IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI SC25/2021

IN THE MATTER	of an appeal under s 149V of the Resource Management Act 1991
AND	
IN THE MATTER	of the East West Link Proposal
BETWEEN	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
	Appellant
AND	**WAKA KOTAHI / NEW ZEALAND TRANSPORT AGENCY**
	Respondent

SUBMISSIONS FOR NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LIMITED

05 APRIL 2022

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Tēnā, e te Kōti

INTRODUCTION

1 The parties to SC25/2021 have been provided with an opportunity to file written submissions on issues raised by the Port Otago appeal, and the related decision in *Port Otago Ltd v EDS* [2021] NZCA 638 (**the Port decision**).[1] A similar approach was adopted by the Supreme Court when it heard the appeals in *King Salmon* and *Sustain Our Sounds* together.[2]

2 Ngāti Whātua Ōrākei adopts without repeating its earlier written and oral submissions in these proceedings;[3] and adopts Forest & Bird's summary of the Port decision and the relevant statutory framework.[4] These submissions focus on key points arising from the Port decision, and (where available) party submissions in the Port appeal, to the extent relevant to the East West appeal. [5]

Overall context

3 As previously submitted by Ngāti Whātua Ōrākei, environmental bottom lines are not new to resource management, town planning or mātauranga Māori. Rāhui have been used for centuries to manage biodiversity. Biodiversity values are cultural values. This is reflected in s6(e) RMA. There are cultural bottom lines in Pt 2 RMA.[6]

4 The reasons that *King Salmon* was correctly decided in 2014 still apply now. An important benefit of *King Salmon* is certainty for policy

[1] SC Minute dated 17 March 2022 giving leave to the parties in SC25/2021 (**East West proceedings**) to file submissions responding to the Appeal in SC6/2022 (**Port proceedings**).
[2] *Environmental Defence Society Inc (**EDS**) v New Zealand King Salmon Company Ltd* [2014] 1 NZLR 593 (**King Salmon**); *Sustain Our Sounds v New Zealand King Salmon Company Ltd [2014] 1 NZLR 673.* Both appeals related to plan change and resource consent proposals for proposed aquaculture farms in the Marlborough Sounds.
[3] Ngāti Whātua Ōrākei Submissions dated 23 September 2021.
[4] Submissions for Forest & Bird in SC6/2022, dated 05 April 2022 (**Forest & Bird submissions**).
[5] This is under a truncated timetable. Counsel has been unable to review in detail the submissions for Marlborough District Council (which were received on the same day that these submissions were due, i.e. 5 April 2022) or EDS's submissions.
[6] Per Palmer J in *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 at [93]-[94]

makers, when drafting policy provisions, and their awareness that using phrasing such as “avoid” in policy frameworks is sufficient to protect values important to wellbeing and community. It has not produced absolutism, instead awareness of using deliberately framed language to create a hierarchy. *King Salmon* has promoted greater certainty in plan drafting, that seeks to reconcile competing policy imperatives and potentially incommensurable values. This is not a ‘regulatory mismatch’.

5 There are some material differences between the NZCPS objectives and policies that apply to reclamation and biodiversity, as distinct from natural character and landscape. Objective 1 and Policy 11 (biodiversity) protect identified taxa and habitats that meet the criteria in Policy 11(a), such as rare and threatened seabirds. Adverse effects that are not minor or transitory are to be avoided. There is no scope to consider whether activities are “appropriate”. This reflects the wording in s6(c) RMA. Policy 10 (reclamation) requires that reclamation is to b e avoided in the coastal marine area, unless specified preconditions are met. None of the preconditions in Policy 10 anticipate an “appropriateness” assessment.

6 By contrast, Policies 13 and 15 of the NZCPS refer to protecting natural character and landscape values from “inappropriate subdivision, use and development”. What is inappropriate is to be judged by reference to the values being protected, per *King Salmon*.[7]

7 Policy 7 of the NZCPS (strategic planning) anticipates an assessment of areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate. The operative Auckland Unitary Plan (**AUP**) has

[7] *King Salmon* at [98] to [105]. Comprehensive references to *King Salmon* are provided by Forest & Bird in their submissions dated 05 April 2022 (on the Port Appeal). These are generally adopted.

undertaken the exercise anticipated by Policy 7, by identifying areas that are to be protected from inappropriate subdivision, use and development. This includes the Marine Significant Ecological Areas (**Marine SEAs**) at issue in the East West appeal.

8 Absent any requirement to evaluate appropriateness, Policies 10 and 11 are more directive, on a spectrum, than Policies 13 and 15 (or, for that matter, Policy 7). This reflects the statutory wording in s6 RMA for matters of national importance. It may also reflect that Policies 13 and 15 require assessment of (*inter alia*) perceptual and experiential qualities, as well as biophysical qualities, that are relevant to the outstanding or high landscape and natural character values.

9 Ngāti Whātua Ōrākei generally agrees with the statement of overall context given by Forest & Bird in their corresponding submissions on the East West appeal. This includes: [8]

9.1 Whether, and the extent to which the PRPS may impact future consenting activities, is a relevant issue raised by the Port in their written submissions, of parallel relevance to the East West appeal. [9]

9.2 Relevant considerations for a consenting process are identified by the Port decision at [61] and [83]. [10] These include the existing environment (Otago Port is a longstanding feature of Otago/Ōtākou Harbour), appropriateness, nature and extent of effects, whether effects are minor or transitory.

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[8] Forest & Bird (East West Link submissions) dated 05 April 2022
[9] *Ibid* at [4]
[10] Miller J in particular notes the importance of future consenting processes to test the PRPS provisions. See also the majority decision at [61]:

> "[61]..it by no means follows from the majority in King Salmon that new activities in a coastal environment, even in an area with high natural character, are precluded. Issues of existing modification to that environment, the appropriateness of development (assessed in the manner indicated by the majority), the extent and duration of effects of the activity and the availability of methods to avoid those effects (such as adaptive management) all potentially mitigate the potential rigour of the majority ruling."

9.3 The impact of national and regional policy frameworks on a non-complying resource consent proposal was a central issue for the East West appeal. If a Regional Plan gives effect to the directive avoidance policies of the NZ Coastal Policy Statement (**NZCPS**), then the consent authority cannot grant consent for a non-complying activity contrary to those directive policies, when the policies are material to the proposal. The reclamation and biodiversity policies (and the corresponding effects on the values identified by those policies) were material to the East West proposal (for reasons explored in the written and oral submissions for Forest & Bird and Ngāti Whātua Ōrākei).

9.4 Policies 9.3(9) and (10) of the AUP give effect to the corresponding directive avoidance biodiversity policy (i.e. policy 11 NZCPS).

9.5 The AUP should be read and reconciled in the way mandated by *King Salmon* for the NZCPS. For biodiversity, Policy 11 of the NZCPS and Policy 9.3(9) and (10) of the AUP create environmental bottom lines as anticipated by King Salmon.

9.6 Policy 10 of the NZCPS and Policy F2.2.2(1) and F2.2.2(2) of the AUP are directive or bottom line policies.[11] Reclamation is to be avoided, unless specified conditions (or thresholds) are met. The AUP also requires that reclamation is managed under the applicable overlays. This relevantly includes the Marine SEAs identified by the AUP as part of a strategic planning exercise.[12] Policy 10 is framed in the NZCPS as an avoidance policy ("avoid unless.."). Policy F2.2.2(1) refers to "avoid reclamation..except where all of the following apply.."; Policy F2.2.2(2) refers to "..where reclamation is proposed that affects an overlay, manage effects in accordance with the overlay.."

[11] The relevant AUP policies are in Volume 2 of the Board Report (Appendices) at 317.04414
[12] Ngāti Whātua Ōrākei Submissions dated 23 September 2021 at [24]-[26]

9.7 Perhaps ironically, the argument made by the Port in relation to the 2017 amendment to s56 RMA supports the Forest & Bird appeal, because it reinforces the materiality of the objectives (as well as the policies) for the NZCPS. This relates to the alleged error by the Board in failing to consider the relevant Objectives of the NZCPS, including Objectives 1, 3, and 6.

PORT DECISION [2021] NZCA 638

10 The Port decision was decided on orthodox grounds by reconciling the avoidance policies in the NZCPS (Policies 11, 13, 15) with the Port policy (Policy 9). Other objectives and policies were also relevant, but these policies had primary relevance. As drafted, the proposed port policy in the PRPS did not give effect to the NZCPS, and was thereby inconsistent with s62(3) RMA. The majority judgment (Kós P and Gilbert J) relevantly found that:

10.1 *King Salmon* was binding authority for the purposes of giving effect to the NZCPS, when determining the port-related policy in the PRPS.

10.2 A policy bottom line in the NZCPS requiring adverse effects to be 'avoided' in areas of outstanding natural character in the coastal environment, is not given effect to by policy wording in the PRPS that states 'avoid, remedy, mitigate'.[13] In short, 'avoidance' is not equivalent to 'avoid, remedy, mitigate'.

10.3 On their proper construction, the avoidance policies (Policies 11, 13, 15, 16) were more directive than Policy 9 (the Port Policy), resulting in a requirement to avoid adverse effects that were not minor or transitory. Reconciliation is not a complex task because the NZCPS contains a clearly discernable prioritisation of values within its text.[14]

[13] This was the essential question posed by the Appeal: Port decision at [78]-[79]
[14] Port decision at [82]

10.4 There was some discussion of the threshold of 'appropriateness' used in Policies 13 and 15, when applied to existing infrastructure (such as the Port). Established infrastructure forms part of the existing environment, and may therefore form part of the context for outstanding and high values. For example, appreciation of the landscape and natural character values of Otago/Ōtākou Harbour will (depending on viewpoint) include visibility of the Port and its infrastructure. The MV Rena wreck contributed to (and did not detract from) the outstanding qualities for Ōtāiti Reef at Motiti Island.[15] Vineyards, viticulture and rural activity were part of the character and outstanding landscape values present for the Man O'War farm at Waiheke.[16]

10.5 This question of appropriateness was relevant to the Port, as existing infrastructure in an area with outstanding and high landscape and natural character values, under NZCPS Policies 13 and 15.

10.6 In *obiter* discussion, the majority addressed "seven points", highlighting perceived difficulties with King Salmon, said to create (*inter alia*) a **regulatory mismatch** between the original intent of the NZCPS, and the manner in which policy directives were to be interpreted as "quasi-rules", post *King Salmon*.

10.7 These criticisms did not change the outcome of the Port decision, and need to be seen in context of the legal and factual dispute before the Court, which related to a policy review process for the partly operative PRPS, conducted in the abstract, and absent any relevant factual findings by a primary decision-maker on effects of proposed port activities on outstanding or high protected values. This may be contrasted with the fact- and case-specific findings made by the Board of Inquiry for East West.

[15] See for example *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC73
[16] *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24

10.8 While not strictly relevant to the appeal (which related to Pt 5 RMA), the majority decision at [33] affirmed *Davidson* as continuing to apply to resource consent processes under Pt 6 RMA.

10.9 While Pt 2 RMA may apply (in limited circumstances identified in *Davidson*),[17] this does not open the door to an overall broad judgment being applied under Pt 2 RMA or reversion to *New Zealand Rail*.[18] Counsel adopts without repeating the argument put forward by Forest & Bird on this point (which relevantly includes protective bottom lines identified by sections 5, 6, 7, and 8 RMA). While not expressly mentioned by Forest & Bird, this may relevantly include the duty of active protection of the exercise of rangatiratanga and vulnerable taonga under s8 RMA.

11 While dissenting, Miller J agreed with the outcome reached by the majority decision, albeit for different reasons.[19] The question of law was "anodyne". It was of course correct that 'avoid' cannot be equated with 'avoid, remedy, mitigate' the relevant effects of Port activities on outstanding values. This arose (as a matter of first principles) from s5(2) RMA.

12 Miller J considered that the PRPS should not include policies that were "rules" that would govern the effects of future Port activities, without understanding the implications of the "rules" (in terms of effects on the environment and Port). Regional rules for the coastal environment should be set through the Regional Coastal Plan, and implemented by resource consent process. This would allow a more contextual assessment of the relevant Port effects.

13 The PRPS was (in Miller J's view) the wrong setting to resolve these effects-based questions. Counsel queries this view. It is an

[17] *RJ Davidson v Marlborough District Council* [2018] NZCA 316
[18] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC)
[19] Miller J in *Port* decision at [97], [104]; Miller J cautioned against use of the expression 'environmental bottom line' as a rhetorical device, not term of art: at [99].

unavoidable feature of the plan review process under Pt 5 and the 1st Schedule RMA that effects questions must be resolved (to some degree) in the abstract. This reflects the hierarchical approach to the higher order instruments. The RPS must "give effect to" the NZCPS, and the Regional Coastal Plan must "give effect to" both the NZCPS and the RPS.

14 Put another way, changes to the PRPS would inevitably result in changes to the Regional Coastal Plan (as the latter must give effect to the RPS, once operative). This might result in a new rules regime for the Regional Coastal Plan (including changes to activity status for port-related activities, for example new activities that might involve dredging). This would (or might) happen in advance of an actual proposal by the Port.

15 For reasons set out below, Ngāti Whātua Ōrākei disagrees that *King Salmon* creates a regulatory mismatch, or other difficulties for planning practice, that require correction or re-interpretation for Pt.5 or Pt 6 RMA. Use of directive language has been successfully applied in a range of planning instruments, post 2014, including the provisions at issue in the Auckland Unitary Plan (**AUP**) relating to (*inter alia*) biodiversity and reclamation.

KING SALMON NOT IN ISSUE

16 Leave has not been sought by any party to the East West appeal to challenge the correctness of *King Salmon*. It was not part of the approved question of law, nor is it part of the approved question for the Port appeal. Moreover, NZTA (during oral argument) expressly confirmed they were not arguing that King Salmon was wrongly decided. The relevant issue in East West was whether King Salmon should be extended to resource consent processes under Pt 6 RMA,[20] in light of the common interpretation issues that apply to the

[20] Pt 8 RMA applies to designations, but these were not the primary issue in contention for the East West appeal.

NZCPS (and other planning instruments), and reflecting the approach taken by the Court of Appeal in *Davidson*.

17 Ngāti Whātua Ōrākei agrees with Forest & Bird that the correctness of *King Salmon* is not (or should not be) at issue in either proceeding. The high threshold for overturning prior Supreme Court authority does not apply.[21] *King Salmon* has been orthodox law since 2014, and implemented through various plan review and plan change processes. There is no regulatory mismatch caused by the reconciliation exercise for directive policy.

18 It would be retrograde to return to an overall broad judgment approach, for plan review processes, and resource consent processes (where *Davidson* applies). If (by contrast) the Court agrees to relitigate the correctness of *King Salmon*, then this question would need to be explored for both appeals, as an overlapping issue. The meaning of the avoidance policies in the NZCPS is a common issue. There are otherwise a range of relevant differences.

DIFFERENCES BETWEEN APPEALS

19 There are material differences (both factual and legal) between the Port Otago appeal, and the East West appeal. These relevantly include:

19.1 The Port decision involved a policy statement review process under Part 5 and 1st Schedule RMA. By contrast, the East West proposal involved non-complying coastal resource consents, and designation processes, for consideration under Parts 6 and 8 RMA. The planning framework was operative (which relevantly included the NZCPS, RPS, and Regional Coastal Plan provisions).

[21] See authorities cited by Forest & Bird in their submissions dated 5 April 2022.

19.2 There is some overlap, but also substantial differences, in the relevant objectives and policies of the NZCPS that apply to each matter.

19.3 The Port decision included a contest between Policies 11, 13, 15, 16 (**the avoidance policies**) and the Port-specific Policy 9 (**port policy**). This may be contrasted with East West, which required consideration of a range of objectives and policies engaged by the coastal resource consents. This included the tangata whenua dimension (Objective 3 and Policy 2); thresholds for reclamation (Policy 10) and biodiversity impacts on rare and threatened species, and their habitats (Policy 11).

19.4 As noted, Policies 13 and 15 (and the strategic planning policies in Policies 1, 7) require an assessment of appropriateness of activities, partly reflecting sections 6(a) and 6(b) RMA. By contrast, Policy 10, and Policy 11 (and s6(c) RMA) do not require consideration of appropriateness. As identified by *King Salmon*, an assessment of appropriateness is not open-ended, and not a gateway to a balancing exercise. Whether the effects of activities are appropriate is to be judged by reference to the values being protected under the Policies (such as the natural character and landscape values).

19.5 On any view, Policy 9 would apply differently to an established Port, especially under Policy 9(b) (in terms of the location of the Port and associated existing infrastructure). Policy 9(b) ("consider where, how and when") has already been answered to the extent that the Port is existing infrastructure.

19.6 Contrast the East West proposal: the locational or "where" question is a key question under Policies 10 and 11. The Board made a factual finding that there was no functional need for the East West

Link to be located in the coastal marine area.[22] Other factual findings related to the biodiversity issues, in particular whether the threshold for avoidance of effects on Policy 11(a) values was met for rare and threatened species.

19.7 As noted, a live issue for the East West appeal is whether (and the extent to which) *King Salmon* applies to resource consent processes. This was not at issue for the Port appeal. In any event, the Port decision affirmed the approach taken to consideration of Pt 2 RMA (for resource consents) in *Davidson*.

OTHER KEY FINDINGS IN PORT DECISION[23]

Paragraph reference in Port Decision (Decision)	**Response by Ngāti Whātua Ōrākei**
Decision at [13] "..Those concerns were also pursued before us on appeal, but the exact problems faced by Port Otago were amorphous and difficult to assess. Its evidence shed very little light on them. Decision at [105] "Whoever imposes such a rule should understand its implications for the environment and the port…Unlike the Supreme Court in King Salmon, we do not understand the implications of the	20.1 By definition, a resource consent proposal (or Notice of Requirement for designation) must provide specifics of the relevant activity for which consent is sought, and identify the relevant environmental effects. 20.2 The Board of Inquiry Report makes extensive findings on the relevant effects. These included (relevant to the questions of law in SC25/2021) adverse impacts on the habitat of rare and threatened

[22] The Board decision (East West COA, Vol 90) at [699] – [700] identifies the point and should be read in full for context. Note especially

"[699]..The Board agrees with Mr Brown that, ".[T]he route is there by choice, not functional necessity…"

"[700] While the Board agrees with Mr Brown that there is not a functional need for the road to be located within the CMA, on the basis of the Board's finding in relation to the route selection, there is an operational need for it to be located within the CMA. This outcome is anticipated in the preamble of Section F2.14 (Use, development and occupation in the coastal marine area) of the AUP:OP, which states, "[D]ue to the geography of Auckland, some infrastructure may have an operational need to locate in, or traverse the common marine and coastal area to enable an effective and sustainable network".

[23] For reasons of efficiency, these are set out in table form.

rule we are asked to reject or confirm."	species; and findings on the cultural values and relationships of Ngāti Whātua Ōrākei to the subject proposal and the wider Manukau (as well as the relationship of other Iwi and their hapū).
Decision at [19]-[20], [34] "..The function of each instrument changes according to its place in the hierarchy. Objectives and policies sit at the top and flow down through all documents, particularised to a local region. Methods to achieve those policies are introduced in regional policy statements. Rules to achieve those objectives and policies are then located in regional plans." "[34] For a non-complying activity resource consent application, only the regional plan (or proposed plan) is directly determinative of whether a consent will or will not be granted. But given the hierarchical structure of these planning instruments, the NZCPS and relevant regional policy statement will significantly influence the regional plan and whether a consent is granted."	20.3 This is true in general terms, reflecting a top-down approach. But there are instances where a planning instrument that is lower order to the NZCPS (such as the Regional Plan), cross-references a higher order instrument, or requires consideration 'up the chain'. Where the higher order wording is different to the lower order, then something more than a "consistency check" is required. This applies to the different thresholds for reclamation in Policy 10. 20.4 AUP Policy E26.2.2(6) is one such example.[24] This required specific consideration of bottom lines set by the NZCPS. A cross-checking exercise was not sufficient. 20.5 Interpretation of the NZCPS should colour interpretation of the relevant Regional Coastal Plan provisions in the AUP. This reflects the "significant influence"

[24] AUP Policy E26.2.2(h) relevantly states:

> "(h) whether adverse effects on the identified values of the area of feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement."

AUP Policy D9.3(9) and (10) relevantly refer to avoiding activities in the coastal environment where they result in non-transitory effects on (inter alia) threatened or at risk indigenous species.

	of the NZCPS as the higher order instrument.
[33] "..But the decision in *King Salmon*..does not prevent consideration of pt 2 of the RMA – the general purposes and principles part – when considering a resource consent application." *Footnote referring to Davidson (CA) at [70]-[72]	20.6 Agree that Pt 2 RMA may be considered when relevant under Davidson. But consideration of Pt 2 RMA does not lead back to an overall broad judgment. Section 5, and sections 6 to 8, include a range of directive values that must be considered. Section 5 distinguishes 'avoid' from 'avoid, remedy, mitigate'. Per *King Salmon*, 'avoid' has its ordinary meaning in s5(2)(c) of 'not allow' or prevent occurrence of'.[25] Ports are not identified as matters of national importance in pt 2 RMA or the NZCPS. 20.7 The Board of Inquiry decision was issued in light of the High Court decision in *Davidson*, and not the Court of Appeal decision (which post-dated the Board Report).
[53] A number of issues, in some instances, difficulties, arise with the *King Salmon* decision. They are worth noting, although in a sense they are irrelevant to our task. Whatever else might be said, it is plain that the decision binds this Court on this appeal.."	20.8 The CA correctly applied the ratio in *King Salmon* to the case, as binding.[26] The "difficulties" are identified in a non-binding section of the judgment (*obiter*).
[55]..*King Salmon's* reinforcement of an 'environmental bottom line', rather than overall, balancing	20.9 Agreed. The original intent of the RMA forms part of the "context" under the (repealed)

[25] *King Salmon* at [96]; *Port* decision at [42]
[26] In the interests of efficiency, Ngāti Whātua Ōrākei does not respond to all points made by the *Port* decision on *King Salmon*, but does not necessarily agree with the majority (and minority) criticisms of *King Salmon*.

approach is more consistent with Parliament's original intent when enacting the RMA.."	Interpretation Act 1999 (now Legislation Act 2019)
[56]..The major difficulty inherent in this redirection is that Parliament..does not directly modify the approach taken in *New Zealand Rail*, or suggest such modification was needed..Had the NZCPS been drafted in light of *King Salmon* rather than *New Zealand Rail*, its content likely would have been quite different.."	20.10 Disagree. The Minister (and not Parliament) promulgated the NZCPS, in light of the relevant statutory criteria in Pt 5 RMA. The Minister was not bound to implement a *New Zealand Rail* type-approach. Indeed Greig J's decision in *NZ Rail* was limited to pt2 RMA, as it then was,[27] and not the statutory imperatives that apply to the NZCPS. 20.11 The NZCPS 2010 includes more directive language than its predecessor. The 1994 version of the NZCPS explicitly included both avoidance policies, and scope for overall broad judgment (under the general principles). The NZCPS 2010 was amended accordingly.[28] Language and policy choices in the 2010 version of the avoidance policies rejected the overall broad judgment approach.
[57] ..nor did the Minister of Conservation respond to *King Salmon* by revisiting the form of the NZCPS..A direct consequence of that regulatory mismatch..is that the NZCPS, construed in light of *King Salmon*, now has the	20.12 Disagree that there is a regulatory mismatch. The Minister could have amended the NZCPS to introduce an overall broad judgment framework, post *King Salmon*. The Minister did not do

[27] There have been substantial amendments to the RMA since 1994, when the *New Zealand Rail* decision was issued. Section 104 RMA was amended to explicitly state that resource consent decisions were to be made "subject to Pt 2 RMA". Moreover, the facts in New Zealand Rail are quite different to both the Port Otago decision, and the East West Link.

[28] For example, under general principles, the NZCPS 1994 states that:
"2. The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places."

practical effect of setting quasi-rules, both in that instrument and a subsidiary regional policy statement..”	so. Query why this is a regulatory mismatch?
“[58]..the overall broad judgment has been clung to by means of mitigation, because the NZCPS does not really work, in the post-*King Salmon* world, exactly in the way intended at the time it was gazetted in 2010..”	20.13 Disagree that the overall broad judgment has been “clung to”, save for a few examples (cited by the Court as examples), and overturned on appeal.
[83]..if in the wake of *King Salmon* the NZCPS now poses unworkable standards for essential infrastructure, the answer lies elsewhere. The regulatory mismatch means the NZCPS was likely drafted on the premise that a broad overall judgment would be taken in its construction and application in subsidiary planning instruments, and that recourse might be made to pt 2 in that process. The Supreme Court has now however precluded the former, and permitted the latter only in a narrow range of exceptional cases..	20.14 Agree that the remedy lies elsewhere (such as an amendment to the NZCPS, or wider RMA reform, both of which are not relevant to the East West appeal grounds). The High Court in East West erred in applying an exception lens to the relevant AUP provisions for reasons traversed in the SC hearing (and not repeated).

OTHER MATTERS

21 Ngāti Whātua Ōrākei adopts without repeating the submissions of Forest & Bird in answer to the Port’s legal submissions.

22 Counsel for the Port has raised the point that s56 RMA was amended by adding reference to “objectives and..” to the purpose of the NZCPS such that from 19 April 2017 it reads:

> "The purpose of a New Zealand Coastal Policy Statement is to state [objectives and] policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand."

23 The Port submits that the NZCPS policies must be read in light of the objectives. That point may be trite. As noted by Counsel for Forest & Bird, this legislative change was simply declaratory of the existing law (i.e. the NZCPS objectives were always relevant). But on any view, it does underscore that the Board (in East West) was required to consider the relevant objectives and policies in the NZCPS. It failed to consider relevant Objectives in the NZCPS, for reasons already addressed. This goes to materiality.

24 Ngāti Whātua Ōrākei has not had opportunity to undertake a detailed review of the submissions of Marlborough District Council (or EDS). The submissions were received today (5 April 2022). This is a function of the timetable, and not a criticism of Council. Accordingly, Ngāti Whātua Ōrākei reserves its position on these submissions.

25 In summary, Ngāti Whātua Ōrākei continues to support the Appeal by Forest & Bird in SC25/2021. Several of the questions of law in SC25/2021 do not rely on resolution of the Port Otago issues raised by the appeal in SC6/2022, and justify relief in their own right.

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Dated this 5th day of April 2022

Rob Enright
Counsel for Ngāti Whātua Ōrākei Whai Maia Ltd

Certified as suitable for publication under clause 7 of the Supreme Court Practice Note 2021

LIST OF AUTHORITIES

Supreme Court

*Environmental Defence Society Inc (**EDS**) v New Zealand King Salmon Company Ltd* [2014] 1 NZLR 593

Sustain Our Sounds v *New Zealand King Salmon Company Ltd [2014] 1 NZLR 673*

Court of Appeal

Auckland Regional Council v North Shore City Council [1995] 3 NZLR 18

RJ Davidson v Marlborough District Council [2018] NZCA 316

Man O'War Station Ltd v Auckland Council [2017] NZCA 24

High Court

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70

Tauranga Environmental Protection Society v Tauranga City Council [2021] NZHC 1201

Environment Court

Ngāi Te Hapū Inc v Bay of Plenty Regional Council [2017] NZEnvC73

Policy Instruments

New Zealand Coastal Policy Statement 1994

New Zealand Coastal Policy Statement 2010

Auckland Unitary Plan (relevant provisions are set out in the COA in SC25/2021)