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

SC 6/2022

BETWEEN	**PORT OTAGO LIMITED**
	Appellant
AND	**ENVIRONMENTAL DEFENCE SOCIETY INC**
	First Respondent
	OTAGO REGIONAL COUNCIL
	Second Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC
	Third Respondent
	MARLBOROUGH DISTRICT COUNCIL
	Fourth Respondent

SUBMISSIONS FOR NEW ZEALAND TRANSPORT AGENCY

Dated: 5 April 2022

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1. INTRODUCTION

1.1 The New Zealand Transport Agency, Waka Kotahi, appreciates the opportunity to provide written and oral submissions on the overlapping issues raised in this appeal with the appeal in SC25/2012 *Royal Forest and Bird Protection Society of New Zealand Inc v NZTA* relating to the East West Link (the *EWL* appeal).

1.2 The key issue that arises in both the *Port Otago* and the *EWL* appeals is the contest between the 'absolutist' approach to the 'avoid' policies in the NZCPS demonstrated in the dicta of the High Court and Court of Appeal majority in the *Port Otago* case ('avoid' means an absolute prohibition at all costs and in all cases),[1] and the more nuanced position demonstrated by Powell J in the High Court in *EWL* and the Court of Appeal in *RJ Davidson* (avoid is a strong policy directive that in many cases may be determinative, but not an absolute veto).[2]

1.3 Waka Kotahi respectfully disagrees with what appears to be the view of the CA in *Port Otago* that this Court in *King Salmon* expressed a final conclusion in favour of the absolutist approach, and that this extends to an absolute veto in the consenting context of activities that are unable to avoid the specified adverse effects.

1.4 Waka Kotahi however agrees with the analysis of the CA majority in *Port Otago* describing the "regulatory mismatch" between the NZCPS as it was drafted and intended to operate on the one hand, and the way it has in some cases been applied following *King Salmon* on the other hand. Waka Kotahi submits that this analysis further demonstrates that the absolutist approach was neither intended by Parliament in enacting the RMA nor the Minister in issuing the NZCPS. An NZCPS interpreted as containing four areas of absolute veto (natural character, natural landscape, biodiversity and surf breaks), overriding all other objectives and considerations, does not conform with the Act's requirements nor with Part 2 and s 5 in particular.

1.5 For the convenience of the Court and the parties to the *Port Otago* appeal, these submissions repeat some parts of the submissions filed by Waka Kotahi in SC25/2021, as well as addressing additional points in respect of the *Port Otago* decision under appeal here.

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[1] See also *Royal Forest & Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, (2017) 20 ELRNZ 564. **Appellants' Bundle of Authorities (ABoA) tab 9**.

[2] *Royal Forest and Bird Protection Society of New Zealand Inc and Ngāti Whātua Ōrākei Whai Maia Ltd v New Zealand Transport Agency and Ors* [2021] NZHC 390 (*EWL* (HC)) **ABoA tab 6**; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283. **ABoA tab 4**.

1.6 In terms of references, these submissions refer to the *EWL* case on appeal and bundles of authorities (ABoA, RBoA), and also to a supplementary bundle of authorities to be filed (SBoA).

2. PORT OTAGO: AVOID = ALWAYS AN ABSOLUTE VETO?

2.1 The *Port Otago* case relates to a planning decision under Part 5 of the RMA with its directive to "give effect to" the NZCPS.[3] This obviously distinguishes the case from the *EWL* appeal, which involves consenting under Part 6 and notices of requirement under Part 8 of the RMA, with the directions in ss 104/171 respectively to "have regard to"/ "particular regard to" a range of matters including the NZCPS.

2.2 The ratio of the *Port Otago* decision is understood to be that the proposed regional policy statement (PRPS) failed to "give effect to" the policy statement in the NZCPS that certain adverse effects were to be avoided, by specifying a policy that such effects were to be "avoided, remedied or mitigated".[4] That ratio has no direct application to the *EWL* appeal.

2.3 It seems clear however that this ratio is based on an 'absolute' view of what 'avoid' means, as the majority explains:[5]

> The short point is this: a bottom line requiring adverse effects be "avoid[ed]" cannot be substituted with "avoid, remedy or mitigate". They are altogether distinct concepts, and the latter formulation fundamentally dilutes the former. In effect the wording suggested by the Environment Court … invites a decision-maker instead to reach a broad value judgement, potentially permitting (rather than avoiding – that is, preventing the occurrence of) adverse effects of activities on natural character in areas of the coastal environment with outstanding character (and significant adverse effects on natural character in other areas of the coastal environment). The foregoing discussion focusses primarily on policy 13, but the same applies to policies 11, 15 and 16.

2.4 It is notable that the CA majority does not itself engage in any analysis of whether this absolute meaning of 'avoid' can or should be read into the NZCPS. Rather the Court appears to consider that this is a binding ratio from the majority in *King Salmon*.

2.5 The majority then also go on to make obiter observations about the implications of this approach to consenting decisions under Part 6 of the RMA, to the effect that the 'avoid' policies would operate as an absolute prohibition even under Part 6. It appears that the obiter view of the majority is that an

[3] Sections 62(3), 67(3)(b) and 75(3)(b).
[4] *Port Otago* (CA) at [78].
[5] *Port Otago* (CA) at [79].

activity that failed to avoid the specified adverse effects could never be consented, and the majority propose a consenting process that first of all addresses that binary question as a sort of 'strike out'. This is described in the majority judgment at [85] – [86] (original emphasis):

> 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 and its context. Where factual context is relevant in determining policy compliance, provisions enabling an application for resource consent can be appropriate. Whether *in fact* an *adverse* effect, *on natural character*, occurs in an area of the coastal environment *with outstanding natural character* from a proposed port activity is a fact-specific inquiry and requires detailed evaluation of both activity and environment.
>
> … Port activities … may not in fact, correctly analysed at the recourse consent stage, adversely affect natural character in that environment at all. Proposed activity effects in context may be minor or transitory, or otherwise capable of being avoided.

2.6 This appears to be an absolute bottom line of the same kind that the majority of this Court recognised in the *Trans-Tasman Resources* case in relation to discharges and dumping governed by s 10(1)(b) of the EEZ Act (though not in relation to marine consents under the equivalent to s 5 of the RMA, s 10(1)(a) of the EEZ Act).[6]

2.7 Respectfully, the distinction that the CA majority seeks to draw in *Port Otago* between prohibiting *activities* and prohibiting *effects* is without real meaning in this context.[7] The RMA's basic framework provides for activities to be classified and consented *on the basis of their effects*.[8] Prohibiting certain effects is exactly the same as prohibiting the activity that generates those effects. There is no difference in outcome whether the relevant plan says "x activity in this area can be consented provided it has no adverse effects" or "x activity in this area is prohibited unless it has no adverse effects". Similarly, whether the plan lists each activity type (reclamation, infrastructure, port activity), or groups them into a general rule that "all activities in this area that have these specified effects" are prohibited / cannot be consented, makes no

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[6] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. **Respondents' Bundle of Authorities (RBoA) tab 12**. Section 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 states the purpose of "protect[ing] the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter."

[7] *Port Otago* (CA) at [85]

[8] The basic classification of activities as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited reflects the assessment of its likely effects, being the fundamental tenant of the RMA framework: see for example the Hon Simon Upton (Minister for the Environment) moving the 3rd reading of the Bill: "Unlike the current law, the Bill is not designed or intended to be a comprehensive social-planning statute. It has only one purpose – to promote sustainable management of natural and physical resources, and it does that in two ways: first, through the allocation of resources [refers to what is now the Crown Minerals regime]; and second, through limited the adverse environmental effects of the use of natural and physical resources. For the most part, decision makers operating under the Bill's provisions will be controlling adverse effects – especially in the use of private land. // The Bill should be seen as legitimising intervention only to achieve its purpose … In adopting the present formulation of clause 4 [now s 5] the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …" Resource Management Bill (4 July 1991) 516 NZPD at 3019-3020. **Supplementary Bundle of Authorities (SBoA) tab 2.**

difference in substance. However a plan might be framed, in practical terms the CA majority's obiter approach that avoid is an absolute veto, even in Part 6, means that the NZCPS has the effect of prohibiting any activity that cannot avoid the specified adverse effects.

2.8 The CA majority's obiter approach accordingly appears to match RFB's position in the *EWL* appeal:[9] projects that fail to avoid specified adverse effects in four areas (natural character, natural landscape, biodiversity and surf breaks) *cannot* be consented, irrespective of the mitigation, offsets and positive effects that mean that the project meets the purpose of promoting sustainable management under s 5.

3. PORT OTAGO OBITER OBSERVATIONS ON PART 6 ARE IN ERROR

Outline of Waka Kotahi's position

3.1 Waka Kotahi respectfully submits that the obiter observations of the CA majority on how the 'avoid' policies in the NZCPS impact the consenting process under Part 6 of the RMA, outlined above, is in error.

3.2 Waka Kotahi's position is that the 'avoid' policies in the NZCPS are strong policy directives that in many cases may be determinative, but not an absolute veto. The distinction is especially important in the context of a complex proposal such as the EWL, which engages both positively and at times negatively with a wide range of both enabling and protective policies, within and outside the NZCPS.[10]

3.3 Waka Kotahi's position is that the correct approach in consenting decisions that engage with the NZCPS is that expressed by the Court of Appeal in *RJ Davidson* and *Trans-Tasman Resources*, and by analogy with the guidance of this Court in *Trans-Tasman Resources* for marine consents engaging s 10(1)(a) of the EEZ Act (the equivalent to s 5 RMA).[11]

3.4 Waka Kotahi further submits that the NZCPS on its face cannot be properly interpreted to generate an absolute veto of adverse effects in the four areas of

[9] With the notable exception that RFB in the *EWL* appeal take the position that the law does not allow consideration of mitigation or remediation that would bring the adverse effects below the level of minor or transitory effects, while the CA majority in *Port Otago* appear to contemplate that this would be allowed, although they do so with no discussion of how that reconciles with the language used in the NZCPS policies.

[10] The EWL proposal engaged with four national environmental standards and five national policy statements including the NZCPS. Within the NZCPS, the proposal engaged with 11 policies (the Treaty, tangata whenua and Māori heritage; infrastructure activities; reclamation; indigenous biodiversity; restoration of natural character; historic heritage; public open space; walking access; enhancement of water quality; sedimentation; storm water management and reducing discharge of contaminants). The proposal engaged with 149 provisions of the AUP and various legacy plans, and required consideration of the Hauraki Gulf Marine Park Act 2000.

natural character, natural landscape, biodiversity and surf breaks. Nor does the RMA contemplate or allow the Minister to set a national policy statement with that effect.

3.5 Waka Kotahi also submits that this Court in *King Salmon* did not finally determine the critical question of whether the NZCPS can and/or should be interpreted as imposing an absolute prohibition allowing of no exceptions.

3.6 Finally, Waka Kotahi respectfully submits that the analysis of the CA majority in *Port Otago* as it relates to consenting decisions under Part 6 is not fully considered and raises issues of internal inconsistency.

The correct approach: RJ Davidson and Trans-Tasman Resources

3.7 The Court of Appeal in *RJ Davidson* was directly concerned with whether this Court's rejection in *King Salmon* of the "overall balancing" approach to planning decisions under Part 5 applied to consenting decisions under Part 6. The Court of Appeal confirmed that it did not, noting the specific direction in s 104 for a consenting decision maker to "subject to Part 2, have regard to" the NZCPS and other matters.

3.8 The Court also made a number of observations how a consenting authority maker should engage with the policies of the NZCPS, especially in complex applications engaging with a range of policies and objectives. The Court concluded with the following guidance:[12]

> … if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, King Salmon would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.
>
> In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies of a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".

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[11] *RJ Davidson* (CA) at [71] – [74]. **ABoA tab 4**; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 **SBoA tab 5**; *Trans-Tasman Resources* (SC).

[12] At [71] – [74], quoting from [72] - [73], also [82].
Noting the Court of Appeal at [31] referred to *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [22]**SBoA tab 4**. See also [20] – [27] of that decision.

3.9 The Court in *RJ Davidson* thus confirmed that under Part 6, the consenting decision maker retains the role and function of exercising an overall judgement against the purpose of the RMA and the matters specified in Part 2. "Overall judgement" in this sense does not mean the discredited framing of "economy vs environment" where one is sacrificed for the benefit of the other, or relevant matters are considered only to be set aside. Rather, the Court is invoking consenting decisions that reflect the purpose of sustainable management expressed in the wording of s 5 itself where "while" is read as "at the same time", as this Court affirmed in *King Salmon*,[13] and the Hon Simon Upton reiterated in his speech to the House.[14]

3.10 Similar guidance as to the proper approach to the strong directives in the NZCPS in the context of consenting decisions was provided by the Court of Appeal in the *TTR* case.[15] The Court there was considering the obligations of the Decision Making Committee on a marine consent application to 'take into account' the 'nature and effect of other marine management regimes' including the RMA and thus the NZCPS:[16]

> If a proposed activity within the EEZ would have effects within the CMA that are inconsistent with environmental bottom lines under the marine management regime governing the CMA, that would be a highly relevant factor for the DMC to take into account. The DMC would need to squarely address the inconsistency between the proposal before it and the objectives of the NZCPS. If the DMC was minded to grant a consent notwithstanding such an inconsistency, it would need to clearly articulate its reasons for doing so.

3.11 The minority of the Supreme Court in *TTR* expressly agreed with this approach.[17] Glazebrook J (with whom Williams J and Winkelmann CJ agreed on this point)[18] did not disagree with it in the context of the RMA or marine activity consents governed by the equivalent purpose statement to s 5 (s 10(1)(a) of the EEZ Act).[19] The majority described the general approach to that assessment as:[20]

> … the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59 [s 104 equivalent], in light of s 10(1)(a) [s 5 equivalent], to determine whether the consent should be granted.

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[13] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195 at [24(c)]. **ABoA tab 2**.
[14] Resource Management Bill (4 July 1991) 516 NZPD at 3020.
[15] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.
[16] At [200], referring to s 59 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
[17] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [182], and further elaborated at [185] – [186], affirming the description of Policy 13 of the NZCPS as "something in the nature of an environmental bottom line", which required the DMC "to square up to that" and "directly confront the effect of the environmental bottom lines in the NZCPS … and explain, albeit briefly, why it consider that factor was outweighed by other s 59 factors or sufficiently accommodated in other ways."
[18] At [298] and [331].
[19] At [280].
[20] At [5].

3.12 Waka Kotahi respectfully submits that this is the approach required of a consenting decision-maker under Part 6 of the RMA where a project engages with the objectives and policies of the NZCPS, rather than the binary 'strike out' approach described by the CA majority in *Port Otago*. The proposal must be assessed by undertaking a fair appraisal of all the relevant objectives and policies read as a whole, in light of s 5. If the proposed activity would have effects that are inconsistent with an 'avoid' policy (or any other strong policy directive) that is a highly relevant matter for the decision maker to take into account, and must be squarely addressed. If the decision maker is minded to grant consent notwithstanding such inconsistency, it would need to clearly articulate its reasons for doing so. But the key point is that it is open to the decision-maker to do that.

3.13 That is what the Board did in granting the EWL consents. The EWL consenting process was a textbook example of an effective process for a complex proposal, which actively engaged with the key objectives and policies of the RMA framework (both enabling and protective, and including numerous matters of national significance) and ended with an outcome that the Board was satisfied genuinely achieved 'sustainable management'.[21]

The NZCPS does not impose an absolute veto

3.14 Waka Kotahi agrees with the analysis of the CA majority in *Port Otago* that in issuing the NZCPS in 2010 the Minister would not have intended for her policy statement to read as directing the setting of rules that provided an absolute veto in all circumstances of consents for activities with certain specified effects.

3.15 This is also clear from the Regulatory Impact Statement for the NZCPS which states (emphasis added):[22]

> The essential caveat concerning the analysis is that the NZCPS **does not directly regulate activities** managed under the RMA, but guides the management and regulation of activities by local authorities. The impact of the NZCPS therefore depends on how local authorities give effect to it, particularly in policy statements and plans. Plan provisions will vary according to the nature and scale of coastal management issues for different regions and districts. **The impact on decision making on resource consents and other relevant approvals will also vary from case to case, depending on**

[21] BOI [1392] – [1398], esp at [1396] 316/90 **316.04329 – 316.04331**. See also [1393] where it states: "Section 5(2)(a), (b) and (c) matters have not been overlooked by the Board. Adverse effects are avoided, remedied, or mitigated (or off-set). Particular regard has been paid to the life-supporting capacity of water, soil and ecosystems". See also BOI at [1373] and ch 14. 316/90 **316.04325 – 316.04326, 316.04175 – 316.04313** (the adverse effects "will be adequately avoided, mitigated or off-set) and BOI at [578] - [614] esp [614]. 316/90 **316.04129** – **316.04137** (the outcome of the offset and mitigation package "***at least balances the ecological effects***" of the EWL Project).
[22] Regulatory Impact Statement *New Zealand Coastal Policy Statement* Dept of Conservation, 4 November 2010 at [2].

> **the weight decision makers give to the NZCPS, relative to the other matters they must have regard to, when determining applications**.

3.16 And further:[23]

> Regional policy statements, regional plans and district plans must give effect to the NZCPS. The NZCPS is therefore the key instrument (after legislation) for central government to influence the content of planning documents as they relate to the coast.
>
> The NZCPS has a lesser influence on resource consent decisions. A consent authority must, subject to Part 2 of the Act, have regard to matters including any relevant provisions of the NZCPS.

3.17 Nor is an interpretation of the NZCPS that sets an 'absolute veto' in these four areas (natural character, natural landscape, biodiversity and surf breaks) supported by the text of the NZCPS itself.

3.18 The NZCPS does not use the word 'prohibit' at all. Rather, it uses a range of positive and negative directives more suited to policy statements than absolute hard edged rules. Placing these on a tentative gradient these include:

Positive directives	**Negative directives**
Local authorities are directed to – Policy 29	Do not allow – Policy 23
Provide for / require – Policies 2, 4, 10, 18, 21, 26	Does not occur – Policy 3
Recognise – Policies 2, 6, 8, 9, 12, 18, 19, 26, 27	Ensure no adverse effect – Policies 9, 16, 22, 23
Do where practicable – Policies 6, 7, 14, 21	Control – Policies 20, 22
Give priority to improving – Policy 21	Avoid – Policies 11, 13, 15, 16
Allow to occur – Policy 3	Avoid unless – Policy 10
Promote – Policies 6, 14, 23, 27	Avoid significant adverse effects – Policies 5, 11, 13, 15, 23
Encourage – Policies 6, 10, 25	Avoid where practicable – Policy 23
Maintain and enhance – Policy 19	Minimise adverse effects – Policy 23
Take into account - – Policies 2, 5, 6, 27	Avoid, remedy or mitigate adverse effects – Policies 5, 11, 13, 15, 19
Have particular regard to – Policy 10	Provide protection – Policies 7, 17
Consider – Policies 2, 5, 6, 7, 9, 19, 23	Avoid increasing risks of harm – Policy 25
	Discourage – Policy 25
	Have particular regard to – Policy 10, 23
	Consider impacts /have regard to – Policies 15, 18

[23] At [3] and [4].

3.19 It is not possible to read 'avoid' in the above array as intending an absolute 'avoid at all costs'. It is clearly a strong directive, but it is also clearly not the strongest. Nor, if the approach is one of strict interpretation of relative strength of expression, can 'avoid' be directly equated with "not allowing" as the Court in *King Salmon* indicated, because that term is used separately.[24]

3.20 This approach of establishing dominance between policies by looking at the relative strength of expression also results in an artificial focus on trying to interpret a multiplicity of verbs in the NZCPS, instead of applying all the objectives and policies of the NZCPS to give effect to the values they represent. The NZCPS is drafted in the imprecise language of a policy statement (which it is), and is not susceptible to a rigid hierarchical 'statutory interpretation' exercise of this nature.

3.21 Nor is it sensible to try and 'interpret' each of these positive and negative verbs in the NZCPS in a rigid cascade that mechanically generates an internal hierarchy. The relative strength of each verb is highly debatable and subjective, and it is far from clear that a negative verb such as 'avoid' should be read as stronger than enabling verbs such as 'recognise' or 'provide for' or 'enhance'.[25] The RMA is an enabling regime, and a wide range of key objectives are expressed in this manner, including such fundamental policies in the NZCPS as Policy 2 (The Treaty of Waitangi, tangata whenua and Māori heritage), Policy 6 (infrastructure that is important to the social, economic and cultural well-being of people and communities), Policy 18 and 19 (public access) and Policy 21 (water quality), Policy 24 (natural hazards such as climate change). It is inherently unlikely that simply by the choice of a negative verb, the Minister intended that in all cases and in all circumstances those policies would be subservient to the protection of natural character, natural landscape, biodiversity and surf breaks.

3.22 This approach of reading 'avoid' as meaning a rule imposing an absolute prohibition that trumps all enabling objectives and policies also unbalances the NZCPS by giving absolute priority to these four areas. This is clearly not the

[24] *King Salmon* at [24(b)]. Policy 23(2) of the NZCPS states "In managing discharge of human sewage, do not allow… discharge of human sewage directly to water in the coastal environment without treatment…"
[25] It is also important to have regard to the limitations of language in a policy document that aims to both achieve positive outcomes and prevent negative ones. As RFB's submissions in the *EWL* appeal make clear, in their view an absolute prohibition would *always* 'trump' any positive enabling directive, no matter how firmly expressed (this appears also to be the view of the CA majority in *Port Otago*). However, simply due to the nature of the English language, negative verbs will always have a 'stronger' tone that *enabling* verbs. This 'interpretation' exercise would only allow an actual *mandatory* obligation to be seen as equal (and even then not overriding) a negative verb (thus 'do not allow' is matched by 'must provide for' or similar). However, mandatory provisions are not appropriate for a policy which seeks to enable positive outcomes, not control the activities of communities. Read in this context, enabling verbs such as "recognise", "provide for", "allow" and "promote" should be given at least equal weight to the

intention of the NZCPS, as all of its objectives and policies are included because they each reflect the important and nationally significant matters and priorities specified in s 58. The enabling policies are equally important as the protective policies.

3.23 This is confirmed by the Regulatory Impact Statement for the NZCPS, which makes no reference to these four policies (natural character, natural landscape, biodiversity and surf breaks) amounting to an absolute prohibition on activities with specified adverse effects. On the contrary, the RIS confirms the nuanced approach to 'avoid' policies.[26] It also confirms the importance of the enabling policies, and makes no suggestion that they are subservient to the policies dealing with these four areas.[27]

3.24 As the majority in *King Salmon* observed, the "various objectives and policies are expressed in deliberately different ways".[28] A purposive reading of the NZCPS would see any relativity in the strength of expression in the policies as indicating the relative strength of the values described in the policies: when a decision maker comes to assess a specific project, those indications will provide the framework for the assessment of whether, and how well, the proposal responds to each of the policies, and for the overall assessment of whether the proposal meets the purpose of sustainable management. Where the absolutist approach errs is that it purports to determine the relative strengths of all the policies in advance, on an abstract and narrow basis, leading to the proposition seen here that simply by comparing verbs an 'avoid' policy will always and in every case 'trump' all other policies and objectives,

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protective negative verbs, even if an abstract language based 'reconciliation' of the Policies is considered appropriate.

[26] Regulatory Impact Statement *New Zealand Coastal Policy Statement* Dept of Conservation, 4 November 2010 at [2] – [4] as quoted above. See also at [42], discussing the benefits and costs of the proposed NZCPS, one of which that it would provide more certainty by: "**guiding decision makers on how competing national benefits and local costs of proposed activities should be weighted**." See also the summary of key policy changes set out on page 9, which refers to strategic and special planning and describes the benefits of the NZCPS as providing "More certainty for consent applicants and communities about where resource use & development can occur or is likely to raise significant issues, and **where certain activities unlikely to proceed**." Similarly in the context of and management of natural character, features and landscapes (and surf breaks), the benefits are described as; "More certainty for consent applicants and communities about **where impacts on landscapes, significant natural features and natural character will be a significant issue for development**, and where that is less likely." See also [60] setting out conclusions and recommendations: "[the 2010 NZCPS] is likely to be more effective at achieving the purpose of the RMA. It would **promote more stringent controls on development with adverse effects on the natural values of coastal places and landscapes, balanced by more express recognition of the importance of development with national and regional benefits**. It would support clearer spatial and strategic planning, providing more certainty to resource users and communities about where development is more or less likely to raise significant issues."

[27] For example, the RIS records at [21] that the NZCPS is intended to address "key deficiencies" in the previous regime, including a range of matters where the NZCPS policies addressing those deficiencies are expressed in enabling terms, such as: little or no priority being given in many places to protection of coastal public open space and recreation values, and public access to the coast; insufficient action to maintain water quality; inadequate management of coastal hazard risks such as erosion, particularly considering likely impacts of climate change; insufficient recognition of tangata whenua values and interests in coastal resource management; and a general deficit in strategic and spatial planning, including for future infrastructure needs and use of renewable energy sources in the coastal environment. And more generally at [17] the RIS confirms that "The primary objective for the NZCPS policies is … they are effective in promoting sustainable management of coastal resources."

[28] *King Salmon* at [127].

rendering all of them effectively irrelevant before the project is even considered.

The RMA does not authorise the Minister to set absolute rules in the NZCPS to prohibit consents for activities with specified effects

The difference between policies and rules

3.25 A central feature of the structure of the RMA regime is the separation between the policy and plan making framework on the one hand (Part 5), and the consenting framework on the other (Part 6).

3.26 The policy and plan making framework in Part 5 provides for a cascade of increasingly specific principles at a national, regional and district level. The consenting framework in Part 6 sits next to *but is not part of* the policy and plan making framework under Part 5: the interface sits at the Rule level. Under s 77A it is the Rules that specify the status of an activity, from permitted to prohibited, with the consent framework governing all the activities that fall between the two.

<table>
<tr><td rowspan="3">National Policy Statements, Regional Policy statements (objectives, policies, methods) →</td><td rowspan="3">National Environmental Standards, Regional and District Plans →</td><td rowspan="3">Rules specify →</td><td>Permitted activities</td></tr>
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<tr><td>Prohibited activities</td></tr>
</table>

3.27 The status of activities in plans and Standards are generally specified as such on the basis of their effects (hence permitted activities will often have a range of 'standards' set out in the plan that must be met, to ensure that potential adverse effects are acceptable).[29] Activities that require consent are categorised as such to allow a case by case assessment of their effects against the relevant objectives and policies.

3.28 Resource consents are determined under Part 6, with the key decision-making provision being s 104.[30] This provides that the consent authority "must, subject to Part 2, have regard to" (inter alia): any actual and potential effects on the environment of allowing the activity; any offsetting or compensating

[29] For example, various activities are permitted in the SEA-M1, provided they comply with the relevant standards. e.g. removal of up to 20m² vegetation for the maintenance of existing lawful structures subject to other operational requirements (r F2.19.4(A44); F2.21.5.7); maintenance, repair or reconstruction of existing lawful structures within the existing footprint subject to other standards(r F2.19.10(A122); F2.21.10.1(3)); In SEA-M2, dredging is permitted for certain purposes up to1,500m, subject to other standards (E15.4.2(A27); E15.6.6).

[30] The basic structure of the consent framework also differentiates between activities on land and activities in the coastal marine area. In simple terms, all activities on land are permitted except those that are prohibited or specified in a standard or rule as requiring consent (s 9). In contrast, the RMA prohibits most activities in the CMA unless expressly allowed by a standard, rule or resource consent (s 12). The 'coastal environment' straddles the two. For s 9 see **ABoA tab 1**. For s 12 see **RBoA tab 1**.

positive measures; relevant provisions of a national environmental standard, a national policy statement (including the NZCPS), a regional policy statement and a plan; and any other relevant matter.

3.29 The Act is thus clear that a decision maker under ss 104 does not 'give effect to' or 'implement' or 'comply with' the NZCPS or any other Policy or Plan (noting however that this does not mean that the decision maker is free to not apply the Rules set in the Plan or the Standards in the NES. NES are promulgated as Regulations, and Rules are specified under the RMA as having the force and effect of Regulations,[31] and so both must be applied on their terms. Polices however do not have that same force, and the sole operative direction is for the decision maker to 'have regard' to them.)

3.30 "Have regard to" is in deliberate contradistinction to "give effect to" and entails a higher level of discretion and judgement. This is consistent with the devolved decision-making structure of the RMA, and the objective of avoiding inflexible and rigid rules that was a critical feature of the legislative reforms. It is also notable that the 2005 reforms, which introduced the "give effect to" direction in Part 5 to strengthen the requirement on regional plan makers in relation to the national policy statements,[32] did not make any change to the s 104(1) "have regard to" obligation for consent authorities in Part 6.

Obiter observations in King Salmon that the Minister could direct blanket prohibitions in the NZCPS

3.31 The majority in *King Salmon* made obiter observations suggesting that the NZCPS could include directives that "contemplated the prohibition of particular activities in certain localities."[33] These observations were made in the context of the reasoning as to whether the 'overall judgement' approach to 'giving effect to' the NZCPS was correct.

3.32 If these observations were intended to be read as a finding that the RMA authorises the Minister in setting the NZCPS to *require* a Council (or a decision maker) to specify that certain effects are to be absolutely prohibited in all circumstances, then Waka Kotahi respectfully submits that this would be incorrect.

[31] Section 43 (National Environmental Standards), s 68(2) (Regional Rules and Regional Coastal Rules), s 76(2) (District Rules).
[32] Resource Management Amendment Act 2005 (No 87) s 41 amended s 67 RMA to require regional plans to give effect to the NZCPS as well as other national and regional policy statements **SBoA tab 1**.
[33] *King Salmon* at [132]. See also [117] – [124].

3.33 The primary basis for the majority's observation appears to be Policy 29 of the NZCPS, which the majority refer to as "an obvious example" of a policy statement that has the effect "of what in ordinary speech would be a rule".[34] Policy 29 states that the Minister does not require any activity to be specified as a restricted coastal activity. The majority also refer to the related provision in s 58 (setting out the matters that may be addressed in the NZCPS), and note in particular s 58(e),[35] which specifically authorises the Minister to include in the NZCPS:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value.

3.34 When first enacted, the RMA provided for all restricted coastal activity consent applications to be determined by the Minister of Conservation.[36]

3.35 With respect to the majority in *King Salmon*, section 58(e), and Policy 29 which addresses it, do not support a reading of the RMA that permits the Minister to direct that activities with certain effects must be absolutely prohibited. Section 58(e) rather provides a specific authority for directives to be made for restricted coastal activity status, in circumstances where the potential adverse effects of an activity could be so serious that the Minister considers it appropriate to remove decision-making discretion from the usual decision maker and reserve the decision instead to themselves. It is a single, limited and express statutory exception to the non-prescriptive nature of the policy statement. And it also goes no further than allowing the Minister to reserve the consenting decision in confined circumstances. It does not support the existence of an abstract veto power in the NZCPS.

3.36 Critically, the majority in *King Salmon* also did not take into account other key aspects of the RMA regime in expressing this view; most importantly the fact that the Minister *is* empowered to prohibit activities and direct rule-making, but

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[34] At [116] and [121] – [122].
[35] At [121].
[36] In 2009 this special provision was removed and the RMA now provides that restricted coastal activity consents are to be decided by an appointed panel: Resource Management (Simplifying and Streamlining) Amendment Act 2009. The current NZCPS does not provide for any restricted coastal activities.

only through National Environmental Standards.[37] National Environmental Standards are set by regulation on the recommendation of the Minister to the Governor-General.[38] The Act specifies additional requirements that must be met for such standards to be set,[39] on top of the process requirements that apply to both national policy statements and the NES.[40]

3.37 The majority in *King Salmon* refer to the existence of National Environmental Standards only once, in their outline of the hierarchy of planning documents:[41] NES are not referred to again and there is no discussion about the different roles each plays under the regime. On the contrary, and with respect to the Court, there appears to be an error in [107] where the majority refers to the debate on the third reading of the Bill, and sees the Hon. Simon Upton's reference to "hard environmental standards" as supporting the position that the policy statements could themselves set such standards. Read in context, the Hon Simon Upton appears to be referring to the National Environmental Standards, not the National Policy Statements.[42]

3.38 The most obvious interpretation of these contrasting provisions (s 58 for the NZCPS and s 43A for the NES) is that the Minister is empowered under the NZCPS to direct certain activities with potentially significant or irreversible effects to be restricted coastal activities, over which they (at least initially) would retain final decision-making power, *on a case by case basis*. The RMA does *not* expressly authorise the Minister to impose a blanket direction under the NZCPS that specified effects are to be in all cases prohibited. That power is conferred only through the National Environmental Standards.[43]

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[37] Section 43A. There are 9 NES currently in force, only two of which direct certain activities to be prohibited (and those in quite confined terms): Resource Management (National Environmental Standards for Air Quality) Regulations 2004 and Resource Management (National Environmental Standards for Freshwater) Regulations 2020.
[38] Section 43 and 44.
[39] Section 44.
[40] Sections 46A.
[41] *King Salmon* at [11]. The standards are also recorded in the text of the quote from clause 1 of schedule 1AA, 'incorporation by reference', at [123].
[42] Resource Management Bill (4 July 1991) 516 NZPD 3019. **RBoA tab 11**. The Hon Simon Upton in the beginning of this speech and in the paragraph immediately following the quote identified by the majority, refers to both environmental standards and national policy statements, recognising that they are different things, and referring as part of this discussion to changes that 'strengthened the setting of national *standards* …'. Mr Upton in opposition during the second reading also clearly understood the difference between the policy statements and the standards, and argued in the House that the provision in the bill for the Minister to set standards by way of regulation should be the central thrust of the legislation: Resource Management Bill (28 August 1990) 510 NZPD 4113. **RBoA tab 10**.
[43] The distinction is also confirmed in ss 32(4) and 87A(6) which contemplate that it is the National Environmental Standards (not National Policy Statements) that can impose prohibited status on an activity. This is confirmed also as a matter of definition: 'Prohibited activity' is defined in s 2 by reference to s 87A(6).

An NZCPS interpreted as the CA majority in Port Otago *contemplates would be unlawful*

3.39 Waka Kotahi's position is that an NZCPS that purported to direct the setting of rules that provided an absolute veto in all circumstances for activities with specified effects would be outside the Minister's powers under s 58, as outlined above.

3.40 Waka Kotahi also submits that an NZCPS interpreted to give absolute priority in all contexts to the four areas of natural character, natural landscapes, biodiversity and surf breaks, over all other objectives and matters of national importance, would be contrary to s 5 and Part 2. It would thus fail to comply with its own purpose in s 56 of stating objectives and policies "in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand" and be unlawful on that basis also.

3.41 Section 5 of the RMA states that the purpose of the Act is to promote sustainable management of natural and physical resources, with sustainable management defined as (noting the very wide definition of environment):[44]

> …the use, development and protection of natural and physical resources in a way, or at a rate, which **enables** people and communities to provide for their social, economic and cultural well-being and for their health and safety **while** -
> (a) **sustaining** the potential of natural and physical resources … 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.

3.42 This is equivalent to s 10(1)(a) of the EEZ Act that was considered by this Court in the *TTR* case.[45] While the majority in that case considered that the separate (and later added) purpose provision for discharges and dumping in s 10(1)(b) constituted a clear bottom line, it did not read s 10(1)(a) as also setting such limits. Respectfully, that is correct and would apply equally to the RMA: the language of s 5 contemplates both enabling and protective measures which must all be brought to bear. If there is any level of 'bottom line' apparent in s 5 it is in relation to (b) – "safeguarding the life-supporting

[44] "Environment" in the RMA is defined very broadly at s 2, as "environment includes -
(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters."

[45] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. Section 10(1)(a) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 states the purpose to "promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.".

capacity of air, water, soil and ecosystems", not "avoiding, remedying or mitigating" adverse effects of activities on the environment in (c).

3.43 Top-down imposition by the Minister of wide-ranging absolute prohibitions that prioritise protection of natural character and landscape, biodiversity and surf breaks at all costs, overriding all other considerations and without allowing for any future variation to accommodate exceptional or unusual circumstances, is not consistent with s 5. It is not consistent with the concept of '*managing* the use, development and protection of resources' to *enable* 'people and communities to provide for their social, economic and cultural well-being and for their health and safety' *while* meeting the objectives in s 5(2)(a) – (c).

3.44 Similarly, s 6 provides that to "achiev[e] the purpose of this Act" the Minister in setting the NZCPS was required to ("shall"): "recognise and provide for [eight] matters of national importance." Those matters include preserving natural character and protecting outstanding natural landscapes, and protecting areas of significant indigenous vegetation and habitats of indigenous fauna. They also include, on an equal value and weighting basis, the following:

> the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> the protection of historic heritage from inappropriate subdivision, use, and development:
>
> the protection of protected customary rights:
>
> the management of significant risks from natural hazards

3.45 A blanket policy operating at a national level that in all cases and in all contexts prioritised three out of the eight matters of national importance over the others would not be consistent with section 6. Nor does section 6 contemplate, or allow, that protection of the fourth 'avoid' area in the NZCPS (access to and enjoyment of a surf break) could have priority over these matters of national importance.

3.46 In addition, ss 7 and 8 required the Minister, in setting the NZCPS, to have particular regard to a range of other matters, including the effects of climate change (s 7), and to take into account the principles of the Treaty of Waitangi (s 8). Again, a blanket policy prioritising four areas over all these other considerations and interests would not be consistent with these provisions.

3.47 Finally, if the NZCPS is interpreted as setting prescriptive rules whereby avoidance must be complete, without regard to mitigation, offsetting or

compensatory measures (as RFB argue),[46] the NZCPS would be unlawful as purporting to override the statutory direction in s 104(a) and (ab). Those provisions, which reflect the basic framework of the RMA that the entire proposal must be considered, require that a consent authority must have regard to:[47]

> (a) any actual or potential effects on the environment of allowing the activity; and
>
> (b) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity

Principles of administrative law

3.48 The more limited scope of the Minister's powers in setting *policy* under the NZCPS versus recommending *regulations* under the National Environmental Standards is also consistent with four core principles of administrative law. Those principles support an interpretation that such powers are not to be implied into s 58.

3.49 First, the imposition of a permanent, absolute and inflexible prohibition is an extreme position, only very rarely taken in any regulatory regime.[48] The RMA itself directs this only for matters where Parliament has determined that there is no possibility that an exception would be warranted or tolerated, being:

(a) Prohibitions in relation to radioactive waste and toxic or hazardous waste in the coastal marine area (s 15C);

(b) Certain prospecting, exploring or mining in the internal waters of the Coromandel Peninsula (s 87B(2)); and

(c) Mining for mercury (s 87B(4)).

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[46] Noting this court in *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [252] and [308], correctly recognised that anything less than 'material harm' even in a legislatively imposed 'environmental bottom line' would have no environmental utility. The Court in *TTR* could readily infer the concept of material harm into s 10(1)(b) of the EEZ Act, but that does not appear to be an option with the term 'avoid adverse effects' when contrasted with 'avoid significant' and 'avoid, remedy or mitigate' in the NZCPS. The suggestion in *King Salmon* at [144] – [145] that 'avoid' would allow minor or transitory effects despite the contrast between 'avoid' is, with respect, doubtful as a matter of interpretation, if the NZCPS is to be read as setting defined rules rather than policy objectives. The Court appears to derive this at least in part from the qualifier in the relevant policies of avoiding "inappropriate" use. That qualifier does not extend to Policies 11 (biodiversity) or Policy 16 (surf breaks).

[47] Subsection (ab) and the equivalent s 171(1B) were introduced in the Resource Legislation Amendment Act 2017 and post-date this proposal. However, they reflect existing case law, and positive effects were already recognised as a relevant consideration AUP rule C1.8 and Chapter D9.3(1)(e). See Departmental Report on Resource Management Amendment Bill 2017, at page 92 **RBoA tab 8**; and for example Williamson J in *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC) at 18: "To ignore real benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity." **RBoA tab 18.**

[48] Even in the context of fundamental human rights, the New Zealand Bill of Rights Act 1990 recognises that justified limitations to most of those rights may arise in some circumstances (s 5). Similarly important occupational health

3.50 The RMA also provides in s 77A for Rules to be set specifying prohibited activities, but these are always open to revision via an application for a plan change or upon plan review. Empowering the Minister to set broad-ranging, absolute prohibitions by way of a general policy statement, that allows for no exceptions (and is not subject to the discipline of regulatory drafting, design and oversight)[49] would be another matter entirely.

3.51 Second, as the Legislation Advisory Committee Guidelines confirm, the imposition of nation-wide blanket prohibitions at a high level of generality (and without prospect of variation or exemption) is more appropriately vested in Parliament than in the executive.[50]

3.52 Third, imposing absolute and inflexible prohibitions on the use and development of land constitutes an extreme interference with private property rights. In contrast, for example, to achieve the same outcome under the Conservation Act 1987 or the Marine Reserves Act 1971, the Crown would have had to first acquire the property from a willing seller,[51] and an equivalent covenant under the Reserves Act 1971 would require the owner's consent.[52] Basic principles of statutory interpretation require clear words to demonstrate that Parliament had intended to confer such powers.[53]

3.53 Fourth, the framing and application of the NZCPS is too uncertain: if it is to be read as imposing absolute and inflexible prohibitions, then it fails to meet basic standards of certainty and transparency.[54]

(a) The NZCPS covers an undefined area of the 'coastal environment', so individual property owners or those dealing with them *do not necessarily know* whether the NZCPS applies to their property at all.[55] This is not a minor point, as illustrated by the recent decision of

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and safety duties owed to workers are subject to what is 'reasonably practicable' under the Health and Safety at Work Act 2015 (s 36).

[49] By the Regulations Review Committee.

[50] As confirmed in the Legislation Advisory Committee (LAC) Guidelines at ch 14, Part 1. The NES provide a tailored exception to that, to allow specific matters requiring technical input and stakeholder engagement to be addressed in more detail than would be appropriate in the empowering legislation, as contemplated in the LAC Guidelines at ch 14, Part 1. **RBoA tab 32.**

[51] Conservation Act 1987, s 7; Marine Reserves Act 1971, s 5.

[52] Reserves Act 1971, s 77.

[53] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) - pp 435 – 436. **RBoA tab 31**. See also *SMW Consortium (Golden Bay) Ltd v Chief Executive of Ministry of Fisheries* [2013] NZCA 95 at [31] and fn 37. **RBoA tab 16**. Noting also that the Regulatory Impact Statement *New Zealand Coastal Policy Statement* Dept of Conservation, 4 November 2010, page 1, 3rd paragraph expressly states that while the NZCPS "in some cases [may] be a factor in decisions to approve or refuse consent. It would not override fundamental common law principles." **RBoA tab 9**.

[54] See LAC Guidelines ch 14, discussing the certainty and predictability of the law.

[55] As noted above, the *coastal environment* is not defined in the RMA nor the NZCPS, rather it is described in general terms in Policy 1 of the NZCPS. As the Supreme Court in *King Salmon* noted (fn 35) the full extent of the landward side of the coastal environment is unclear. See also Nolan at [5.7] **RBoA tab 28**.

Environment Court which suggested that the entire Auckland isthmus might fall within the coastal environment ambit of the NZCPS.[56]

(b) Nor are the particular sites subject to 'avoid' directives well defined or known. Areas of 'outstanding natural character' (Policy 13) and 'outstanding natural landscapes' (Policy 15) are described (not defined) in extremely broad terms, and there are no nationally consistent criteria or methodology to determine them. While many of these areas are mapped, it is still open to the decision maker on a consent application to identify other areas.[57] Further, even where mapped, the protected values will not generally be fully defined in advance, but rather are assessed only at the time a proposal is framed for consenting under the RMA.

(c) More generally, the NZCPS uses language that is expressed at the high level of objectives and policies, with no clear definitions and no attempt to align or reconcile the relationship between various provisions. This is suited to statements of policy, not regulation that directly affects property rights and restricts public activity.

3.54 These fundamental principles of administrative law run counter to any Parliamentary intent to authorise the executive to impose absolute prohibitions via a policy statement, outside the clear provisions in the RMA for setting regulations by way of the National Environmental Standards. None of these difficulties arise however if the 'avoid' policies in the NZCPS are read as a very strong directive that in many cases will be determinative, but not an absolute veto.

3.55 The distinction between 'avoid' being interpreted as an absolute 'avoid at all costs' (ie prohibit) instead of a strong but not absolute policy directive, is therefore critical. This distinction was not addressed by the majority in *King Salmon*, and it is respectfully submitted that the only feasible reading of that decision and the NZCPS is the latter.

Point was not decided in *King Salmon*

3.56 The 2014 decision in *King Salmon* is recognised as iconic, changing the then-prevalent understanding of what it means to 'give effect' to higher order instruments in the Part 5 plan making framework. The decision undoubtedly

[56] *Cabra Rural Developments v Auckland Council* [2018] NZEnvC 90 at [90] – [93]. **RBoA tab 23**. Note that while this decision has subsequently been overturned, this point remained undisturbed.

gave greater focus to environment protection as an intended outcome of the enactment of the RMA than had previously been recognised.[58]

3.57 However, read on its own terms, *King Salmon* does not stand for the proposition that all the 'avoid' directives in the NZCPS always and in all circumstances amount to an absolute veto, prohibiting consents for activities that cannot avoid the specified adverse effects.

3.58 First, the *King Salmon* majority's obiter statement that 'avoid' in the context of Policies 13(1)(a) and 15(a) carries its 'ordinary meaning' of 'not allowing' or 'preventing the occurrence of'[59] is not accompanied by analysis or reasons, indicating that it was not considered to be a contentious, let alone 'regime changing' issue in that case.

3.59 Second, as noted above, the term 'do not allow' is actually used separately and as a stronger directive than 'avoid', in Policy 23(2) relating to managing discharge of human sewage. The majority in *King Salmon* did not refer to this, despite it being relevant (and contrary) to a firm interpretation of 'avoid' as always meaning the same as 'do not allow'. This supports the view that these were obiter observations only.

3.60 Third, the 'ordinary meaning' of avoid is nuanced: while it conveys the concept of a strong desire to 'prevent something from happening' it is also not as strong as 'absolutely prohibit' or 'do not allow under any circumstances'. There is also a significant difference in RMA terms if 'avoid' is interpreted as a strong but not absolute overriding directive, as outlined above. It is notable that the majority in *King Salmon* do not mention or engage in any discussion on those matters, which indicates that the majority were not intending to lay down a general rule that 'avoid' in the NZCPS always and necessarily means absolutely prohibit.

3.61 Finally, the majority in *King Salmon* is careful in its discussion to *not* say that 'avoid' means an absolute prohibition: they refer to 'something in the nature of a bottom line' but holds back from stating what that actually requires. Similarly, the majority explicitly decline to express a view on the approach

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[57] *Southland Fish & Game New Zealand v Southland Regional Council* [2016] NZEnvC 220 at [252] – [254] and [258] – [259]. **RBoA tab 24**.
[58] See for example Elias CJ speaking extra-judicially in an Address to the Resource Management Law Association Salmon Lecture, July 2013. **RBoA tab 29**.
[59] *King Salmon* at [24(b)], [62], [93], [96], [97] and [126].

taken by the Environment Court in *Wairoa River Canal Partnership v Auckland Regional Council* that 'avoid' is 'a step short of' prohibit.[60]

3.62 It is respectfully submitted that the CA majority in *Port Otago* was incorrect in its apparent assumption that *King Salmon* stood for this proposition, especially in the context of consenting decisions under Part 6. Waka Kotahi's position is that the critical question of whether the NZCPS can and/or should be interpreted as imposing an absolute prohibition allowing of no exceptions has not yet been determined by this Court.

3.63 Waka Kotahi also submits in the alternative, if the CA majority in *Port Otago* is correct in its apparent understanding of the ratio of *King Salmon* as establishing an absolute veto in the context of consenting decisions, then it would be appropriate for this Court to revisit this aspect of *King Salmon*.[61] Grounds for doing so include the range of matters that were not considered by the Court in 2014 which support a contrary position, and the fact that the lower courts are still grappling with this aspect of the case so there is no settled understanding on this issue.[62]

***Port Otago* CA majority analysis on Part 6 is flawed**

3.64 With respect to the CA majority in *Port Otago*, the obiter analysis of the implications of the 'avoid' policies post *King Salmon* for consenting decisions under Part 6 is also not consistent with prior authority and appears to be internally inconsistent.

3.65 First, the absolute approach that the majority appears to endorse for Part 6 is not consistent with the decision in *RJ Davidson*, which the majority earlier in its decision specifically affirmed.[63] Nor does the majority refer the contrary approach expressed in the *TTR* decisions at both CA and Supreme Court level, discussed above.

3.66 Second, the apparent endorsement of the absolute approach is not consistent with the majority's earlier agreement with Miller J's view that the concept of a bottom line in *King Salmon* was not absolute.[64] Miller J's expression of the

[60] At [95] – [96], referring to *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 RENZ 152.
[61] In accordance with the principles discussed in *Couch v Attorney-General* [2010] NZSC 27 at [104] – [108]. **SBoA tab 3**.
[62] See for example *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 **ABoA tab 5**; and *Royal Forest and Bird v Bay of Plenty Regional Council* (taking the 'absolute' approach); and *EWL* (HC); *RJ Davidson* (CA); and *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 **SBoA tab 6** (not taking the 'absolute' approach).
[63] *Port Otago* (CA) at [34] and [59].
[64] At [55], referring to Miller J's discussion at [99] – [102].

concept would inevitably lead to a more nuanced approach to consenting decisions, as His Honour suggests.[65]

3.67 Finally, the CA majority in its suggested formulation of the consenting process seems to actually re-introduce the concepts that it has ruled incompatible with the 'avoid' directives. As part of the ratio of its decision, the majority had earlier expressed the clear view that 'avoid' and 'avoid, remedy or mitigate' are "altogether distinct concepts",[66] and recorded that 'avoid' is also distinct from the 'lower hierarchy' direction to 'avoid significant' adverse effects.[67] In its framing of the consenting process however it appears to allow for adverse effects that may be temporary (ie can be remedied) or minor (ie not significant). The CA majority do not explain how in its framing an absolute rule of 'avoid' would allow these concepts to be reintroduced at the consenting phase.[68]

3.68 Waka Kotahi also shares the concern expressed by the Marlborough District Council and the Auckland Council that the practical implications of the absolutist approach apparently endorsed by the CA majority in *Port Otago* would be unworkable in the real world context (regardless of whether or not less than minor adverse effects are allowed). As the SEA map provided by the Auckland Council demonstrates, if adverse effects must in all cases be absolutely avoided in Auckland's SEAs, then many proposals for essential infrastructure that must engage with the harbour or coastal routes would be simply unconsentable, as would many projects addressing coastal hazards, climate change adaptation and renewable energy.

3.69 Similarly, even projects designed to actively improve the environment, such as the reclamations for coastal restoration, leachate containment and water treatment or the reopening of the historic portage under SH1 at Ōtāhuhu creek[69] that form part of the EWL proposal, would be unconsentable even if

[65] At [115].
[66] At [79].
[67] At [26].
[68] See also at [61] where the majority appear to allow for temporary adverse effects, or adverse effects that may be managed by adaptive management (which is not a tool for total avoidance of effects).
[69] The Ōtāhuhu portage has been in use since before 1100AD, and was used by the Tainui Waka of the Great Fleet to enter the Manukau Harbour – Cultural Values Assessment at [5.2]. 303/17 **303.01341**.

pursued on their own, as both cannot avoid adverse effects on specified values in the SEA-M areas.[70]

Dated 5 April 2022

Victoria Casey QC / Vanessa Evitt / Jack Parker
Counsel for the respondent

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Victoria Casey QC – Counsel for Waka Kotahi

[70] The restoration of the natural coastline, the containment of contaminated leachate from the rubbish dumps that abut the Inlet and the water treatment wetlands that will treat the run-off of the entire Onehunga industrial, commercial and residential catchment involve more than minor adverse effects on the SEA-M2. BOI at [645] – [647]. 316/90 **316.04143**. The restoration of the portage at Ōtāhuhu creek would involve declamation and replacement of the box culverts under SH1, which is also an area of SEA-M2 recognised for its intertidal habitat. For that project, for example, consents would be required to authorise: (a) construction activities in the CMA, temporary occupation and associated discharge of contaminants; (b) declamation; depositing of material in the CMA; CMA disturbance; vegetation alteration/removal (including mangroves); damming or impoundment of coastal water; taking, use or diversion of coastal water; parking on CMA structures; vehicle use of the foreshore and seabed; demolition or removal of any existing CMA structures; and (c) Temporary CMA structures construction activities including the installation of 100 temporary piles, works associated with the removal of the existing culvert and replacement with a bridge and the construction of a new bridge at Ōtāhuhu Creek, which involved the installation of 8 permanent piles. See Technical Report 16 – Ecological Impact Assessment and Supplementary Assessment (TR16), at page 51. 301/12 **301.00258**. While adverse effects on existing coastal values will be addressed in this project through mitigation, reaching an overall positive outcome, it is unrealistic to expect that all adverse effects on the relevant SEA values for a project of this nature would be avoided in their entirety.