

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

**IN THE SUPREME COURT OF NEW ZEALAND
I TE KOTI 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

SUBMISSIONS OF THE OTAGO REGIONAL COUNCIL

Dated 5 April 2022

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SUBMISSIONS OF THE OTAGO REGIONAL COUNCIL

May it Please the Court:

Introduction

- 1 This appeal concerns the interpretation of the New Zealand Coastal Policy Statement 2010 ("**NZCPS**") and how the Proposed Otago Regional Policy Statement 2019 ("**PORPS**") gives effect to the NZCPS.
- 2 In particular, the relationship between:
 - (a) policy 9 of the NZCPS ("the **port policy**"), which recognises the requirement for an efficient and safe network of ports; and
 - (b) policies 11, 13(1), 15 and 16 of the NZCPS ("the **avoid policies**") which protect the coastal environment from the effects of activities.

Submissions for Otago Regional Council ("ORC")

- 3 In its PORPS the ORC must give effect to the NZCPS.¹
- 4 Contrary to the Appellant's submission that an "*overall judgment*" approach would in 2010 have been expected, the NZCPS uses more directive language, and gives decision-makers less flexibility, than the 1994 NZCPS².
- 5 The NZCPS was considered by this Court in *King Salmon*.
- 6 The ORC in giving effect to the NZCPS in the PORPS, must apply the relevant principles in *King Salmon*.
 - (a) "*Give effect*" means "*implement*" and is a strong directive"³
 - (b) Policies are to be read and applied in accordance with their terms. The language used is significant⁴.

¹ Sections 61(1) and 62(3) of the RMA

² *Environmental Defence Society Inc v The King Salmon Co Limited* [2014] 1 NZLR 593 ("*King Salmon*") at [134]

³ *King Salmon* at [77]

⁴ *King Salmon*, at [126]

- (c) Some policies are more specific and directive, while others are less prescriptive⁵.
- (d) Decision-makers must identify all relevant policies. Those in more directive terms carry greater weight than those in less directive terms. A policy may be in such directive terms that a decision-maker has no option but to implement it. While there may infrequently be instances where policies "*pull in different directions*", it may be that that an apparent conflict will dissolve if close attention is paid to the way in which the policies are expressed.⁶
- (e) In *King Salmon* the overall judgment approach was rejected.⁷

7 There has not been a policy response by the Minister to *King Salmon*. The NZCPS has not been amended and remains in the terms considered in *King Salmon*.

8 The existence of established ports is stated in the NZCPS as one of the particular challenges in promoting sustainable management.⁸

9 The NZCPS requires recognition that port activities are required, and both protects and makes provision for, port activities⁹.

10 Port activities are to be protected from other activities by: "*ensuring that development in the coastal environment does not adversely affect [port activities]*".¹⁰

11 Provision for port activities is to occur by: "*considering where, how and when to provide in regional policy statements and in plans for...*".¹¹

12 Strong directive language ("*ensuring*") is used to protect port activities against the effects of other activities.

13 Less prescriptive language ("*considering where, how and when...*") is used to provide for port activities.

⁵ *King Salmon*, at [127]

⁶ *King Salmon*, at [129]

⁷ *King Salmon* at [106] to [146]

⁸ ConA 201.155, NZCPS, Preamble, third bullet point

⁹ ConA 201.165, NZCPS, policy 9

¹ ConA 201.165, NZCPS, policy 9(a)

¹¹ ConA 201.165, NZCPS, policy 9(b)

- 14 In contrast to the less prescriptive language used to provide for port activities, the avoid policies use clear directive language that protection of certain values is to occur by:
- (a) avoiding adverse effects on listed biodiversity and outstanding natural character, features and landscapes, and protecting surf breaks of national significance;¹²
 - (b) avoiding significant adverse effects on other listed biodiversity and other natural character, features and landscapes; and
 - (c) avoiding, remedying or mitigating other adverse effects on other listed biodiversity and other natural character, features and landscapes.¹³
- 15 Avoidance is required for adverse effects on the most important values, or significant adverse effects on other values.
- 16 Other effects are to be avoided, remedied or mitigated.
- 17 The port policy and the avoid policies¹⁴ operate together such that the directive framework for managing the effects of activities informs where, how and when port activities are provided for in regional policy statements and in plans.
- 18 The ORC must give effect to the port policy and the avoid policies in the PORPS, in the manner described above.
- 19 This achieves objectives 1, 2 and 6 of the NZCPS by:
- (a) recognising the importance of port activities and their functional need to locate in the coastal environment; while also
 - (b) informing as to the locations and limits which will be appropriate, by reference to the effects of port activities on important parts of the coastal environment.

¹² ConA 201.166 to 201.169, NZCPS, policies 11(a), 13(1)(a), 15(a) and 16(a)

¹³ NZCPS, policies 11(b), 13(1)(b) and 15(b). Policy 5 also provides this level of protection for area held under the Conservation Act 1987 and other Acts.

¹⁴ And other less directive policies 6(1)(a), recognise the importance of infrastructure, 6(2)(c) recognise functional need to locate in the coastal marine area, and 7, strategic planning including identification of areas where particular activities are or may be inappropriate.

- 20 The avoid policies do not operate to prevent existing port activities. Those activities form part of the existing environment. The NZCPS recognises that the coastal environment includes infrastructure that has modified the coastal environment.¹⁵ On applications to renew consents section 104(2A) of the RMA requires the consent authority to have regard to the value of the investment of the existing consent holder.
- 21 The prior existence of port activities does not change the meaning or effect of the NZCPS. Rather, the existing nature and effects of port activities are part of the existing environment against which the effects of new or expanded activities are considered.
- 22 The avoid policies may however operate (generally through lower order instruments) to prevent new or expanded port activities if those activities would cause adverse effects which must be avoided under the avoid policies.
- 23 There is no conflict between the port policy and the avoid policies. The port policy provides for port activities. The avoid policies limit the permissible effects of those activities.
- 24 Any conflict arises from the application of the policies in the physical environment of the Otago Harbour and its surrounds. That does not mean the policies conflict. There is no conflict of the type referred to in *King Salmon*¹⁶.
- 25 This is the national policy setting in the NZCPS. It must be given effect to in the PORPS.
- 26 These submissions are expanded in the following sections.

Context

- 27 The Resource Management Act 1991 ("**RMA**") establishes a hierarchy of planning documents ¹⁷. At the top of the hierarchy are national instruments which contain objectives and policies which must be given

¹⁵ ConA 201.161, NZCPS, policy 1(2)(i)

¹⁶ *King Salmon*, at [129]

¹⁷ *King Salmon*, at [10]

effect to in lower order (regional and district) documents made under the Act¹⁸.

- 28 There must be a New Zealand coastal policy statement¹⁹.
- 29 A coastal policy statement is promulgated by the Governor-General in Council on the recommendation of the Minister of Conservation who is responsible for its preparation and review²⁰.
- 30 The purpose of the NZCPS is to state objectives and policies to achieve the purpose of the RMA in relation to the coastal environment.²¹
- 31 Section 6 of the RMA requires that in achieving its purpose all persons exercising functions and powers under the RMA relating to the management of use, development and protection of resources must recognise and provide for specified matters of national importance. These include:
- (a) the preservation of the natural character of the coastal environment, and the protection of it from inappropriate subdivision, use, and development²²;
 - (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development²³; and
 - (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna²⁴.
- 32 Section 6 of the RMA contemplates protection of natural coastal character and outstanding natural features from inappropriate use and development, whereas areas of significant biodiversity are to be protected without that qualification.
- 33 The NZCPS policies are to achieve the objectives of the NZCPS.

¹⁸ *King Salmon*, at [11] and [14]

¹⁹ Section 57(1) of the RMA

²⁰ Sections 28(a), 52 and 57 of the RMA

²¹ Section 56 and 58 of the RMA. Note section 56 did not include "objectives" at the time the NZCPS was promulgated. Section 58 did.

²² Section 6(a) of the RMA

²³ Section 6(b) of the RMA

²⁴ Section 6(c) of the RMA

- 34 The ORC must have a regional policy statement²⁵. Regional policy statements must be prepared in accordance with and give effect to the NZCPS²⁶.
- 35 In turn, regional and district plans must give effect to the regional policy statements²⁷.
- 36 There must be a regional coastal plan to manage the coastal marine area²⁸. The coastal marine area is the space seaward of mean high water springs and within the outer limits of the territorial sea²⁹.
- 37 As the coastal environment extends landward of mean high water springs, district and other regional plans may also regulate activities including commercial port activities.³⁰

Interpretation of the NZCPS

- 38 This Court in *King Salmon* explained how the NZCPS is to be interpreted.
- 39 The Court emphasised the importance of the way in which its individual provisions are expressed. Close attention must be paid to the words chosen. *"The language of the relevant policies in the NZCPS is significant"*³¹
- 40 The Court observed that some policies give Councils considerable flexibility and scope for choice, whereas others are more specific and directive³².
- 41 Policies which use words such as *"recognise"* come within the former category³³.
- 42 Policies which use the word *"avoid"* come within the second³⁴. *"Avoid"* is a strong imperative, meaning *"not allow"* or *"prevent the occurrence of"*³⁵

²⁵ Section 60 of the RMA

²⁶ Section 61(1) and 62(3) of the RMA

²⁷ Sections 67(3) and 75(3) of the RMA

²⁸ Section 64(1) of the RMA

²⁹ Section 2 of the RMA

³⁰ ConA 201.161, Policy 1, NZCPS

³¹ *King Salmon*, at [126]

³² *King Salmon*, at [127]

³³ *King Salmon*, at [127]

43 The Court observed that apparent conflict between particular policies may dissolve if close attention is paid to the way in which they are expressed³⁶.

44 In summary, the relationships between policies are governed by the language used. Policies are to be read and applied in their terms. More directive provisions prevail over less prescriptive policies. In particular, the avoid policies take precedence over policies to "consider" or "recognise"³⁷.

NZCPS preamble and objectives

Preamble

45 The preamble to the NZCPS records: *"The coastal environment has characteristics, qualities and uses that mean there are particular challenges in promoting sustainable management ... [including] ... the coastal environment contains established infrastructure connecting New Zealand internally and internationally such as ports ..."*³⁸.

46 The NZCPS contains objectives and policies to respond to those issues, from a national perspective³⁹.

47 Existing ports are expressly noted. NZCPS policies (in particular, the port policy) do not distinguish between new and existing ports.

Objective 1

48 Objective 1 provides:

"To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;*

³⁴ *King Salmon*, at [127], [128], [131] and [132]

³⁵ *King Salmon*, at [24](b) [96] and [97]

³⁶ *King Salmon*, at [129]

³⁷ *King Salmon*, at [126]-[132]

³⁸ ConA 201.155, Preamble, third bullet point

³⁹ *King Salmon*, at [14]

- *protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and*
- *maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.*⁴⁰

49 Objective 1 is not qualified (as other objectives are) by reference to "appropriate" use and development.

Objective 2

50 Objective 2 provides:

"To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- *recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;*
- *identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and*
- *encouraging restoration of the coastal environment.*⁴¹

51 It is implicit from the reference to "inappropriate" use and development that there may be some forms of appropriate use and development.

Objective 6

52 Objective 6 includes:

"To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

⁴⁰ ConA 201.159

⁴¹ ConA 201.159

- *the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;*
- *some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;*
- *functionally some uses and developments can only be located on the coast or in the coastal marine area;*
- *...*
- *the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;*
- *...⁴²*

53 Objective 6 acknowledges the importance of human activities in the coastal environment, but in a qualified way. Such activities must be in "*appropriate places and forms*", and within "*inappropriate limits*".

The policies recognising and providing for activities

Policy 6'1³

54 Policy 6(1)(a) is to "*recognise*" that the provision of infrastructure is important to the social, economic and cultural well-being of people and communities. Its expression mirrors in some respects that of the port policy.

55 Among other things policy 6(2) of the NZCPS provides in relation to the coastal marine area:

"(c) recognise that there are activities which have a functional need to be located in the coastal marine area, and provide for these activities in appropriate places;

⁴² ConA 201.160

⁴³ ConA 201.163 to ConA 201.164

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there;... "

56 Policy 6 requires recognition of the importance of infrastructure, that some activities have a functional need to locate in the coastal marine area, and for policy makers to provide for these activities in appropriate places. Conversely, activities without a functional need to locate in the coastal marine area generally should not do so.

Policy 7⁴⁴

57 Policy 7 concerns strategic planning. When preparing regional policy statements, and plans:

(a) Policy 7(1)(a) requires: "*consideration of where, how and when to provide for future [activities] in the coastal environment*".

(b) Policy 7(1)(b) requires the identification of areas where activities and forms of subdivision, use and development are "*inappropriate*", or may be "*inappropriate*" without the consideration of their effects through a resource consent process, notice of requirement for a designation or a Schedule 1 process, and directs protection from "*inappropriate*" subdivision, use and development in these areas.

58 Policy 7(2) requires that risk from adverse cumulative effects be identified and managed in regional policy statements, and plans.

59 In *King Salmon*, this Court observed that policy 7 is important because of its focus on strategic planning and required a regional council to look at its region as a whole in formulating a regional policy statement or plan⁴⁵.

60 The Court added two points. If "*inappropriate*" development is not permitted, then this did not necessarily rule out any development; and what is "*inappropriate*" is assessed against the nature of the particular area under consideration in the context of the region as a whole⁴⁶.

⁴⁴ ConA 201.164 to ConA 201.165

⁴⁵ *King Salmon* at [54]

⁴⁶ *King Salmon*, at [55]

61 Policy 7 underscores that while development (including ports) may occur in the coastal environment, that is only if appropriate, and the policymaker must protect against the effects of inappropriate development.

62 Policy 7 is also a link between the NZCPS and the plan (and regional policy statement) preparation process, and the 'real world' consequences of that process for ports and others.

Policy s4⁷

63 Policy 8 and its relationship with the avoid policies was at issue in *King Salmon*.

64 Its relevance here is that unless there are distinguishing aspects the relationship between the port policy and the avoid policies is the same as the relationship between policy 8 and the avoid policies.

65 Policy 8 provides:

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

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

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

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

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

⁴⁷ ConA 201.165

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

*Policy 9*⁴⁸

- 66 The port policy begins: *"Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes"*.
- 67 It then specifies two steps which must be taken to give effect to the direction in its opening words.
- 68 The first is by: *"ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of those ports, or their connections with other transport modes"*. The obvious example of how this would be applied is to protect the port from reverse sensitivity.
- 69 The second is by: *"considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes"*.
- 70 The two limbs are expressed in language of differing strength.
- 71 By using *"ensuring"*, policy 9(a) is the more directive.
- 72 Policy 9(b) is softer, requiring regional councils to *"consider"* and allowing councils to exercise judgments about *"where, how and when to provide"* for the efficient and safe operation of ports, their development and their connections with other transport modes.
- 73 While policy 9(a) might set something in the nature of a bottom line in protecting port operations, policy 9(b) is much more open-ended.
- 74 The key words in policy 9(b) are *"recognising ... by ... considering where, how and when to provide in regional policy statements ..."*.

⁴⁸ ConA 201.165

- 75 Policies that use "*recognise*" and "*consider*" are more flexible and less directive than provisions that use terms like "*avoid*"⁴⁹.
- 76 Policy 9 requires policymakers to recognise that an efficient national network of safe ports is required. It goes on to state that this recognition is to be achieved by considering where, how and when to provide for these. There is no inconsistency with the clear directive language of the avoid policies. Read together, the avoid policies inform (and constrain) the required consideration of where, how and when to provide for safe and efficient ports.
- 77 Policy 9 must therefore be given effect to in a manner that avoids adverse effects, where required by avoid policies. The provision for ports must take place within the constraints of the avoid policies.
- 78 The Appellant adopts the reasoning of Miller J at paragraphs [111] and [112] of the Court of Appeal judgment⁵⁰ to support a submission that the port policy requirements to provide for port operations are an imperative which may conflict with the avoid policies.
- 79 For the reasons outlined above, the ORC does not agree. In short, while the port policy uses both directive words and less prescriptive words, the words requiring provision for port activity are less prescriptive and are clearly qualified by the avoid policies.

Is there a relevant distinction between policy 8 and the port policy?

- 80 While the wording in policy 8 differs from the port policy, there are sufficient similarities to mean that they have similar weight vis-a-vis the avoid policies and each takes effect within the constraints of the avoid policies:
- (a) Both begin with the verb "*recognise*".
 - (b) Provision is to be made in policy statements and plans.
 - (c) Under policy 8 aquaculture activities are to occur "*in appropriate places*". Under policy 9(b), decision-makers are to consider

⁴⁹ *King Salmon*, at [127]

so ConA 05.010, *Port Otago Limited v Environmental Defence Society Incorporated* [2021] NZCA 638

"where, how and when to provide" for ports in policy statements and plans. Both require judgments to be made.

- (d) Neither policy 8 nor the port policy contains any express statement about their relationships with other provisions. That is an indicator that the effects management regime in other policies, including the avoid policies, must apply.
- (e) Neither policy deals with the environmental effects of aquacultural or port activities. That is plainly to be found in other provisions of the NZCPS, including the avoid policies.

81 No material distinction can be drawn between policies 8 and 9. Both must be implemented within the envelope of the avoid policies.

The avoid policies

Policy 5⁵¹

82 Policy 5(1) provides: "*Consider effects on land or waters in the coastal environment held or managed under:*

- (a) *the Conservation Act 1987 and any Act listed in the 1st Schedule to that Act; or*
- (b) *other Acts for conservation or protection purposes;*

and, having regard to the purposes for which the land or waters are held or managed:

- (c) *avoid adverse effects of activities that are significant in relation to those purposes; and*
- (d) *otherwise avoid, remedy or mitigate adverse effects of activities in relation to those purposes*

83 Policy 5 is included for completeness. It has not been at issue in these proceedings. There is potential overlap between this policy and policy 11(a)(vi) depending upon the values protected. This is not material because both policies must be given effect if applicable.

⁵¹ ConA 201.163

84 The Aramoana salt marsh mentioned in the Appellant's submissions is held for the purpose of an ecological area under the Conservation Act 1987⁵². The particular scientific values for which it is held are:

"(i) Its importance as an uninterrupted sequence (now rare or absent on the coast of New Zealand) from tidal eelgrass mudflats, through salt-marsh, and salt-marsh shrub-land to adjacent dry-land;

(ii) Its value for fish productivity (including shellfish);

(iii) Its indigenous vertebrates;

(iv) Its use by a significant variety of migratory wading birds."

85 The Aramoana salt marsh is a coastal wetland of international and national significance which also has high aesthetic and cultural values⁵³.

*Policy 11*⁵⁴

86 Policy 11 provides:

"To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

⁵² New Zealand Gazette 4 June 1998, 1701

⁵³ ConA 201.287, *Coastal Environment of Otago Natural Character and Outstanding Natural Features and Landscapes Assessment* by Mike More landscape architect for the Otago Regional Council and Dunedin City Council 2015 at page 43

⁵⁴ ConA 201.166

- (v) *areas containing nationally significant examples of indigenous community types; and*
 - (vi) *areas set aside for full or partial protection of indigenous biological diversity under other legislation; and*
- (b) *avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:*
- (i) *areas of predominantly indigenous vegetation in the coastal environment;*
 - (ii) *habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;*
 - (iii) *indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable*
 - (iv) *to modification, including estuaries, lagoons, coastal wetlands, dune/ands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;*
 - (v) *habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;*
 - (vi) *habitats, including areas and routes, important to migratory species; and*
 - (vii) *ecological corridors, and areas important for linking or maintaining biological values identified under this policy."*

87 Unsurprisingly given the nature of the biodiversity listed, policy 11(a) is expressed in clear unqualified directive language: "*To protect indigenous biological diversity in the coastal environment: (a) avoid.....*"

88 The Aramoana salt marsh mentioned in the Appellant's submissions is captured by policy 11(a)(vi) and maybe other parts of policy 11(a).

Policy 13(1)⁵⁵

89 Policy 13(1) provides:

"To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and*
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; ... "*

90 The introductory words of policy 13(1) refer to protection from "inappropriate" activities. This suggests some level of distinction from policy 11.

Policy 15⁵⁶

91 Policy 15 provides:

"To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and*
- (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; ... "*

92 As for policy 13(1), the introductory words of policy 15 refer to protection from "inappropriate" activities. These two policies appear somewhat less directive than policy 11.

⁵⁵ ConA 201.167

⁵⁶ ConA 201.168 to ConA 201.169

*Policy 16*⁵⁷

93 Policy 16 provides:

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

(a) *ensuring that activities in the coastal environment do not adversely affect the surf breaks; and*

(b) *avoiding ... "*

94 Although policy 16(a) does not use the word "avoid" it nonetheless uses clear prescriptive language. *"Protect... by ensuring that activities .. do not adversely affect..."*.

95 The language used is as strongly directive as policy 11.

96 Of the Otago surf breaks listed in schedule 1 of the NZCPS, the Spit and Whareakeake are near to and potentially affected by the Appellant's activities (for example, the dumping of material dredged from the shipping channel).

Interpretation of the avoid policies

"Avoid"

97 The Appellant has submitted that "avoid" is nuanced and may in some circumstances mean *"avoid if at all possible"*.

98 It is accepted that the word can be nuanced and in everyday language may have the meaning submitted by the Appellant, depending on context.

99 However, in the avoid policies a distinction is drawn between avoiding adverse effects, and avoiding, remedying or mitigating adverse effects.

100 The interpretation *"avoid if at all possible"* has the same or similar effect to *"avoid, remedy or mitigate"*. The distinction between policies 11(a) and (b), 13(1)(a) and (b) and 15(a) and (b) would be lost if this interpretation was adopted.

⁵⁷ ConA 201.169

- 101 The use of "*avoid, remedy or mitigate*" in some parts of the avoid policies implies that if the word "*avoid*" is used without qualifying words, then no qualification is intended.
- 102 It may be that "*avoid if at all possible*" is intended by the Appellant to have a narrower meaning than "*avoid, remedy or mitigate*".
- 103 At paragraph 2.11 of the Appellant's submissions an exception (in the PORPS) is proposed if the Appellant establishes: "... *the adverse effects from the operation or development are the minimum necessary in order to achieve the efficient and safe operation of its ports*".
- 104 This is narrower in scope. It is mitigation in limited circumstances.
- 105 However, given NZCPS policy wording which expressly uses a different phrase ("*avoid, remedy or mitigate*") to qualify the word "*avoid*", it is difficult to infer another unstated qualification when the word is used alone.

De facto prohibited activities

- 106 The avoid policies as interpreted in *King Salmon* have been criticised as creating de facto prohibited activity rules.
- 107 This ignores the distinction between activities and their effects.
- 108 The NZCPS (including the port policy) requires recognition of and provision for activities.
- 109 The avoid policies require management of the effects of activities.
- 110 The avoid policies do not mandate that any particular activity must or even should be prohibited.
- 111 It may however be the case that plan provisions follow which prohibit some activities in some places. This could include activities that would adversely affect port activities, to give effect to policy 9(a). Or activities in areas that would have adverse effects on the biodiversity listed in policy 11(a).
- 112 This reflects the national policy setting in the NZCPS.

A distinction between avoid policies

- 113 In addition to the requirements to avoid certain adverse effects, some themes emerge from the preceding policies (and the objectives they give effect to):
- (a) Activities are provided for while protecting the environment from the adverse effects of those activities.
 - (b) The nature of protection afforded differs between different parts of the environment.
 - (c) Natural character, features and landscapes are protected from inappropriate subdivision use and development.
 - (d) Whereas indigenous biodiversity and nationally important surf breaks are simply protected.
- 114 At paragraph [145] of *King Salmon* this Court noted that the definition of "effect" applies "*unless the context requires otherwise*" and went on to consider the meaning of the phrase "*avoid adverse effects*" in policies 13(1)(a) and 15(a).
- 115 The Court observed that the meaning relates back to the overall policy stated in the opening words.
- 116 This supported an observation that it is improbable that it would be necessary to prohibit an activity of minor or transitory effect. Implicitly because the meaning of "*avoid adverse effects*" is likely to be qualified by the opening words of the policies.
- 117 The opening words of policies 13(1) and 15 refer to protection from "*inappropriate subdivision, use and development*".
- 118 In contrast policies 11 and 16 are not qualified in this way.
- 119 If the meaning of "*avoid adverse effects*" is to be assessed against the opening words of policies 13(1) and 15, then this suggests that policies 11 and 16 are stricter (more directive) than policies 13(1) and 15.
- 120 Such a distinction is unsurprising. The same distinction is found in section 6 of the RMA and in the objectives of the NZCPS.

121 This highlights that policies 11 and 16 are expressed in the clearest directive language and suggests that if policies 13(1) and 15 are *"in the nature of a bottom line"*⁵⁸, then policies 11 and 16 are bottom lines.

A coherent whole

Regional policy

122 Applying these principles and considering that policies 11 and 16 may be somewhat more directive than policies 13(1) and 15, the following requirements emerge for a regional policymaker considering where, how and when to provide for port activities.

123 The policymaker must strategically consider, in context of the region as a whole, where particular activities are appropriate or not (policy 7(1)).

124 The importance of infrastructure (such as ports) must be recognised (policy 6(1)(a) and policy 9).

125 Where, how and when to provide for port activities must be considered (policy 9(b)).

126 Any functional need to locate in the coastal marine area must be recognised and provided for in appropriate places (policy 6(2)(c)).

127 But the policymaker must ensure that other development in the coastal environment does not adversely affect port activities and activities without a functional need to locate in the coastal marine area generally should not locate there (policies 9(a) and 6(2)(d)).

128 Adverse effects on the biodiversity values in policy 11(a) must be avoided. Adverse effects on the biodiversity values in policy 11(b) must be avoided if significant and otherwise avoided remedied or mitigated.

129 The policymaker must ensure that activities in the coastal environment do not adversely affect surf breaks of national significance and avoid adverse effects on access to, use and enjoyment of those surf breaks (policy 16).

⁵⁸ *King Salmon*, at [132]

130 Adverse effects on outstanding natural character, features and landscapes must be avoided. For other natural character, features and landscapes significant adverse effects must be avoided and other adverse effects avoided, remedied or mitigated. The introductory words referring to inappropriate use and development may bear on what constitutes an "*adverse effect*" (policies 13(1) and 15).

Plans

131 Plan makers must then give effect to the regional policy statement and to the NZCPS.

132 Rules may enable consent applications and the assessment of effects using that pathway.

133 In preparing plans rules may be promulgated which result in activities being classified as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited.⁵⁹

134 Plans (or the regional policy statement) may also identify which natural character, features and landscapes are outstanding such that adverse effects on them must be avoided.

135 Prohibited activity status is a possibility for activities and areas where it is clear the activity cannot occur without breaching the avoid policies.

136 Prohibited activity status prevents a resource consent application.

137 Non-complying activity status requires the threshold tests in section 1040 of the RMA to be met. Adverse effects must be minor or the activity not contrary to the objectives and policies of the relevant plan.

138 For other classifications, and for non-complying activities if the s1040 threshold is met, there is assessment under section 104 of the RMA.

Consents

139 The consent authority has an apparently broader discretion under section 104 of the RMA, the requirement being to "*have regard to*" the NZCPS, the regional policy statement and plans (among other things)

⁵⁹ Section 77A of the RMA

and may consider measures to achieve positive effects on the environment, such as offsetting or compensation.

- 140 In assessing effects, the existing port activities form part of the receiving environment against which effects are assessed. And under section 104(2A) of the RMA on applications to renew consents the consent authority must to have regard to the value of the investment of the existing consent holder.
- 141 Consent conditions may be imposed to avoid adverse effects, or significant adverse effects, or to avoid, remedy or mitigate adverse effects.
- 142 Given that plans and policy statements must give effect to the NZCPS, and that the NZCPS contains clear directive language as to avoidance of certain adverse effects, it seems unlikely that the (apparently) broader discretion would see different outcomes to those one would expect from a reading of the NZCPS.⁶⁰

The Fourth Respondent's submissions

- 143 The NZCPS is in force. Its standing is not in issue.
- 144 Nor is it contentious that under section 62(3) regional policy statements must give effect to the NZCPS.
- 145 Whether the issue is framed in terms of the correct interpretation of the NZCPS and *King Salmon*, or that *King Salmon* should be reconsidered, the underlying issue is the same. What do the words in the NZCPS mean? In this case the enquiry is specific to policy 9 and the avoid policies.
- 146 The ORC relies upon the balance of its submissions on that point and further submits as follows.

Disablement

- 147 The avoid policies do not disable other policies. They provide the framework for managing the effects of activities provided for by other

⁶⁰ For example, *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283

policies, in connection with specified (and important) aspects of the coastal environment.

148 Whether and to what extent adverse effects must be avoided is left to the regional (or district) level where the avoid, remedy or mitigate standard is used in the avoid policies, and for those parts of the coastal environment not included in the avoid policies at all.

149 But where there is a clear NZCPS directive to avoid adverse effects on specific parts of the coastal environment, this must be given effect to in regional policy statements. Regardless of any limitations of the "top down" approach this is the clear national policy directive.

150 Pared down, for port activities, regional councils must:

- (a) protect port activities from other development; and
- (b) provide for port activities; but
- (c) in a way that avoids, or avoids, remedies or mitigates, adverse effects on specified parts of the coastal environment.

151 This does not disable the port policy.

Section 32 of the RMA

152 Section 32 of the RMA cannot be used to circumvent this position.

153 The NZCPS was subject to its own section 32 analysis. Under section 56 of the RMA the NZCPS has the purpose of achieving the purpose of the RMA in relation to the coastal environment.

154 Under section 62(3) of the RMA regional policy statements must give effect to the NZCPS. It is not open to a regional council to choose objectives and policies which do not do so.

155 In terms of section 32(1)(a) of the RMA objectives which give effect to the NZCPS are necessarily the most appropriate way to achieve the purpose of the RMA in relation to the coastal environment. That is the effect of sections 56 and 62(3) of the RMA.

156 In terms of section 32(1)(b) all options must be options which achieve those objectives. Any option which does not give effect to the NZCPS is contrary to section 62(3).

Overturning King Salmon to a "circle of legitimate choice"

157 Doing so would reduce *King Salmon* to a range of potentially relevant considerations, albeit some having greater weight than others.

158 Given sections 56, 58 and 62 of the RMA it is very difficult to conclude that NZCPS policies are merely relevant considerations, or able to be disregarded.

159 The directive text of the NZCPS indicates a clear intention that it be just that. Directive where directive language is used.

160 The suggestion of superior court supervision is illusory. In this scenario it would be for the policymaker as an expert decision-maker to evaluate the application of the policies in particular circumstances. Provided all relevant provisions are considered in their terms, and no irrelevant matters are taken into account, the outcome being a matter of expert judgment is generally immune to appeal or review for error of law. There will largely be no supervisory superior court.

161 Since 2014 plans and regional policy statements have been written in accordance with *King Salmon*. Any change would have a disruptive effect on planning law and practice.

The Appellant's submissions

The significance of adding "objectives" to section 56 of the RMA

162 The Appellant submits that the addition of "*objectives and*" to section 56 of the RMA expands the purpose of the NZCPS.

163 It does not.

164 The purpose of the NZCPS is still to achieve the purpose of the RMA.

165 The amendment is that the NZCPS is now required to: "*state objectives and policies to achieve the purpose of*" the RMA.

166 The purpose is unchanged in substance.

167 Nonetheless, policies of the NZCPS should achieve the objectives of the NZCPS, and the objectives are relevant to interpreting the policies.

168 This is not new.

169 Section 58 of the RMA has provided that the NZCPS may state "objectives and policies" since 10 August 2005.

170 Objective 6 does not support the Appellant's position. It specifically refers to use and development *"in appropriate places and forms, and within appropriate limits"*. What is appropriate is determined by the avoid policies.

171 Objective 6 clearly contemplates that uses provided for will also be constrained.

The significance of context and the Legislation Act 2019

172 The Appellant submits that under section 10 of the Legislation Act 2019 the meaning of the NZCPS must now be ascertained not only from its text and in the light of its purpose, but also from its context.

173 This is correct but does not detract from the NZCPS meaning evident from its text and purpose.

174 The Appellant submits that when the NZCPS was promulgated the Courts applied an *"overall judgment"* approach and that the NZCPS was intended to be interpreted in this manner.

175 An alternative inference could be drawn that the then existing *"overall judgment"* approach may have been a driver of the Minister's decision to use more directive language in the 2010 NZCPS than had been used in the 1994 NZCPS, and to remove provisions supportive of an overall judgment approach⁶¹.

176 Further, if the Appellant's submission is correct, then one would expect the Minister to have taken steps to amend the NZCPS after this Court's decision in *King Salmon*. Almost eight years have passed, and this has

⁶¹ The contrast between the 1994 NZCPS and the 2010 NZCPS is discussed in *King Salmon* at [133] and [134]

not happened, despite a Department of Conservation review of the impact of the NZCPS on RMA decision-making in 2017⁶².

Existing port activities

- 177 Neither policy 9, nor the avoid policies of the NZCPS, draws a distinction between new ports and existing ports.
- 178 The avoid policies do not constrain existing effects of existing lawfully established port activities, which form part of the existing environment.
- 179 Policy 1U) of the NZCPS expressly requires recognition that *"Physical resources and built facilities, including infrastructure, that have modified the coastal environment are part of the coastal environment."*
- 180 Neither the NZCPS nor the PORPS prevents the continued operation of the port as it presently exists.
- 181 The prior existence of the port does not change the meaning of the NZCPS policies. The policies have the same meaning wherever they are applied. What differs is the outcome when the policies are applied to different scenarios. Policies in the NZCPS are national directions to be applied uniformly.
- 182 The existing status of the port will influence consideration of what activities are appropriate. Interpretation of what is inappropriate is against a backdrop that includes the port.
- 183 It is nonetheless the case that the stricter avoid policies, such as policy 11(a), operate as bottom lines and may prevent new or expanded activities of the Appellant.
- 184 The example given by the Appellant of expansion into the Aramoana salt marsh is apt. The Aramoana salt marsh is held for the purpose of an ecological area under the Conservation Act 1987⁶³ and captured within policy 11(a), meaning there can be no adverse effects.

⁶² Department of Conservation, *Review of the effect of the NZCPS 2010 on RMA decision-making*, June 2017 (two parts)

⁶³ New Zealand Gazette 4 June 1998, 1701

- 185 The Appellant's concern as to this prospect is well understood. If such expansion is what the Appellant plans, then there is conflict between this aspiration and the national policy setting in the NZCPS.
- 186 But whether this means the NZCPS should change or not is a matter of policy for the Minister.
- 187 There is nothing in the policy 9 requiring that port activities be provided for in a way that allows adverse effects on threatened biodiversity.
- 188 To the contrary, the port policy requires consideration of where, how and when to provide for such activities. It is implicit in this that not everywhere will be suitable.
- 189 And it is explicit even in the enabling objective 6 that use and development is to be in appropriate places and within appropriate limits.
- 190 This is the clear policy setting under the NZCPS. Effects on the biodiversity listed in policy 11(a) must be avoided. If a port cannot do that with respect to a new activity, then the activity cannot occur.
- 191 The PORPS cannot provide to the contrary.

Conclusion

- 192 The question of law determined by the Court of Appeal was: "*Did the High Court misapply the Supreme Court's decision in Environment Defence Society Inc v New Zealand King Salmon Co Ltd?*".
- 193 The appeal was dismissed.
- 194 The approved question in this appeal is: "*whether the Court of Appeal was correct to dismiss the appeal.*"
- 195 The answer is yes.

Outcome

196 The appeal should be dismissed.

197 The ORC seeks costs.

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5 April 2022