headland as an ONL.

[140] Mr van Voorthyusen's answers indicated that at least from a planning perspective the distinction had not been given much thought and he observed that *a lot of Councils have just lumped them into one*, but the Court's experience is that there are a developing number of planning instruments that do make the distinction. Mr van Voorthyusen was fair in his concession that it might be better to treat features and landscapes separately.⁸⁸ Mr Brown was alive to the distinction and helpful in his explanation of the differences.⁸⁹ He highlighted that for an ONL, wider concepts such as perception of the landscape and how values are attached to it comprise part of the assessment, and therefore a much broader interpretation of what comprises the landscape is required. By way of comparison, his evidence was that the assessment of an ONF is more specifically focused on the nature of the feature itself, which may be of scientific, heritage and/or educational importance.⁹⁰

[141] The following exchange between Mr Brown and the Court is now set out:⁹¹

Q So just picking up on the concept about outstanding natural features as opposed to outstanding natural landscapes, are you saying that you can have both the separate things?

A Yes.

Q And sometimes the two might be combined?

A Sometimes they might, but I think they would probably be defined for different – they would have a different basis. The landscapes would be, would be appreciated in a different way from features. The features really should have scientific, educational value, natural heritage value, inherent natural heritage value regardless of what they look like. Whereas there's no doubt that the identification about outstanding natural landscapes does have a lot to do with what these landscapes look like.

Q So again, just picking up to be absolutely clear – if we were to separate out the harbour for argument's sake as an ONF for

⁸⁸ Transcript, page 143, line 29 to page 144, lines 1-5

⁸⁹ Mr Brown, evidence-in-chief, Annexure 4

⁹⁰ Transcript, pages 95-97

⁹¹ Transcript, page 98, lines 10-31

ecological reasons were there evidence to support that, would you then consider the beach – I think I heard you say “no” – the beach as an ... ONL.

- A No I think the beach is closer to becoming an ONL. I am just not convinced that it quite reaches the level that has been set for all of the ONLs to date within the region. But in isolation, as my page 24 suggests, it certainly gets close. But the harbour area is not close in terms of land – from a landscape perspective.

[142] Mr Lloyd, when questioned, was reasonably dismissive about the distinction between ONFs and ONLs, maintaining that the cases had treated them in the same way. He described the distinction as *a red herring* but was not opposed to the idea, should the Court consider that a distinction existed.⁹² We consider there to be a distinction, and developing case law has certainly recognised there is a difference, but we are left in the position that the point was not strongly argued for by ORRA, and as we foreshadow, the Council has not separately categorised outstanding natural features.

[143] The concern is that if the option chosen is to categorise ONF's and ONLs together as ONFLs, then given Mr Brown's response, the *assessment* of a proposed ONFL and arguably the *assessment criteria* themselves will need to be more finely tuned to ensure that the correct basis for assessment is applied, depending on whether a landscape or a feature is being assessed, or whether a feature within a landscape is being assessed. With this in mind, we turn to consider how the proposed RPS deals with features and landscapes.

[144] Section 12B of the proposed RPS outlines the landscape assessment approach. It purports to define *landscape* and *feature* as follows:

Landscape is a cumulative expression of natural and cultural features, patterns and processes in a geographical area, including human perceptions and associations (New Zealand Institute of Landscape Architects Best Practice Note 10.1, November 2010). A feature is a discrete part of a landscape.

The next mention of *feature* appears under the heading *Assessing Landscapes* at stage four of the assessment process, where there is a requirement to *Explain the appraisal of each landscape (or feature) with reasons*.

[145] The proposed RPS on our view, whilst referring to *features* and *landscapes* does not in fact distinguish between the two either in terms of the assessment criteria

⁹² Ibid, pages 14-15

that apply, or the approach taken to assessment. The inference we draw is that the proposed RPS envisages that ONFL's are in fact assessed as *landscapes* and that any *features* within them are brought under the *landscape assessment* umbrella.

[146] We are left in somewhat of a dilemma as a result of the above because of the way the case was argued for ORRA, and the fact that Mr Lockhart's evidence like Mr Brown's, focussed on assessing *the whole* of the landscape including the obvious natural features within it such as Mototaua Rock, Wharekawa Harbour, the beach and the spit (the latter two arguably could comprise a landscape and a feature.) As well, the wider landscape lens is used for the experts assessments, rather than the more specific lens used as Mr Brown suggested, when dealing with ONFs. We conclude therefore that the assessments undertaken by the experts were basically *landscape assessments*, but we record our considerable unease that this approach may have produced a result that is not sufficiently refined for the Opoutere environment. We say this because this is an environment which seems to us to include elements of ONF and ONL, and whilst it is described as combining both (because it is called an ONFL), it is apparent to us that it has fact only been assessed through an ONL lens. The question for us is whether the analysis undertaken by the experts can nonetheless provide an evidential foundation for us to reach a conclusion on this point, but we have decided, because of the way the case was run, that it cannot.

What parts of the landscape should be assessed?

[147] The landscape experts agreed⁹³ that the Opoutere landscape includes both the harbour and the ocean beach, and the aspects of both that they identified were the same as those listed above in paragraph [39]. Mr Lockhart referred to the difficulty of defining appropriate boundaries for any given landscape. He said:⁹⁴

However in this case the Ohui bluffs and ridge line of Ruahiwiwi Point provide very suitable and easy to define northern and southern points of the Opoutere beach. The estuary itself is easily identified as is the escarpment containing Maungaruawahine on the estuary's northern border.

[148] Mr Lockhart's delineated line for the ONFL proposed by ORRA does not include however any production forestry or housing⁹⁵ and only a little of the

⁹³ Joint Witness Statement-Landscape

⁹⁴ Mr Lockhart, evidence-in-chief, paragraph [35], page 179

⁹⁵ Mr Lockhart, evidence-in-chief paragraph [71]

surrounding farmland, with the result that Mr Brown questioned whether Mr Lockhart had properly assessed the landscape in issue.

[149] Mr Brown was critical of Mr Lockhart's boundary, describing it as:

...a completely arbitrary construct that bears no relation to the landscape of Opoutere and Wharekawa.⁹⁶

He said Mr Lockhart had completely excluded a large part of the visual and physical catchment, around the harbour in particular. He referred to:

...the settlement, the areas of production forestry south and east of the harbour, the production forestry west of the harbour, the farming at the head of the harbour, the settlement next to it, the transmission lines⁹⁷ going across the harbour, all those are part of what I have looked at and that I regard as being part and parcel of this landscape. ... [I]t is not just all the nice bits.

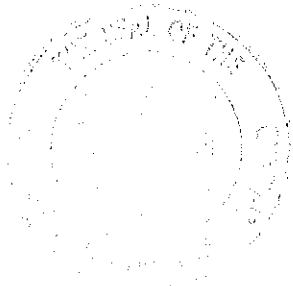
[150] There was however in fact very little difference between the experts about the boundary of what Mr Brown identified on his Annexure 16 as *the Opoutere Beach Catchment*. Mr Lockhart's boundary for assessment included the area to the south of the camping ground and Mr Brown's did not, but apart from that, the boundary adopted by Mr Lockhart was similar to that adopted by Mr Brown.

[151] The major difference between the experts was in relation to what Mr Brown described, and showed (in part) as *the Wharekawa Harbour Catchment* on his Annexure 16. On the western side of the harbour Mr Lockhart's delineated line did not include the settlement that extends south to Kapakapa Stream and the native forest/bush behind it. On the eastern side both witnesses adopted boundaries that took in farm land close to the eastern entrance to the harbour. Mr Lockhart described this as the ridge line of Ruahiwihiwi Point, although Mr Brown's boundary appears to take in a little more farm land. However, further south on the eastern side Mr Lockhart's delineated line closely hugged the shoreline and the road and did not extend up to the ridgeline to take in an extensive area of production forestry and associated roading. Mr Brown emphasised that this resulted in a key difference in perspective from the main point of entry to Opoutere.

[152] In support of his boundary, Mr Brown attached to his evidence an independent landscape assessment commissioned by the Council from Beca Ltd dated

⁹⁶ Transcript, pages 66 – 73.

⁹⁷ He meant 'power lines' given elsewhere in his evidence he refers to and the photographs show power lines.



9 September 2013 (a peer review), which concluded that Opoutere does not qualify as an ONFL because it is too modified. It assessed a much larger landscape than that proposed by Mr Lockhart or even Mr Brown and is therefore in our view not comparable. But in any event, this is not in our view a major point. More important are the reasons given by Mr Lockhart for his delineated line and his explanation of how it related to the area he assessed, and Mr Brown's reasons for his critique of this.

[153] Mr Milne submitted, that Mr Lockhart's proposed ONFL artificially divides the landscape as it is outlined in the joint witness statement, requiring the viewer to turn a deliberate blind eye to areas that are very much physically present but which even Mr Lockhart agreed do not qualify as part of the ONFL. This, he submitted was illustrated, when a series of photographs attached to Mr Brown's evidence-in-chief⁹⁸ upon which he had delineated a blue line with a cross above the areas that were visible from the identified viewpoints, were put to Mr Lockhart in cross-examination. These viewpoints had been excluded from Mr Lockhart's proposed ONFL, but he agreed in cross-examination that the photographs accurately depicted what was seen from them.

[154] Mr Lockhart's point however, was that he had included these areas in his assessment of the criteria, but did not include them in his proposed delineated ONFL.⁹⁹ He accepted that the areas above the delineated line would not meet the ONFL criteria, but we infer from the context of this concession, that he was agreeing that the areas above the line would not, if assessed without reference to the rest of Opoutere's landscape values meet the test. In our view this concession is consistent with what we understand Mr Lockhart's opinion to be, which is that even if one takes into account the fact that the areas above the line do not meet the ONFL criteria, the sum of the other values of the Opoutere landscape outweigh this aspect.

[155] Had Mr Lockhart failed to take these areas into account in his assessment, this would have affected the basis for his opinion, but as we have outlined above, we accept that Mr Lockhart *did* include them in his assessment, despite the fact that they are excluded from his delineated line. The question for us is whether we agree with Mr Lockhart's assessment that the sum of the other landscapes values present at Opoutere are such, that despite the viewpoints above the line, the area he has delineated is properly an ONFL.

⁹⁸ Exhibit 8

⁹⁹ Transcript, page 41, lines 6-29

[156] It follows that the differences between the witnesses about the extent of the landscape, are not so much about *what* was assessed, but whether or not it is artificial for Mr Lockhart's line not to include them. Given that the areas above the line were included in Mr Lockhart's assessment we have formed the view that the distinction is not material, as the issue is more about *what weight* should be given to the landscape values of the areas above the line in the overall assessment.

[157] We also make the point that for every landscape identified as an ONFL there will be a line delineating it from neighbouring areas that are not considered to be outstanding. In other words, the delineation itself identifies the distinction between ONFLs that are outstanding and those that are not.

[158] For the reasons we have expressed above, we do not agree that Mr Lockhart's boundary was "*a completely arbitrary construct*" as Mr Brown suggested.

Does all or part of Opoutere qualify under the assessment criteria as an ONFL?

[159] As we have outlined above, Mr Brown accepted that Opoutere Beach was closer to being categorised as an ONFL than Wharekawa Harbour, but he did not consider it to necessarily be outstanding on a regional basis. Moreover Mr Brown said that the ocean beach is not sufficiently distinct or special to be an ONFL when compared with other parts of the regional coastline including the likes of New Chums Beach and Waikawau Bay. His opinion was that Wharekawa Harbour did not qualify as an ONFL, because it was not *outstanding*, given the presence of farming, forestry and settlement within the landscape.¹⁰⁰ Mr Lockhart did not agree. He argued that Opoutere was the sum total of its parts and that all the area he identified in his Annexure 1 was outstanding. He did not specifically address whether it might qualify as an ONF because of its significant ecological and scientific values.

[160] We note that a recent High Court decision might now throw into doubt whether or not an outstanding natural feature or landscape must also meet a threshold of significance at a national, regional or district level,¹⁰¹ thereby bringing into doubt any analysis that seeks to establish a bar of significance within a region or a district. We sought no submissions on this point, because the comments by the High Court are arguably obiter as they relate to regional or district significance and the evidence in

¹⁰⁰ Mr Brown, rebuttal evidence, paragraphs [48]-[49]

¹⁰¹ *Man O' War Station Limited v Auckland Council*, CIV-2014-404-2064, paragraph [14]

this case by both parties assumed that regional significance was a threshold to be met, with the debate focussing on whether the bar for it had been set too high.

[161] We start with the relevant proposed RPS provisions, because these set out the assessment criteria and generally provide the framework for the approach taken to the assessment of ONFL's. We note that these seem to incorporate the factors that the case law has developed for assessing the significance of landscapes, starting with the *Pigeon Bay/WESI* factors,¹⁰² which are reflected in Policy 15(c) of the NZCPS.

The proposed RPS provisions

[162] The provisions regarding ONFL's and the policies relating to landscape (including seascape), natural character and amenity are included in Section 12 of the proposed RPS. The important policy for the purpose of this discussion is Policy 12.1, to which Implementation Methods 12.1.1 and 12.1.2 and the Explanation attached to them relate. Section 12A includes Table 12-1, which is the list of ONFL's of regional significance and this is followed by the Maps showing them in regional context (Map12-1A) and specifically (the remaining maps). Section 12B includes Table 12-2, which sets out the landscape values and characteristics assessment criteria.¹⁰³

[163] There are three ONFL's within the coastal environment, but they are counted as one of the twelve considered by the Council to be of regional significance. All are part of ONFL10 which is entitled *Coastal areas of the Coromandel*.¹⁰⁴ They are *Cathedral Cove, Shakespeare Cliff and coastline south of Hahei* (ONFL 10/1), *the northern tip of the Coromandel peninsula and the western slopes of the Moehau Range out to coast* (10/2) and *Coromandel-Tuateawa* (ONFL 10/3).

[164] Policy 12.1 provides:

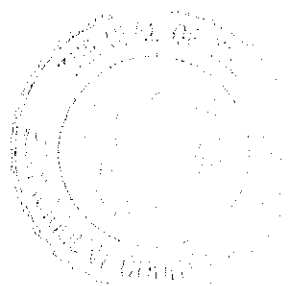
Policy 12.1 Outstanding Natural Features and Landscapes

Identified values and characteristics of outstanding natural features and landscapes (including seascapes) of regional or local significance are protected from adverse effects, including cumulative effects, arising from inappropriate subdivision, use or development within or adjacent to the landscape or feature.

¹⁰² *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*, [1999] NZRMA 209. *Wakatipu Environmental Society v Queenstown Lakes District Council* [2000] NZRMA 59

¹⁰³ Section 12B as amended was included by a draft consent order as Exhibit 4

¹⁰⁴ Arguably this means that there are in fact fourteen ONFL's, although the three referred to are part of the ONF 10.



[165] Implementation methods 12.1.1, 12.1.2 and 12.1.3 appear directly beneath Policy 12.1 and include:

12.1.1 Protect values of outstanding natural features and landscapes

Regional and District Plans shall identify and provide for the protection of the values and characteristics of outstanding natural features and landscapes, including those of regional significance identified in section 12A (Table 12-1).

12.1.2 Identify local outstanding natural features and landscapes

Waikato Regional Council will encourage territorial authorities to undertake a district-wide assessment of outstanding natural features and landscapes of local significance, the criteria in section 12B (Table 12-2) should be used as a basis of any new assessment.

12.1.3 Values of outstanding natural features and landscapes to tāngata whenua

Waikato Regional Council will work with tāngata whenua to confirm the values of significance to tangata whenua of the outstanding natural features and landscapes included in section 12A (Table 12-1) and ensure these are recognised in regional and district plans.

[166] Implementation method 12.1.1 requires that plans (both regional and district) identify and provide for the protection of ONFLs, but the proposed RPS has also identified ONFL's of regional significance in Table 12-1. We do not read method 12.1.1 as preventing a Regional Plan from adding to the ONFLs specifically listed in Table 12-1, despite the Explanation seeming to limit this to districts.

[167] The Explanation to Policy 12.1 and the Implementation methods attached to it, highlight that there is benefit in using the same criteria to assess outstanding areas in regional and district plans. It is recognised:

...that the absolute boundaries of features and landscapes are difficult to define.

And it notes that

The focus of the policy and methods is on the values and characteristics of the outstanding features and landscapes (including seascapes) rather than on the features or landscapes themselves. This recognises that landscapes evolve over time and it is neither practical nor desirable to protect them in a particular state or at a particular point in time.

[168] We do not agree that the NZCPS supports the interpretation of *protect* outlined in the Explanation as it has now been explained by the Supreme Court in *EDS v King Salmon*, if this Explanation leads to a position where regardless of whether the feature and landscape has been identified as outstanding and subject to protection, that protection does not apply because it is *neither practical nor desirable to protect it in a particular state or at a particular point in time*.

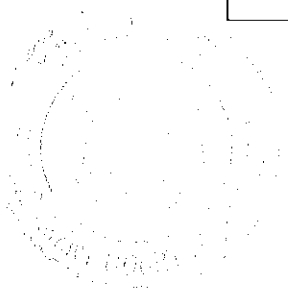
[169] The assessment criteria used to determine regional and local (i.e. district) ONFL's as now proposed are set out in Table 12-2 as follows:

12B Landscape values and characteristics assessment criteria

Table 12-2: Typical factors to consider when assessing landscapes

The following criteria have been used as the basis for identifying outstanding natural features and landscapes of regional significance (as listed in Section 12A and mapped in Maps 12-1 to 12-15) and should be used as the basis for identifying outstanding natural features and landscapes of local significance.

<u>Attributes</u>	<u>Typical factors</u>
<u>Physical Attributes</u>	<p><u>Natural - the characteristics of intactness, health and significance of natural landscape features including:</u></p> <ul style="list-style-type: none"> • <u>Geology, geomorphology, and resultant topography</u> • <u>Hydrology (hydrological features and processes)</u> • <u>Soil and natural vegetation</u> • <u>Ecology (the health and significance of ecological attributes)</u> <p><u>Human ('Cultural') - the characteristics of human features, any inherent cultural significance, and the manner in which they relate to the underlying natural setting including:</u></p> <ul style="list-style-type: none"> • <u>Land use</u> • <u>Human vegetation patterns</u> • <u>Buildings, structures and settlements</u> • <u>Road networks</u> <p><u>Human or cultural factors are relevant to landscape assessment in general. However, for assessment of outstanding natural features and landscapes the focus will be on natural areas where such human factors are recessive or absent.</u></p>
<u>Aesthetic Attributes (perceptual, sensory, experiential)</u>	<p><u>Visual and aesthetic characteristics including:</u></p> <ul style="list-style-type: none"> • <u>Expressiveness – the manner in which biophysical features (including landforms, water-bodies and natural vegetation) express natural processes and patterns</u> • <u>Legibility (in the sense of way-finding and orientation) – the role of landscapes and features as landmarks, boundaries, areas with a distinctive character (taking the 3D sequential experience into account)</u> • <u>Picturesqueness / Composition (including such attributes as the presence of water, contrast of shadow and light, perspective depth, focal-points, the mix of openness and enclosure, and the overall composition of landscape elements)</u> • <u>Coherence (the manner in which different elements relate to each other including the intactness of natural landscapes and the extent to which human elements and patterns reflect the natural structure of the landscape)</u> <p><u>Account should be taken of attributes that may be only occasionally or seasonally present (such as wildlife or snow), and the effects of movement (wind, waves) i.e. the 'transient factors'</u></p>



<u>Associative Attributes</u>	<p>Values or meanings associated with a landscape including such matters as:</p> <ul style="list-style-type: none"> • <u>Naturalness associations (such as 'wilderness' values)</u> • <u>'Sense of place' the manner in which landscapes convey a distinctive local character (cultural or natural)</u> • <u>Historical associations (where relevant to appreciation of the landscape)</u> • <u>Tangata whenua associations (where relevant to appreciation of the landscape)</u> • <u>Recreational uses based fundamentally on landscape qualities</u> • <u>Emblematic attributes (for instance where a feature has been adopted as an icon for a community)</u>
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[170] Mr Brown gave evidence of his involvement in developing the assessment criteria in Table 12-2 after the notification of the proposed RPS. He said he recommended revised assessment criteria be employed in Section 12, and these were incorporated in the staff report of December 2011 prepared for the proposed RPS hearings, then re-examined in the course of those hearings. As a result, the criteria provided the foundation for identification of the ONFLs listed in the decisions version of the proposed RPS.

[171] The criteria in Table 12-2 were appealed to this Court by *Federated Farmers*,¹⁰⁵ which has resulted in the criteria being revised by the parties to it (not including ORRA). The Federated Farmers appeal has now been resolved by consent and a draft consent order has been submitted to the Court for approval. We refer to this in paragraph [22]. Table 12-2 listed above is the version that has been submitted to the Court for approval.

[172] Mr Brown was clear that although the revised criteria involved some changes from those employed by him in 2011, they nevertheless address the identification of ONFLs in a manner and via key criteria that are very similar to those employed in his review. We accept that the key criteria with the factors and thresholds in the draft consent order are sufficiently similar to those employed by Mr Brown in his review and in the decisions version of the proposed RPS.

[173] Mr Lockhart took no issue with the criteria themselves and we agree that they are appropriate. His critique of Mr Brown's approach was twofold:

- (a) he challenged whether or not Mr Brown's opinion had been influenced by the approach taken in earlier landscape assessments done by others, which Mr Lockhart considered to be flawed; and

¹⁰⁵ ENV-2012-313 - 000031

(b) he challenged the way in which the criteria had been applied to Opoutere.

[174] Mr Lockhart said:¹⁰⁶

In particular, it is my opinion that Mr Brown (and other landscape assessments of the area), give too much weight to the perceived lack of 'naturalness' of the Opoutere area and the presence of forestry and residential settlement and the like and insufficient weight to other factors, particularly ecological, socio-cultural and heritage factors.

The earlier landscape assessments

[175] At the heart of this argument is the suggestion that Mr Brown may not have properly assessed the landscape values at Opoutere, because the basis upon which he proceeded was constrained by a purportedly flawed approach taken by earlier assessments.

[176] The first landscape assessment was the Waikato Regional Landscape Assessment dated February 2010¹⁰⁷ ("**the Buckland report**") commissioned by the Waikato Regional Council, which as the name suggests was a regional landscape assessment.¹⁰⁸ The Buckland report was peer reviewed by Boffa Miskell, an exercise completed in 2009.¹⁰⁹ The Buckland report was completed before the NZCPS 2010 was finalised. The ONFLs identified in the Buckland report were carried through into the notified version of the proposed RPS.

[177] Mr Brown was commissioned by Thames-Coromandel District Council to prepare the Coromandel Peninsula Landscape Assessment dated September 2011 ("**the Coromandel Peninsula assessment**"), which, as the name suggests, was specific to the Coromandel Peninsula. The Coromandel Peninsula assessment has been used to identify outstanding natural landscapes and amenity landscapes in the proposed Thames Coromandel District Plan.¹¹⁰ We had no evidence about the specific provisions of that proposed District Plan, any submissions on or officer's reports related to submissions, or the outcome of any hearings.

¹⁰⁶ Mr Lockhart, evidence-in-chief, page 177, paragraph [23].

¹⁰⁷ By Mary Buckland, Chow Hill, O'Connor Manning Consultants & GHD

¹⁰⁸ Relevant excerpts from this assessment are attached to Mr Lockhart's evidence-in-chief as Annexure 3, pages 207-212, Agreed Bundle

¹⁰⁹ Mr Brown, evidence-in-chief, paragraph [6]

¹¹⁰ Relevant excerpts from this assessment are attached to Mr Lockhart's evidence-in-chief as Annexure 4, pages 213-222, Agreed Bundle

[178] In 2011, Mr Brown was also engaged to undertake a peer review of the Buckland report and in particular Section 12 of the proposed RPS when Boffa Miskell (the first peer reviewer) faced potential conflicts of interest.¹¹¹

[179] Mr Brown was also engaged by the Council to review all of the submissions made on the ONFLs included in the notified version in the proposed RPS.

The Buckland report

[180] Mr Brown noted that neither Boffa Miskell nor he had the scope to reassess landscapes across the entire region. Both were asked if they could support the higher order landscapes identified as ONFLs, whether any refinement was needed in relation to the criteria employed to address the regions ONFLs, and subject to some “tweaking” of the criteria, whether other landscapes identified in the submissions to the proposed RPS might be added to the original list of ONFLs.

[181] Mr Brown understood his task was to have regard to the regional context and to apply the same threshold that had been applied to the ONFLs identified in the Buckland report. Mr Brown described this exercise as follows:¹¹²

It involved fine-tuning rather than the sort of wholesale change that might have occurred with a re-evaluation of the entire Region. In my opinion, the bar had been set very high for the regions ONFLs, but this simply meant that any alterations or additions to them would have to meet the same exacting standards, as a few landscapes did. However, I did not anticipate that any of the draft ONFLs would be subject to radical surgery, although some – such as ONFL 8 addressing the Kaimai Ranges and ONFL9 focusing on Lake Taupo – were ultimately affected by more fine-grained reconfigurations.

[182] Mr Brown agreed with the Boffa Miskell review of the Buckland report that it did not clearly distinguish between assessments of landscapes and natural character, a point of difference identified in the NZCPS 2010. He also agreed that the criteria adopted needed to be refined to take into account the modified *Pigeon Bay / WESI* criteria, however he said that he reached the view from the outset of his involvement with Section 12 that it would not be *practical or desirable* to rewrite the assessment method initially employed.¹¹³ Mr Brown did not elaborate about his reasons for reaching these conclusions and whilst we can understand the practicality of the situation (particularly as it relates to the cost of so doing), it is harder to understand

¹¹¹ Mr Brown, evidence-in-chief, paragraph [4]-[6]

¹¹² Mr Brown evidence-in-chief, paragraph [8]

¹¹³ Mr Brown evidence-in-chief, paragraph [27]

why it would be *undesirable* to review the assessment method if it is what sets the bar for regional significance, and particularly because Mr Brown seemed to have reservations about the bar having been set so high.

[183] Mr Lockhart considered the Buckland report to be deficient for the following reasons:¹¹⁴

- (a) It contained no assessment of Opoutere Beach, indeed the relevant section of the report is entitled *Eastern Coastline – River Mouths, Harbours and Islands* and refers to *landscape features* of which Wharekawa Harbour is one of a number of harbours mentioned.¹¹⁵ The inference is therefore that the harbour was assessed but not the ocean beach.
- (b) The methodology used (in terms of classifying scores) was not consistently applied, with Wharekawa Harbour classified as an HVANFL (High Value Amenity Natural Feature and Landscape) and not an ONFL. To be an ONFL it required a score of 7 or more, particularly *for memorability and vividness*. Even though the Wharekawa Harbour received a score of 7, for reasons not explained it was classified as an HVANFL rather than an ONFL.
- (c) The size of the area assessed compromised the quality of assessment. The Waikato Region covers most of the central North Island (approx 2.5 million hectares) and has 1,150 km of coastline, and an assessment of such a large area must necessarily lack depth. The quality of the assessment must be compromised to some degree by quantity.
- (d) The report has inappropriately and unsatisfactorily included all of the islands, river mouths, harbours and islands of the eastern coastline of the Coromandel together. For example, Whangamata Harbour (an intensively developed harbour with a large marina and no wildlife of note) was rated the same as Wharekawa Harbour (an undeveloped, internationally¹¹⁶ recognised and protected wetland and home to a wide range of threatened bird species), with both being identified as HVANFL's rated each with 7 points;

¹¹⁴ Mr Lockhart's evidence-in-chief, paragraph [44], Agreed Bundle page 181

¹¹⁵ Agreed Bundle page 209

¹¹⁶ We have directly quoted Mr Lockhart here, but have already determined that the harbour may also be of international significance

- (e) There are flaws or inaccuracies with the scoring process, to some extent caused by placing all of the eastern harbours of the Coromandel together. Mr Lockhart considered that if Wharekawa Harbour was being assessed (as opposed to all of the eastern Coromandel Harbours) it would score a high mark under the ecology criterion and probably under expressiveness, cohesion and eminence criteria, taking it comfortably into the ONLF category.

[184] The challenges by Mr Lockhart to the Buckland report in respect of Opoutere appear to be well made. In the end however, the relevance of this argument is the degree to which it influenced (if at all) Mr Brown's assessment – a point to which we will return shortly.

The Coromandel Peninsula assessment

[185] The Coromandel Peninsula assessment is a district assessment and not a regional one, and the author was Mr Brown. The report divides the Coromandel Peninsula into 88 landscape units and categorises them as *outstanding* or *amenity landscapes*. Opoutere is divided into three units – Opoutere Beach, Wharekawa Harbour and Wharekawa Harbour Escarpment, each of which is classified as an *amenity landscape*.

[186] Mr Lockhart did not take particular issue with the criteria used in the Coromandel Peninsula assessment; but in his opinion:

- (a) the way in which the criteria were applied to the landscapes being assessed was unclear;
- (b) the weight given to each of the criterion and how the final rating is arrived at were unclear; and
- (c) he did not agree that it was appropriate for Opoutere to be divided into three separate landscape units; rather he considered it should be assessed as a cohesive, whole and single unit.

[187] Mr Brown was cross-examined about this report. There was a challenge to the method used by Mr Brown to record his ratings of the landscape (shading a column on a box), as it was contended that this method does not clearly explain what criteria inform the rating and what weight has been attached to them. We consider

this in more detail below as this method was also adopted by Mr Brown to record his assessment of Opoutere against the proposed RPS criteria, but we signal that we agree with Mr Lockhart's critique of it.

Mr Brown's involvement in the proposed RPS

[188] We have outlined above how Mr Brown was involved in the proposed RPS and as we have already outlined there is no dispute that the criteria for assessment as they have eventually evolved are appropriate. As well as developing the assessment criteria however, Mr Brown reviewed the ONFL's that had been included in Table 12-2 and he recommended that:

- (a) All of the ONFLs identified in the Buckland report should be retained, but some of the boundaries of some of them, most notably the Kaimai Ranges and Lake Taupo, should be refined.
- (b) The Waiotapu Geothermal Area and the Horohoro Escarpment and the Waikato River should be included in Table 12 -2 as regionally significant ONFLs.

[189] Apart from not agreeing to include the Waikato River as an ONFL, the Council accepted Mr Brown's recommendations.

[190] The focus of this part of our decision is to analyse whether or not the process adopted by Mr Brown in his assessment of the ONFL's in Table 12-2, when considered in conjunction with his substantive analysis, was sufficiently robust to justify his conclusion that Opoutere should not be one of them.

[191] Mr Lloyd's first challenge to the process adopted by Mr Brown was to refer to an inaccuracy in his review of submissions document. Under the heading of *Immediate Responses*, in dealing with the ORRA submission, Mr Brown wrongly (he conceded the mistake in cross-examination¹¹⁷) referred very briefly to the Kuoatunu/Rings Beach area which he had rated as an ONFL, when it was not. No explanation was given for this error and it seems to be an unusual one to make, however it is not an error that goes to the heart of the matter. We also accept that Mr Brown had come into the assessment process quite late in the piece and he was asked

¹¹⁷ Mr Brown, evidence-in-chief, page 41

to respond to submissions on the proposed RPS in a way that essentially provided a summary or report.¹¹⁸

[192] Mr Lloyd next challenged the process Mr Brown undertook in his assessment. This focussed on Mr Brown's analysis of the criteria and how he had weighted them. To begin with Mr Brown said that he had not undertaken an analysis that explored every one of the criterion in Table 12-2 in relation to this particular landscape, because he said that Opoutere does not come close to being an ONFL.¹¹⁹ If the ocean beach, the harbour and its margins are taken into account as the landscape, his opinion was that there are key elements which compromise it to such an extent that it could not be considered an ONFL. He described this as being clear.¹²⁰

[193] Mr Brown then appeared to take a different tack about the process he followed. He said that using his years of experience, he weighed up the various attributes of the landscape and reached a conclusion, summarising the different qualities and aspects of Opoutere that he considered to be important. He said that he had applied the criteria, but he had not done it in a structured manner.¹²¹ Mr Lloyd suggested that this was not a transparent approach.¹²² We agree.

[194] The appellant's next challenge was to the rating tables used by Mr Brown to record his assessment. Mr Lockhart contended that the rating tables used by Mr Brown were very similar to those used by Mr Brown in the Coromandel Peninsula assessment and were similarly flawed because there was insufficient information within them to indicate how or why the columns in these tables were shaded to the points they were, and nothing to indicate what degree of shading might qualify a natural feature and natural landscape to be outstanding.¹²³ Mr Lockhart said:¹²⁴

Ultimately how much each of the bars under each of headings is shaded is largely subjective and how much shading is required to qualify as an ONFL is unstated. In other words the tables give an impression of scientific objectivity but are in reality are (sic) very subjective.

¹¹⁸ Transcript, page 50, lines 7-11

¹¹⁹ Ibid, page 52, line 29

¹²⁰ Transcript, page 43, lines 1-4

¹²¹ Ibid, pages 51-53

¹²² Ibid, page 49

¹²³ Mr Lockhart, evidence-in-chief, paragraphs [50]-[54]

¹²⁴ Ibid, paragraph [68]

[195] Under cross-examination Mr Brown referred to the key characteristics under the shaded columns which he contended helped to summarise some of the attributes and concerns about the landscape, but he accepted that the graphs leave readers none the wiser about the criteria in the proposed RPS that had been used.¹²⁵

[196] We agree with Mr Lockhart that the summary rating tables are less than clear and are not a useful way to record the criteria in Table 12-2 that have been taken into account.¹²⁶ The importance of this is that the reader is not able to clearly identify the reasons why a conclusion about the rating of the landscape has been reached. We accept that the assessment of criteria is not a mathematical exercise, but it must be transparent, particularly for comparison purposes. We found the rating tables to be wanting in this regard.

Finding

[197] Despite the above, we are satisfied that Mr Brown reassessed Opoutere for the Court hearing with an open mind and still reached the conclusion that it did not qualify as an ONFL. In our view however, his conclusion was constrained by the approach adopted in the Buckland report and the bar set in it for regional significance, which was confirmed by the Council. We received no evidence about why the bar was set so high for the inclusion of ONFLs in the Waikato region and indeed for the coastal environment (a matter we return to). The impression we are left with is that had Mr Brown undertaken the initial assessment the bar might not have been set so high. This is important because the case proceeded on the basis that the ONFLs included in the proposed RPS must be both *outstanding* and of *regional significance* in terms of Policy 12.1 and Implementation method 12.1.1, although we note that the latter point might now be subject to debate. Mr Brown clearly felt constrained by the prior approach taken and was very fair in his acknowledgement of this during his evidence.

[198] The critical question is however where this takes us. We are satisfied that a conclusion can be reached about whether Opoutere is an outstanding landscape on the basis of the expert assessment of the criteria in Table 12-2 that does not completely depend on the rating tables, but rather the reasons given by the witnesses in evidence for their respective opinions. Our evaluation also needs to factor in that the NZCPS

¹²⁵ Transcript, page 81

¹²⁶ Mr Lockhart, evidence-in-chief, page 23

2010 was not in force at the time the initial landscape evaluation work was done, such work having effectively set the bar for *outstanding* and *regional significance*.

The application of the assessment criteria by the experts

[199] We return now to the substantive issue and the evidence about it. As we have said, we deal with the landscape inside the line delineated by Mr Lockhart on the basis that his assessment took into consideration all of the area included in Mr Brown's line.

[200] The argument by ORRA is that Mr Brown's ratings are incorrect because he did not give enough weight to ecological, socio-cultural and heritage factors which appear under the headings of *Physical Attributes* and *Associative Attributes* and over emphasised others (farming, production forestry and the presence of maritime pines) which are part of *Human ("Cultural")* characteristics included under the heading *Physical Attributes*. ORRA submitted that Mr Brown, unlike Mr Lockhart, did not assess Opoutere in accordance with the procedure he formulated in Table 12-2 of the proposed RPS.

[201] In their Joint Witness Statement the two landscape witnesses provided a comparative rating of the factors in the Table 12-2 criteria on a five point scale (Very Low/Low/Moderate/High/Outstanding). That rating scale is not contained in the proposed RPS. While the rating comparison was accompanied by a useful summary of the key attributes for each witness that informed the rating, we also need to look more deeply into the evidence and the detailed analysis that formed the basis of Mr Lockhart's assessment.

Physical Attributes

[202] Table 12-2 divides the factors to be considered under this heading in to two groups; those that are *Natural* and those of *Human ("Cultural")* origin. Mr Lockhart rated the physical attributes of the site as *Outstanding* and Mr Brown rated them as *High/Moderate (variable)*.

[203] In the Joint Witness Statement Mr Lockhart listed the key *Natural* attributes of the site as being the ecological values of the wetland and ocean spit, together with:

- a range of geographical features



- Wharekawa's salt marsh-wetland-mangroves-river-estuary sequence
- the distal spit and its very high habitat values
- the dune corridor and ocean beach – connected with open ocean, Hikinui Island, Slipper Island etc
- the strip of pines and bush fringes.

[204] In the Joint Witness Statement Mr Brown agreed with most of the elements identified by Mr Lockhart, but he considered the overall naturalness of the physical attributes and their integrity to be compromised by the exotic pines behind the beach, the forestry plantings within the wider Wharekawa/Ohui landscape, and the settlement/farming activities. He said that the spit is exceptional as a habitat, but cannot be isolated from these other physical attributes.

[205] In his evidence Mr Lockhart described the ocean beach as an extensive, undeveloped white sand beach of approximately five kilometres in length,¹²⁷ and he also described the dune system behind the beach:

... as good and as unmodified as dune system as I have seen anywhere in the Coromandel area...

And one which is:

... well coated in native grasses, primarily spinifex sericeus and pinago, the latter of which is very much in decline in New Zealand.¹²⁸

[206] Mr Lockhart referred to the dunes containing populations of the very rare dune snail (*succinea archii*) and the moko skink both of which are in serious decline and have disappeared from many other Coromandel beaches.¹²⁹ He considered that the maritime pine forest behind the dune system provided a very effective buffer between the adjoining four hectare blocks and the dune system and the beach, and he said that

... it creates a very real sense of remoteness and isolation for the beach which is both rare and attractive.¹³⁰

[207] Mr Lockhart referred to the two NZ dotterel colonies at Opoutere beach, one at Ohui and one at the sandspit, the sculptural and gothic qualities of Hikinui Island

¹²⁷ Mr Lockhart, evidence-in-chief, paragraph [23]

¹²⁸ Ibid, paragraph [28]

¹²⁹ Ibid, evidence-in-chief, paragraph [29]

¹³⁰ Ibid, paragraph [27]

and the pohutakawa covering Ruahiwiwi Point, at the mouth of the estuary or Wharekawa Harbour. Whilst acknowledging that the southern and western boundaries of the estuary comprise primarily farmland and forestry, Mr Lockhart considered its northern and eastern boundaries of the estuary to be dominated by Maungaruawahine, which he described as:¹³¹

..a visually impressive conical landform covered in mature coastal forest.

[208] Mr Lockhart highlighted the ecological significance of the estuary referring to the ecological values attached to its saltmarsh, seagrass and mangrove communities.¹³²

[209] Mr Brown accepted that on ecological values alone, Opoutere is an extremely important site.

[210] Mr Lockhart highlighted that ecologically significant areas are seriously under-represented in the table of ONFLs set out in Table 12-1. He suggested that Mr Brown had favoured the purely visual/aesthetic over the ecological in his assessment, but Mr Brown contested this. Whilst he accepted that not a single estuarine wetland environment or ecosystem has made its way into Table 12-1, Mr Brown explained that he had recommended that the area of the Waikato River that merges with the Whangamarino Swamp and the wetlands closer to the mouth of the river should be included in Table 12-1. Mr Brown told us that the hearings panel did not agree, as they considered that the river as a whole was too modified to meet the threshold set for ONFLs.¹³³ Mr Brown also told us that he had suggested that the Council should look at outstanding natural features specifically and he still thought this was a task worthy of being undertaken.¹³⁴

[211] We accept that Mr Brown took into account the ecological significance of Opoutere when assessing the landscape¹³⁵ and we also accept that ecological values are not an overriding factor, as Mr Brown pointed out.¹³⁶ The critical question is whether in the overall *landscape* analysis sufficient weight was given to the ecological significance of Opoutere.

¹³¹ Ibid, paragraph [33]

¹³² Mr Lockhart, evidence-in-chief, paragraph [33]

¹³³ Transcript pages 42-43

¹³⁴ Ibid, pages 43, 74 – 77

¹³⁵ Ibid, page 61

¹³⁶ Mr Brown, evidence-in-reply, page 99, paragraph [5]

[212] In relation to the key *Human (Cultural)* attributes of the site, Mr Lockhart relied on reports by Dr Louise Furey¹³⁷ (and Dr Nicholson¹³⁸) to substantiate what he described as a rich Maori and Pakeha history in the area.¹³⁹ He said that the area contains a large number of pa sites including Maungaruawahine and the Ruahiwihiwi headland where terracing is still evident to the naked eye, but he also referred to other early occupation sites indicated by the presence of bird and fish bones and the like. Dr Furey referred to middens of up to 700 years of age and early occupation sites in the area, the presence of which these days are a rarity on the Coromandel Peninsula and in the northern North Island. Some of these middens are visible particularly at the base of Maungaruawahine and on the estuary side of the spit. We acknowledge that neither Dr Furey nor Dr Nicholson gave evidence before us, but the references in Mr Lockhart's evidence to their earlier reports were not challenged.

[213] Mr Brown did not consider the cultural and spiritual values for tangata whenua and historical and heritage associations in his assessment of landscape.¹⁴⁰ He questioned whether these should be more appropriately addressed under s 6 (e) and (f) of the Act, but conceded that this approach would not necessarily be consistent with Policy 15(c) of the NZCPS 2010.

[214] With reference to Opoutere Village, Mr Lockhart described it as comprising:¹⁴¹

... sparse low intensity housing mainly of the traditional NZ bach type, with the houses predominantly on a hill side overlooking the estuary.

Mr Lockhart accepted that there is human settlement and production forestry in the surrounding area. He considered that these do not materially detract from the overall sense of *naturalness* imparted by the other features, such as the harbour, sandspit, Maungaruawahine and the beach, and he highlighted that little or no human development can be seen from the beach.

Aesthetic Attributes

[215] Table 12-2 next includes the heading *Aesthetic Attributes (perceptual, sensory, experiential)*. Factors to be assessed include *visual and aesthetic*

¹³⁷ Tab 9 of ORRA's submission to the Commissioners

¹³⁸ Tab 8 of ORRA's submission to the Commissioners

¹³⁹ Mr Lockhart, evidence-in-chief, paragraph [82]

¹⁴⁰ Transcript, page 56 line 27 – page 57 line 30

¹⁴¹ Mr Lockhart, evidence-in-chief, paragraph [34]

characteristics. Mr Lockhart rated these attributes as *High/Outstanding*, whereas Mr Brown rated them as *Moderate*.

[216] In the Joint Witness Statement Mr Lockhart summarised this as the combination of elements described under the heading of *Physical Attributes* experienced as one moves through the landscape. The factors under this heading include *expressiveness* and *legibility*. In his opinion the site displays high levels of both. He referred to the coastal fringe which includes mature pohutukawa transitioning into the estuary and salt marsh landscapes, together with views of the harbour that are important. He described the journey to the ocean as highly memorable; a progression that feels natural even if it is not 'natural' in the sense that landscape experts typically use the word.

[217] The Joint Witness Statement records that Mr Brown agreed with the key attributes identified by Mr Lockhart and considered that the ocean beach, combined with the spit, harbour mouth and Hikunui Island are particularly appealing and are local landmarks. However, he also considered that these values are compromised to some degree by the presence of open farmland and structures, pine forestry, the settlement, and exposure to smaller scale pockets of development (including the edge of the camping ground).

[218] In his evidence Mr Lockhart quoted excerpts from the Coromandel Peninsula assessment about the *expressiveness* of Opoutere with which he agreed. He referred to the interplay between the coastline and the ocean heightened by the remoteness of the beach, and expressive nature of the incoming and outgoing tide from the estuary, and the combination of the two. Because of its wildlife reserve and its relative lack of development, he said that there is an ability to appreciate the '*web of life*' at Opoutere - that phrase having been used by Dr Nicholson in his report.¹⁴²

[219] Mr Lockhart also described highly visible *transient values* and as examples of this, he referred to the ebb and flow of the tide and the coming and going of migratory birds particularly in the dotterel colonies. He said that the close connection and interest that the local community has with the dotterel colonies is an additional factor that that should be taken into account. He referred to local volunteers being involved in counting chicks and being rostered to watch over the chicks when they are young.

¹⁴² Dr Nicholson report, page 2 (no paragraph numbers provided in report)

[220] When dealing with *legibility* as a factor, Mr Lockhart described the area as a collection of distinctive landmarks and features that are arguably individually outstanding, but in his opinion most certainly outstanding when considered together. He noted that neither the Buckland report nor the Coromandel Peninsula assessment refer to Hikinui Island and Ruahiwihiwi Point, both of which are striking and memorable landforms in their own right, and he also noted that the Buckland report does not mention Maungaruawahine or the 5km long white sand beach.

[221] Another factor referred to under this heading is *picturesqueness/composition*. Mr Lockhart considered Opoutere to be highly picturesque. He specifically mentioned the presence of water of contrasting character (still waters and the ribbon of water left in the channel at low tide in the estuary, waters at the mouth and the surf waves of the ocean beach). He considered the combination of openness (the beach) and enclosure (the estuary enclosed by hills) to be distinctive and memorable.

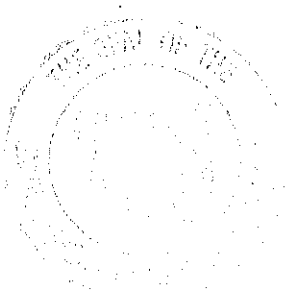
[222] In terms of *coherence* (the manner in which different elements relate to each other)¹⁴³, Mr Lockhart considered that the Opoutere landscape should include as a single cohesive unit the area marked on the map attached to his evidence-in-chief as Annexure 1. He said that Opoutere is a place that is very much the sum of its parts. In his opinion, the estuary is connected to the beach physically by the sandspit, but also by the ebb and flow of the tide and the dotterel colonies that occupy both the estuary and the beach sides of the sandspit and the other or Ohui end of the beach. Mr Brown considered that the level of *coherence* is variable, in places quite low – especially around Wharekawa Harbour and both ends of the ocean beach.

Associative Attributes

[223] *Associative Attributes* are described in Table 12-2 as *values or meanings associated with a landscape* and there are number of factors to be assessed under this heading. Mr Lockhart rated the associative attributes of the site as *Outstanding*, whereas Mr Brown rated them as *High*.

¹⁴³ The decisions version referred to coherence (and the Table 12-2 criteria are not exhaustive), as follows:

Coherence / Unity: reflecting the degree to which the landscape is visually cohesive, without discordant elements that adversely impact on its key characteristics and features, eg. subdivision high on the flanks of an otherwise predominantly 'natural' range or volcanic cone.



[224] In the Joint Witness Statement Mr Lockhart referred to the combination of Opoutere's physical attributes, which in his opinion, because of the area's historic and natural features, creates a unique coastal experience; an experience which he said is becoming increasingly rare. He described this experience as culminating in the ocean beach, where one experiences a sense of isolation; an experience which he said differentiated this beach from most of the Coromandel's other more settled beaches.

[225] In the Joint Witness Statement Mr Brown agreed that Opoutere Beach has considerable appeal, but less so the Wharekawa Harbour catchment. In his opinion identity/*sense of place*, *naturalness associations* (wilderness etc) and other associative values are diminished somewhat by the various land uses and structures that intrude into parts of the landscape. He regarded the ocean beach as being similar in some respects to Hot Water Beach and Waikawau Bay, both of which have extensive ocean beaches, although these are currently subject to remediation of their dune systems and Hot Water Beach is also exposed to forestry at its northern end and a settlement at its southern terminus.

[226] Overall, Mr Lockhart's opinion was that there are strong *naturalness associations* evident at Opoutere because of the ecological values evident there, the estuary and sand spit, and the undeveloped white sand beach backed by the maritime pine forest. He disagreed with Mr Brown that this forest, which he described as well-established and possibly part of Opoutere's socio-cultural history, detracts from the experience, memorability or the naturalness of Opoutere. He said that the forest creates a sense of isolation and remoteness and associated tranquillity and that there are few places left in the Coromandel in which those feelings can be experienced, making Opoutere in general and the beach in particular, memorable. He considered the length, attractiveness and lack of development on Opoutere's white sand beach to be striking and now rare on the Coromandel and in New Zealand. He described these characteristics as the essence of what he termed *the Opoutere experience*.

[227] On *sense of place* Mr Lockhart considered Opoutere in many ways to be the quintessential Coromandel experience, exhibiting a sense of how the Coromandel used to be.

[228] Mr Lockhart referred to the factor entitled *recreational uses*. He described these as being fundamentally quiet and low impact activities based on landscape qualities, identifying bird watching, fishing, shellfish gathering, kayaking, sailing of small craft and particularly walking as examples. He also referred to the track to the

summit of Maungaruawahine, multiple tracks through the forest behind the beach and the beach itself and he said there is a five knot speed limit over the whole of the estuary/harbour discouraging boating activities that are inconsistent with the overall quietness and tranquillity of Opoutere.

[229] In terms of *emblematic attributes* Mr Lockhart mentioned the reserve in the village dedicated to Michael King, the well-known NZ historian and author who lived and wrote at (and about) Opoutere until his death. He referred to a Bill Manhire poem entitled “Opoutere”.

Other matters

[230] As the criteria make clear, the list in the Table 12-1 is not exhaustive and other factors may be relevant and have greater or lesser weight depending on the circumstances.¹⁴⁴

[231] Mr Lockhart said that when landscape assessments are done, for consistency reasons there need to be comparisons carried out with other similar landscapes and Mr Brown did not seem to disagree. Evidence was given about Pakiri beach in the Auckland Region by Mr Brown. Mr Lockhart argued that Mr Brown had supported the inclusion of Pakiri beach as an ONFL in the Auckland Region, but it had large tracts of production forestry and farmland behind it.

[232] In cross-examination Mr Brown said Pakiri beach stretches for approx 20 km (compared with 5 km for Opoutere) and has a dune system that is well formed and culminates in the Mangawhai Heads, a major feature within and next to the Auckland Region. However he agreed that the pine forest behind it does not contribute positively to the values of the landscape.¹⁴⁵

[233] Mr Brown referred to the reasons for including Pakiri beach as an ONFL. He said that Pakiri beach, although nothing special in its own right, is an ONFL because it is the only major ocean beach down the eastern Auckland Region’s eastern coastline that remains substantially unaffected by settlement and other forms of overt development.¹⁴⁶ Picking up on this, Mr Lockhart contended that, like Pakiri beach, Opoutere beach is surrounded on all sides by intensively developed beaches and

¹⁴⁴ Note 2

¹⁴⁵ Transcript, page 73

¹⁴⁶ Mr Brown evidence-in-chief, paragraph [49]

coastline, because immediately to the north are Tairua and Pauanui and to the south are Onemana and Whangamata, however in cross-examination Mr Lockhart accepted that Opoutere is *relatively undeveloped*, not *undeveloped*.¹⁴⁷

[234] Mr Lockhart also considered that Opoutere is no less worthy than the three other areas of the Coromandel coast that have been scheduled as ONFL.

[235] Mr Lockhart also considered the *night-time values*. He said he had stayed at Opoutere overnight on many occasions and could attest to the clarity of the night sky and the silence of the night apart from hearing sounds associated with the estuary and the beach, all evident because of the relatively sparse residential settlement in the area.

Are the landscape values at Opoutere outstanding?

[236] In terms of the ONFL thresholds (whether a landscape is *conspicuous*, eminent, especially because of excellence, and remarkable, and therefore outstanding),¹⁴⁸ Mr Lockhart considered that the sum of Opoutere's parts make it an ONFL, but Mr Brown disagreed. Mr Lockhart's opinion (as expressed in the Joint Witness Statement) was that Opoutere combines a number of quintessential elements including the estuary edge with its mature pohutukawa and meandering road, arrival at the estuary, then the transition to the ocean beach to create what he described as a unique coastal landscape in the context of the Waikato. Mr Brown's opinion was that these values are compromised by an awareness of the settlement and production forestry (in particular) at Opoutere's gateway.

[237] In relation to the landscape values of Opoutere beach and spit, Mr Lockhart considered these to be outstanding. He agreed with Mr Brown that the key characteristics of Opoutere beach and spit are as follows:¹⁴⁹

Both the beachfront and its distal spit are strongly articulated, dramatic, and highly appealing features. Their profile and high aesthetic/recreational value are complemented by the off-shore islands, forested headland at the northern end of the beach and the primary dunes that flank – and enclose – the beachfront.

¹⁴⁷ Transcript, page 35, line 34

¹⁴⁸ *Wakatipu Environmental Society Incorporated and others v Queenstown-Lakes District Council*, C180/99 at paragraph [82]

¹⁴⁹ Mr Brown, evidence-in-chief, page 24, paragraph [48], and Mr Lockhart, evidence-in-chief, page 197, paragraph [116], Bundle of documents

[238] However, the two differed in terms of the effect of land use on the landscape values of Opoutere beach and spit. Mr Lockhart considered the values subtly undermined by the presence of production forestry, farming and settlement in the surrounding environs, but not to the extent that the beach is anything less conspicuous, eminent, excellent and remarkable. Mr Brown disagreed. He considered the values were subtly undermined by the dominant pine forest behind the beach and the signs of both production forestry and to the south pastoral activities on rising hill country that frames both ends of the beach. He was also of the opinion that on the spit next to the mouth of Wharekawa Harbour both these signs of modification and development within the Opoutere settlement become much more apparent.

[239] Although Mr Milne suggested to Mr Lockhart in cross-examination that the landscape elements he described are common elsewhere, Mr Brown did not disagree with much of Mr Lockhart's analysis and neither do we. In attempting to summarise the key differences between the assessments of the two witnesses Mr Brown's rebuttal evidence states¹⁵⁰:

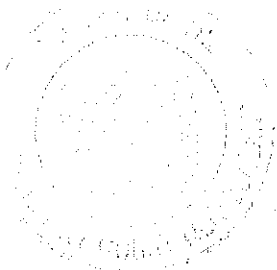
... it is my opinion that Mr Lockhart focuses excessively on particular components of the Opoutere/Wharekawa Harbour – the ocean beach, spit and harbour area – without sufficient regard to those components that have an adverse effect in terms of the greater whole, including: the locality's pine forestry, its harvested areas, farming activity, the maritime pines behind the ocean beach, and the Opoutere settlement with its attendant roading, power lines, boat ramp and other infrastructure.

These elements ultimately limit the biophysical naturalness of the Opoutere landscape, together with its perceptual/aesthetic values and overall appeal – both in terms of the original Table 12-2 assessment criteria [and those criteria now agreed by consent order]. ...

Turning to the Joint Expert Witness [Statement] it is notable that Mr Lockhart's ratings are consistently higher than my own In my opinion, this ultimately distils down to Mr Lockhart having a stronger focus on Opoutere's spit area and ocean beach, whereas my analysis remains informed to a greater degree by surrounding areas of land and activity – both within the Opoutere/Wharekawa landscape and on its visible margins – that impart a sense of modification and development that erodes the overall character and value of the Opoutere landscape.

In this context I can only reiterate that I agree this landscape retains some natural elements that are very special; yet, this does not outweigh or supersede the influence of productive activities, the existing settlement, and other areas of residential development when looking at this landscape 'in the round'. As a result, I still do not believe that it meets the 'outstanding' threshold associated with the other ONFLs identified in Chapter 12 of the PWRPS.

¹⁵⁰Mr Brown, rebuttal evidence, page 100, Bundle of documents

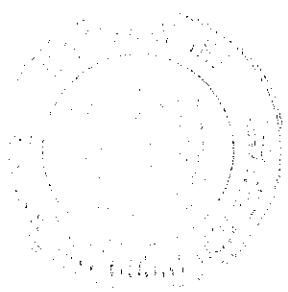


[240] Mr Brown's evidence is persuasive that the whole of the area proposed by Mr Lockhart is not *outstanding* in terms of the assessment criteria that now effectively form part of Table 12-1 in the proposed RPS, but we find there is sufficient evidence to justify a finding that part of it, namely the Opoutere ocean beach and spit, is *outstanding*. We are mindful that Mr Brown's view was that the ocean beach and spit area came very close to being an ONFL. We also note the Beca report of 9 September 2013 attached to Mr Brown's evidence when dealing with the ONFL threshold described the white silica sand of Opoutere beach as *iconic* (the threshold in the proposed RPS at that time) in the context of the Coromandel itself.¹⁵¹

[241] Our site visit was instructive and our own observations about the beach and spit confirm the key characteristics of it that Mr Lockhart described and are listed above. The sense of naturalness described by the experts was evident and there is definitely a sense of remoteness from human development experienced from almost the entire beach. We agree with Mr Lockhart that it is uncommon to find such an undeveloped beach on the Coromandel Peninsula. As to the presence of the maritime pines, they should not be treated in our view in the same way as production forestry. We are not aware of any plans to remove them, and although not indigenous, we agree with Mr Lockhart that they do not detract from the naturalness of the beach and spit but add to their aesthetic and associative attributes. As well, whilst there is some development near the Ohui end of the beach, it is nothing like the developments that are backdrops to beaches to the north and south of it. This is a factor that should be given more weight than Mr Brown gave it.

[242] In relation to the estuary however, we cannot ignore the presence of farming and production forestry which was a relatively strong visual element within the surrounding landscape. We are satisfied that Mr Brown properly took into account the ecological values of the estuary in his assessment, but we agree that from a *landscape perspective* the presence of the other strong visual elements we have referred to, even if coupled with the socio-cultural factors mentioned earlier, mean that this area cannot be considered *outstanding*. It may be that a more nuanced approach with assessment criteria for natural features would result in a different outcome; and we have noted our unease about this, however we have concluded that it is not an option open to us to pursue.

¹⁵¹ Page 62, paragraph [2.4], Bundle of documents



Is Opoutere (part or all of it) regionally significant?

[243] There was a considerable amount of evidence addressed at whether or not Opoutere could be said to be regionally significant from a landscape perspective.

[244] Mr Lockhart referred to three other areas of the Coromandel coast scheduled in Table 12-1 as ONFLs and did not take issue with these, but considered that Opoutere is no less worthy of inclusion. He said that Cathedral Cove is self-evidently included because of its dramatic cathedral-like cliff faces and rock formations, but it is modified by its pathways and car/bus stops and inferentially, because of its attraction to visitors, it does not engender a sense of remoteness or isolation. In cross-examination, Mr Brown mentioned other factors that justified the inclusion of the Cathedral Cove and surrounds.¹⁵² Mr Lockhart said that Mr Brown has a preference, exclusively it would seem, for the large, obvious landscapes and appeared to exclude from consideration smaller landscapes, like Opoutere, that require a more nuanced assessment.

[245] As well as referring to Pakiri beach, beaches within the Coromandel Peninsula that had not been included as ONFL's were referred to in evidence. Mr Brown referred to New Chums Beach and even much of Hot Water Beach as undeveloped beaches surrounded by well-developed beaches.¹⁵³ Mr Brown considered that other less modified beaches, such as those found within Waikawau Bay and at New Chums Beach to be more natural, expressive, isolated and overall unique at the regional level. He felt that those beaches come closer to being *outstanding* at the regional level than Opoutere and the Wharekawa Harbour. In his opinion, Opoutere is a 'step' below these other beaches when evaluated against the agreed criteria. Mr Brown considered Opoutere to be less than an ONFL in terms of the Waikato Region.

[246] Whilst we accept that comparisons are helpful in a general way, they are not determinative and at times not particularly useful because each landscape will be different. However, there is a further reason for questioning the basis of the comparisons made in this case which we now go on to discuss.

[247] Mr Brown gave evidence that he considered the bar had been set quite high and that he would have set it lower and included more areas as ONFL if he had done

¹⁵² Transcript, page 76

¹⁵³ Ibid, pages 76 – 77

the initial work.¹⁵⁴ He said that some regionally important landscapes had not currently been captured including possibly New Chum's Beach and Waikawau Bay. When asked by the Court whether a lower bar would have included either the beach or the spit, or the harbour, Mr Brown said that it would not have included the harbour, but it might have included the beach.

[248] In his opening submissions for ORRA, Mr Lloyd referred to Mr Brown's acknowledgement that the bar for ONFL's was set at a high level and he posed the following questions:

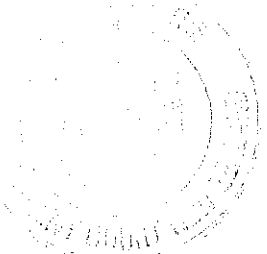
- (a) Why should the bar have been set so high?
- (b) Who dictated that we should be so parsimonious with what qualifies as an outstanding landscape?

[249] There is nothing in the proposed RPS to explain why the bar has been set at such a high level, but it is clear to us, that Mr Brown felt constrained to follow the approach taken in the Buckland report. As a result, his analysis in relation to Opoutere started with the focus on exclusion rather than inclusion and seemed to be heavily weighted with reference to the other landscapes that had been included in Table 12-1, most of which were not in the coastal environment. We do not consider that applying the same approach to identifying the values and characteristics of outstanding natural features and characteristics in the *coastal environment to the region generally*, adequately gives effect to Objective 2 and Policies 7 and 15 of the NZCPS 2010. It follows that the exclusion of New Chums Beach and Hot Water Beach from Table 12-1 cannot be used as a reason for not including the ocean beach and spit at Opoutere.

[250] Accordingly, the inference we reach from Mr Brown's evidence is that absent the bar which focussed on the whole of the region not the coastal environment within the region and which we have found constrained his approach, he may well have considered the beach and the spit to be outstanding within the region's coastal environment.

[251] It was put to Mr Lockhart that he did not undertake a regional landscape assessment as part of his evidence. The inference we were indirectly being asked to draw from this, was that absent such an assessment Mr Lockhart was not in a position

¹⁵⁴ Ibid, pages 91-92



to form an opinion about the regional significance of this landscape. We have already referred to the need in our view for Opoutere to be assessed in relation to the region's *coastal environment*. In this regard, the evidence of both experts focussed on comparative coastal environments within the Coromandel Peninsula, rather than for example those on the west coast. Because of both these things, we do not find the evidence of either expert much help on this aspect of the case.

[252] In relation to the beach and spit however, there is a wildlife refuge, and we have the ecologists' evidence that the avian values present are nationally significant, and there are also the other terrestrial values associated with the dunes. The beach and spit landscape that support these values are significantly natural and undeveloped. We consider that we are able to draw from this evidence to support our conclusion that the beach and spit are a regionally significant landscape.

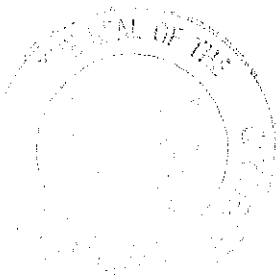
Conclusion

[253] For the reasons we have outlined above, we find the beach and spit to be an outstanding landscape, and therefore an ONFL in terms of the proposed RPS. As to its regional significance (leaving to one side that this may not be the correct test), we find that the bar for the selection of an ONFL in the context of the Waikato Region was set very high at a time well before the finalisation of the NZCPS 2010, which requires identification of outstanding landscapes to be done in the context of the coastal environment of the region. We are satisfied that there is sufficient evidence to establish that the beach and spit are significant within the Waikato regional coastal environment.

[254] We find that including Opoutere beach and spit in Table 2-2 of the proposed RPS as an ONFL would be an important step in recognising and providing for the protection of it as required by s6(b) and Policy 15 of the NZCPS 2010.

[255] In the light of this finding, we need to determine exactly where the boundaries of the ONFL for the beach and spit are on a map suitable for inclusion in the proposed RPS. We conclude that the two landscape experts should confer on where the line should be drawn to demarcate that ONFL. When questioned we note that Mr Lockhart said that the ONFL should include the areas experienced from the beach and extend south across the harbour entrance.¹⁵⁵

¹⁵⁵ Transcript, page 43



[256] The s32 report on submissions carried out by the Council staff recommended that ORRA's submission that Opoutere be recognised as an ONFL be rejected in the following terms:¹⁵⁶

Field assessment of the areas identified in the submission by a landscape architect indicates that even though the Opoutere spit and ocean beach are highly distinctive and attractive, this part of the Coromandel Peninsula is currently too affected by both residential settlement, production forestry and wilding pines – including their spread along the immediate beach hinterland and over nearby headlands - to qualify as an ONL. Although significant at the local/district level, the subject area is not identified as a proposed ONL in the recent (2007-2011) district assessment and this landscape is not considered sufficiently 'eminent, remarkable, or outstanding at the regional level.

[257] In terms of the matters we need to turn our attention to under section 32, we are not required to address the objectives, policies or even implementation methods of the proposed RPS for outstanding natural features and landscapes. We are evaluating whether an additional ONFL should be added to Table 12-1 and its mapped extent shown on the overview map (Map 12-1A) and an additional more detailed map (a new Map 12-16). The landscape experts gave evidence on the basis of factors and an outstanding threshold set out in Table 12-2 of the proposed RPS in the draft consent order. We have already noted that a note to Table 12-2 makes it clear that those factors are not a list or exhaustive.

[258] As will be apparent, after extensive evidence including cross-examination, we have come to a different conclusion from that which was made at the first instance. We are satisfied that Opoutere beach and spit are an ONFL and should be included as such in the proposed RPS.

Overall conclusion

[259] We conclude that the purpose of the Act will best be achieved by the decision we have made, which is to identify the following areas in the proposed RPS:

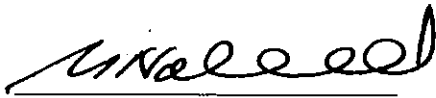
- (a) The mapped area identified by Mr Kessels in Exhibit 3 as an area of ecological significance (or similar nomenclature), including any explanation thought necessary (see paragraphs [105] to [107]; and
- (b) The ocean beach and spit as an ONFL in Table 12-1.

¹⁵⁶ EW staff report on submissions, volume 2, page 264

[260] We direct the parties to confer and provide the Court with the appropriate maps to accord with our decision. There will need to be some discussion about whether or not the Ruahiwihiwi headland, Hikinui Island and Mototaua Rock should be included (our tentative view is that they should), but if the parties are unable to agree we will determine this matter and any other dispute about the extent of the ONFL at a later date.

SIGNED at AUCKLAND this ^{9th} day of ^{June}2015

For the Court



M Harland
Environment Judge

