

We, Douglas Allan, and Madeleine Wright certify that this submission is suitable for publication.

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

SC 6/2022

**BETWEEN**

**PORT OTAGO LIMITED**

*Appellant*

**AND**

**ENVIRONMENTAL DEFENCE  
SOCIETY INCORPORATED**

*First Respondent*

**AND**

**OTAGO REGIONAL COUNCIL**

*Second Respondent*

**AND**

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

*Third Respondent*

**AND**

**MARLBOROUGH DISTRICT  
COUNCIL**

*Fourth Respondent*

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**SUBMISSIONS OF COUNSEL FOR THE ENVIRONMENTAL  
DEFENCE SOCIETY INCORPORATED**

DATED 5 APRIL 2022

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Counsel acting:

Douglas Allan  
Ellis Gould Lawyers  
48 Shortland Street Auckland  
PO Box 1509  
Tel: 09 307 2172  
Email: dallan@ellisgould.co.nz

Madeleine Wright  
SG Barrister  
Level 1, 189 Hardy St  
Nelson 7010  
Tel: 0274687778  
Email: madeleine@sallygepp.co.nz

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## MAY IT PLEASE THE COURT

### 1. SUMMARY OF ARGUMENT

- 1.1 The Environmental Defence Society Inc (“**EDS**”) appears as the First Respondent, as it did in the Court of Appeal.
- 1.2 Port Otago Ltd (“**Port Otago**”) seeks to overturn the Court of Appeal decision in *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638 (“**CA Decision**”).<sup>1</sup> The CA Decision confirmed the High Court’s Decision in *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2178 (“**HC Decision**”), which overturned aspects of the Environment Court’s decision in *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 (“**EC Decision**”).
- 1.3 The planning and legal context for the appeal is how the policy in the proposed Otago Regional Policy Statement (“**pORPS**”) relating to port activities should be worded to “*give effect to*” the New Zealand Coastal Policy Statement 2010 (“**NZCPS**”) as required by s 62(3) Resource Management Act 1991 (“**RMA**”).
- 1.4 EDS says that in giving effect to the NZCPS the pORPS must require port activities at Port Chalmers and Port Dunedin to:
- a. Avoid adverse effects on the areas/values listed in NZCPS under:
    - Policy 11(a) re. specified coastal biodiversity
    - Policy 13(1)(a) re. areas of outstanding coastal natural character
    - Policy 15(a) re. outstanding coastal natural features and landscapes
    - Policy 16 re. nationally significant surf breaks
  - b. Avoid significant adverse effects on the coastal biodiversity specified in Policy 11(b), and other landscape and natural character values in accordance with Policies 13(1)(b) and 15(b).
- 1.5 In contrast, the EC Decision held that, in giving effect to the NZCPS, the provisions of the pORPS could provide for port activities to avoid,

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<sup>1</sup> COA 05.010.

remedy, or mitigate adverse effects on the areas/values in paragraph 1.4.<sup>2</sup> EDS understands that Marlborough District Council (“**MDC**”) supports that conclusion.<sup>3</sup> Port Otago now says the Environment Court’s policy is “*too wide*” and proposes a revised provision, that EDS also opposes on the basis it also fails to “*give effect to*” the NZCPS.<sup>4</sup>

- 1.6 Resolution of the issue requires analysis of the NZCPS policies in paragraph 1.4 above alongside NZCPS Policy 9 which makes provision for the national transport network, and as part of that, for port activities.
- 1.7 For convenience, NZCPS Policies 11, 13, 15, and 16 will collectively be referred to as the “**Avoid Policies**” (adopting the terminology in Port Otago’s submissions); the areas identified in paragraph 1.4 above will collectively be referred to as “**Protected Coastal Sites**”; and NZCPS Policy 9 will be referred to as the “**Ports Policy**”.
- 1.8 EDS says resolving the question before this Court requires the following steps:
  - a. Identification of the correct approach to interpreting the NZCPS’s objectives and policies and applying them in subordinate planning documents like the pORPS.
  - b. Applying that approach to the NZCPS policies relevant in this case.
  - c. Determining whether the majority of the Court of Appeal understood and applied the correct approach.
- 1.9 These submissions are structured around those three steps.
- 1.10 The essential points of the argument for EDS on the first step are:
  - a. The decision of this Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*<sup>5</sup> (“**King Salmon**”) is the leading authority on how to interpret the objectives and policies of the NZCPS and “*give effect to*” (implement) them in subordinate planning documents

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<sup>2</sup> COA 05.149 EC Decision at [135].

<sup>3</sup> Submissions responding to points raised by MDC are based on review of draft submissions provided to EDS by counsel. At the time of writing, we have not seen the final version.

<sup>4</sup> POL submissions [2.10] – [2.11].

<sup>5</sup> BOA 162-241 [2014] NZSC 38.

like the pORPS. The Court of Appeal, the High Court, and the Environment Court were bound by that decision.

- b. As a regional policy statement, the pORPS must “*give effect to*” the NZCPS.<sup>6</sup> The “*give effect to requirement is a strong directive*”, intended to constrain decision-makers. The consequence of its implementation depends on the level of specificity of the provision(s) being considered.<sup>7</sup>
- c. The correct approach to interpreting the NZCPS and applying it in planning documents required to “*give effect to*” it is to: identify the relevant provisions; pay careful attention to the way they are expressed; and apply them according to their terms. Conflict between provisions will generally fall away on careful examination of the words used in each, allowing all relevant provisions to be reconciled, and implemented at the same time according to their terms.<sup>8</sup>

1.11 The essential points of argument for EDS on the second step are:

- a. The Avoid Policies direct that adverse effects/significant adverse effects on Protected Coastal Sites must be avoided. This is a strong and specific direction. It can be contrasted against directions to avoid, remedy, or mitigate adverse effects, “*mostly avoid*”, “*avoid if at all possible*”, or to keep adverse effects to the “*minimum necessary*”, which Port Otago and MDC say can lawfully apply.
- b. The Ports Policy provides for protection of port activities from other development and requires drafters of subordinate planning documents like the pORPS to consider “*where, how and when*” to provide for the safe and efficient operation of ports. It does not alter the approach to managing the adverse effects of port activities as set by the Avoid Policies.
- c. The Avoid Policies and the Ports Policy do not conflict or otherwise pull against each other. All policies can be reconciled. The Ports Policy can be applied according to its terms, within the bounds of the

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<sup>6</sup> BOA 30: s 62(3) RMA.

<sup>7</sup> BOA 204 – 208: *King Salmon* para [77], [80] – [91].

<sup>8</sup> BOA 218 – 220: *King Salmon* para [126] – [130].

Avoid Policies.

- d. That approach to reconciling the Ports Policy and the Avoid Policies is not affected by the other NZCPS objectives or policies.

1.12 The essential points of argument for EDS on the third step are that:

- a. The majority of the Court of Appeal correctly identified and understood the *King Salmon* approach to interpreting the NZCPS and giving effect to it in subordinate planning documents.
- b. The Court of Appeal then applied that approach to the NZCPS provisions, and the pORPS, and correctly concluded that a policy in the pORPS allowing port activities to avoid, remedy, or mitigate adverse/significant adverse effects on Protected Coastal Sites would not “*give effect to*” the NZCPS.

1.13 EDS says the answer to the question before this Court is yes, the Court of Appeal was correct to dismiss Port Otago’s appeal.

1.14 These submissions cover the following:

- a. Question of Law (Part 2)
- b. Statutory Framework (Part 3)
- c. Narrative of context in which the appeal arises (Part 4)
- d. Correct approach to interpreting and applying the NZCPS (Part 5)
- e. Applying the correct interpretative approach to NZCPS policies relevant to this appeal (Part 6)
- f. Did the Court of Appeal apply the correct approach (Part 7)
- g. Practical consequences of *King Salmon* (Part 8)
- h. Conclusion (Part 9)

## 2. QUESTION OF LAW

2.1 This appeal raises a single question of law: whether the Court of Appeal was correct to dismiss Port Otago’s appeal in the CA Decision.

2.2 The question before the Court of Appeal was: did the High Court

misapply the Supreme Court’s decision in *King Salmon*.

- 2.3 As set out at paragraphs 1.3-1.5 above, the practical issue at the heart of both is: how should the pORPS policy relating to port activities be worded to “*give effect to*” the NZCPS. EDS says that tackling this issue, and consequently finding the answer to the question under appeal, comprises the three steps listed at paragraph 1.8 above.
- 2.4 EDS considers it important to recognise the differences in, and to avoid conflating, the language used in the RMA with respect to plan-making and the determination of resource consent applications. This appeal is not about application of the NZCPS or regional policy statements to decisions on individual resource consent applications. It is not about the meaning of “*inconsistent with*” in s 104D RMA, “*have regard to*” in s 104 RMA or “*have particular regard to*” in s 171 RMA.

### 3. STATUTORY FRAMEWORK

- 3.1 The scheme of the RMA is hierarchical, both within the RMA and in terms of the subordinate statutory planning documents which are created under it. The hierarchy moves from the general to the specific.
- 3.2 Part 2 RMA contains the Act’s purpose and principles. Its purpose is to “*promote the sustainable management of natural and physical resources*”.<sup>9</sup> Sustainable management is defined in s 5(2) RMA. It encompasses enabling people and communities to provide for various dimensions of wellbeing “*while*”<sup>10</sup> (emphasis added):
- (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
  - (b) *safeguarding the life supporting capacity of air, water, soil, and ecosystems; and*
  - (c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.*
- 3.3 The principles of the RMA are set out in ss 6-8: matters of national importance are set out in s 6 which must be recognised and provided for; matters in s 7 must be given particular regard; and under s 8 the principles of Te Tiriti o Waitangi must be taken into account.

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<sup>9</sup> s 5(1) RMA.

<sup>10</sup> **BOA 186**: *King Salmon* at [24(c)] holds that “*while*” in this context means “*at the same time as*”.

3.4 Here, ss 6(a), (b), and (c) are particularly relevant (emphasis added):

- (a) *The preservation of natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and river and their margins, and the protection of them from inappropriate subdivision, use, and development:*
- (b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
- (c) *The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna: ...*

3.5 The hierarchy of subordinate planning documents has three tiers: national policy statements<sup>11</sup> (including the NZCPS<sup>12</sup>), then regional policy statements,<sup>13</sup> then regional and district plans.<sup>14</sup> Each tier must “*give effect to*” the planning documents sitting in the tiers above. Within these planning documents, the hierarchy continues through a structure of objectives, policies, and methods. In regional and district plans, methods may include planning “*rules*”.<sup>15</sup>

3.6 The NZCPS is a mandatory planning document and sits at the top of the hierarchy.<sup>16</sup> Per s 56 its purpose is to state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand.<sup>17</sup> The fact s 56 did not refer to “*objectives*” when *King Salmon* was decided is inconsequential, and certainly does not mean, as Port Otago suggests, the NZCPS’s objectives had “*no legal status*” or the Supreme Court’s findings are now not applicable.<sup>18</sup> In 2014, s 58(1) specifically enabled inclusion of objectives, the NZCPS included objectives, and the Supreme Court considered those objectives.<sup>19</sup>

3.7 By way of introduction, the NZCPS provisions of primary relevance in this case are the Ports Policy (NZCPS Policy 9) and the Avoid Policies (NZCPS Policies 11, 13, 15, 16). NZCPS provisions of secondary relevance are: NZCPS Objectives 1, 2, 6; Policy 1–Extent and

<sup>11</sup> **BOA 13 – 19:** ss 45-55 RMA.

<sup>12</sup> **BOA 19 – 20:** ss 56-58A RMA.

<sup>13</sup> **BOA 29 – 31:** ss 59-62 RMA.

<sup>14</sup> **BOA 31 – 41:** ss 63-71, ss 72-77 RMA.

<sup>15</sup> Rules in the RMA sense are defined in s 43AA as “*a district or regional rule*” **BOA 7**. Regional rules are addressed in ss 68-70 RMA **BOA 34**. They may be included in a regional plan for the purpose of carry out regional council functions and achieving the objectives and policies of the plan. District rule are primarily dealt with in s 76 RMA and have an analogous purpose **BOA 39**. Section 77A then provides for six rule classifications (discussed in para [3.9] of these submissions) **BOA 41**.

<sup>16</sup> **BOA 19:** s 57 RMA.

<sup>17</sup> **BOA 19:** s 56 RMA.

<sup>18</sup> Port Otago submissions at [7.3].

<sup>19</sup> **BOA 189 – 212:** *King Salmon* at [31]-[33], [48], [52], [99]-[105].

characteristics of the coastal environment; Policy 6-Activities in the Coastal Environment; NZCPS Policy 7-Strategic Planning; and NZCPS Policy 8-Aquaculture.

- 3.8 Regional policy statements, like the pORPS, sit a tier below the NZCPS. They must be prepared and changed “*in accordance with*” the NZCPS, and their content must “*give effect to*” the NZCPS.<sup>20</sup> Provision of a regional policy statement is mandatory for each region.<sup>21</sup> The purpose of a regional policy statement is to provide an overview of the region’s resource management issues, and policies and methods (but not “*rules*”) to achieve integrated management of the natural and physical resources of the whole region.<sup>22</sup>
- 3.9 District plans and regional plans are the next step in the hierarchy of planning instruments. Regional coastal plans and district plans are mandatory. Other regional plans are optional. These documents contain objectives, policies and methods (including “*rules*”) that give effect to the higher order planning documents. Specific development proposals are managed by the “*rules*” in these plans. Any given proposal may: be enabled as of right (as a “*permitted activity*”); require one or more resource consents (as a “*controlled*”, “*restricted discretionary*”, “*discretionary*” or “*non-complying*” activity); or be a “*prohibited*” activity, in which case no application for resource consent may be lodged or accepted.<sup>23</sup>
- 3.10 Resource consent applications are assessed under s 104 RMA, pursuant to which the decision maker is to “*have regard to*” a range of matters, including “*any actual and potential effects on the environment of allowing the activity*”, “*relevant provisions of*” the NZCPS, a regional policy statement and a regional or district plan.<sup>24</sup>

## 4. NARRATIVE OF CONTEXT IN WHICH APPEAL ARISES

### Environmental Context

- 4.1 The environmental context in which this appeal arises is the Otago

<sup>20</sup> BOA 29 – 31: ss 61(1)(da), 62(3). Port Otago appears to have overlooked the latter per subs [3.10.5].

<sup>21</sup> BOA 29: s 60(1) RMA.

<sup>22</sup> BOA 29: s 61 RMA.

<sup>23</sup> BOA 41: s 77A RMA.

<sup>24</sup> BOA 96.

Region, with a particular focus on Otago Harbour.

- 4.2 The region is endowed with habitats of indigenous coastal species such as Otago Harbour’s seagrass beds which act as nursery grounds and its unique string of shell islands which provide seabird roosts.<sup>25</sup> The area around Dunedin also exhibits unique natural character formed through volcanism.<sup>26</sup> The region is home to four of the nationally significant surf breaks identified in NZCPS Schedule 1 and subject to NZCPS Policy 16: The Spit (at Aramoana, just outside of Otago Harbour), Karitane, Whareakeake, and Paparowai.
- 4.3 Otago Harbour is home to ports at Port Chalmers and Dunedin. A consented dredging channel runs the length of the harbour. There are numerous beacons demarking the channel’s width. Port Otago has three consented dredge disposal sites near the Harbour.<sup>27</sup>
- 4.4 There is potential for a geographical overlap between port activities (e.g. vessel movements along the channel; dredging; beacons) and Protected Coastal Sites. In some situations, undertaking of port activities and protection of Protected Coastal Sites may be compatible, in terms of the Avoid Policies. In others, they may not, and the undertaking of port activities may physically conflict with avoiding adverse effects on Protected Coastal Site. EDS understands that Otago Regional Council (“**Council**”) has not yet completed its survey of Protected Coastal Sites in the Otago Harbour, so there is currently no certainty as to whether physical conflict could arise in fact and, if so, the extent and nature of it.
- 4.5 The matters discussed in paragraph 4.4 above relate to the physical or factual relationship between the ports and the Protected Coastal Sites. For clarity, EDS notes that whether there is a physical/factual conflict is distinct from whether there is a conflict between NZCPS policies (being the matter on which *King Salmon* provides guidance). EDS considers that Port Otago’s submissions conflate the potential for a

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<sup>25</sup> COA 05.102 – 103: EC Decision at [11].

<sup>26</sup> COA 05.102: EC Decision at [9].

<sup>27</sup> COA 301.306.

physical or factual conflict with a policy conflict.<sup>28</sup>

- 4.6 Potential for factual conflict does not make a conflict between relevant NZCPS policies inevitable. To the contrary, the NZCPS provides national direction regarding the resolution of potential factual conflicts. The setting of environmental bottom lines or limits is one method of doing this and was not only an anticipated part of the RMA’s resource management framework, but a critical one.<sup>29</sup>

### **Planning and legal context - The pORPS**

- 4.7 The planning context in which this appeal arises is the preparation of a regional policy statement by the Council under Part 5 RMA.
- 4.8 Council notified the pORPS for public submission in May 2015. Hearings were then held by an independent hearings panel. Decisions on the pORPS were released in October 2016. The decisions version of the pORPS did not contain express provision for port activities at Port Chalmers and Port Dunedin. Instead, those matters were covered by the pORPS’s general significant infrastructure provisions in Chapter 4.
- 4.9 Chapter 4 pORPS concerns the ability for Otago communities to be resilient, safe, and healthy.<sup>30</sup> Objective 4.3 is that “*Infrastructure is managed and developed in a sustainable way*”.<sup>31</sup> Policy 4.3.4 sets out approach to managing adverse effects of infrastructure. It requires that adverse effects on Protected Coastal Sites are avoided in accordance with the Avoid Policies. Greater flexibility is provided in other parts of the coastal environment and in respect of outstanding or significant areas/values outside the coastal environment. The same approach to effects management is set out for other activities in Chapter 3 pORPS.<sup>32</sup>

### **Previous Decisions**

- 4.10 The decision not to include a port-specific policy in the pORPS was appealed to the Environment Court by Port Otago. Port Otago sought

<sup>28</sup> E.g. Port Otago Ltd submissions [2.7], [4.4].

<sup>29</sup> **BOA 213: King Salmon** at [107].

<sup>30</sup> **COA 301.199**.

<sup>31</sup> **COA 301.212**.

<sup>32</sup> **COA 300.183 – 198**.

introduction of a policy focused on port activities at Port Chalmers and Port Dunedin that provided an exemption for port activities from the requirement to avoid adverse effects/significant adverse effects.

- 4.11 The Environment Court found there was an unreconcilable conflict between the Ports Policy and the Avoid Policies, relying predominately on the presence of the word “*requires*” in the Ports Policy and the absence of the words “*without compromising the other values of the coastal environment*”, which feature in NZCPS Policy 6(1)(b) relating to infrastructure.<sup>33</sup> From there, the Environment Court concluded that the pORPS could, “*give some effect*” to the Ports Policy “*without giving full effect*” to one or more of the Avoid Policies.<sup>34</sup>
- 4.12 Based on that analysis the Environment Court recommended that a policy be included in the pORPS that allowed the adverse effects/significant adverse effects of port activities on Protected Coastal Sites to be avoided, remedied, or mitigated, rather than simply avoided which is what the Avoid Policies require.<sup>35</sup>
- 4.13 It is pertinent to note here the similarities between the Environment Court’s approach to that of the Board of Inquiry in *King Salmon*. The Board of Inquiry considered that the requirement to “*give effect to*” the NZCPS did not mean every NZCPS policy needed to be met, or that every policy “*must be given full effect to*”. Rather, it considered it was required to give effect to the provisions of the NZCPS having regard to its provisions “*as a whole*”.<sup>36</sup> Port Otago adopts similar language, asserting that giving effect to the NZCPS “*as a whole*” allows for exceptions to the Avoid Policies not provided for by the NZCPS.<sup>37</sup>
- 4.14 EDS appealed the EC Decision to the High Court. It said that, under the pORPS, port activities needed to avoid adverse effects/significant adverse effects on Protected Coastal Sites. The High Court agreed and

<sup>33</sup> COA 05.135: EC Decision at [91] – [92].

<sup>34</sup> COA 05.145: EC Decision [122].

<sup>35</sup> COA 05.149: EC Decision [135].

<sup>36</sup> BOA 205: *King Salmon* at [81].

<sup>37</sup> E.g. Port Otago submissions at [3.11.1] – [3.11.3], [5.6].

allowed the appeal.<sup>38</sup>

4.15 The High Court took an orthodox approach to determining how the pORPS policy relating to effects of port activities on Protected Coastal Sites needed to be framed to “*give effect to*” the NZCPS:

- a. It identified *King Salmon* as the leading authority on the matters before it, noting at [46]-[60] the Supreme Court’s findings regarding the hierarchy of planning instruments; meaning of “*give effect to*”; and the importance of the language used in the relevant NZCPS provisions.
- b. The High Court then applied that approach as part of an orthodox statutory interpretation exercise, examining the structure and text of the Ports Policy on the one hand and the Avoid Policies on the other ([79]-[94]). It found that the terms “*avoid*” and “*do not adversely affect*” in the Avoid Policies are specific and directive, and that the ways in which the Ports Policy specifies the requirements of the national transport network and ports are to be recognised did not include an exemption from those policies.
- c. The High Court then cross-checked that conclusion against NZCPS Policy 6 which recognises the importance of infrastructure, and NZCPS Policy 7 which sets out a process for undertaking strategic planning ([95]-[102]). It found nothing in text of those policies that would change its conclusion.

4.16 Port Otago appealed the High Court’s decision to the Court of Appeal. The Court of Appeal dismissed the appeal. See analysis in Section 7.

## 5. THE CORRECT APPROACH TO INTERPRETING AND APPLYING THE NZCPS

5.1 *King Salmon* is the leading authority on the relationship between the RMA’s different planning documents, and how to interpret the objectives and policies of the NZCPS and “*give effect to*” (implement)

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<sup>38</sup> COA 05.094 – 95: HC Decision at [113] – [116].

them in subordinate planning documents like the pORPS.

- 5.2 The Court of Appeal, High Court, and Environment Court were bound to apply the Supreme Court’s decision in *King Salmon*. Identifying what *King Salmon* says is therefore critical to determining this appeal.
- 5.3 The primary issue before the Supreme Court in *King Salmon* was whether changing the regional coastal plan to include policies and rules providing for salmon farming in a location where that activity would generate adverse effects on outstanding natural character and outstanding landscape values, would “*give effect to*” the NZCPS.
- 5.4 The Supreme Court approached this issue through analysis of the following two-part question:<sup>39</sup>
- a. Whether the NZCPS has standards which must be complied with by lower order planning documents; or
  - b. Whether the NZCPS’s policies can be “*assessed in the round*” and a “*balanced judgement*” made on how they should be implemented in a particular lower order planning document?
- 5.5 The Supreme Court characterised the former as an “*environmental bottom line approach*” and the latter as an “*overall broad judgment approach*”.<sup>40</sup> It confirmed the “*environmental bottom line approach*” as correct in law.<sup>41</sup>
- 5.6 The Court began by examining the scheme of the RMA itself. Next it looked at the role and text of the NZCPS. It then analysed and set out how the NZCPS is to be interpreted and applied, in a general sense.
- 5.7 The Supreme Court found that the NZCPS does not comprise a range of potentially relevant policies to be applied as local decision-makers see fit.<sup>42</sup> Rather, the requirement to “*give effect to*” the NZCPS is “*a strong directive, creating a firm obligation on the part of those subject to it*”, it is “*intended to constrain decision-makers*”.<sup>43</sup> It is more onerous than the direction for regional policy statements to not be “*inconsistent*” with any NZCPS that

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<sup>39</sup> BOA 183: *King Salmon* at [17].

<sup>40</sup> BOA 191: *King Salmon* at [38].

<sup>41</sup> BOA 219: *King Salmon* at [128]-[132]; BOA 225: *King Salmon* [150]-[152].

<sup>42</sup> BOA 218: *King Salmon* at [124].

<sup>43</sup> BOA 204 – 208: *King Salmon* [77], [90]-[91].

existed before 2003.<sup>44</sup>

5.8 The Court found that the NZCPS’s objectives and policies reflect considered choices made at a national level and those choices matter.<sup>45</sup>

5.9 This statutory context means that the words used in each provision are critical, and the correct approach to interpreting and reconciling the NZCPS’s provisions and then applying the in subordinate planning document is:<sup>46</sup>

- a. Identify the policies that are relevant.
- b. Pay careful attention to the different way in which those policies are expressed. *“These differences matter.”*<sup>47</sup>
- c. Terms that have more flexibility in how they are implemented and are less prescriptive include<sup>48</sup>: take account of; take into account; have (particular) regard to; consider; recognise; promote; encourage; as far as practicable; where practicable; where practicable and reasonable; taking all practicable steps; no practicable alternative methods.
- d. In contrast, terms that are specific, directive, and unqualified, and leave little or no flexibility in how they are implemented include:<sup>49</sup> avoid; do not allow; directed to.
- e. Policies *“expressed in more directive terms will carry greater weight than those expressed in less directive terms”*. A policy may be *“stated in such directive terms that the decision-maker has no option but to implement it.”*<sup>50</sup> Port Otago’s submissions to the contrary are incorrect.<sup>51</sup> It is this Court and not EDS that has concluded that policies can *“have the effect of what in ordinary speech would be a rule”*.<sup>52</sup> The Court made that finding aware

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<sup>44</sup> This wording applied when *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 was decided. Note that no New Zealand coastal policy statement was in force when the *New Zealand Rail* decision was made, nor any other national policy statement (the NZCPS 1994 came into force on 5 May 1994, the hearing on *New Zealand Rail* was September 1993, and the judgement was issued 4 November 1993).

<sup>45</sup> **BOA 208**: *King Salmon* at [90].

<sup>46</sup> **BOA 219 – 220**: *King Salmon* at [127] – [132].

<sup>47</sup> **BOA 219**: *King Salmon* at [127].

<sup>48</sup> **BOA 219 – 220**: *King Salmon* at [127], [129].

<sup>49</sup> **BOA 219**: *King Salmon* at [127].

<sup>50</sup> **BOA 215 – 219**: *King Salmon* at [116], [127].

<sup>51</sup> Port Otago submissions at [3.10.1], [5.2], [5.3].

<sup>52</sup> **BOA 215**: *King Salmon* at [116].

of the RMA-specific concept of “rules”.<sup>53</sup>

f. Apparent conflict between policies is likely to dissolve “*if close attention is paid to the way in which policies are expressed*”<sup>54</sup>. Only if conflict remains after the analysis summarised at paras a. – e. above is there justification for undertaking an assessment against Part 2 RMA.<sup>55</sup>

5.10 The outcome of the Supreme Court’s approach is not that one NZCPS policy applies to the exclusion of another. Rather, it is generally possible for all relevant policies to be applied at the same time (reconciled), according to their terms.

5.11 Only after that statutory level analysis did the Supreme Court turn to applying the approach to interpreting and applying the NZCPS it had identified as correct in law to the factual scenario before it.

5.12 The analysis and findings in *King Salmon* therefore comprise broad principles of legal interpretation, applicable beyond its fact scenario. Submissions to the contrary do not reflect the detail and structure of the Supreme Court’s decision or the role of the Supreme Court as senior appellate court.

5.13 Applying its approach, the Supreme Court looked at the role and meaning of the terms “*avoid*” and “*inappropriate*” in NZCPS Policies 13-Natural Character and 15-Natural Features and Landscapes, and “*appropriate*” and “*taking account of*” in NZCPS Policy 8-Aquaculture. It concluded that “*protect*”, “*preserve*”, and “*avoid*” were stronger than the directions in NZCPS Policy 8, and that in combination the terms “*avoid*” and “*inappropriate*” in NZCPS Policies 13 and 15 created “*something in the nature of an environmental bottom line*”.<sup>56</sup>

5.14 The Supreme Court considered that “*policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7*” through requiring identification of specific areas and adoption of plan provisions.<sup>57</sup> The

<sup>53</sup> BOA 180 – 215: *King Salmon* at [10], [11](a), (b), [14], [112] – [116].

<sup>54</sup> BOA220: *King Salmon* at [129].

<sup>55</sup> BOA220: *King Salmon* at [130].

<sup>56</sup> BOA210 – 212: *King Salmon* [97] – [103].

<sup>57</sup> BOA200 – 211: *King Salmon* [63], [70], [102].

“*overall broad judgement approach*” was at odds with and risks compromising strategic planning.<sup>58</sup>

- 5.15 The Supreme Court concluded that the Board of Inquiry had erred in granting a plan change that would not require aquaculture to avoid adverse effects on an area of outstanding natural character and landscape.<sup>59</sup>
- 5.16 The analysis of *King Salmon* undertaken above, reveals MDC’s “*intermediate position*” to be, in essence, an attempt to reintroduce the “*overall broad judgement*” approach the Supreme Court rejected.
- 5.17 MDC’s assertions that the relationship between policies is “*legally significant*”, regional policy should be “*strongly shaped*” by the NZCPS, the NZCPS is a “*shaping force*” and its policies are “*powerful signposts*”, are just ways of saying that regional policy statements, and plans, do not need to apply the NZCPS according to its terms. MDC’s approach involves the NZCPS being taken into account rather than being given effect. That approach does not reflect the analysis or findings in *King Salmon*, or the statutory language of and hierarchy within the RMA, and lacks precision.
- 5.18 On MDC’s approach, a regional exception to a directive policy is a “*legitimate exception*” if “*rationaly supported*” by a s 32 analysis. This approach could be used to support the implementation in a given region of any activity that is contrary to the Avoid Policies, on the basis that regional factors outweigh the national considerations expressed in the NZCPS. It is contrary to the Supreme Court’s findings regarding the relationship between NZCPS provisions. Further, s 32 requires consideration of options that are lawfully available to a local authority. A provision is not lawful if it does not “*give effect to*” the NZCPS. Thus, a regional policy providing for an exception to the Avoid Policies, is not lawful, and cannot be confirmed as “*appropriate*” under s 32 RMA. In its commentary on s 32 the Supreme Court did not suggest that it could result in an exception to the Avoid Policies.<sup>60</sup>

<sup>58</sup> BOA 223 – 226: *King Salmon* [140], [153].

<sup>59</sup> BOA 226: *King Salmon* [153].

<sup>60</sup> BOA 202 – 204: *King Salmon* at [69], [75]-[76].

5.19 Port Otago’s assertion at [7.4] that enactment of the Legislation Act 2019<sup>61</sup> means the NZCPS should be interpreted differently is misplaced. Insertion of the word “*context*” did nothing more than align the words of the Act with established legal principle.<sup>62</sup> In any event, such contextual matters were addressed in *King Salmon*.<sup>63</sup>

## 6. APPLYING THE CORRECT INTERPRETATIVE APPROACH TO NZCPS POLICIES RELEVANT TO THIS APPEAL

### The Avoid Policies

6.1 Common language is used as between Policies 11, 13, 15 (emphasis added):

***Policy 11 Indigenous biological diversity (biodiversity)***

*To protect indigenous biological diversity in the coastal environment:*

(a) avoid adverse effects of activities on:

...

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

...

***Policy 13 Preservation of natural character***

(1) *To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:*

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment

...

***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 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 on other natural features and natural landscapes in the coastal environment;...

6.2 Protection or preservation requires avoidance of adverse effects on areas with outstanding qualities or of highest biodiversity value. A lower standard of protection or preservation is provided for in other areas of

<sup>61</sup> BOA 4.

<sup>62</sup> See: Explanatory Note to the Legislation Bill 2019, General Policy Statement, on Clause 10. For example: In *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 the Court stated at [22] “In determining the purpose [of an enactment] the Court must obviously have regard to both the immediate and the general legislative context. Of relevance to may be the social, commercial or other objective of the enactment”.

<sup>63</sup> See for example *King Salmon* at [107]: BOA 212 and [133]-[134] BOA 221.

natural character, in other landscapes, and for other specified biodiversity values: “*avoid significant*” adverse effects, and “*avoid, remedy or mitigate other*” adverse effects.

- 6.3 "Avoid" means "not allow" or "prevent the occurrence of". It is a "strong word" that is “*specific and directive*”.<sup>64</sup>
- 6.4 NZCPS Policies 13 and 15 further stipulate that it is the adverse effects of "inappropriate" development that must be avoided; "*what is inappropriate is to be assessed against the characters of the environment that policies 13 and 15 seek to preserve*".<sup>65</sup> The term “*inappropriate*” does not import a discretion to determine whether an activity is appropriate based on other factors (e.g.: technical suitability of the area for the activity).
- 6.5 NZCPS Policy 16 uses a different formulation but means the same thing (emphasis added):

***Policy 16 Surf breaks of national significance***

*Protect the surf breaks of national significance for surfing listed in Schedule 1, by:*

- a. ensuring that activities in the coastal environment do not adversely affect the surf breaks; and*
- b. avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.*

- 6.6 The difference in language reflects a difference in sentence structure. On its plain meaning, the direction to “*ensure*” is absolute, it denotes a “*thing that shall happen*”.<sup>66</sup> A requirement to “*ensure*” activities “*do not adversely affect*” nationally significant surf breaks has the same strength and specificity as a direction to avoid adverse effects.

## **Ports Policy**

- 6.7 The Ports Policy is (emphasis added):

***Policy 9: Ports***

*Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by:*

- a. ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes;*
- b. considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for*

<sup>64</sup> BOA186 – 219: *King Salmon* [126] – [127]. Avoid also defined at [24b], [62], [93], [96].

<sup>65</sup> BOA211 – 212: *King Salmon* [100]-[104].

<sup>66</sup> Pocket Oxford Dictionary 4<sup>th</sup> Edition, pg 266.

*shipping; and their connections with other transport modes.”*

- 6.8 The direction in the chapeau is to “*recognise*” that a sustainable transport network “*requires*” efficient and safe ports. The Supreme Court concluded that a requirement to “*recognise*” is flexible, specifically referencing the Ports Policy as an example in doing so.<sup>144</sup>
- 6.9 The term “*requires*” relates to the national transport system and introduces the description of what it needs to be sustainable. It is not a direction to decision-makers regarding a specific outcome or action.
- 6.10 Subparagraphs (a) and (b) then state two specific ways in which drafters of subordinate planning documents are to “*recognise*” the national transport network and its need for safe and efficient ports.
- 6.11 Subparagraph (a) is directive about the interplay between the safe and efficient operation of ports and their transport connections and other development in the coastal environment. Other development must not adversely affect those elements of a port’s operation. This might support a stringent approach to preventing or controlling non-port related development in proximity to a port e.g. in an identified shipping channel. It has no bearing, however, on the interplay between port activities and protection (which is distinct from development) of Protected Coastal Sites.
- 6.12 Subparagraph (b) then instructs decision-makers to “*consider where, how, and when*” to provide for the sufficient and safe operation and development capacity of ports in planning documents:
- a. “*Consider*” is a broad and flexible term<sup>67</sup>. There may be a wide range of options available regarding: the locations in which to provide for ports (the where); the extent of development, or the construction, maintenance and operational methods to be used (the how); and the timing of port development or expansion (the when).
  - b. Those issues regarding where, how, and when to provide for port activities must (and can), however, be determined and implemented

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<sup>67</sup> BOA 219: *King Salmon* at [127].

in accordance with any constraints that arise because of the directions in the Avoid Policies.

- 6.13 The difference between the language of the Avoid Policies and the Ports Policy is not “*subtle*” as MDC contends. A direction to “*avoid*” adverse effects on specifically identified areas of national importance, is clearly more specific and directive than a direction to “*recognise*” the requirements of the national transport network by “*considering where, how, and when*” to provide for the safe and efficient operation of ports.

### **NZCPS Policy 8 Aquaculture**

- 6.14 NZCPS Policy 8 Aquaculture is relevant because it was the enabling policy at issue in *King Salmon*. It states:

***Policy 8 Aquaculture***

*Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:*

*(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:*

*(i) the need for high water quality for aquaculture activities; and*

*(ii) the need for land-based facilities associated with marine farming;*

*(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and*

*(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.*

- 6.15 The similarities between NZCPS Policy 8 and the Ports Policy are plain:
- a. In both policies, decision-makers are told to “*recognise*” the various well-beings of aquaculture/ports “*by*” doing a list of specific things.
  - b. One method in Policy 8, is through regional policy statements and regional plans providing for aquaculture in “*appropriate*” places, recognising aquaculture’s need for high water quality and land-based facilities. In this context appropriate refers to technical suitability for aquaculture. This method, like the direction to consider where, how, and when to provide for the safe and efficient operation of ports under the Port Policy, must be understood and implemented in a way that is in accordance with the directions in the Avoid Policies.
  - c. Another method in Policy 8 is providing aquaculture with similar protection from other development, as is afforded to port activities

under the Port Policy.

- 6.16 There is no difference in text between the Ports Policy and NZCPS Policy 8 justifying a different approach to managing the effects of ports on Protected Coastal Sites from that adopted in *King Salmon* with regard to aquaculture.

### **NZCPS Policy 6 Activities in the coastal environment**

- 6.17 NZCPS Policy 6 is relevant because it relates to activities in the coastal environment including infrastructure, and infrastructure in the NZCPS includes ports,<sup>68</sup> and because it directly informed the Environment Court’s conclusion there was an irreconcilable conflict between the Ports Policy and the Avoid Policies.

- 6.18 NZCPS Policy 6 relevantly states:

***Policy 6 Activities in the coastal environment***

*(1) In relation to the coastal environment:*

*(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;*

*(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment; ...*

- 6.19 Policies 6(1)(a) and (b) are both broad and flexible. They can be met at the same time as requiring infrastructure to avoid adverse effects in accordance with the Avoid Policies.
- 6.20 The Environment Court’s conclusion that the Ports Policy conflicts with the Avoid Policies because it did not include the phrase “*without compromising the other values of the coastal environment*”<sup>69</sup> in NZCPS Policy 6(1)(b) is wrong. NZCPS Policy 8-Aquaculture does not contain that phrase, but this was not considered by the Supreme Court to result in a conflict. The Ports Policy must be read on its own terms alongside the Avoid Policies and, as submitted above, the Ports Policy and the Avoid Policies do not conflict.

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<sup>68</sup> COA 301.177 and s 2 RMA “**infrastructure** means ... (k) facilities for the loading or unloading of cargo or passengers carried by sea, including a port related commercial undertaking as defined in section 2(1) of the Ports Companies Act 1998.

<sup>69</sup> COA 05.135: EC Decision at [91].

## NZCPS Policy 7 Strategic planning

6.21 NZCPS Policy 7 is relevant because it relates to strategic planning of the coastal environment overall, part of which involves protecting and preserving Protected Coastal Sites and part of which involves providing for port activities, and because the Environment Court and MDC consider it justifies an exception for ports to the Avoid Policies.<sup>70</sup>

6.22 NZCPS Policy 7 states (emphasis added):

### ***Policy 7 Strategic planning***

#### *Strategic planning*

*(1) 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 a regional and district level, and:*

*(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:*

*(i) are inappropriate; and*

*(ii) 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.*

*(2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided*

6.23 NZCPS Policy 7 is a procedural policy directing how strategic planning should occur to implement the NZCPS. Nothing in it, or in *King Salmon*, suggests that through this process, the application to Protected Coastal Sites of specific and directive provisions like those in the Avoid Policies can be reduced or removed for certain activities or in certain regions.

6.24 To the contrary, logically the Avoid Policies will directly inform the process of identifying the areas referred to in Policy 7(1)(b) and 7(2).

6.25 As observed by the Supreme Court, NZCPS Policies 13 and 15 "*reinforce the strategic and comprehensive approach required by policy 7*", through also requiring identification and adoption of plan provisions.<sup>71</sup> The Supreme Court did not see NZCPS Policy 7 as providing a means of circumventing the requirement to avoid adverse effects in those policies.

<sup>70</sup> COA 134: EC Decision at [91] COA 146: EC Decision at [128].

<sup>71</sup> BOA 200: *King Salmon* at [63].

If it had, it would have reached a different decision.<sup>72</sup>

- 6.26 Importantly, an ability to apply for a resource consent to undertake an activity (as anticipated by Policy (1)(b)(ii)), can be provided for in situations where a policy(ies) applies that requires avoidance of adverse effects. Submissions asserting otherwise are wrong.<sup>73</sup>
- 6.27 This is because it is avoidance of effects, not activities that is required. Whether an activity has an adverse effect, whether that effect can be avoided, and how it can be avoided, will depend on the facts of a specific proposal. Where the factual context is relevant to determining policy compliance, provisions that enable application for resource consent can be appropriate.<sup>74</sup>
- 6.28 The requirement to avoid adverse effects in the Avoid Policies is not contextual. The factual question (i.e. whether a proposed activity seeking to locate or operate will have an adverse effect) may be contextual.

### **NZCPS Objectives and Policy 1**

- 6.29 Port Otago says (at [6.4]) that Objective 6 justifies an exception to protection of values of the coastal environment, and thus the Avoid Policies. This is wrong. Objective 6 recognises that protection of the coastal environment “*does not preclude use and development in appropriate places and forms, and within appropriate limits*”. The Avoid Policies specify limits that implement that objective. Port Otago also fails to mention Objectives 1 and 2 which are to (in summary):
- a. “*To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems*” including by “*protecting representative or significant natural ecosystems and sites of biological importance*” (Ob 1)
  - b. “*To preserve the natural character of the coastal environment and protect natural features and landscape values*” including through “*identifying those areas where various forms of subdivision, use, and development would be inappropriate*”

<sup>72</sup> **BOA 197**: See *King Salmon* at [54], **BOA 223**: *King Salmon* at [139].

<sup>73</sup> E.g Port Otago submissions [2.9].

<sup>74</sup> **COA 41**: CA Decision at [85].

*and protecting them from such activities” (Ob 2)*

6.30 MDC appears to contend that NZCPS Policy 1 supports regional exceptions to the Avoid Policies. EDS disagrees. Policy 1(1) recognises that the physical nature and extent of the coastal environment will vary across Aotearoa. Policy 1(2) then sets out a list of features that assist with identification of extent. The Avoid Policies focus on avoiding potential effects. The statement in Policy 1(1) that, “*issues that arise may have different effects in different localities*” recognises that effects generated by activities will vary across the country but it does not mean that regions can choose whether to apply the Avoid Policies.

## **7. DID THE COURT OF APPEAL APPLY THE CORRECT APPROACH**

### **Majority judgement**

7.1 Like the High Court, the majority of the Court of Appeal took an orthodox approach to determining the question before it (being whether the High Court misapplied *King Salmon*):

- a. To begin, it set out and commented on the NZCPS policies relevant to the appeal (CA Decision [21]-[34]). This ensured it had the text of those provisions at the forefront of its mind.
- b. The Court of Appeal then examined both the majority and minority decisions in *King Salmon* to identify for itself the Supreme Court’s findings on the correct approach to interpreting the NZCPS and applying it in subordinate planning instruments required to “*give effect to*” the NZCPS (CA Decision [38]-[49], [50]-[52]). The majority identified the following key points from *King Salmon*:
  - That the requirement to “*give effect to*” the NZCPS is a strong direction, intended to constrain decision-makers.
  - There is no need to refer back to Part 2 RMA to interpret the policies in the NZCPS. The interpretation exercise should be focused on the text of the relevant NZCPS policies.

- The term “*avoid*” means “*not allow*” or “*prevent the occurrence of*”. It can be contrasted with “*avoid, remedy, or mitigate*”. *Avoid* means “*not allow*” or “*prevent the occurrence of*” and is a stronger direction than “*take into account*”.
  - The NZCPS can contain policies that are intended to, and do, have binding effect. NZCPS Policies 13 and 15, which use the term “*avoid*”, are examples of such policies.
- c. The majority then familiarised itself with the analysis and findings of the Environment Court and the High Court, for it to then compare those with the analysis and findings of the Supreme Court in *King Salmon* (CA Decision [62]-[70]).
- d. Finally, against that background, the majority undertook its own analysis of the relevant NZCPS Policies, using the approach it had identified from *King Salmon* (CA Decision [78]-[87]). It concluded the High Court had not misapplied *King Salmon* and was correct in finding that a policy allowing port activities to avoid, remedy or mitigate adverse effects on Protected Coastal Sites did not “*give effect to*” the NZCPS. The reasons for this were:<sup>75</sup>
- The Ports Policy is “*not sufficiently textually or contextually different from policy 8 [aquaculture] so as to enable a different outcome from King Salmon*”.
  - The key directions to decision-makers in the Ports Policy are “*recognise*” and “*consider*” and these are flexible.
  - The operative verb in the Ports Policy is not “*require*”. That term is an “*intensifier*” which adds detail to the underlying matter to be recognised through the Ports Policy (national transport network); it does not give the Ports Policy greater imperative status vis-à-vis the Avoid Policies or NZCPS Policy 8-Aquaculture.
  - Subparagraph (a) of the Ports Policy is directive but in relation to protecting ports from development. Subparagraph (b) provides “*a far lower level of direction, and one broadly consistent with the provision for*

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<sup>75</sup> COA 39 – 40: CA Decision at [81] – [82].

*strategic planning in policy 7”*

- Overall, “*the NZCPS contains its own directive hierarchy. The avoidance policies contain relatively clear environmental bottom lines; policies 7 and 9 contain lower level degrees of direction as to development and other activities in the coastal environment*”. They are not equally directive. Read in that way all policies can be reconciled and applied at the same time; the ports policy (policy 9) is applicable, but within the bounds set by the more directive avoidance policies. The same is true of the strategic planning policy (policy 7). Port Otago’s submission (at [1.1]) that the majority considered the Avoid Policies and Ports Policy did not need to be reconciled is wrong.

7.2 The sequential step through of the CA Decision, the Supreme Court’s decision in *King Salmon*, and the relevant provisions of the NZCPS themselves undertaken above, confirms that the majority of the Court of Appeal was correct to dismiss Port Otago’s appeal.

### **Minority judgement**

- 7.3 Port Otago and MDC say the minority judgement was correct. EDS disagrees and respectfully says Miller J was in error in finding the Avoid Policies and the Ports Policy “*cannot be fully reconciled*”<sup>76</sup>.
- 7.4 EDS does not agree that uncertainty over the implications of the Avoid Policies for activity status or decisions on resource consents justifies departure in the pORPS from the directions in those policies.<sup>77</sup> There can be no certainty as to those matters at this stage, as they are not the subject of the pORPS process. The Environment Court was required to determine what the pORPS must say to “*give effect to*” the NZCPS as regards potential effects of ports on Protected Coastal Sites. Activity status for port activities will be determined, however, through the subsequent regional coastal plan process; and any resource consent applications will ultimately be determined through Part 6 RMA.

<sup>76</sup> COA 05.050: CA Decision at [112].

<sup>77</sup> COA 47: CA Decision at [104] – [106].

- 7.5 EDS also says that in focusing on the “*real meaning of our decision*”<sup>78</sup>, Miller J conflated the potential for a factual conflict between port activities and protection of Protected Coastal Sites such that adverse effects cannot be avoided, with a conflict between the text of NZCPS policies. The potential for a factual conflict does not justify an exception to the Avoid Policies. Whether a specific port activity can in fact avoid relevant effects does not drive the pORPS policy framework that applies to ports. Miller J’s approach implies policies should be determined by reference to anticipated consequences of the policy framework (a ‘bottom up’ approach). The RMA provides for the reverse (a ‘top down’ approach) as shown in Section 3 above and in *King Salmon*.
- 7.6 For the reasons set out at paragraphs 6.7-6.13 above, EDS disagrees with Miller J’s interpretation of the structure of and direction in the Ports Policy.<sup>79</sup>

## 8. CONSEQUENCES OF *KING SALMON*

- 8.1 The Court of Appeal was keenly aware of the practical consequences for port activities of its findings, and of the environmental bottom line approach to interpreting and applying the NZCPS more generally.
- 8.2 In this case, the direct consequence is that the pORPS will include a policy that says port activities must avoid adverse/significant adverse effects on Protected Coastal Sites. The pORPS or the regional coastal plan can also provide direction to assist applying that policy in practice. For example, the pORPS could: spatially identify the existing extent of ports or Protected Coastal Sites; identify the characteristics of Protected Coastal Sites; and provide direction on what constitutes an adverse effect. These types of provisions or methods, represent lawful ways of providing regional specificity.<sup>80</sup>
- 8.3 In terms of the consequence for regional coastal plans, Port Otago says prohibited or non-complying status for activities in Protected Coastal

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<sup>78</sup> COA 47: CA Decision at [104].

<sup>79</sup> COA 49: CA Decision at [111] – [112].

<sup>80</sup> Cf. MDC position that a regional council may deliver regional specificity by departing from the Avoid Policies without an equally directive national level policy providing for that, if that is “*rationality supported*” by s 32 RMA.

Sites is inevitable. EDS disagrees. It has not any stage said prohibited activity status or non-complying activity status is a necessary consequence of the Avoid Policies.<sup>81</sup> Furthermore, the activity status that ultimately applies to any individual activity potentially affecting a Protected Coastal Site is a question for the subsequent regional coastal plan process and a product of the s 32 RMA evaluation undertaken as part of that process. All options in s 77A RMA are available.<sup>82</sup>

- 8.4 Turning to the consequence for resource consents, all that can be said is that some port activities within or that impact on Protected Coastal Sites may be able to go ahead, some may have to be adjusted, and some may not be able to proceed. That consequence is not inherently unlawful and is consistent with the scheme of the RMA.<sup>83</sup>
- 8.5 There is no evidence to support Port Otago's claims it will have to cease existing operations and close,<sup>84</sup> or be unable to get resource consent for almost all, if not all, its operations.<sup>85</sup> Whether, for example, removal of some seagrass has a significant adverse effect on the overall seagrass habitat and ecosystem such that it offends against Policy 11(b), is a fact-specific question that requires technical ecological assessment; as is whether there are alternative methods of achieving a desired operational outcome that does not generate such adverse effects. Port Otago has existing use rights under Part 3 RMA (some short term and some long term) for its activities.
- 8.6 The environmental bottom line approach has been beneficial to resource management in New Zealand and is legally correct.
- 8.7 As regards its benefits, the approach is simple, clear, and certain. Proponents of development: know exactly which effects are allowed and which are not; can identify areas in which development will be more challenging and, where, in some cases such development may not be able

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<sup>81</sup> Relevant excerpts of submissions from the Environment Court, High Court, and Court of Appeal proceedings can be provided if considered necessary.

<sup>82</sup> See *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 3217 for an example where a suite of activity statuses was adopted for different farming activities, from permitted activity status upward, in an outstanding natural landscape that was also a working rural landscape.

<sup>83</sup> Resource Management Bill, Third Reading, 4 July 1991, Hansard Reports from pg 3017.

<sup>84</sup> **COA 05.107**: EC Decision at [22].

<sup>85</sup> See Port Otago Submissions at [2.14], [4.2] – [4.5].

to occur at all. Investment decisions can be made on that basis.

- 8.8 It also ensures that the social, economic, and cultural benefits of a healthy natural environment are realised now and for future generations, consistent with s 5 RMA. These benefits are not always found in development; they can be found in nature. The Avoid Policies relate to resources that are of national importance under s 6 RMA, typically scarce, precious ecologically or in terms of human well-being, and often at risk. They are not resources that future generations will thank current generations for degrading or destroying. It is no accident that the NZCPS applies such a stringent policy framework to these matters.
- 8.9 As regards its accuracy in law, an environmental bottom line approach to interpreting and applying the NZCPS is, as the Court of Appeal observed, “*more consistent with Parliament’s original intent when enacting the RMA*”.<sup>86</sup> It is consistent with: Part 2 RMA; the hierarchical structure of the RMA itself and the planning documents created under it; the amendment to the RMA replacing “*not inconsistent with*” with “*give effect to*”; the purpose of New Zealand coastal policy statements; and the process by which New Zealand coastal policy statements are prepared.<sup>87</sup>
- 8.10 If Port Otago considers that where the environmental bottom lines are currently drawn is resulting in outcomes that were not anticipated when the NZCPS was gazetted<sup>88</sup> and the NZCPS now poses unworkable standards for essential infrastructure, the answer lies elsewhere.<sup>89</sup> It is the role of the courts to clarify how the law is correctly interpreted and applied, which the Supreme Court has done in terms of interpretation of the NZCPS and its implementation in subordinate planning instruments. It is the role of the Minister of Conservation (s 57) to redraft the NZCPS if on proper analysis that is found to be required.<sup>90</sup>

<sup>86</sup> **COA 050.029**: CA Decision at [55]. See also fn. 83 above: Resource Management Bill, Third Reading, 4 July 1991, Hansard Reports from pg 3017.

<sup>87</sup> **BOA 222**: The process for preparing the NZCPS is discussed in *King Salmon* at [136].

<sup>88</sup> As the Court of Appeal suggests might be possible: **COA30 – 31**: CA Decision at [56]-[58].

<sup>89</sup> **COA 40**: As stated by the Court of Appeal in the CA Decision at [83].

<sup>90</sup> It is notable that the Department of Conservation’s review of the NZCPS was released in February 2018, and despite recording the “industry view” that the NZCPS presents challenges because of *King Salmon*, no changes have been made in the intervening four years: *Review of the effect of the NZCPS 2010 on RMA decision-making. Overview and key findings*, prepared for the Minister of Conservation by the Department of Conservation, June 2017, Part 1 at [17] – [27].

There is currently a genuine opportunity for Port Otago to raise its concerns with the Minister as part of resource management law reform and the imminent repeal and replacement of the RMA.

## 9. CONCLUSION

- 9.1 The Court of Appeal was correct to dismiss Port Otago's appeal. A policy that provides for port activities to "*avoid, remedy, or mitigate*" adverse effects on Protected Coastal Sites does not give effect to the NZCPS.
- 9.2 Port Otago's new proposed provision is opposed. It simply replaces "*avoid, remedy, mitigate*", with keep adverse effects to "*the minimum extent necessary*", which is equally does not "*give effect to*" the NZCPS.
- 9.3 EDS therefore seeks that this appeal also be dismissed.

Dated 5<sup>th</sup> day of April 2022

DA Allan / MC Wright / CSS Woodhouse  
Counsel for the First Respondent

## **AUTHORITIES**

### **Legislation**

- Resource Management Act 1991: ss 2, 5, 43AA, 45 – 58A, 59 – 77, 77A
- Legislation Act 2019: s 10

### **Cases**

- *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70
- *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767
- *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (SC)
- *Man, O'War Farm Ltd v Auckland Council* [2017] NZHC 3217

### **Other Materials**

- New Zealand Coastal Policy Statement 2010
- Legislation Bill 2017, Explanatory Note
- *Review of the effect of the NZCPS 2010 on RMA decision-making, Overview and key findings*, prepared for the Minister of Conservation by the Department of Conservation, June 2017
- Resource Management Bill, Third Reading, 4 July 1991, Hansard Reports