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

No. SC 6/2022

BETWEEN	**PORT OTAGO LTD**
	Appellant
AND	**ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**
	First Respondent and Others

SUBMISSIONS BY THE MARLBOROUGH DISTRICT COUNCIL (4TH RESPONDENT) IN SUPPORT OF PORT OTAGO'S APPEAL

Dated: 5 April 2022

***** Underling indicates hyperlinks to the Council's BOA.

****** A mature version of these submissions was sent to the other respondents on Thursday 31 March 2022 as was done in previous hearings because the Council's argument supports Port Otago's appeal.

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Introduction

[1] The Council's interest in this proceeding is that it manages the region with the most extensive coastline and coastal environment in New Zealand. Much of the coastal environment is scenic, and significant parts are outstanding or have a high natural character, further protected in the proposed Marlborough Environment Plan.[1] The Council also manages several ports and New Zealand's largest aquaculture industry. Therefore, much is demanded of the Council regarding good coastal strategic planning.

[2] This appeal concerns the scope for choice by lower-order decision-makers such as local authorities when undertaking strategic coastal planning and fulfilling the obligations under Part 5, RMA (including relevantly for a regional policy statement, RMA, s 59 and ss 61-62) to:

(a) Undertake regional strategic policy design for regional planning instruments following RMA s 32 under the provisions of RMA, Part 5; and

(b) At each step to meet the obligation to implement national policy (the Implementation Obligation) (see, for example, RMA, s 62(3));

(collectively the 'Statutory Strategic Planning Functions'). The Implementation Obligation in Part 5 applies to all national policy with the same wording despite the fact the NZCPS is treated elsewhere in RMA, Part 5 separately.

[3] Specifically, the issue of choice arises when the so-called Avoidance Policies in NZCPS are engaged because of the consideration of a policy of that type (NZCPS, Policy 13) in *King Salmon*. Therefore, the correct assessment of the *rationes decidendi* of *King Salmon* is important.[2]

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[1] Proposed Marlborough Environment Plan (Marlborough District Council website). The Council was also an intervenor to support coastal biodiversity tools in regional coastal plans in *Attorney-General v The Trustees of The Motiti Rohe Moana Trust & Ors* [2019] NZCA 532 [4 November 2019]

[2] *Environmental Defence Society Incorporated v. The New Zealand King Salmon Company Limited* [2014] NZSC [38] ("*King Salmon*") (BOA tab 4)

Summary of the Council's argument

[4] The Marlborough District Council ("Council") submits:

(a) The majority judgment of the Court of Appeal decontextualised *King Salmon* from the context of the NZCPS policies it engaged and the coastal environmental and regional planning context that applied. The Court did not accurately capture *King Salmon's rationes decidendi*. *King Salmon* did not seek to determine that the NZCPS Avoidance Policies would operate inflexibly for all strategic coastal planning issues that engaged them in New Zealand because that was needed to meet the Implementation Obligation.

(b) The majority of the Court of Appeal implausibly read the judgment in *King Salmon* as making a basic error of law by treating a policy Statement promulgated as a suite of objectives and policies for a small part of the Statement (i.e. the Avoidance Policies) to be akin to regulation. Consequently, the judgment leaves no room for the evaluative task when developing new regionally specific objectives and policies that Parliament directed under RMA ss 61-62. The Avoidance Policies on that analysis would operate to unlawfully fetter (by that level of constraint) the strategic planning task demanded under RMA ss 61-62.[3]

(c) The Court of Appeal's majority judgment oversimplified the strategic planning issue at [78] because the Implementation Obligation applies to the NZCPS as a whole. If, as the Environment Court found, the environmental context is that complete avoidance could potentially disable or severely limit the operation of Port Otago against the strongly worded NZCPS, Policy 9 then the correct issue is different: the issue is whether following the instruction in NZCPS Policy 7, the statutory directions in ss 61-62 (including RMA s 32) that was an appropriate[4]

[3] In administrative law a fetter to this degree would be regarded as unlawful if policy is used in that way by a decision maker; per *M v. Syms* HC Wellington 5 December 1990 (BOA tab 8)

[4] For 'appropriateness' as part of the assessment see RMA,s58(1)(a), RMA s 32(1) (made relevant under RMA, s61 (BOA tab 1) and NZCPS, Policy 7 (BOA tab 16).

environmental outcome to be built into the design of the proposed Otago Regional Policy Statement considering all relevant potential environmental consequences? The Court of Appeal decided wrongly that issue should be decided solely on a textual analysis that turned on the subtle difference in relative directive strength of the Avoidance Policies and Policy 9 that the majority identified. Because the Avoidance Policies prevailed a more nuanced policy approach informing the future assessment of effects in resource consents was not allowed. There was no material difference in the strength of Policy 9. Also, respectfully, even if there was a subtle difference the improbable result is the Court of Appeal found that the Minister of Conservation intended the possible disablement of Port Otago when making the NZCPS 2010 without further regional-level inquiry and evaluation of the particular environmental consequences. That cannot be correct. For example, the evaluation report for the NZCPS, following RMA s 32(1)(c) as directed by ss 57(1) and 52(1)(c) does not consider these matters at all. That report has only a very general analysis of the impact of Policy 9 and the Avoidance Policies and nothing about their interaction.[5]

(d) The Court of Appeal's decision also failed to consider the crucial NZCPS, Policy 1(1) that identifies that environmental issues are not uniform across the country or within a region and hence there is no formulaic response expected by the policy imperatives of the NZCPS 2010.

(e) The majority in the Court of Appeal held at [59] that the Supreme Court probably overstated the rigidity with which the New Zealand Coastal Policy Statement (NZCPS) was intended to be followed by lower-order decision-makers applying the 'environmental bottom-line' metaphor because it was made when the 'overall judgment approach' prevailed. The conclusion of the Court of Appeal at [57] that the Minister of Conservation understood the implications of

5 "Summary of the Evaluation of the NZCPS 2010 under section 32 of the Resource Management Act", Department of Conservation (Wgn) (BOA tab 20)

King Salmon for activities such as Ports but did nothing, and it is now for the government to change has no evidential basis and is, with respect, weak and incorrect reasoning. For example, the Department of Conservation in its review of the implementation in the NZCPS in June 2017 (under key findings at D page 5) described the *King Salmon* decision as causing polarised views as to its implications requiring ongoing discussion.[6]

(f) Conversely, Miller J, while erring on the substantive question of the Environment Court making an error, correctly:

(i) Attempted to contextualise *King Salmon*'s when assessing its *rationes decidendi* at [98] – [100].

(ii) Observed at [99] the limitations of the environmental bottom-line metaphor in a policy context.

(iii) Considered there was scope for legitimate choice in strategic planning, and NZCPS, Policy 9 was not like Policy 8 at [108] and then at [109] the environmental context mattered.

(g) If the majority of the Court of Appeal was correct about the effect of *King Salmon* then, with respect, *King Salmon* should be reconsidered at least by allowing for evaluation of appropriate strategic planning design where significant other NZCPS policies such as Policy 9 and Policy 6(1)(a) may be disabled by complete avoidance. The textual method, giving policy precedence based only on the strength of the direction in a policy and then applying the superior policy as a rule, is not how the NZCPS was intended to be implemented. That submission is based on the logic of the system in RMA, Part 5, the directions in ss 61-62 and the contextual material surrounding the Minister's decision to issue the NZCPS

[6] "Review of the effect of the NZCPS 2010 on RMA decision-making. Part 1 – Overview and key findings." Prepared for the Minister of Conservation by the Department of Conservation , ISBN 978-1-98-851448-2 (online) (BOA tab 22)

that is relevant to discerning the NZCPS's meaning and use.[7] For example, the NZCPS, Preamble, is plain on the limits of existing knowledge and the importance of understanding better the environmental context with the NZCPS's priorities in mind to secure a range of environmental imperatives through high quality plans. Also, RMA, s 32 requires the Council to choose at the regional scale the most appropriate objectives and policies which is not limited to only where the Avoidance Policies do not apply.

(h) A purely textual approach of the type applied by the Court of Appeal will cause significant unintended and inappropriate consequences on critical infrastructure required to meet the needs of present and future generations. Providing capacity for that infrastructure is an important aspect of sustainable management under RMA, s 5(2)(a) reflected in important policies in the NZCPS on key infrastructure.

[5] The Environmental Defence Society and Royal Forest and Bird have presented the Senior Courts in a number of cases after *King Salmon* with a false binary choice. Either one treats the Avoidance Policies as environmental bottom lines operating like regulation relying on *King Salmon,* or you are left with policies simply weighted at the decision maker's discretion, which is the disallowed 'overall judgment approach'. Properly considered, *King Salmon* is authority for an intermediate position where the constraining force of policy and the relationship of the policies to each other is legally significant for decision-making that must be addressed in decision-making and which is choice limiting at the regional scale. However, that does not remove choice in strategic planning design for every resource management issue irrespective of the environmental context. 'Environmental context' means in these submissions the full array of natural and physical resources under consideration and the consequences or outcomes of choices for the natural environment and communities, along the response continuum of use, management and protection. The

7 See for example "Summary of the Evaluation of the NZCPS 2010 under section 32 of the Resource Management Act", Department of Conservation (Wgn) (BOA tab 20)

more directive policies where they operate will strongly constrain choices more than other policies, so exceptions are harder to justify. For example, the trade-offs that cause the tensions with other major environmental values must be fully justified and impinge on resources where the Avoidance Policies apply only to an appropriate extent.

[6] The Senior Courts can, following *King Salmon,* assess whether there has been a legitimate performance of the Implementation Obligation. That Senior Court supervision was impossible when the Senior Courts before *King Salmon* had endorsed the 'overall judgment approach'. Because that method allowed for weighting by the primary decision-maker as unconstrained evaluation and hence never reached the threshold of an error of law. That Senior Court supervision of the Implementation Obligation must be performed with an appropriate acknowledgement of the national scope of the instrument, the limited environmental information behind the NZCPS's formulation, the role of Part 5 for regional strategic planning and the need for appropriate deference to specialist decision-makers.

The structure of the Council's submissions

[7] The Council's submissions follow the sequence below:

(a) Describing generally the discipline strategic planning and the terrain of the current contest.

(b) Considering in more detail the logic of RMA, Part 5 and the correct interpretation of *King Salmon*.

(c) Explaining why the Environment Court made its decision in this proceeding and why it did so correctly.

(d) Identifying the dangers of relying on text (especially focusing on directional strength of verb phrases) without considering the environmental context in strategic planning.

(e) Addressing the boundaries of the Implementation Obligation.

(f) Some specific submissions on Policies 7 and 9 of NZCPS.

(g) A conclusion.

Strategic planning and its current state since several decisions of Senior Courts after *King Salmon*

[8] Strategic planning is a discipline described in NZCPS, Policy 7 and *King Salmon* and performed generally under RMA, Part 5.[8] A key aim of the NZCPS was better coastal strategic planning.[9] The essential nature of strategic planning is a systematic evidence-based process of policy development using goals (objectives), policies, and in the lowest instruments 'methods' (including rules that have the status of regulation)[10] to achieve sustainable management. The evaluation task responds to the particular environmental context with greater granularity as one moves down the chain. The policy development at each stage in the planning instrument hierarchy shapes the design of lower-order instruments. Ultimately that system influences the activity class of uses in rules (operating as regulation)[11] and constrains the performance of discretions concerning applications for consent for activities under RMA, s104.[12] Strategic planning is also values-driven because the essence of modern planning is values-based planning. Key shaping values governing policy choice are the directions expressed in RMA, Part 2, ss 6-8 and national policy, recognising the importance of particular natural and physical resources and the interests of tangata whenua.

[9] *King Salmon* at [55] cannot be clearer on the point that environmental context matters in strategic planning.

[10] *King Salmon* magisterially explained why the 'overall judgment approach' with its general recourse to the open language of RMA, s 5 as the mediating

8 *Environmental Defence Society Incorporated v. The New Zealand King Salmon Company Limited* [2014] NZSC 38 (BOA tab 4)
9 'New Zealand Coastal Policy Statement 2010 Summary of evaluation under section 32 of the Resource Management Act 1991', Department of Conservation; 3.4.1 (BOA tab 20)
10 RMA, s 68(2) (BOA tab 1)
11 RMA, s 68(2) (BOA tab 1)
12 RMA, s 87A (BOA tab 1)

or operative lodestar for evaluation was wrong (for example, see *King Salmon* at [150] – [151). That approach with its distinctive use of RMA s 5 as the overriding decision-making tool meant that the weighting of policies became much more governed by the Hearing Panel's preferences than the constraining influence of higher-order policy. Because of RMA, s 5's open language, the 'overall judgement approach' bestowed a license on decision-makers to exercise almost infinite choice in environmental outcomes. It, therefore, engendered a misunderstanding of a crucial characteristic of strategic planning as a system operating under the shaping forces of higher-order policy. In that respect, *King Salmon* is an enormously important contribution to resource management practice and underscores the importance of strategic policy as many practitioners understand it. From the Council's perspective, it gave heft to its strategic planning to resist the demands of large commercial interests for marine farms in areas set aside as free from marine farming as the Council was required to do. That is especially important to Marlborough as a region of great beauty but with a small rating base.

[11] *King Salmon* also determined that the Implementation Obligation, like any statutory obligation, had boundaries that could be assessed and held to be breached.

[12] A younger sibling of *King Salmon* is the Court of Appeal decision in *Davidson v. Marlborough District Council* (*Davidson*) applying in the RMA, Part 6 context.[13] Despite clear policy in NZCPS, Policy 11 implemented by the identification of special feeding areas for threatened King Shag[14] in the Council's regional coastal plan, the Davidson Family Trust argued that Part 2 (and notably RMA, s 5(2)) could be invoked to adjust the Council's planning regime in favour of marine farm development.[15] After all, the Davidson Family Trust argued, the regional coastal plan under RMA, s 104 was merely a statutory regard, and the discretion was *subject to Part 2*. The Council argued such an approach was also against strategic planning aims

[13] *Davidson v. Marlborough District Council* [2018] NZCA 316 (BOA tab 5)
[14] Also a totemic species for Ngati Apa
[15] The subject feeding area was especially important because it was close to a roosting site and in shallower waters. King Shag is a dimorphic species where the female is smaller than the male and hence has less deep diving capability.

and an inappropriate 'overall judgment approach' using the non-operative RMA, s 5 at the resource consent stage. The Court of Appeal at [73] – [74] accepted the Council's submission that strategic planning aimed to implement RMA, Part 2 in lower-order plans by well-constructed policy that strongly constrained discretions under RMA s 104 because they aimed to secure environmental bottom lines. When lower-order plans did meet that goal, they were the most relevant on a fair reading of the instruments under RMA s104. In essence, resource consent processes are not places to reformulate a well-constructed lower-order planning strategies for achieving sustainable management. In that case the NZCPS and regional coastal plan policy prevailed.

[13] The Council did not argue in the Court of Appeal in *Davidson* that, *subject to Part 2* in RMA s104, does not engage those components of Part 2 (ss 6-8) that affect all decision-making. These may be important, for example, to address gaps or to assist in understanding where policy has its source in the principles of the RMA. These RMA, Part 2 provisions have mostly a protective character. Most practitioners have had the experience where lower-order plans have missed or inadequately addressed key environmental values or missed tangata whenua relationships, or simply not adequately addressed the resource management issues presented by the resource consent application.[16] Also Part 2 may be informative when there is a new higher-order policy after the lower-order instruments are made setting a new direction, or there are gaps or tensions arising from new national policy not adequately addressed by that lower-order plan.

[14] *Davidson* also correctly acknowledges that lower-order policy may not in a straightforward way address the complex multi-faceted environmental outcomes generated by a particular proposal. For example, new large-scale infrastructure. What is necessary in such a case when performing the RMA, s 104 discretion is a fair appraisal of all policies relevant to the proposal.

[15] The Court of Appeal did not endorse the use of the 'overall judgment approach' in assessing resource consents under RMA s 104 using RMA s 5.

[16] A good example is *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8. The Hawkes Bay "Waka' case.

Rather at [67] the Court held that *King Salmon's* rejection of the 'overall judgment approach' did not remove appropriate consideration of Part 2 and in particular ss 6-8 when exercising a discretion under RMA, s104. Respectfully, the Council agrees.

[16] Following *Davidson*, Palmer J in *Tauranga Environmental Protection Society Incorporated v. Tauranga City Council*[17] addressed the word *relevant* in RMA s104(1) that favoured the most recent and specific planning instruments if complete. A crucial point is that the sequencing of the making of planning instruments is a long process, and the sequencing is not always neat. For example, many regional plans controlling freshwater were not made under and therefore did not implement the National Policy Statement of Freshwater Management 2020. That is why the RMA, s104 enables consideration of all instruments. It does not follow that a lower order instrument made under all relevant national policy is no more relevant than one that is not because they are merely statutory regards. That makes no sense.

[17] The reality is that after *King Salmon* and *Davidson,* everyone knows that policy wording matters to powers and discretions that they govern. Consequently, the wording of policy and scope for choice in the design of lower-order policy matters and is debated more fully in the design of second-generation plans under the RMA.

[18] As second-generation plans under the RMA are developed around New Zealand, Royal Forest and Bird and the Environmental Defence Society participate. They argue that, relying on *King Salmon* that whenever the Avoidance Policies apply, there is no scope for choice about policy design in lower-order plans other than complete avoidance irrespective of the environmental context and irrespective of the operation of other strong policies to the particular area under consideration.

[19] Some Senior Court decisions have agreed with these organisations, which has had an inappropriate chilling effect on the Environment Court's and

[17] *Tauranga Environmental Protection Society Incorporated v. Tauranga City Council* [2021] NZHC 1201 (BOA tab 7)

regional councils' proper performance of their Statutory Strategic Planning Functions.

[20] Finally, on this topic the Court is encouraged to look at the transcript of the first leave application for this proceeding in [2020] NZSC Trans 11 pp 30-36. The Environmental Defence Society said when leave to appeal in this proceeding was first heard in the Supreme Court in March 2020 that *King Salmon* required Avoidance Policies under the NZCPS, where they applied, to produce similar unqualified avoidance directions in the lower-order policy. However, the Environmental Defence Society said that did not mean avoidance was necessary at the resource consent stage because policies were only a matter of statutory regard under RMA s 104(1). It is submitted that it is plainly against the system of strategic planning described above, and it would be odd for all the effort that goes into strategic planning to be so easily put to one side. The claim also rings hollow since if that were true, why did the Environmental Defence Society challenge the Environment Court decision in this case? The Council has found Royal Forest and Bird's position in this proceeding more straightforward: 'avoid means avoid' and that has avoidance consequences down the strategic planning chain and ultimately more or less determines resource consent discretions.

The logic of RMA, Part 5, the scope for choice by local authorities and the *rationes decidendi* of *King Salmon*

[21] By way of context, the study of central government's development, use and implementation of policy is a sub-field of the academic discipline of public administration.[18] Effective policy implementation is a critical concern of central government, notably in managing natural and physical resources. Implementation theory and the law treat central government policy under a statute differently from regulation. The two methods have different legal force and hence differences in interpretation and operation that vary, reflecting design choices in the system the statute creates. The provisions

[18] See for example, The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches Lucie Cerna, Analyst, OECD 2013 (BOA tab 12) and Ingram, H., & Schneider, A. (1990). Improving Implementation Through Framing Smarter Statutes. *Journal of Public Policy, 10*(1), 67-88. doi:10.1017/S0143814X00004682 (BOA tab 10)

of the NZCPS and RMA, Part 5 (especially in this case RMA, ss 60-62) obtain clarity from the public administration framework because the framework has explanatory power concerning the presence of choice and the legitimate function and scope of authority of actors 'lower' in the system in the design of RMA, Part 5.

[22] A 'top-down' policy regime (as it is called in implementation theory) is commonly employed by central government. National policy shapes more detailed planning. That is reflected in the RMA's arrangement of a hierarchy of planning instruments.

[23] The major limitation of the 'top-down' approach is that central government cannot perform a robust and critically necessary, evidence-based regulatory impact analysis of a policy document at the regional scale. That regional-scale analysis enables the appropriate management of specific localities and the management of natural and physical resources within them or to ensure unintended consequences are avoided following RMA, s 32.[19] Put simply, central government has limited knowledge of the implications of a national coastal policy and the tensions in achieving policy when applied at the scale of every bit of coastline or every part of the coastal environment in New Zealand. But central government can be reasonably confident regional planning should be strongly shaped by the national policy leading to outcomes that at a regional scale achieve the national priorities. The level of regulatory impact analysis appropriate to making the NZCPS reflects only that level of confidence. The examination at the local level of the appropriate picture of sustainability requires a refinement process. As a corollary, that system points to a necessary exercise of some choice at lower levels of government. The NZCPS is now secondary legislation and context matters.[20] Accordingly, the interpretation method of the NZCPS, the Implementation Obligation Court, and RMA Part 5 are all related contexts. The Court is also respectfully encouraged to look at the following

[19] *King Salmon* acknowledged the importance of that provision at [158]. See also Ministry for the Environment. 2017. A guide to section 32 of the Resource Management Act: Incorporating changes as a result of the Resource Legislation Amendment Act 2017. Wellington: Ministry for the Environment (BOA tab 17). See also Banks, G. 2009, Evidence-based policy making: What is it? How do we get it? (ANU Public Lecture Series, presented by ANZSOG, 4 February), Productivity Commission, Canberra (BOA tab 13)

[20] RMA, s 52 (3) (BOA tab 1)

contextual material of the Minister's reasoning that is relevant context for the meaning and purpose of the NZCPS and also the scope of the Implementation Obligation are the following statutory documents published by the Department of Conservation:

(a) Summary of Board of Inquiry recommendations and Minister of Conservation's decision

(b) Summary of the Evaluation of the NZCPS 2010 under section 32 of the Resource Management Act

(c) The Regulatory Impact Statement – NZCPS 2010.

(collectively these are 'The Minister's Record of Reasoning')

[24] The significance of The Minister's Record of Reasoning' is that they are a statutory record of the Minister's evaluation and hence decision-making rationale under RMA, ss 52 and 57. They are useful interpretative aids showing the intended use of the NZCPS through the RMA, Part 5 system. Their detail reflects the direction in RMA, s 32(1)(c).

[25] One benefit of the '10,000-metre' view of central government in national policy design is central government's ability to express policy in clear and direct terms as a shaping instrument for national priorities.[21] The Court of Appeal's judgment referred to the absence of nuance and said that it is now up to central government to fix that in light of the view it took about the rigidity of *King Salmon*. The lack of nuance in the relationship between policies to address local-scale issues is not a central government failure. It is wrong for the Court to expect it. Nuance to that degree was not needed in objectives and policies in the NZCPS. That nuance or appropriate framing of sustainability at the regional scale and for particular parts of the coastal environment is developed in lower plans by the system Parliament created.

[21] Quality of Public Administration A Toolbox for Practitioners: Luxembourg: Publications Office of the European Union, 2017 © European Union, 2017 (BOA tab 14); There are multiple references to good central policy being clear and direct as part of the' leadership' function.

[26] The RMA, Part 5 system is the sensible application of the principle of subsidiarity within the constraining framework of national policy.

[27] The statutory direction concerning the implementation of national policy must take its meaning from and be assessed against the statutory facilitation in RMA, Part 5 of the consideration of local circumstances to create sharper, focused and appropriate policy.

[28] The satisfactory performance of the Implementation Obligation (when region-wide and comprehensive strategic planning is performed) should be judged by the congruency of the environmental outcomes of the lower order instruments with national policy when viewed at the regional scale and consideration of the NZCPS as a whole. The scope of the Implementation Obligation has to have an appropriate relationship to the level of generality of the instrument to be implemented. That is affirmed by *King Salmon*'s endorsement of the 'whole of region' approach to strategic planning at [153].

[29] The Council submits that the *rationes decidendi* of *King Salmon* is captured by the following propositions[22]:

(a) National policy has a shaping force on lower plans calibrated by the statutory directions. The direction *give effect to* is an implementation direction that has increased the constraining force of national policy more strongly than the old *not inconsistent with*. The result is that the national policy statement must shape more powerfully regional outcomes. Therefore, the national policy requires careful analysis and reconciliation of text as a major (and potentially, but not necessarily, decisive) assessment factor in determining what constitutes region-wide sustainable management. The difference in the strength of direction in the national statement's policies in that reconciliation exercise is a powerful signpost to the correct answer

[22] Counsel has relied upon the strategic assessment approach referred to in Ruru *et al The New Zealand Legal System Structures And Processes* 6th Edition, Lexis Nexis Wgn 2016 at 9.2.7 (BOA tab 11).

in most cases. That is different from 'weighting' the respective policies by scale as discrete items in an overall evaluation exercise.

(b) The general words of RMA, s 5 or Part 2 more generally should not be used to override the explicit national policy framework or as a mechanism for treating all policies as available for weighting at the decision maker's discretion. National policy is expository of the requirements for an entire environmental domain (such as the National Coastal Policy Statement covering the coastal environment) on the RMA's purpose unless the document does not cover the field.[23]

(c) The degree of flexibility and choice is influenced by the strength of the directions in policy and the environmental context and viewed from a regional perspective. There is a circle of legitimate choice for lower-order decision-makers within the Implementation Obligation.[24] The statutory duty to *give effect to* national policy in a regional planning exercise means Senior Courts can say an outcome falls outside a discretion's 'circle of legality'. Hence the Courts may intervene because it is genuinely an error of law. The Implementation Obligation creates a boundary of legitimacy to use the language of legality.

[30] In *King Salmon,* the Supreme Court found that the Marlborough District Council's sound strategic planning for the protection of certain small and important land and seascapes as an essential dimension of sustainable management could not be undermined by private proposals for new marine farms in these special localities where they cause more than minor effects. In that strategic planning context, Avoidance Policy 13 obtained overwhelming force from a correct reconciliation of Policies 13 and 8 and the absence of credible countervailing environmental considerations. The small areas strategically planned for protection which is an aspect of

[23] *King Salmon* at [88] (BOA tab 4)
[24] *King Salmon* at [91] (BOA tab 4)

sustainable management, could not be unravelled by incremental development of new marine farms.[25]

[31] In *King Salmon*, the Supreme Court found, following the *rationes decidendi* summarised above, that the Board of Inquiry's decision to approve the plan change was outside a legitimate circle of choice required by the obligation to *give effect to* NZCPS 2010.[26] The situation had arisen because the Board of Inquiry's reasoning did not meet the principles listed in [29](a)-(b) above.

The Environment Court's legitimate performance of strategic planning in its Port Otago decision

[32] The Environment Court, in this case, found that Port Otago's operation could be disabled if the regulatory planning framework yet to be formulated in a new Otago regional coastal plan required complete avoidance of effects on ecological resources in the Otago Harbour.[27] The proposed Regional Policy Statement had to address that crucial regional issue and shape the content of the future lower-order instrument under RMA, s 59.

[33] The Environment Court considered that the Otago regional policy statement needed to provide direction to shape any future regional coastal plan by directing an assessment of port activities on their merits where avoidance was not reasonably practicable. That would ensure a full discretionary activity classification of port activities in a future regional coastal plan.[28] To constrain future decision-making under a resource consent discretion, the Environment Court outlined a possible policy regime. In the first instance, Port Otago must aim for avoidance where practicable. Otherwise, any proposal should be carefully evaluated on its

[25] In the case of Policy 8 that meant marine new aquaculture was not appropriate in places where Policy 13 applied where it caused significant adverse effects. Central government did not consider the Avoidance Policies inflexibly require complete avoidance especially for existing marine farms; See Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020, Reg 21 (BOA tab 2). The Independent Hearings Panel did the same in the Auckland Unitary Plan. 21. See Auckland Unitary Plan Objective F2.15.2(3), policy F2.15.3(3) (BOA tab 18). See also *Man O'War Station Ltd v Auckland* Council [2017] NZCA 24 at [81] (BOA tab 6).
[26] *King Salmon* at [154] (BOA tab 4).
[27] That is a finding of fact not law.
[28] RMA, s 87A (BOA tab 1)

merits under a resource consent with an ordering of values that recognised the paramount importance of safety as an essential characteristic of a port.

[34] Relying on *King Salmon,* the Environmental Defence Society appealed the Environment Court's decision on the bases that:

(a) The Avoidance Policies trumped other NZCPS policies and were intended to apply with ineluctable precedence in all circumstances as the authoritative picture of sustainability irrespective of effects on other environmental values present or existing. The imperative verb *avoid* in NZCPS's Avoidance Policies was stronger than the direction in Policy 9. That textual superiority alone meant conclusively there was no tension or conflict of the type *King Salmon* mentioned. Further, creating tension in the operation of individual NZCPS policies from the factual circumstances of the region in a locality was impermissible because avoidance was an environmental bottom-line.

(b) Following from (a), under *King Salmon,* while minor effects may be permissible, nothing else is. Whether the effects are genuinely minor can be considered through an appropriate resource consent regime yet to be developed.

[35] The Environmental Defence Society and The Royal Forest & Bird seek a rigid avoidance policy framework in all lower-order instruments parroting the Avoidance Policies relying on *King Salmon*. That aims to achieve the following regulatory regime in a regional coastal plan:[29]

(a) At least the non-complying activity class (to which the RMA, s 104D the jurisdictional limit of 'minor' effects will apply following *King Salmon*) for any port activities.[30]

[29] As confirmed in the Court of Appeal by Mr Andersen for Royal Forest and Bird.
[30] Those parties now acknowledge they do not seek a prohibited activity class, and say the High Court was wrong about that being the consequence of *King Salmon*. But what the High Court said about their case was right at the time.

(b) A policy regime that means the second gateway test in RMA s 104D cannot be passed if the port does not achieve avoidance.

(c) An undiluted and un-nuanced avoidance policy regime to presumptively constrain any resource consent discretion following *Davidson v. Marlborough District Council*.[31]

[36] Resource management processes for large infrastructure are enormously expensive.[32] Such an outcome as the one the Environmental Defence Society and Royal Forest and Bird promote moves this important resource management issue into perilous consenting territory for Port Otago. Jurisdictional impediments to consent resting on the two 'gateway' evaluations under RMA s 104D means that the environmental debate is often fought on that qualitative battleground. That is inefficient and clumsy resource management for such an important port major facility, as the East-West Link, *Waka Kotahi* case shows.[33]

[37] In the present case, the Environment Court did not consider the outcome the Environmental Defence Society and RFB are angling for was desirable. That was for environmental reasons and for resource management practice and procedure reasons. The Court endorsed the mechanism of the resource consent under NZCPS, Policy 7(b)(ii) for the fact-based assessment and evaluation of the appropriateness of Port activities.

[38] The Department of Conservation's advice on the origin and implementation of NZCPS, Policy 9 supports the Environment Court's decision in this proceeding.[34]

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[31] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 [21 August 2018] (BOA tab 5).

[32] The cost of consenting infrastructure projects in New Zealand
A report for The New Zealand Infrastructure Commission / Te Waihanga.
David Moore, Jeff Loan, Sally Wyatt, Kelvin Woock, Sally Carrick, Zabard Hartmann July 2021 (BOA tab 15)

[33] See *Royal Forest And Bird Protection Society Of New Zealand Incorporated v. New Zealand Transport Agency* [2021] NZSC 52 [28 May 2021].

[34] Department of Conservation NZCPS 2010: Guidance Note, Policy Nine (BOA tab 23).

[39] The Council submits that the Environmental Defence Society is mischaracterising the principles of *King Salmon*. The Society's argument is wrong because:

(a) The Avoidance Policies are different from rules. To treat them as the same is to make a categorical error. The approach by the Environmental Defence Society cannot sit with the RMA, s 32 and RMA, ss 61-62, which calls for an evidence-based approach and the performance of discretions by evaluation.

(b) It is valid under *King Salmon* to identify tensions in national policy arising from the potential in a regional context that avoidance may not be reasonably achieved and, if required, cause significant disablement of other important policies. *King Salmon* is not authority that tension or conflict requiring 'reconciliation' only arises if the policies engaged have equal directive strength.

(c) Avoidance Policies can have potentially reduced constraining force in individual parts of the region due to the consequences on other locality specific environmental values such as those expressed in Policy 9.

(d) Under NZCPS, Policy 7 a case by case assessment of the appropriateness of port activities in a policy regime is rational and can be justified if embedded in a mostly avoidance ethic.[35]

[40] It is undeniable that *King Salmon* can be interpreted in the way that the Environmental Defence Society suggests because Senior Courts have done so. There are at least two reasons for confusion as to the interpretation of *King Salmon*.

[41] First, the Supreme Court's reasoning and decisive intervention were made in the context of the facts before the Court, where the activities were defined, and the effects of the activity were decided as part of the process. There was an existing regional planning regime (not one under

[35] The Avoidance Policies will still obtain some constraining force in any resource consent discretion under RMA s 104.

development) and specific NZCPS policies that were at issue. Stripped of that context, it is possible to erroneously read the Supreme Court's judgment like a statute in a way that supports the approach of the Environmental Defence Society by treating particular paragraphs alone as sufficient justification for the decision of the Supreme Court to intervene. However, in doing so, one ossifies *King Salmon* and goes against the key features of *King Salmon*, which is first that the policy and environmental context matters. That is why the judgment sets out those matters in detail. Secondly, the Supreme Court acknowledged that there is a legitimate but not infinite circle for choice for local authorities performing strategic planning under RMA Part 5. The question in each case is how much choice.[36] The last sentence of Arnold J's judgment at [141] puts beyond doubt the question is one of "weight" measured against *relevant* context. The Council reads that as both the relevant policy context and the relevant environmental context.

[42] The second cause for confusion is that the Supreme Court used as an analytical tool a 'compare and contrast' method to illuminate the errors in the Board of Inquiry's reasoning using two generic evaluative methodology types. They were 'the overall judgment' approach and the 'environmental bottom-line' approach. In the Supreme Court in *King Salmon* and the judgment of the Court of Appeal in this proceeding, reference is made to the Minister's speeches about the 'environmental bottom-line' approach but only in the context of the Avoidance Policies and RMA s 5(2)(b). In explaining that idea in a more academic environment, the Minister correctly noted that all of RMA, s 5(2) (a) – (c) were environmental bottom lines, not just (b).[37] Sustaining essential existing infrastructure for the community and future generations can be a bottom-line. Also, the metaphor of an environmental bottom-line has limitations if treated as a regulatory term in this context rather than a values-based explanation for the strengths in national policy direction in the NZCPS.

[36] *King Salmon* at [91] (BOA tab 4).
[37] Upton, S D "Purpose and Principles in the Resource Management Act" [1995] WkoLawRw 2; (1995) 3 Waikato Law Review 17 (BOA tab 9).

[43] If the Council is wrong in its argument and the Environmental Defence Society is right about the *rationes decidendi* of *King Salmon,* then the Council respectfully submits it is important that *King Salmon* is reconsidered in light of the consequences for, at least, existing large and important physical resources such as Ports and key infrastructure.

The dangers of relying on text without environmental context in environmental management

[44] Echoing the words of Lord Steyn about the importance of context in the interpretation of black-letter law, the Council submits that in strategic planning the constraining higher-order policy context and the environmental context are everything.[38]

[45] It is hard to convey the complexity of resource management as a multi-disciplinary inquiry. Nature does not follow neat boundaries and nor do human interactions and needs to use nature. Sustainable management is hard mahi not readily amenable to simplistic prescriptions. It requires good natural and social science and the usual good administration judgments applying proportionality and workability.

[46] A contemporary illustration may serve the purpose to show how environmental context is relevant.[39] King Shag, considered in *Davidson,* is a cormorant only found in the Marlborough Sounds, is threatened and has about 200 breeding pairs. It is an opportunistic feeder of flat fish found in the muddy substrate of the Sounds. It roosts on small craggy outcrops and can travel up to 25 km for food. NZCPS, Policy 11 is engaged concerning King Shag in the Sounds, but when you examine the text without environmental context and judgment, you immediately strike problems that show the policy is deliberately written without nuance and in simple language requiring further evaluation. Species are protected by protecting their habitat, so avoidance of effects involves protecting the habitat. However, habitat is an ecological term that would include all feeding areas,

[38] Lord Steyn once famously observed, "In law, context is everything": *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28].
[39] This arises as to the scope of protection of King Shag habitat in the Proposed Marlborough Environment Plan.

not just roosting sites. Theoretically, limiting all activities that affect the habitat of King Shag's target prey, such as marine farming and fishing, is avoiding adverse effects. Does that mean the entire 25-kilometre radius area (most of the Sounds) should become a type of marine reserve around roosting sites preventing all existing and future marine farming and fishing activities? Or does it require a more nuanced approach judged using a combination of science and judgment? If the latter, one automatically sees the emergence of evaluation as a key decision-making task.

[47] This proceeding is another excellent example of complexity. The safety of people is a value that may operate more strongly than others in the right circumstances.[40] For example, securing that value is crucial to allow key shipping modes and is only at the expense of some loss in seagrass habitat that is sufficiently limited to safeguard that habitat's life-supporting capacity.

[48] In the interpretation of RMA, ss 6-8, one also sees in some decisions an over-reliance on the statutory direction's strength without the crucial input of environmental context in the evaluation. So, for example, the *take account* formula in RMA, s 8 has been often taken as of lesser directive strength than other Part 2 principles to the disadvantage of tangata whenua, for example, in the freshwater arena.[41] Depending on the environmental context, the combination of the status of Te Tiriti o Waitangi and the obligations engaged by that direction could operate as significant factors in decision-making or process well beyond what the words *take account* might suggest relative to stronger Part 2 directions.[42] Equally, as we see in *Davidson,* the direction *have regard to* is not alone a reliable indication of the constraining force of particular policy.

[49] Added to this complexity is the reality that it is not uncommon for resource management practitioners to be dealing with more than one national policy

[40] The Roman (and later English) legal maxim *salus populai suprema lex esto.* That means: 'the highest purpose of the law is the safety of the people'. Used in the RMA context see *View West Limited v. Auckland Council* [2018] NZEnvC 237 at [51].
[41] The problems in application of RMA, s8 are well documented in Waitangi Tribunal Reports. For example, the Stage 2 Report for the National Freshwater and Geothermal Resources Claims ; Wai 2358 (2019) at section 7.2.2.
[42] *King Salmon* treats s 8 as in a class of its own at [27] (BOA tab 4).

instrument, most of which make no visible attempt to reconcile their imperatives as between each other.[43] The Supreme Court's determination as to the nature and extent of the Implementation Obligation must correctly allow for that complexity.

[50] These illustrations hopefully show that using the choice of the directive verb in a national policy as in every case a sure indication of environmental precedence and the correct environmental outcome to meet the Implementation Obligation in all cases would be too rough and non-evidence-based.

[51] Further, central government had regulation available in its toolbox as a choice to implement coastal environmental bottom lines under RMA, Part 5 as one type of National Direction governing coastal permits. With standards, the scope for choice is eliminated in policy design but remains to the extent discretions are conferred. Like ordinary black letter law, it is to be *applied* and is not *implemented* as a policy agenda. An example is the recent making of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020. These regulations seek to protect the remaining three per cent of New Zealand's coastal and inland natural wetlands as an environmental bottom line implementing RMA, s 6(a). They do so by prohibiting interference with wetlands and making non-complying any activities that affect wetland hydrology. That is an example of environmental bottom-line regulation.

[52] By choosing objectives and policies as the tool for the implementation of coastal environmental priorities, the Minister of Conservation deliberately allowed for some choice in lower-order policy design.

Assessing the boundaries of the Implementation Obligation

[53] As noted, the Council accepts that the Implementation Obligation has boundaries that may be exceeded. Indeed, Parliament has bestowed on the Environment Court that primary function by giving the Environment Court the power to direct an RMA s 293 process (that may involve further

[43] These are listed by the Ministry for the Environment website here.

public input) to remedy non-implementation of a national policy under RMA, s 293 (3) and (4).

[54] *King Salmon* was novel in determining whether the Implementation Obligation was met. Partly, that was because there was no direction to *give effect to* national policy for most of the history of the RMA. But rather the softer direction not to act inconsistently with national policy.

[55] There is a dearth of literature or case law on assessing the legality of the performance of that type of statutory direction applying to a national suite of objectives and policies. That novelty perhaps explains the confusion as to the nature and basis of the Supreme Court's intervention in *King Salmon*.

[56] The Council accepts that the scope for choice is much narrower when what is engaged is the strongly directive policies corresponding to environmental bottom lines. The Council does not accept bottom-lines are only those found in the Avoidance Policies although they are clear examples.

[57] A significant departure from the strongly directive policy must be something that is rationally supported under the discipline of a detailed RMA s 32 analysis as a legitimate exception in a limited part of the regional coastal environment where compelling other environmental values are at stake, and best practicable measures for mitigation or remediation are employed. 'At stake' means that but for something less than avoidance, other important environmental values (such as other environmental bottom lines) cannot be practicably achieved.

[58] It is unwise, given the complexity of resource management, to be more prescriptive as to what may exceed the boundary of legality. It is sufficient to say that the Superior Courts can and will supervise the sufficiency of respect accorded to the constraining force of policy, especially where they impact any environmental bottom lines.

[59] The Implementation Obligation's legal boundary is justiciable by Senior Courts in the way exemplified in *King Salmon*. *King Salmon* found the boundary had been exceeded because of the cumulative effect of all of the

factors below. These are a combination of policy text and environmental context none of which was alone sufficient:

(a) The Marlborough Regional Coastal Policy Statement and Regional Coastal Plan had implemented good strategic planning under the NZPCS 1994 that had a similar protective aim for Policy 13 places following a strategic planning exercise where the public had participated.[44]

(b) *King Salmon* was only focusing on its strategic interests by spot zoning and not, as Councils do, a region-wide integrated strategic planning enterprise to ensure that sustainable management's use, management, and protection dimensions are met.[45]

(c) The special protected places were small, and the available Sounds coastal waters available for use extensive.

(d) The benefit to King Salmon Limited of the selected locations was merely that they better secured The New Zealand King Salmon Company Limited's bio-security objectives.[46]

(e) The salmon farms' effects were known and significant.[47]

(f) Salmon farms were only enabled under NZCPS, Policy 8 in *appropriate* locations.[48] In the context of the environmental bottom-line value in Policy 13 applied to the Sounds and the resources in question, the Board of Inquiry approved marine farms in *inappropriate* locations.[49]

[60] Also, it is well-known that the careful arrangement of the Marlborough's regional coastal plan into areas that allowed marine farming and those that

[44] *King Salmon*, [69] – [74] (BOA tab 4).
[45] *King Salmon* at [54] and importantly [69] last sentence (BOA tab 4).
[46] *King Salmon* at [19] quoting [1242] of the Board of Inquiry's decision (BOA tab 4).
[47] *King Salmon* at [19] quoting [1243] of the Board of Inquiry's decision. Under Part 7A marine farm plan changes and related resource applications can be heard together. In this way, the planning for them is not like most strategic planning which is more predictive because the activities have not often been conceived or will be dealt with by separate applications. (BOA tab 4)
[48] *King Salmon* [100] – [101] (BOA tab 4).
[49] *King Salmon* at [142] (BOA tab 4).

did not still opened a 'gold-rush' mentality of such magnitude it led to a legislated aquaculture moratorium at the Council's request.[50]

[61] The Board of Inquiry's decision to approve salmon farms in the selected locations was respectfully incomprehensible, and the Supreme Court was correct to say it was unlawful because it did not meet the Implementation Obligation; see *King Salmon* at [174].

The wisdom of the Council's intermediate approach and correlatively the dangers of not adopting it

[62] The intermediate approach has the following qualities:

(a) It allows the Councils and Environment Court to perform its specialist skills sensibly.

(b) It allows for some scope for choice and therefore secures meaningful opportunities for public participation to influence the careful design of regional policy. The Supreme Court recognises that public participation value; see *King Salmon* at [15].

(c) It does not draw the Senior Courts into ruling on every policy contest concerning a strategic planning function as a textual one alone which is flawed. Such an approach would also lead to complex litigation concerning the content of plans without the sophistication of the RMA s 293 processes.

(d) It preserves oversight by Senior Courts in cases where decisions are made that are not a reasonable performance of the Implementation Obligation.

Some specific submissions on Policies 7 and 9 of NZCPS

[63] The Supreme Court in *King Salmon* saw some significance in the Papatua private plan change occurring outside a more integral strategic planning exercise contemplated by NZCPS, Policy 7; see *King Salmon* at [140]. The Environment Court's process, in this case, was addressing and resolving

[50] Resource Management (Aquaculture Moratorium) Amendment Act 2002.

delicate tensions concerning a range of environmental imperatives holistically. Policy 7 recognises that *appropriateness* is a factor governing the ability to create choice through consent processes. The Supreme Court correctly found at [105] that *appropriate* is heavily contextual and relevant to the resources and values one is dealing with and seeking to protect.[51] In part what is being preserved by Policy 9 is the safe and efficient operation of the physical and natural resources utilised by New Zealand's ports. That reinforces the Council's submission that regional strategic planning responds to and considers the environmental context. That also has a relationship to the RMA s 32 function of setting *appropriate* objectives and policies in the lower-order plan.

[64] The scope for choice by regional councils when undertaking strategic planning is also clearly stated in *King Salmon* at [187].

[65] The Environmental Defence Society argues that NZCPS Policy 9 yields to the Avoidance Policies because it is a stronger direction because the verb 'recognise' is weaker than 'avoid'. Even if this difference in strength exists (which is not accepted), it can only be described as a subtle difference that cannot sensibly be the fulcrum upon which the operation of Port Otago depends. It is not an exact ordering of precedence one sees in regulation where 'despite' or 'subject to' is used.

[66] The Council disagrees with the Environmental Defence Society's analysis the strength of NZCPS, Policy 9 because:

(a) The verb *recognise* is a strong verb for enabling ports. By etymology and common usage, it requires cognition and decision-making action in the form of acknowledgment and acceptance.

(b) The Environmental Defence Society focuses on the verb rather than the sense of the policy as a whole. Just as the unit of communication is the sentence in normal syntax, the unit of communication in policy is the entirety of the policy.[52] Policy 9 is

[51] *King Salmon* at [105] (BOA tab 4).
[52] "The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole ..." (Lord Hoffman in *R v Brown* [1996] 1 All ER 545, 560).

strongly directing the acknowledgment and acceptance of the requirements of ports.

(c) Under Policy 9 one may consider *where, how and when* to provide for ports but not 'if' one will provide for them. The words *recognise* at the start of Policy 9 and *provide* in (b) in combination echo the strongest decision making direction in the RMA concerning matters of national importance under RMA, s 6. That is because ports are the life-blood of New Zealand trade. The Department of Conservation's Guide on NZCPS, Policy 9 on the Rationale says 99% of trade flows are by sea.[53]

Conclusion

[67] *King Salmon* is not its parts but the sum of its policy and environmental context parts that in combination supported a finding that the approval of the Papatua Plan Change could not meet the Implementation Obligation.

[68] The minority judgment of William Young J shows a concern with the strength of the majority's language relying on the NZCPS's text. There is a limited response by the majority to explain why avoid does not actually mean completely avoid.[54] It is unclear whether the judgment of William Young J could also support the intermediate approach advanced in these submissions or falls back to support for what the Council considers the flawed 'overall judgment approach' using the lights of RMA, s 5. More probably it supports a hybrid approach captured by the last sentences of [194] which are close to the 'overall judgment approach'; per [205]. The underlying concerns William Young J expressed about how the majority's language supporting the majority's intervention could be misunderstood was, with respect, prescient.

[69] Respectfully, if the appeal is not allowed then the Supreme Court should give clear direction to the Environment Court as to how it is to perform its

[53] Department of Conservation , "NZCPS 2010 Guidance note Policy 9: Ports" (BOA tab 23).
[54] *King Salmon* at [144] – [145] (BOA tab 4).

task and the likely consequences of the Implementation Obligation for the content of the Otago regional policy statement concerning Port Otago.

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