

We, Victoria Casey QC and Vanessa Evitt certify that this submission is suitable for publication.

**IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI**

SC 6/2022

BETWEEN

PORT OTAGO LIMITED

Appellant

AND

ENVIRONMENTAL DEFENCE SOCIETY INC

First Respondent

OTAGO REGIONAL COUNCIL

Second Respondent

**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF
NEW ZEALAND INC**

Third Respondent

MARLBOROUGH DISTRICT COUNCIL

Fourth Respondent

**WAKA KOTAHI OUTLINE OF ORAL SUBMISSIONS
AND ANNEXURES**

Dated: 12 May 2022

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MAY IT PLEASE THE COURT:

Road map

1. Issues raised in Day 1.
2. Overlapping issues between the EWL and Port Otago appeals.
3. Response to RFB apparent change in position between the EWL appeal and this appeal – ‘material harm’? – annexure 1.

Issues raised in Day 1

4. Waka Kotahi’s position on “have regard to”: it is *possible* under Part 6 for a proposal to be consented even if it cannot avoid all adverse effects covered by the ‘avoid’ policies, but the strongly directive policies will be central to the consenting inquiry, and they set a high threshold / place a significant burden on an applicant to justify this. (*RJ Davidson*, *TTR* on the NZCPS (CA) and s 10(1)(a) of the EEA Act (SC)). See also Auckland Council submissions [3.4], noting annex on scope of SEA-M in Auckland CMA.
5. Such consents will be the exception.
6. Consents that allow for material harm to a protected value that is not able to fully mitigated, remedied or offset by conditions will be vanishingly rare. The EWL is not in that category.
7. Whether the high threshold of justification is met is to be measured not by a blanket and undefined test of ‘necessary’ (which is not present in the RMA) but by reference to the ‘fair appraisal’ (*RJ Davidson*) or ‘balancing’ (*TTR*) of the relevant objectives and policies. These are nuanced and carefully calibrated policy statements (from Part 2 and the National Policy Statements downwards) that guide the decision maker in assessing in what circumstances a particular proposal might be consented even though it cannot avoid all adverse effects to a protected value. Guidance is found in the NZCPS itself (eg Objective 6 and Policy 6), and see also for example the guidance in AUP F2.2.3 (reclamation) and E26 (infrastructure) – annexure 2.
8. Many of these are enabling or ‘recognition’ or ‘provide for’ policies, which must be given appropriate weight: ref NZCPS RIS (WK submissions [3.21] – [3.22], and fn 27). They do not incorporate and would be defeated by an additional lens of ‘necessary’.

9. Justification also does not mean that one policy trumps another: where the avoid policies are engaged they remain engaged even if in the circumstances of the particular case other policies support consent being granted despite the proposal failing to avoid all adverse effects. Waka Kotahi agrees that the proposal should be closely scrutinised to ensure that all adverse effects are avoided to the extent practicable, as well as consideration of conditions to mitigate, remedy or offset any unavoidable adverse effects.
10. This is the approach that the Board took in the EWL consent.

The overlapping issues between the EWL and Port Otago appeals

11. Two key overlapping issues:
 - 11.1 “Avoid” means absolute veto. CA in *Port Otago* does not address the question directly but infers this as a binding ratio from *King Salmon*.
 - 11.2 Obiter observations by CA in *Port Otago* that this absolute veto applies in Part 6 consenting decisions, suggesting some sort of binary mandatory ‘strike out’. In other words, that the decision maker has no power to grant a consent for an activity that fails to avoid the specified adverse effects, even if granting the consent would meet the objectives of s 5 and Part 2 of the RMA.
12. Waka Kotahi’s position on first issue (‘avoid’ = absolute veto):
 - 12.1 Agrees with CA in *Port Otago* that this was not the intention of the Minister, cf also the 2010 RIS for the NZCPS: WK subs [3.14] – [3.16].
 - 12.2 The text of NZCPS does not support an interpretation that sets an absolute and overriding veto in the four areas of natural character, natural landscapes, indigenous biodiversity and surf breaks: WK subs [3.17] – [3.25]. (Noting counsel for ORC incorrect – surf breaks are not a matter of national importance under s 6).
 - 12.3 Basic principles of administrative law also speak against such an interpretation: WK subs [3.48] – [3.54].
 - 12.4 Interpreted as imposing absolute vetoes in these four areas, the NZCPS would be unlawful:
 - 12.4.1 The RMA does not authorise the Minister to set an absolute veto through the NZCPS (as opposed to specifying restricted

coastal activities in the NZCPS, or setting prohibitions in the National Environmental Standards): WK subs [3.25] – [3.38].

12.4.2 An NZCPS that absolutely in all circumstances prioritised values in the areas of natural character, natural landscapes, indigenous biodiversity and surf breaks over all other considerations would be contrary to s 5, fail to have proper regard to the other matters of national importance (s 6) and the matters specified in ss 7 and 8, and fail to meet its own objectives in s 56: WK subs [3.40] – [3.47].

12.5 *King Salmon* did not finally determine this point: WK subs at [3.56] – [3.62].

13. WK position on second issue (the impact of the ‘avoid’ policies under Part 6 – “have regard to”):

13.1 The correct approach to consenting decisions under Part 6 is that outlined by this Court in *Trans-Tasman Resources* in relation to s 10(1)(a) of the EEZ Act 2012 (equivalent to s 5 RMA), by the Court of Appeal in *TTR* in relation to the direction to “take into account” the NZCPS.¹ This is also consistent with *RJ Davidson*, which confirmed post-*King Salmon* that Part 6 still allowed scope for the exercise of expert judgement by the decision maker, albeit in less complex cases the answer may be clear. WK agrees that ‘overall judgement’ in the pre-*King Salmon* sense (the ‘shopping list’, considering and putting to one side) is not correct. WK subs [3.7] – [3.13].

13.2 The obiter observations relating to Part 6 by the CA majority in *Port Otago* were not fully considered: the majority seem to import (without discussion) the same approach that this Court took to discharge and dumping activities governed by s 10(1)(b) of the EEZ Act, which is in very different terms. The proposed approach also appears to be internally inconsistent: WK subs [2.5] – [2.6], [3.64] – [3.66].

13.3 The observations of the majority in *Port Otago* on the distinction between ‘activities’ and ‘effects’ under the RMA are also incorrect: the RMA framework classifies activities and provides for consents for

¹ Under s 59(2)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

activities *on the basis of their effects*, and the distinction drawn is without real meaning: WK subs [2.7], illustrated by the AUP provisions – annexure 3.

14. Waka Kotahi's position overall:

14.1 'Avoid' is a nuanced word and does not mean absolutely prohibit in all circumstances and at all costs. The NZCPS contains strong policy directives, not absolute prohibitions.

14.2 It is possible under Part 6 for a proposal to be consented even if it cannot not avoid all (or more than minor or transitory) adverse effects covered by the 'avoid' policies, but the strongly directive policies set a high threshold / place a significant burden on an applicant to justify this.

14.3 There is no environmental utility in assessing an activity's effects without also considering whether adverse effects can be mitigated, remedied, or offset through conditions. Sections 104 and 171 also require this as a matter of law.

Annexure 1: Response to RFB submissions - RFB appears to have changed position

1. The Court will recall the key uncontested conclusions of the Board of Inquiry in EWL that the modifications to the proposal and the increased mitigations and offsets developed through the consenting process “at least balance” the adverse ecological effects, and that the proposal “will achieve” the purpose of sustainable management.²
2. It was central to RFB’s appeal in EWL that these conclusions - while not contested in fact - were insufficient in law, because (RFB says) the ‘avoid’ directives bite *before* consideration of any mitigation, remedy or offset (in contrast to ‘more lenient’ policies that refer to “avoid, remedy or mitigate”).³ Ms Gepp for RFB in oral submissions in the EWL appeal confirmed RFB’s position:
 - 2.1 Under the NZCPS infrastructure under Policy 6 and reclamation under Policy 10 is allowed only where it would not have the adverse effects that Policy 11 precludes;⁴
 - 2.2 This is not a matter of a high threshold or significant burden on the applicant, but an absolute prohibition;⁵
 - 2.3 Minor or transitory adverse effects can be allowed by ‘reading in’ a proviso to the word “avoid”,⁶ although “avoid” cannot allow effects that are subsequently mitigated or remedied, given the contrast in language in the cascading policies.⁷ Nor can a decision maker have regard to offsetting or whether effects are “dealt with in some other way” – the only question is whether there is “harm in the raw”.⁸ Thus it was an error of

² See BOI [614] and [1396], SC25/2021 transcript at p 5. The potential effects of most significance were in relation to: (a) impact on rare vegetation sequence through piers holding up viaduct in Anns Creek SEA-T; and (b) Impact on (especially) migratory birds through loss of habitat (not breeding grounds) from reclamation along Mangere Inlet foreshore in SEA-M2 (note no reclamation in the more vulnerable Anns Creek SEA-M1 as the EWL lifts onto viaduct to avoid that). In terms of NZCPS Policy 11 (biodiversity) the highest order values engaging the strongest protection (para 11(1)(a) ‘avoid’) and the lower order values para 11(1)(b) ‘avoid significant’ and ‘avoid, remedy or mitigate other’) broadly but not entirely align with the SEA-M1 and M2 classification. The SEA-T (territorial) may encompass both. See Auckland Council submissions in EWL appeal 29 October 2021 at [4.24], [4.25] and [4.11]. Auckland Council submissions in this hearing annex maps showing the extent of the SEAs in the Auckland region.

³ Confirmed in RFB EWL reply submissions 29 October 2021 at [9].

⁴ Transcript at pp 17-18 (policy 6) and 23 (policy 10).

⁵ At p 26.

⁶ At p 24.

⁷ At pp 31 and 32.

⁸ At pp 53 and 111, see also pp 202 -203, 205.

law for the Board to take into account mitigation, remedy or offsets where the avoid policies applied.

- 2.4 RFB acknowledged that the Board had concluded that adverse effects in the SEAs that have not been avoided will be adequately mitigated or offset, but submitted that this breached the “avoid” policies, which did not allow regard to be had mitigation or offsetting.⁹ If actual harm occurs at any stage in the process, the ‘avoid’ directive is contravened.
3. At the end of the EWL hearing, in oral reply submissions, Ms Gepp appeared to adjust position slightly, stating that conditions that mitigated adverse effects would be relevant,¹⁰ but went on to say that offsetting and remediation could *not* be taken into account.¹¹ Ms Gepp did not explain how a strict interpretation of “avoid” *as contrasted with* “avoid, remedy or mitigate”, which is the core of the RFB’s textual based argument, could include mitigation.
4. Ms Gepp in oral reply also expressly distinguished the ‘avoid’ directive with the ‘protect’ directive considered by this Court in *Trans-Tasman Resources*, saying that the ‘avoid’ directive does not allow consideration of remediation or other methods by which the harm to the environment is reduced.¹² RFB’s position in the EWL appeal was that the ‘avoid’ directives are stronger than s 10(1)(b) of the EEZ Act as the NZCPS prevents any harm occurring at all, while the EEZ Act allows harm to occur, provided it can then be remedied or mitigated to a level below ‘material’.
5. RFB in the present appeal appears to have radically changed position. In its written submission in this hearing (filed after WK’s submissions), RFB is initially aligned with its position in EWL that the effects to be avoided “are unlikely to include minor or transitory adverse effects” as this is “improbable” to be required by the avoid policies.¹³ However, RFB also now appear to equate the required threshold as being “consistent with” the threshold of “material harm” described by the Court in *TTR* in relation to s 10(1)(b) of the EEZ Act.¹⁴

⁹ At p 100 (confirming at p 5 that this is uncontested), referring to BOI [704] – [706] (316.04156), see also [731] more generally (316.04162).

¹⁰ At p 388.

¹¹ At p 389 – 390, 393 and 394.

¹² At p 394.

¹³ RFB EWL submissions at [16], see also RFB Port Otago submissions at [67] and [92].

¹⁴ RFB Port Otago submissions at [66] - [67], fn 30.

6. The concept of “material harm” adopted by the Court in *TTR* is not the same as minor or transitory harm.¹⁵ The concept of “material harm” is wholistic, taking into account the full context of the proposal.¹⁶ It requires an overall assessment of the activity once all conditions, mitigation, remediation (including remediation in the future) and offsetting are taken into account,¹⁷ which is the very basis upon which Ms Gepp for RFB sought to distinguish that approach.
7. RFB’s change of position appears to be critical to the RFB appeal against the EWL consents and NORs, in two respects:
- 7.1 While it seeks to avoid irrationality (as this Court indicated in *Sustain Our Sounds*¹⁸), the introduction of the threshold of ‘material harm’ into the ‘avoid’ policies is not justified on the language of the policies: as Ms Gepp submitted for RFB in EWL, it ‘collapses’ the distinctions drawn by the language.¹⁹ Waka Kotahi’s submission has been that the contrasting language in the policies makes sense and can be rationally understood as *policy directives* indicating the strength of desired protection, but do not make sense as strict rules. RFB’s change of position appears to acknowledge the problem that arises if these are read as strict rules, but its proposed solution to add this type of proviso to the strict rule is not open on the face of the wording of the cascading policies in the NZCPS.
- 7.2 If the Court accepts RFB’s new approach to the ‘avoid’ directives and applies the framework seen in s 10(1)(b) of the EEZ Act to Part 6 of the RMA then, on the uncontested findings of the Board, the EWL NORs and consents as a matter of fact meet that threshold. If the threshold is *TTR*’s concept of ‘material harm’ and all offsetting, mitigation and remediation were to be considered, then the EWL proposal falls well within that envelope.²⁰ Indeed, if mitigation and offsetting is taken into

¹⁵ In RMA terms, ‘material’ sits on a continuum somewhere between ‘minor or transitory’ and ‘significant’.

¹⁶ *TTR* at [6], [253] and [255], [293], [316], [318].

¹⁷ Overturning the Court of Appeal on this point: see *TTR* at [63], [84], [252], [254], [256] – [260], [293].

¹⁸ *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [143].

¹⁹ RFB EWL reply submissions 29 October 2021 at [9].

²⁰ The uncontested factual conclusion of the Board that the mitigations and offsets in relation to the protected values “at least balance” the adverse ecological effects of the proposal is directly equivalent to an assessment that overall there is no material harm to the protected values: BOI at

account then, in respect of the ecological values canvassed in this appeal, the EWL proposal would also meet an overall threshold of “less than minor” adverse effects, as the Board’s findings indicate: see annexure 4. RFB’s appeal in EWL was predicated on it being an error of law for the Board to take those conditions into account all.

8. If, as it appears, RFB now take the position that it was not an error of law for the Board to take into account conditions providing for remediation, mitigation and offsetting, and that it is not an error of law for the Board to grant a consent where it is satisfied that there is no “material harm” to the protected values, then its appeal in EWL cannot succeed on the facts.
9. As a matter of general approach, however, Waka Kotahi confirms its broader position that the proposed framework put forward by RFB is wrong in principle, as is the suggested consenting decision framework outlined in the obiter observations of the CA in *Port Otago*. The strongly worded policy directives do not create a binary ‘strike out’ framework under Part 6 of the RMA. Rather, they place a high burden on the applicant, and a proposal that fails to fully avoid adverse effects on the specified values must be strongly justified (in terms of all relevant policies, s 5, the other matters of national importance under s 6, and Part 2 overall).
10. Nor – unlike s 10(1)(b) of the EEZ Act - is the burden on the applicant and the inquiry by the decision maker directed only at the overall *end result* (so that avoidable harm to the specified values is acceptable provided it is later remedied, offset or mitigated). That would defeat the core purpose of the ‘avoid’ directives.
11. Respectfully, there was no error of law in the approach taken by the Board in this case. In terms of ecological effects, the Board was satisfied that adverse effects on the specified values had been avoided to the greatest extent practicable,²¹ and that the unavoidable effects were mitigated and offset to a level where there was no overall harm to those values:

[614] Overall, the Board accepts the integrated approach to the consideration of ecological effects, mitigation and offsets in relation to the Proposal. The range of effects and the scale of the Proposal facilitates this approach and provides greater flexibility to offset effects that cannot be adequately mitigated, provided that the scale of effects themselves is acceptable. In this case, the Board finds that the magnitude, scale and intensity of effects is acceptable in the context of

[614]. See also the discussion starting at BOI [578] through to the conclusion at [614] on the ‘adequacy of ecological mitigation and off-sets’ to ‘address all the ecological effects of the EWL’.

²¹ See eg BOI [610], [646], [706], [731].

the mitigation and offsets proposed, and by a margin that has improved throughout the Hearing. While there will be direct adverse effects on rare and threatened species, those effects will not compromise the viability of those populations or ecosystem types. However, an outcome that at least balances the ecological effects through mitigation and offset benefits is an appropriate requirement. The Board finds that such an outcome will be achieved through the deletion of the sub-tidal dredging, modification or deletion of headlands, and implementation of the additional ecological mitigation and offsets proposed. ...

12. The Board then took that assessment of ecological effects into its fair appraisal of the proposal having regard to all relevant policies, including all matters of national significance and the objectives in s 5:

[1393] ...the EWL will provide significant community, social and transport benefits; and will further provide significant infrastructure to meet the transport needs of the region. It will also provide benefits through ecological off-sets. Section 5(2)(a), (b) and (c) matters have not been overlooked by the Board. Adverse effects are avoided, remedied, or mitigated (or off-set). Particular regard has been paid to the life-supporting capacity of water, soil and ecosystems. The Board sees the dual use of the reclamation aspect of the Proposal as sustaining the potential of the degraded Māngere Inlet (by some modest improvements) to meet the reasonable foreseeable needs of future generations. ...

[1396] The Board considers and determines that the management and mitigation methods proposed, the conditions it imposes, and the positive effects of the Proposal will achieve sustainable management of the natural and physical resources involved.

Annexure 2: Examples

AUCKLAND UNITARY PLAN

F2.2. Drainage, reclamation and declamation

F2.2.2.2 Objectives

- (2) The natural character, ecological values and natural coastal processes of the coastal marine area are not adversely affected by inappropriate reclamation, drainage or declamation.

F2.2.3. Policies

- (1) Avoid reclamation and drainage in the coastal marine area except where all of the following apply:
 - (a) the reclamation will provide significant regional or national benefit;
 - (b) there are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area;
 - (c) efficient use will be made of the coastal marine area by using the minimum area necessary to provide for the proposed use, or to enable drainage. ...

E26 Infrastructure

E26.2.1 Objectives

- (1) The benefits of infrastructure are recognised. ...
- (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled

E26.2.2 Infrastructure policies

For new infrastructure or major upgrades in scheduled areas

- (6) Consider the following matters where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character:

- (a) the economic, cultural and social benefits derived from infrastructure and the adverse effects of not providing the infrastructure;
- (b) whether the infrastructure has a functional or operational need to be located in or traverse the proposed location;
- (c) the need for utility connections across or through such areas to enable an effective and efficient network;
- (d) whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values of those places, while having regard to E26.2.2(6)(a) - (c);
- (e) the extent of existing adverse effects and potential cumulative adverse effects;
- (f) how the proposed infrastructure contributes to the strategic form or function, or enables the planned growth and intensification, of Auckland;
- (g) the type, scale and extent of adverse effects on the identified values of the area or feature, taking into account:
 - (i) scheduled sites and places of significance and value to Mana Whenua;
 - (ii) significant public open space areas, including harbours;
 - (iii) hilltops and high points that are publicly accessible scenic lookouts;
 - (iv) high-use recreation areas;
 - (v) natural ecosystems and habitats; and
 - (vi) the extent to which the proposed infrastructure or upgrade can avoid adverse effects on the values of the area, and where these adverse effects cannot practicably be avoided, then the extent to which adverse effects on the values of the area can be appropriately remedied or mitigated.
- (h) whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.

FROM THE NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

3.22 Natural inland wetlands

- (1) Every regional council must include the following policy (or words to the same effect) in its regional plan(s):

“The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:

(a) the loss of extent or values arises from any of the following:

- (i) the customary harvest of food or resources undertaken in accordance with tikanga Māori*
- (ii) restoration activities*
- (iii) scientific research*
- (iv) the sustainable harvest of sphagnum moss*
- (v) the construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
- (vi) the maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
- (vii) natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or*

(b) the regional council is satisfied that:

- (i) the activity is necessary for the construction or upgrade of specified infrastructure; and*
- (ii) the specified infrastructure will provide significant national or regional benefits; and*
- (iii) there is a functional need for the specified infrastructure in that location; and*
- (iv) the effects of the activity are managed through applying the effects management hierarchy.”*

Waka Kotahi Annexure 3: Activity vs Effects?

12 May 2022

The RMA is an effects based regime. Activities are controlled because of their likely effects, and 'activity status' is primarily a proxy for controlling effects.

This is demonstrated by the AUP. Chapter A sets out the Activity Classification provisions.¹

A1.7.1. Permitted activity

No resource consent is required for a permitted activity and the activity is allowed as of right. The activity may be subject to permitted activity standards which must be objectively certain and not subject to a discretionary assessment. Exceedance of a permitted activity standard normally results in the activity being considered as a restricted discretionary activity.

Activities are classed as permitted where the character, intensity and scale of their effects are expected to be in keeping with the quality of the existing environment or the relevant objectives and policies of the relevant zone or precinct.

A1.7.2. Controlled activity

Resource consent is required for a controlled activity but the Council must grant consent and only has power to impose conditions on the consent in relation to those matters over which control is reserved by the Plan or a national environmental standard. The activity may be subject to controlled activity standards. Exceedance of a controlled activity standard normally results in the activity being considered as a restricted discretionary activity.

Activities are classed as controlled where the activity is in keeping with the existing environment and the likely effects are well understood and able to be avoided, remedied or mitigated by conditions.

A1.7.3. Restricted discretionary activity

Resource consent is required for a restricted discretionary activity. Consent may be either granted or refused, but only for reasons which are relevant to the matters stated in the Plan or a national environmental standard over which the discretion can be exercised. The activity may be subject to restricted discretionary activity standards. If consent is granted, then any conditions of consent may only be in relation to the matters stated in the Plan or a national environmental standard.

Activities are classed as restricted discretionary where they are generally anticipated in the existing environment and the range of potential adverse effects is able to be identified in the Plan, so that the restriction on the Council's discretion is appropriate.

A1.7.4. Discretionary activity

Resource consent is required for a discretionary activity and may be granted or refused for any relevant resource management reason. An application for resource consent for a discretionary activity will be fully assessed in terms of the relevant provisions of the Plan, including all relevant objectives and policies, and the Resource Management Act 1991, including in particular Part 2.

¹ Excerpt from Auckland Unitary Plan Operative in part (Updated 8 April 2022): Chapter A: Introduction A.1.7 Activity Status p 7-10.

Activities are classed as discretionary where they are not generally anticipated to occur in a particular environment, location or zone or where the character, intensity and scale of their environmental effects are so variable that it is not possible to prescribe standards to control them in advance. A full assessment is required to determine whether the activity, subject to any conditions, would be appropriate in terms of the provisions of the Plan, the effects of the activity on the environment and the suitability of the proposed location.

As well, any activity that is not specifically classed in a rule is deemed to be a discretionary activity under General rule [C1.7\(1\)](#).

A1.7.5. Non-complying activity

Resource consent is required for a non-complying activity. As threshold matters, the proposal must be assessed to determine whether its adverse effects on the environment will be no more than minor or whether it will not be contrary to the objectives and policies of the Plan. If the proposal is found not to breach one or other of those thresholds, then its merits may be considered on a broadly discretionary basis and consent may be granted (with or without conditions) or refused. If it is found to breach both thresholds, then consent must be refused.

Activities are classed as non-complying where greater scrutiny is required for some reason. This may include:

- where they are not anticipated to occur; or
- where they are likely to have significant adverse effects on the existing environment; or
- where the existing environment is regarded as delicate or vulnerable; or
- otherwise where they are considered less likely to be appropriate.

A1.7.6. Prohibited activity

An activity which is classed as prohibited cannot be the subject of an application for resource consent. Any proposal for a prohibited activity must first be the subject of a plan change to change the activity status (either generally or in respect of a particular proposal) to one of the other classes of activity.

Activities are classed as prohibited where they are expected to cause significant adverse effects on the environment which cannot be avoided, remedied or mitigated by conditions of consent or otherwise where it may be appropriate to adopt a precautionary approach.

A1.7.7. Not applicable

Where an activity table states that an activity is 'not applicable' or 'NA' this means that the activity is not relevant in that particular part of the activity table.

Where an activity table for a precinct leaves the status for a particular activity blank, then the activity status in the relevant overlay, zone or Auckland-wide provision applies.

A1.7.8. Abbreviation of activity classes

The Plan uses the following abbreviations to identify the class of activity:

Activity class abbreviation	Activity class abbreviation meaning
P	Permitted activity
C	Controlled activity
RD	Restricted discretionary activity
D	Discretionary activity
NC	Non-complying activity
Pr	Prohibited activity

AUP: Regional Coastal Plan: Chapter F

Coastal Activity tables for reclamation and coastal structures²

Table F2.19.1 Activity table - Drainage, reclamation and declamation³

Note 1

Table F2.19.1 specifies the activity status for works that reclaim or drain any foreshore or seabed, and for declamation activities in the coastal marine area. The RMA activities that this table covers are:

- Reclamation and drainage of any foreshore or seabed (RMA s12(1)(a))
- Activities that contravene a rule in the regional coastal plan (RMA s12(3))
- Disturbance of the foreshore and seabed, incidental to the activity (RMA s12(1)(c), (e), (g))
- Deposition of material in, on or under the foreshore or seabed, incidental to the activity (RMA s12(1)(d))
- Diversion of coastal water, incidental to the activity (RMA s14)
- Discharge of contaminants or water into water, incidental to the activity (RMA s15).

GCM = general coastal marine area

SEA = significant ecological area (M signifying marine, 1 and 2 relative robustness with 1 more vulnerable)⁴

ONL = outstanding natural landscapes

ONF = outstanding natural feature

ONC = outstanding natural character

HNC = high natural character

HH = historic heritage

² Excerpts from Auckland Unitary Plan Operative in part (Updated 8 April 2022): Chapter F: Coastal - Table F2.19.1 Activity table - Drainage, reclamation and declamation pp 42-45; Table F2.19.10 Activity table – Structures pp63-68. There are numerous other coastal activity tables eg dredging, deposition, discharges, occupation.

Activity		Activity status						
		GCM Zone	SEA-M1, ONC	ONL	SEA-M 2 ⁵ , HNC	ONF Type A1 and A	ONF Type V1, V2, B, C, D, E, F	HH
(A1)	Reclamation or drainage not otherwise provided for	NC	Pr	NC	NC	Pr	Pr	Pr
(A2)	Maintenance or repair of a lawful reclamation or drainage system	P	P	P	P	P	P	P
(A3)	Minor reclamation for the purpose of maintaining, repairing or upgrading a lawful reclamation	RD	D	D	D	D	D	D
(A4)	Reclamation or drainage for any of the following: <ul style="list-style-type: none"> carried out as part of rehabilitation or remedial works; where it is required for the safe and efficient operation or construction of infrastructure; or where it is necessary to provide for safe public access to, within or adjacent to the coastal marine area. 	D	NC	NC	NC	NC	NC	NC
(A5)	Authorisation of an unlawful reclamation under s 355A Resource Management Act 1991	D	NC	NC	NC	NC	NC	NC
(A6)	Declamation	D	NC	NC	NC	NC	NC	D

Table F2.19.10 Activity table – Structures

Note 1

⁵ Noting that not every SEA-M2 will trigger a Policy NZCPS Policy 11(1)(a) avoidance policy/value but some SEA-M2s are scheduled for both Policy 11(1)(a) and (b) values. See Auckland Council RFB submissions dated 29 October at paragraph 4.24 and Auckland Council Port Otago submissions at 1.4(d).

Table F2.19.10 specifies the activity status for structures in the coastal marine area. The RMA activities that this table covers are:

- Construction, erection, reconstruction, placement, alteration, extension, removal or demolition of structures (RMA s12(1)(b))
- Occupation of the common marine and coastal area by the structure (RMA s12(2)(a))
- Disturbance of the foreshore and seabed, incidental to the activity (RMA s12(1)(c), (e), (g))
- Deposition of material in, on or under the foreshore or seabed, incidental to the activity (RMA s12(1)(d))
- Use of structures (activities that contravene a rule in the regional coastal plan) (RMA s12(3)), unless the use is addressed more specifically in Table F2.19.8
- Diversion of coastal water, incidental to the activity (RMA s14)
- Discharge of contaminants or water into water, incidental to the activity (RMA s15).

Note 2

In this table, unless specified otherwise, the activity status for occupation of the common marine and coastal area (section 12(2) of the Resource Management Act 1991) has the same activity status as for the construction of a structure (section 12(1) of the Resource Management Act 1991) that the occupation relates to.

Note 3

The activity status for a new consent for an existing structure (re-consenting its use of the coastal marine area pursuant to section 12(3) and its occupation of space in the common marine and coastal area pursuant to section 12(2) of the Resource Management Act 1991) has the same activity status as construction of that structure listed in this table.

Note 4

Provisions relating to moorings in the Coastal – General Coastal Marine Zone are contained in the F4 Coastal – Mooring Zone and moorings outside the Coastal – Mooring Zone.

Note 5

Activities regulated by the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 are not affected by the provisions below.

Activity		Activity status						
		GCM Zone	SEA-M1, ONC	ONL	SEA-M2, HNC	ONF Type A1 and A	ONF Type V1, V2, B, C, D, E, F	HH
(A121)	Construction of coastal marine area structures and buildings unless provided for elsewhere in this table (see table F2.19.8 for the use of the structure)	D	NC	NC	NC	NC	NC	NC
(A122)	Maintenance, repair or reconstruction of existing lawful coastal marine area structures or buildings	P	P	P	P	P	P	Refer HH activity tables
(A123)	Extension or alteration of existing lawful coastal marine area structures or buildings other than those that are a component of infrastructure (including the use of the extended or altered structure or building)	RD	NC	NC	D	NC	NC	Refer HH activity tables
(A124)	Extension or alteration of existing lawful coastal marine area structures or buildings that are a component of infrastructure (other than as provided for as minor infrastructure upgrading of network utilities)	RD	D	D	D	D	D	Refer HH activity tables
(A125)	Demolition or removal of any buildings or coastal marine area structures	P	C	C	P	C	C	Refer HH activity tables
(A126)	Coastal marine area structures located below the surface of the foreshore and seabed, constructed by methods other	P	D	D	D	D	D	D

Activity		Activity status						
		GCM Zone	SEA-M1, ONC	ONL	SEA-M2, HNC	ONF Type A1 and A	ONF Type V1, V2, B, C, D, E, F	HH
	than trenching, (but not the occupation by those structures)							
(A127)	Occupation associated with coastal marine area structures located below the surface of the foreshore and seabed (other than cables located within the cable protection areas (as identified on the planning maps))	RD	RD	RD	RD	RD	RD	D
(A128)	Temporary coastal marine area structures or buildings	P	D	RD	P	D	D	Refer HH activity tables
(A129)	Navigational aids including their extension and alteration	P	P	P	P	P	P	P
(A130)	Maimai including their extension and alteration	P	P	P	P	P	P	P
(A131)	Minor infrastructure upgrading of network utilities	P	P	P	P	P	P	P
(A132)	Cables and pipes including their extension and alteration operated by network utility operators attached to existing bridge structures	P	P	P	P	P	P	P
(A133)	Infrastructure coastal marine area structures not otherwise provided for	D	D	D	D	D	D	D
(A134)	Occupation of the common marine and coastal area by infrastructure structures, that form part of a network operated	P	P	P	P	P	P	P

Activity		Activity status						
		GCM Zone	SEA- M1, ONC	ONL	SEA- M2, HNC	ONF Type A1 and A	ONF Type V1, V2, B, C, D, E, F	HH
	or managed by a network utility operator, and were lawfully existing at 23 October 2001, and any subsequent upgrade to such a structure							
(A135)	Cables located within the cable protection areas (as identified on the planning maps) including their extension and alteration, and including the occupation by cables located below the surface of the foreshore and seabed	P	P	P	P	P	P	P
(A136)	Marine and port facilities on existing wharves or other existing coastal marine area structures	RD	D	D	RD	D	D	D
(A137)	Marine and port accessory structures and services on existing wharves or other existing coastal marine area structures	RD	D	RD	RD	D	D	D
(A138)	Coastal marine area structures for scientific research, investigation or monitoring	RD	RD	RD	RD	RD	RD	RD
(A139)	Marine and port facilities and buildings not on an existing wharf or existing coastal marine area structure	D	NC	NC	D	NC	NC	D
(A140)	Marine and port accessory structures and services not on an existing wharf or existing coastal marine area structure	D	NC	D	D	NC	NC	D
(A141)	Maritime passenger facilities	D	NC	NC	D	NC	NC	D

Activity		Activity status						
		GCM Zone	SEA- M1, ONC	ONL	SEA- M2, HNC	ONF Type A1 and A	ONF Type V1, V2, B, C, D, E, F	HH
(A142)	Hard protection structures	D	NC	NC	D	NC	NC	D
(A143)	Observation areas, viewing platforms and boardwalks	D	D	D	D	D	NC	D
(A144)	Artworks	D	NC	NC	D	NC	NC	D
(A145)	Boat ramps	D	NC	D	D	NC	NC	D

Waka Kotahi Annexure 4: Key activities / effects and related Policy 11 elements plus AUP equivalents ¹

Note: Italicised text in table represents sub-policies raised by RFB that Waka Kotahi does not consider are engaged but are included for completeness

Activity	Location / SEA	Potential effects (pre-mitigation)	NZCPS Policy 11	AUP equivalent	Decision references/Board's key findings on effects post-mitigation
Construction / permanent occupation of structures for EWL viaduct	Anns Creek East (SEA-T)	Disturbance / loss of rare / threatened indigenous shrubs / ecosystems	11(a)(i)	D9.3(9)(a)(i)	<ul style="list-style-type: none"> The Board accepted that adverse effects within Anns Creek East had been avoided to the greatest extent practicable by pushing the Proposal alignment as far north as possible to avoid the most intact lava shrubland habitats and the threatened plant habitats, and minimise construction access impacts.² The Board records evidence of the coastal ecologist Dr De Luca who confirms that the design team have done all possible to avoid effects relating to the structures.³ The Board also found that the mitigation and offsets now offered would adequately address the effects of the construction activity and the shading that will occur on completion of the works. The mitigation included the additional planting and pest control.⁴ Expert ecological evidence noted that the existing weeds may have a greater impact on these features than the potential shading / construction effects from EWL.⁵
			11(a)(iii)	D9.3(9)(a)(iii)	
			11(a)(v)	D9.3(9)(a)(iv)	
			11(b)(i)	D9.3(10)(a)	<ul style="list-style-type: none"> The Board was satisfied that the Proposal had avoided

¹ Note for purposes of s104D policy gateway assessment there were multiple AUP policy sets engaged – see Annexure D to Waka Kotahi's EWL submissions dated 14 October 2021. For the s104/s171 assessments, an even broader scope of policy and plan objectives and policies were engaged as part of the Board's assessment of the EWL proposal including under the NZCPS – see Waka Kotahi EWL submissions at [3.11] – [3.12].

² BOI Decision at [610].

³ BOI Decision at [918].

⁴ See also progression through [591], [593]-[594], [598], noting strengthened conditions at [604], confirming concerns adequately addressed [610] – [611], confirmed [614] and concluding [649], [704]-[706], adverse effects are adequately mitigated or offset. Also more detailed discussion of expert views and conclusions in [915] – [920], the mitigations at [929] onwards and key conclusion at [964]. Also [1371], [1393], [1396]. For detailed discussion of Policy D9 see [642] – [649].

⁵ Rebuttal Evidence of Shona Myers on behalf of NZTA – Terrestrial Ecology, at [4.15] – [4.17]. 308/52 308.02438.

Waka Kotahi Annexure 4: Key activities / effects and related Policy 11 elements plus AUP equivalents ¹

Note: Italicised text in table represents sub-policies raised by RFB that Waka Kotahi does not consider are engaged but are included for completeness

Activity	Location / SEA	Potential effects (pre-mitigation)	NZCPS Policy 11	AUP equivalent	Decision references/Board's key findings on effects post-mitigation
		Disturbance / loss of indigenous vegetation / ecological sequences	11(b)(iii)	D9.3(10)(c)	significant adverse effects on Anns Creek, and would mitigate other effects on that environment. ⁶
			11(b)(vi)	D9.3(10)(f)	
	Anns Creek Estuary (SEA-M1);	<i>Disturbance and construction effects on threatened / at-risk bird species</i>	11(a)(i)	D9.3(9)(a)(i)	<ul style="list-style-type: none"> Surveys indicated potential presence of threatened / at risk species in Anns Creek Estuary, albeit in low numbers. No direct findings in BOI decision on this aspect of the Proposal, but potential effects addressed in conditions – construction effects would only occur if construction of project proceeded while those bird species were nesting / breeding in the project area. To avoid this risk, construction activities were restricted if any of the birds were found in the area by pre-construction surveys.⁷
			11(a)(ii)		
Deposition/structures related to Headland and boardwalks	Māngere Inlet (SEA-M2w)	Loss of coastal habitats for indigenous and migratory species, including during vulnerable life stages. Disturbance from boardwalks and headlands	11(a)(i)	D9.3(9)(a)(i)	<ul style="list-style-type: none"> Pre mitigation: The Board held that it was contestable whether the proposal would have non-transitory or more than minor adverse effects on threatened or at-risk species, given the availability of similar habitat elsewhere in the Māngere Inlet, Manukau Harbour and Tāmaki River.⁸ Following mitigation: The Board was satisfied that effects on habitat within the Māngere Inlet would be mitigated.⁹
			11(a)(ii)		

⁶ BOI decision at [649].

⁷ See BOI Decision: Volume 3 Conditions - Ecological Condition EM.6(a). 317/92 317.04773.

⁸ BOI Decision at [645]. See also [605], [614], [649], [654], [704] – [706], [731], [964], [1373], [1393], [1396].

⁹ BOI Decision [649].

Waka Kotahi Annexure 4: Key activities / effects and related Policy 11 elements plus AUP equivalents ¹

Note: Italicised text in table represents sub-policies raised by RFB that Waka Kotahi does not consider are engaged but are included for completeness

Activity	Location / SEA	Potential effects (pre-mitigation)	NZCPS Policy 11	AUP equivalent	Decision references/Board's key findings on effects post-mitigation
			11(a)(iv)	D9.3(9)(a)(ii)	<ul style="list-style-type: none"> The Board found that the proposal would result in adverse effects on the habitats of some rare species, but not species that were at the limit of their natural range.¹⁰ No naturally rare species are present in the vicinity of the Proposal.¹¹
			-	D9.3(9)(b)	<ul style="list-style-type: none"> The Board described evidence that there is potential for disturbance by people and activities, considered that some birds could be displaced due to disturbance from ongoing use of the Boardwalks, but as above, noted the availability of similar habitat elsewhere in the Inlet, meaning the species' populations and presence in the Inlet would not be affected.¹²
			11(b)(ii)	D9.3(10)(b)	<ul style="list-style-type: none"> Construction effects: The impact on indigenous bird species during vulnerable life stages would only occur if those bird species were found nesting / breeding during construction, and construction were then to proceed at that time (which, per the conditions, was restricted).¹³ The Board was therefore satisfied the Proposal would not impact on habitats important during the vulnerable life stages of indigenous species.¹⁴
			11(b)(iii)	D9.3(10)(c)	

¹⁰ BOI Decision [645].

¹¹ Technical Report 16 Appendix B – Avifauna species and habitat summary – 301/12 301.00441 – 301.00445.

¹² BOI Decision at [585], [588], [647]. Note disturbance due to public access, must balance NZCPS coastal access and open space Policies 18 and 19, especially 19(3) which only allows limits on public access to “areas where necessary to protect threatened indigenous species”. (AUP equivalent at B8.4.2(3)). Also note the status quo is cycling/walking paths immediately adjacent to these areas.

¹³ See BOI Decision: Volume 3 Conditions - Ecological Condition EM.6(a) 317/92 317.04773.

¹⁴ BOI Decision at [649].

Waka Kotahi Annexure 4: Key activities / effects and related Policy 11 elements plus AUP equivalents ¹

Note: Italicised text in table represents sub-policies raised by RFB that Waka Kotahi does not consider are engaged but are included for completeness

Activity	Location / SEA	Potential effects (pre-mitigation)	NZCPS Policy 11	AUP equivalent	Decision references/Board's key findings on effects post-mitigation
			11(b)(v)	D9.3(10)(e)	<ul style="list-style-type: none"> • Permanent effects: The Board noted that the pre-mitigation effects on shorebird habitat would be significant, but ultimately found that the scale of habitat loss was minor given the extent of equivalent habitat available in the area – the habitat loss would not affect the species' populations or presence in the Inlet.¹⁵ This finding reflected the agreed expert position of all avifauna experts.¹⁶ • The Board held that any impacts on indigenous ecosystems and habitats in the Māngere Inlet would be mitigated (ie at least neutral).¹⁷ • The Board concluded that potential effects on habitat for shorebirds, including threatened and at-risk species, can be adequately addressed by the mitigation, and off-set package, particularly once the Proposal was modified to exclude sub-tidal dredging.¹⁸

¹⁵ BOI Decision at [605].

¹⁶ BOI Decision at [588]. Noting AUP Policy D9.3(12)(b) directed the Board to consider the availability of alternative similar habitats in the same area when assessing effects.

¹⁷ BOI Decision at [649].

¹⁸ BOI Decision at [605].