

We, Simon Anderson and Thea Sefton certify that this submission is suitable for publication.

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

No. SC 6/2022

BETWEEN

PORT OTAGO LIMITED

Appellant

AND

**ENVIRONMENTAL DEFENCE SOCIETY
INCORPORATED**

First Respondent

AND

OTAGO REGIONAL COUNCIL

Second Respondent

AND

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

Third Respondent

AND

MARLBOROUGH DISTRICT COUNCIL

Fourth Respondent

**OUTLINE OF ORAL SUBMISSIONS FOR THE OTAGO REGIONAL
COUNCIL**

Dated 10 May 2022

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MAY IT PLEASE THE COURT:

1. I seek the Court's indulgence that this outline is more detailed than is normal and longer than the prescribed maximum of 3 pages. This is because both ORC counsel are suffering Covid-19 and will be appearing by AVL, and because of the risk that alternative counsel may need to appear.
2. Oral submissions for ORC will expand on written submissions regarding the RMA policy, planning and consenting framework.
3. The purpose is to show that applying King Salmon to the port policy in the NZCPS does not lead to any surprising or unworkable outcome which would justify a departure from King Salmon.

NZCPS

4. Paragraphs 97 to 112 of ORC's written submissions address the meaning of the word "avoid". "Avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of" (King Salmon [96]).
5. This meaning does not create any conflict between the port and related policies and the avoid policies.
6. On the one hand, where, how and when to provide for port activities must be considered (policy 9(b)); and any functional need to locate in the coastal marine area must be recognised and provided for in appropriate places (policy 6(2)(c)).
7. On the other hand, while doing so, certain adverse effects must be avoided; or avoided, remedied or mitigated (policies 11, 13(1), 15 and 16).
8. There is no conflict in this language. While doing one thing, avoid another.
9. The type of conflict described by Miller J in the Court of Appeal judgment (eg at [107]) and adopted in the Appellant's submissions (para 1.1(b)) is a conflict between the effects of activities the Appellant may wish (or need) to undertake and NZCPS policies (and resulting lower order policies and rules) which constrain certain, specific adverse effects.
10. That is not a conflict in the policy wording of the NZCPS. It is normal for policies (and resulting rules) to prevent or limit environmental effects. This is the primary means by which sustainable management is achieved.

11. Conflicts of the nature described by Miller J are considered (with increasingly detailed and specific information) and determined when making rules in plans and deciding whether to grant resource consents.

PORPS

12. The application of the NZCPS to regional policy making is discussed at paragraphs 122 to 130 of ORC's written submissions.
13. The key point is that under ss61(1) and 62(3) RMA regional policy statements must be prepared in accordance with and give effect to the NZCPS.
14. The modification sought in the Appellant's submissions (para 2.11) cannot be made because it permits adverse effects contrary to the avoid policies in the NZCPS.
15. A regional policy statement may though identify or provide for identification of such things as:
 - (a) indigenous biodiversity and outstanding natural character, features and landscapes;
 - (b) the underlying values that require protection;
 - (c) what if any capacity there is for activity without adverse effects; and
 - (d) methods that could be used to protect those underlying values.

Regional and District Plans

16. The application of the NZCPS and the PORPS to regional and district plans is discussed at paragraphs 131 to 138 of ORC's written submissions.
17. It is at this level of the framework that in order to give effect to higher order instruments an activity may be prohibited, if that is appropriate after evaluation under s32 RMA (clause 5(1)(a) Schedule 1 RMA).
18. Some aspects of the s32 evaluation process are of particular relevance.
19. Under s32(1)(a) there must be examination of the extent to which the objectives of the proposed plan are the most appropriate way to achieve the purpose of the Act. This is not a mechanism to reset the NZCPS (which has undergone its own s 32 analysis). The NZCPS states objectives and policies to achieve the purpose of the RMA in relation to the coastal environment (s 56 RMA) and must be given effect to (as must the PORPS). The examination must consider not only the avoid policies but

also the port policy and policy 6(2)(c) concerning the functional need of some activities to locate in the coastal marine area.

20. Under s32(1)(b)(i) other reasonably practicable options to achieve the objectives of the proposed plan must be identified. As noted, those objectives must relate not only to the avoid policies but also to the importance and functional needs of ports.
21. Under s32(1)(b)(ii) and (2) the economic and environmental benefits and costs of the proposed provisions must be identified and assessed. This includes opportunities for increases and reductions in economic growth and employment. Where practicable benefits and costs are to be quantified. If there is uncertain or insufficient information the risk of acting or not acting is to be assessed.
22. In this context if there is the prospect but not certainty of port activities causing adverse effects which are to be avoided, then non-complying activity status would be expected rather than prohibition. This enables more specific and detailed consideration by resource consent application.
23. Prohibited activity status without certainty as to adverse effects would ignore the NZCPS policies which recognise the importance and functional needs of ports.
24. It is difficult to see how prohibited activity status for a port activity could be justified after this assessment unless it is certain that the activity will cause adverse effects which the NZCPS directs must be avoided. This would especially be the case if the continued operation of the port may be at risk, which would skew the economic analysis markedly against prohibited activity status.
25. Following King Salmon ([145]), even if adverse effects are certain, prohibited activity status due to minor or transitory effects is improbable.
26. After evaluation and notification regional and district plans are subject to a public submission and hearing process, with rights of appeal. Changes resulting from the hearing process or on appeal must also be evaluated in accordance with s32 (s32AA RMA).

Consents

27. Consents are discussed at paragraphs 139 to 142 of ORC's written submissions.

28. Conflict between the effects of a specific proposed activity and the provisions of the NZCPS is considered and determined when an application is made for resource consent for that activity.
29. In this context the consent authority role is different to the role of a Council preparing a policy statement or plan which must “*give effect to*” the NZCPS. For a consent authority considering a resource consent application the relevant NZCPS provisions are one of a number of mandatory considerations which the consent authority must “*have regard to*”.
30. This is an evaluative exercise with the consent authority required to exercise discretion after taking account of all relevant factors.
31. This does not mean that the NZCPS and plans which give effect to it are rendered ineffective.
32. If activities are:
 - (a) prohibited, then s104 will not come into play at all and no consent may be granted; or
 - (b) non-complying, then there are threshold tests in s104D of either effects being minor; or the activity not being contrary to plan objectives and policies.
33. When an activity is demonstrably in breach of one of the avoid policies in the NZCPS the consideration would be as described in Davidson (at [71]). The consent authority could take the view that the NZCPS embodies Part 2 of the RMA and that if there are adverse effects contrary to the avoid policies resource consent should be declined.
34. However, the nature of the evaluation is such that all relevant matters must be considered and there may be instances where the limited nature of the adverse effect is such that consent is granted. For example, just as prohibited activity status due to minor or transitory effects on protected values is improbable, it is also improbable that a resource consent application would be declined due to a minor or transitory adverse effect.

Conclusion

35. The potential for conflict between the effects of port activities and the avoid policies in the NZCPS is not indicative of any conflict between the policies of the NZCPS themselves. This is the normal consequence of national policies which seek to achieve sustainable management by

preventing or limiting adverse effects on nationally significant aspects of the environment. The RMA provides a framework for the national policy settings to be given effect to at the regional and district levels, and for the grant or refusal of resource consent for specific proposed activities after having regard to, among other things, those policy directions all relevant factors.



SJ Anderson and TM Sefton

10 May 2022