

In the Supreme Court of New Zealand  
I Te Kōti Mana Nui

SC 6/2022

**Between**      **Port Otago Ltd**  
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

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**SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW ZEALAND INC**

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Dated 5 April 2022

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**SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW ZEALAND INC**

**Tenā, e te Kōti —**

1. Port Otago seeks the inclusion of a policy in the Otago regional policy statement that would in certain circumstances allow its activities to cause adverse effects on the values that contribute to the significant indigenous biodiversity, outstanding natural character, features or landscape and significant surf breaks protected by policies 11, 13, 15 and 16 of the New Zealand Coastal Policy Statement 2010 (the **NZCPS**).
2. The NZCPS requires such adverse effects to be avoided. The Otago regional policy statement is required to give effect to the NZCPS. Forest & Bird supports the Court of Appeal's judgment that in order to give effect to the NZCPS the Otago regional policy statement must also require such adverse effects to be avoided.
3. This is an orthodox application of this Court's recent judgment in *King Salmon*. *King Salmon* authoritatively interpreted the relevant provisions of the RMA, and settled the approach to interpretation of the NZCPS generally. It also specifically interpreted policies 13 and 15 of the NZCPS, again in issue here, against policy 8 (aquaculture).
4. This time the required reconciliation is between the avoidance policies and policy 9 (ports). Policy 9 is in materially equivalent terms to policy 8. Policy 8 requires "recognition" of aquaculture and "inclusion" in regional policy statements and regional coastal plans of provision for aquaculture activities in appropriate places in the coastal environment. Policy 9 requires "recognition" of port activities and "consideration" of where, how and when to provide for them in regional policy statements and in plans.
5. As with policy 8 in *King Salmon*, policy 9 is easily reconciled with the more directive avoidance policies of the NZCPS. Policy 9 applies against the background that port activities cannot occur in one of the protected areas if they will have effects contrary to policies 11, 13, 15 and 16 of the NZCPS.

### The issue in this appeal

6. The issue in this appeal is whether Port Otago’s proposed policy 4.3.7 of the proposed Regional Policy Statement for Otago (the **PRPS**) would “give effect to” the NZCPS as required by section 62(3) of the Resource Management Act 1991 (the **RMA**).

### A preliminary question: does the leave given encompass an argument that this Court should re-visit *King Salmon*?

7. Both Port Otago and the Marlborough District Council (**MDC**) invite this Court to re-visit its decision in *Environmental Defence Society v The New Zealand King Salmon Co Ltd*.<sup>1</sup> Port Otago argues that this is required by subsequent legislative changes.<sup>2</sup> MDC does not point to any subsequent changes but simply argues that if it is wrong in its primary argument as to the interpretation of *King Salmon*, then *King Salmon* should be reconsidered.<sup>3</sup>
8. This Court’s approach to such invitations is set out in *Couch v Attorney General (No 2)*.<sup>4</sup> As summarised by Tipping J at [105]:

All in all the touchstone should be caution, often considerable caution when it comes to suggestions that this Court should depart from one of its own decisions or a decision of the Privy Council. It must usually be evident that the previous decision was or has become clearly wrong, rather than simply representing a preferred choice with which the current Bench does not agree.

9. In its judgment declining leave for a leapfrog appeal, this Court held that while the case did raise a question of general and public importance and general commercial significance, there were not exceptional circumstances justifying a direct appeal from the High Court. This Court defined the leave question as “whether the High Court misapplied this Court’s decision in *King Salmon*” observing that there was force in the

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<sup>1</sup> [2014] NZSC 38, [2014] 1 NZLR 593 **Appellant’s Authorities 11**.

<sup>2</sup> Appellant’s submissions, section 7.

<sup>3</sup> MDC submissions, paragraphs 4(g) and 43.

<sup>4</sup> [2010] NZSC 27, [2010] 3 NZLR 149. See also, eg: *Smallbone v London* [2015] NZSC 192, *Siemer v Auckland High Court* [2021] NZSC 120 and *Thompson v Attorney General* [2016] NZSC 134.

submission that the proposed appeal “would otherwise seek to have the Court re-visit *King Salmon*”.<sup>5</sup>

10. The question on which the Court of Appeal subsequently granted leave to appeal from the High Court judgment was framed in equivalent terms: “Did the High Court misapply the Supreme Court’s decision in *King Salmon*?”.<sup>6</sup>
11. Forest & Bird submits that, as reflected in the judgment declining leave for a leapfrog appeal, the leave granted does not extend to arguing that this Court should re-visit *King Salmon*.

### **The relevant provisions of the RMA**

#### *Part 2: Purpose and principles*

12. Part 2 of the RMA sets out its purpose and principles.
13. The purpose of the RMA is to promote the sustainable management of natural and physical resources: s 5(1). Sustainable management is a defined term, encompassing the use, development and protection of natural and physical resources, while avoiding, remedying or mitigating any adverse effects of activities on the environment: s 5(2).
14. As this Court held in *King Salmon*, the inclusion of protection and avoidance in section 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management. Environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management.<sup>7</sup>
15. The purpose statement in section 5 is given further elaboration in the principles set out in sections 6 to 8.
16. Section 6 specifies matters of national importance which all persons exercising functions and powers under the RMA “shall recognise and provide for”. These include:

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<sup>5</sup> [2020] NZSC 38 **COA Vol 1 / Tab 5**, [7] and fn 11.

<sup>6</sup> [2020] NZCA 246 **COA Vol 1 / Tab 4**.

<sup>7</sup> *King Salmon* **Appellant’s Authorities 11**, [24](d).

- a. the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development: s 6(a);
  - b. the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development: s 6(b).
  - c. the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna: s 6(c).
17. It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from “inappropriate” subdivision, use and development. Like the use of the words “protection” and “avoiding” in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development.<sup>8</sup>
18. The statutory matters of national importance do not include the development and operation of ports, or of other infrastructure.
19. Section 7 specifies a list of other matters to which all persons exercising functions and powers under the RMA “shall have particular regard”. These include such matters as “kaitiakitanga”, “the ethic of stewardship”, “intrinsic values of ecosystems” and “maintenance and enhancement of the quality of the environment”. Again, the development and operation of ports and other infrastructure does not feature on the statutory list.
20. Finally in part 2, section 8 specifies that all persons exercising functions and powers under the RMA shall take into account the principles of the Treaty of Waitangi.

#### *Planning instruments*

21. The RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and

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<sup>8</sup> *King Salmon Appellant’s Authorities 11*, [28].

to part 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.<sup>9</sup>

22. There is a three tiered management system – national, regional and district. A “hierarchy” of planning documents is established. First, there are documents which are the responsibility of central government. These include policy statements, which must be given effect in lower order planning documents. Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. Third, there are documents which are the responsibility of territorial authorities, specifically district plans.<sup>10</sup>
23. One of the documents which is the responsibility of central government is the NZCPS provided for under sections 56 to 58 of the RMA. The Government’s production of other national policy statements is optional. The NZCPS is the only national policy statement that must exist: s 57(1).
24. The purpose of a New Zealand coastal policy statement is to state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand: s 56. The matters that may be addressed include (s 58):
  - a. national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development; and
  - b. activities involving the subdivision, use, or development of areas of the coastal environment.
25. The objectives and policies set by the NZCPS although not having the technical status of a “rule” as defined in the RMA, may nevertheless have the effect of what in ordinary speech would be a rule.<sup>11</sup>

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<sup>9</sup> *King Salmon Appellant’s Authorities 11*, [30].

<sup>10</sup> *King Salmon Appellant’s Authorities 11*, [10]-[11].

<sup>11</sup> *King Salmon Appellant’s Authorities 11*, [116].

26. Sitting in the second tier of the hierarchy, beneath the NZCPS and other national documents, are regional policy statements. These are provided for under sections 59 to 62 of the RMA. A regional policy statement must give effect to a New Zealand coastal policy statement (along with other specified national instruments): s 62(3).
27. Also sitting within the second tier of the hierarchy, but beneath the regional policy statements, are regional plans. These are provided for under sections 63 to 67 of the RMA. Plans (and national environmental standards) are the documents which contain the provisions technically defined as “rules” under the RMA, and under which consents are directly required and considered.
28. A regional plan must give effect to a New Zealand coastal policy statement and any regional policy statement (along with other specified national instruments): s 67(3).
29. It is not necessary to go into the third tier – district plans – for the purpose of this appeal. However, again, a district plan must give effect to a New Zealand coastal policy statement and any regional policy statement (along with other specified national instruments): s 75(3).

**The relevant provisions of the New Zealand Coastal Policy Statement 2010<sup>12</sup>**

30. The NZCPS contains seven objectives.
31. Objectives 1 and 2 can be seen to implement the matters of national significance from s 6 of the RMA, set out in paragraph 16 above. Objective 1 relates to the protection of the integrity, form, functioning and resilience of the coastal environment and sustaining its ecosystems. Objective 2 is:

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;

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<sup>12</sup> NZCPS **COA Vol 2 / Tab 8.**

- 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.

32. Objective 6 provides for appropriate use and development to be enabled, stating (most relevantly):

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:

- 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;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

[...]

33. These objectives enliven 29 policies.
34. Broadly, policies 6 through 10 enable use and development as envisaged under objective 6. Policy 6 relates generally to activities in the coastal environment. Policy 8 is the aquaculture policy interpreted in *King Salmon*. Policy 9 is the ports policy at issue in this case. Policies 8 and 9 are reproduced below.

#### **Policy 8 Aquaculture**

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

(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 Ports**

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, including by:

(a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and

(b) 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.

35. Policies 11 through 16 provide for the protection of the environment as envisaged under objectives 1 and 2, tying back to the matters of national significance recognised in s 6 of the RMA. Policies 11, 13 and 15 are the policies that have become known as the “avoidance policies” and which were interpreted and applied in *King Salmon*. The key first paragraphs of policy 13 are reproduced by way of example below.

### **Policy 13 Preservation of natural character**

(1) 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;

[...]

### **The proposed Regional Policy Statement for Otago<sup>13</sup>**

36. Chapter 3 of the PRPS sets out objectives and policies implementing objectives 1 and 2 and policies 11 to 16 of the NZCPS.
37. Most relevantly, objective 2 requires the identification and protection or enhancement of Otago's natural resources, including outstanding natural features, landscapes, seascapes, indigenous biological diversity, water bodies and soil. Policies 3.1.10, 3.2.1, 3.2.2, 3.2.4, 3.2.6, 3.2.8, 3.2.9 and 3.2.10 seek to implement the protections required by policies 11, 13 and 15 of the NZCPS.
38. Objective 4.3 of the PRPS provides for the management and development of infrastructure in a sustainable way. Policies 4.3.2 and following provide for nationally and regionally significant infrastructure (including ports).
39. Policy 4.3.4 provides for the management of the adverse effects of such infrastructure. Policy 4.3.4(a) gives a preference for such infrastructure to be located outside sensitive areas, including in 4.3.4(a)(i)-(iii) outside areas of significant indigenous vegetation and significant habitats of indigenous fauna, areas of outstanding natural character and areas of outstanding natural features and landscape in the coastal environment. Policies 4.3.4(b) to (d) then provide:
- b) Where it is not practicable to avoid locating in the areas listed in a) above, because of the functional needs of that infrastructure:
    - i. Avoid adverse effects on the values that contribute to the significant or outstanding nature of a) i-iii;
    - ii. Avoid significant adverse effects on natural character in all other areas of the coastal environment
    - iii. Avoid, remedy or mitigate, as necessary, adverse effects in order to maintain the outstanding or significant nature of a) iv-viii;
  - c) Avoid, remedy or mitigate, as necessary, adverse effects on highly valued natural features, landscapes and seascapes, in order to maintain their high values;
  - d) Avoiding, remedying or mitigating other adverse effects.

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<sup>13</sup> PRPS **COA Vol 2 / Tab 10** and **COA Vol 2 / Tab 11**.

40. Policy 4.3.4 includes a notation that where there is a conflict, policy 4.3.4 prevails over the policies under objective 3.2.7 That notation requires some explanation. As policy 4.3.4 provides an almost complete effects management regime for nationally and regionally significant infrastructure, its regime can be considered in place of the policies under objective 3.2 which have more general application.
41. The PRPS as notified did not contain a specific ports policy (although ports are part of the nationally and regionally significant infrastructure dealt with in the policies sitting under objective 4.3 above). Port Otago appealed. The parties in the Environment Court agreed that there should be a specific ports policy, but disagreed on its wording.
42. Following reformulation in the Environment Court, the proposed policy 4.3.7 was:<sup>14</sup>

**Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin**

Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage their effects by:

- (a) ensuring that other activities in the coastal environment do not adversely affect port activities;
- (b) providing for the efficient and safe operation of these ports and effective connections with other transport modes;
- (c) providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;
- (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to nationally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;
- (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;

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<sup>14</sup> [2018] NZEnvC 183 **COA Vol 1 / Tab 7**, [4] and [135].

(f) in respect of naturally significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.

**Forest & Bird’s position on policy 4.3.7**

43. There is no issue taken over paragraphs (a) to (d).
44. The terms of paragraphs (e) and (f) are contentious in the way in which they provide for adverse effects on values that contribute to areas of indigenous vegetation and significant habitats of indigenous fauna or to areas of outstanding natural character, features or landscape in the coastal environment or significant surf breaks. Policies 11, 13, 15 and 16 of the NZCPS require such effects to be avoided. The proposed policy provides instead for such effects to be “avoided, remedied or mitigated”.
45. Forest & Bird says this does not give effect to the NZCPS as required by s 62(3). As the Court of Appeal held by reference to NZCPS policy 13 relating to the protection of outstanding natural character:<sup>15</sup>

[78] [...] the NZCPS requires adverse effects in areas of outstanding natural character to be “avoid[ed]”. The essential question in this appeal remains whether the PRPS gives effect to that requirement by providing adverse effects in such areas be “avoided, remedied or mitigated”? The answer to that question might be thought obvious.

[79] 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.

46. Port Otago in its submissions now accepts that the phrase “avoiding, remedying or mitigating the effects” in paragraph (e) of the Environment Court’s formulation was too wide and that paragraph (f) did not take proper account of the policy of protecting surf breaks. Port Otago proposes an amended formulation of paragraph (e) to replace the Environment Court’s suggested (e) and (f). What is now proposed by Port Otago is:<sup>16</sup>

(e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in Policy 4.3.4(1)(a)(i) to (iii) or to surf breaks identified as being

<sup>15</sup> [2021] NZCA 638 **COA Vol 1 / Tab 3**.

<sup>16</sup> Appellant’s submissions, paragraph 2.11.

nationally significant, Port Otago may apply for a resource consent for the operation or development which cannot be granted unless Port Otago 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.

47. Port Otago's amended formulation does not address the fundamental objection to its proposed policy. The policy still allows for adverse effects to areas of significant indigenous flora or fauna or outstanding natural character, features or landscape in the coastal environment, or significant surf breaks, where they are "the minimum necessary in order to achieve the efficient and safe operation of its ports". This does not give effect to the requirement in policies 11, 13, 15 and 16 of the NZCPS for such effects to be avoided.

**The requirement to "give effect to" the NZCPS**

48. The interpretation of the requirement for a regional plan to "give effect to" the NZCPS was one of the issues before this Court in *King Salmon*. It is addressed at paragraphs [75] to [91] and [106] to [125] of the judgment. The requirement to "give effect to" the NZCPS is the same for regional policy statements, such as the PRPS.

49. The Court held at [77] that:

"Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.

50. This meant that it was an error for a decision-maker to make an "overall judgment" on the facts of the particular proposal and in light of part 2 of the RMA, having regard to the various policies of the NZCPS. As demonstrated by the close review of the statutory provisions conducted by the Court in *King Salmon*, Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements; that is, policies that are prescriptive and are expected to be followed. A New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers

consider appropriate in particular circumstances. A New Zealand coastal policy statement may be directive in nature.<sup>17</sup>

51. Although the NZCPS does not contain “rules” in the technical sense of that term as used in the RMA, a prescriptive NZCPS policy may have the effect of what in ordinary speech would be a rule.<sup>18</sup>
52. Generally, because the purpose of the NZCPS is to state (objectives and) policies in order to achieve the RMA’s purpose in the coastal environment, giving effect to the NZCPS obviates the need for a council to refer directly back to part 2 of the RMA when drafting a plan.<sup>19</sup> It will only be necessary or appropriate for the council to do so if there is a challenge to the validity of the NZCPS, if the NZCPS does not “cover the field”, or if there is uncertainty as to the meaning of particular policies in the NZCPS which cannot be resolved through a purposive interpretation of the policies in accordance with the NZCPS objectives.<sup>20</sup>

#### **The approach to interpretation of the NZCPS**

53. Fundamentally, the requirement to “give effect to” the NZCPS is intended to constrain decision-makers.<sup>21</sup> The implementation of an NZCPS directive will however be affected by what it relates to, ie, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.<sup>22</sup>
54. This means that the language in which particular policies are expressed in the NZCPS matters. This is important both in the interpretation of individual policies, and in the reconciliation of the NZCPS as a whole. The various policies are not inevitably in conflict or pulling in different directions. The various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more

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<sup>17</sup> *King Salmon*, **Appellant’s Authorities 11**, [106]-[125].

<sup>18</sup> *King Salmon* **Appellant’s Authorities 11**, [116].

<sup>19</sup> *King Salmon* **Appellant’s Authorities 11**, [85].

<sup>20</sup> *King Salmon* **Appellant’s Authorities 11**, [88]-[90].

<sup>21</sup> *King Salmon* **Appellant’s Authorities 11**, [91].

<sup>22</sup> *King Salmon* **Appellant’s Authorities 11**, [80].

flexibility or are less prescriptive than others. By contrast, others are expressed in more specific and directive terms.<sup>23</sup>

55. Accordingly, as explained by the Court in *King Salmon*:

[129] [...] the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, “avoid” is a stronger direction than “take account of”. That said however, we accept that there may be instances where particular policies in the NZCPS “pull in different directions”. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

### **The meaning of the “avoidance” policies of the NZCPS**

56. *King Salmon* principally concerned the intersection of policy 8 of the NZCPS (aquaculture) with policies 13 (preservation of natural character) and 15 (natural features and natural landscapes). The cornerstone of the Court’s factual analysis in *King Salmon* was its authoritative interpretation of the text of policies 13 and 15, and their reconciliation with policy 8.

57. Policies 13 and 15 are again in issue in this case. Policies 11 (indigenous biological diversity) and 16 (surf breaks of national significance) are similar avoidance policies that are also engaged.

58. Policies 13 and 15 (and policies 11 and 16) require certain adverse effects to be “avoided”. The Court in *King Salmon* determined what this means in paragraphs [92] to [97] of its judgment (and see also paragraphs [24](b), [62] and [126]).

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<sup>23</sup> *King Salmon Appellant’s Authorities 11*, [126]-[127].

59. The Court interpreted the use of “avoid” in the relevant policies as meaning “not allow” or “prevent the occurrence of”. The Court acknowledged that the interpretation of avoid could be contextual, but concluded that in the context of the NZCPS avoidance policies and objectives 2 and 6 of the NZCPS it bore this ordinary meaning.
60. Paragraph [96] of *King Salmon* summarises the Court’s reasoning:

[96] [...] we consider that “avoid” has its ordinary meaning of “not allow” or “prevent the occurrence of”. In the sequence “avoiding, remedying, or mitigating any adverse effects of activities on the environment” in s 5(2)(c), for example, it is difficult to see that “avoid” could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words “avoid”, “remedy” and “mitigate”. This interpretation is consistent with objective 2 of the NZCPS, which is, in part, “[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities”. It is also consistent with objective 6’s recognition that protection of the values of the coastal environment does not preclude use and development “in appropriate places and forms, and within appropriate limits”. The “does not preclude” formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

61. The Court was alive to the fact that the provisions of s 6 of the RMA, objective 2 of the NZCPS and policies 13 and 15 of the NZCPS refer to protecting areas from “inappropriate” development. The judgment discusses this criterion from paragraphs [98] to [105].
62. The Court held that where the term “inappropriate” is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that “inappropriateness” should be assessed by reference to what it is that is sought to be protected.<sup>24</sup> Applying this approach to the avoidance policies of the NZCPS, the Court concluded:<sup>25</sup>

[102] [...] To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and

<sup>24</sup> *King Salmon Appellant’s Authorities 11*, [101].

<sup>25</sup> *King Salmon Appellant’s Authorities 11*, [102].



development by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character. The italicised words indicate the meaning to be given to “inappropriate” in the context of policy 13.

63. Accordingly, a planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.<sup>26</sup>
64. The Court rejected an alternative approach argued before it of treating “inappropriate” or “appropriate” as the mechanism by which an overall judgment is to be made about a particular development proposal. The avoidance policies do not allow an approach whereby an aquaculture development that would have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be “inappropriate” if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects.<sup>27</sup> The “balancing” approach now advocated by Port Otago in its submissions was thus considered and rejected in *King Salmon* and in the companion judgment in *Sustain Our Sounds*.<sup>28</sup>
65. Accordingly, the correct approach to policies 13 and 15 (and the other avoidance policies of the NZCPS) is that the effects specified to be avoided are “not allowed” and that any proposed activity that would have those effects is for that reason “inappropriate”.
66. This does not require the avoidance of all adverse effects. The effects to be avoided must be assessed against the opening words of each policy and the values to be protected. For example, it is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.<sup>29</sup>

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<sup>26</sup> *King Salmon Appellant’s Authorities 11*, [101].

<sup>27</sup> *King Salmon Appellant’s Authorities 11*, [104]-[105].

<sup>28</sup> Appellant’s submissions, paragraph 5.5; *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 **Joint Respondents’ Authorities [X]**, [71].

<sup>29</sup> *King Salmon Appellant’s Authorities 11*, [145].

67. This approach is consistent with s 104D(1)(a) of the RMA providing a consent authority with a gateway to grant a resource consent for a non-complying activity if it is satisfied that the adverse effects of the activity on the environment will be minor. It is also consistent with this Court's interpretation of a requirement in the EEZ Act to protect the environment from pollution as a requirement to avoid "material" harm.<sup>30</sup>

**The correct specific approach to the reconciliation of the avoidance policies in the NZCPS with the use and development policies**

68. The Court in *King Salmon* then determined what was required to "give effect to" the NZCPS, applying its approach to interpretation and reconciliation of its various policies summarised in paragraphs 53 to 55 above in light of its interpretation of the avoidance policies summarised in paragraphs 56 to 65 above.
69. The Court identified policies 13 and 15 as policies within the NZCPS expressed in "more specific and directive" terms. By contrast, other policies identifying matters for councils to "take account of", "have regard to", "consider", "recognise", "promote" or "encourage" leave councils with considerable flexibility and scope for choice.<sup>31</sup>
70. Policy 8 relating to aquaculture is an example of a less directive "recognise" policy.
71. The Court found no conflict between policies 8 and 13 and 15, appropriately reconciled. Councils could "recognise" aquaculture in the ways provided for in policy 8, while still giving effect to the "avoid" and other protections in policies 13 and 15. As the Court held:

[131] [...] In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of

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<sup>30</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 **Joint Respondents' Authorities [X]**.

<sup>31</sup> *King Salmon, Appellant's Authorities 11*, [127].

the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line.

[135](b) [...] if the coastal area deserves the description “outstanding”, giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

72. The Court concluded with a reference to the matters of national importance set out in section 6 of the RMA, noting that the fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do.<sup>32</sup>
73. The High Court has subsequently applied *King Salmon* to reach the same conclusion about the reconciliation of policies 6 and 7 of the NZCPS with the avoidance policies.<sup>33</sup>
74. The general concept of environmental legislation imposing “bottom lines”, rather than relying on overall judgment, is also found in the recent majority judgment of this Court in *Trans-Tasman Resources*.<sup>34</sup>

**Application to the issue in this appeal: does policy 4.3.7 of the PRPS “give effect to” the New Zealand Coastal Policy Statement?**

75. It will be apparent from the above that Forest & Bird does not agree with much of the characterisation of the *King Salmon* judgment in section 5 of the appellant’s submissions and in MDC’s submissions.
76. Forest & Bird submits that a proper application of the reasoning in *King Salmon* in this case leads to the same conclusion as was reached in relation to the NZCPS aquaculture policy in *King Salmon*.

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<sup>32</sup> *King Salmon Appellant’s Authorities 11*, [149] and [152].

<sup>33</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 **Joint Respondents’ Authorities [X]**, [121].

<sup>34</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 **Joint Respondents’ Authorities [X]**.

77. Adopting the language used by the Court in *King Salmon* at [131], quoted above, policy 9 of the NZCPS recognises that a sustainable national transport system requires an efficient national network of safe ports, but this is against the background that port activities cannot occur in one of the significant or outstanding areas if it will have a (more than minor or transitory) adverse effect on the significant or outstanding qualities of the area. Accordingly, Port Otago's proposed policy 4.3.7 of the PRPS would not give effect to the NZCPS to the extent it would allow such activities to take place.
78. Both this case and *King Salmon* start from the factual premise that the proposed activities will not comply with the avoidance policies of the NZCPS. In *King Salmon*, that had been found as a fact by the Board of Inquiry.<sup>35</sup> In this case, Port Otago's proposed policy 4.3.7 of the PRPS is explicitly drafted so as to apply where Port Otago's activities do not comply with the avoidance policies of the NZCPS, as implemented in other provisions of the PRPS.
79. Policies 13 and 15 of the NZCPS engaged in this case are the same avoidance policies as were engaged in *King Salmon*. Policy 11 (significant indigenous biodiversity) follows the same formula as policies 13 and 15.<sup>36</sup> Policy 16 is in shorter form but again is an avoidance policy.
80. The only question this case raises is therefore whether the reconciliation of policy 9 of the NZCPS (ports), with the avoidance policies, requires a different outcome than the reconciliation of policy 8 (aquaculture) by this Court in *King Salmon*, or of policies 6 (activities in the coastal

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<sup>35</sup> *King Salmon Appellant's Authorities 11*, [5].

<sup>36</sup> Note that the chapeau to policy 11 does not express its purpose in terms of protection of indigenous biodiversity from "inappropriate development" as policies 13 and 15 do, but only in terms of protection of biodiversity. This does not create a difference in interpretation given the approach to interpretation of policies 13 and 15 in *King Salmon*, in particular as to the standard by which "appropriateness" is assessed. It would be a difference of potential moment if the alternative approach to the role of "appropriateness" in policies 13 and 15, rejected in *King Salmon*, were to be adopted. Policy 11 would not admit of the same interpretation.

environment) and 7 (strategic planning) by the High Court in the *Bay of Plenty Regional Council* case.

81. Policies 8 and 9 are quoted in full at paragraph 34 above. They are materially indistinguishable for the purpose of this analysis.
- a. Both policies 8 and 9 require decision-makers to “recognise” their subject matter. This is a notably less prescriptive direction than the direction in policies 11, 13, 15 and 16 to “avoid” adverse effects. Policy 9 was specifically instanced in *King Salmon* as one of the suite of policies that are more flexible and less prescriptive than the avoidance policies.<sup>37</sup>
  - b. Policy 9 includes two limbs specifying methods by which this recognition should occur in the case of ports. Each limb has an equivalent in policy 8 for aquaculture.
    - i. Policy 9(a) is to ensure that that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes. This is the equivalent of policy 8(c) in respect of aquaculture to ensure that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.
    - ii. Policy 9(b) requires decision-makers to “consider” where, when and how 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. This is the equivalent of policy 8(a) requiring decision-makers to include in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment.

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<sup>37</sup> *King Salmon Appellant’s Authorities* 11, [127] fn 132.

- iii. Policy 8 also includes a third limb – not replicated in the ports policy – requiring decision-makers to take into account the social and economic benefits of aquaculture.
82. Policy 9(a) – the “reverse sensitivity” policy – is directive, but is not engaged in this case.
83. Policy 9(b) requires only that decision-makers “consider” where, when and how to provide for ports. This is not a prescriptive policy. Like policy 8 regarding aquaculture, it can be easily reconciled with the avoidance policies in the way described at paragraph 77 above, ie by applying policy 9 against the background that port activities cannot occur in one of the significant or outstanding areas if they will have a (more than minor or transitory) adverse effect on the significant or outstanding qualities of the area.
84. This is reinforced by consideration of objectives 1, 2 and 6 of the NZCPS as explained by the Court of Appeal at paragraph 81 of its judgment.<sup>38</sup> It would also be reinforced by consideration of the matters of national importance in section 6 of the RMA, and by the protection element of section 5, were it necessary to go so far. But it is unnecessary to have recourse to part 2 of the RMA as an interpretative aid in this case, where consideration of the provisions of the NZCPS itself produces a clear answer.
85. Contrary to Port Otago’s submission, this is not as such a conclusion that the avoidance policies “trump” the ports policy, or other use and development policies. On a proper reconciliation, there is no conflict. The ports policy is applicable, but within the bounds set by the more directive avoidance policies.<sup>39</sup>

**Effect of this approach on Port Otago’s ability to obtain resource consents for future expansions of its operations**

86. The PRPS and any regional and district plans are required to give effect to the NZCPS. The above approach means that the effect of their provisions must be that port activities cannot occur in one of the

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<sup>38</sup> [2021] NZCA 638 **COA Vol 1 / Tab 3**, [81].

<sup>39</sup> See [2021] NZCA 638 **COA Vol 1 / Tab 3**, [82].

significant or outstanding areas if they will have a (more than minor or transitory) adverse effect on any significant or outstanding qualities of the area or a significant adverse effect on other protected values.

87. This does not mean that port activities must necessarily be prohibited activities in such areas. The avoidance policies apply to effects, not activities. If an activity will inevitably have an adverse effect in certain circumstances or localities then the council may choose to prohibit it.<sup>40</sup> But more generally, as the Court of Appeal explained, provided plans give effect to the avoidance policies, prohibited activity status is not inevitable and the matter should not be prejudged at this stage when plans have not yet been formulated. Activity status will be set in regional and district plans.<sup>41</sup> If, however, a consent for a particular activity would only be granted on certain conditions, then it would certainly be good practice (and may in some circumstances be a requirement) that this be made clear in the plan.<sup>42</sup>
88. Whatever mechanism is adopted in the regional policy statement and plans to give effect to the NZCPS avoidance policies, they must have the effect that consent cannot be obtained for an activity if, after taking into account any conditions, it would have one of the adverse effects to be avoided under the NZCPS avoidance policies.<sup>43</sup> If the lower order instruments allow activities with these effects, then they do not give effect to the NZCPS.
89. This approach flows through to the interpretation of the provisions of the RMA applicable to consent applications. Forest & Bird's position on these provisions is developed more fully in its submissions on the *East West Link* appeal. But, in short, taking the circumstances of that appeal as an example, Forest & Bird says that where a plan contains policies giving effect to the NZCPS avoidance policies locally (as it is required to

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<sup>40</sup> *King Salmon Appellant's Authorities 11*, [133].

<sup>41</sup> [2021] NZCA 638 **COA Vol 1 / Tab 3**, [84]-[85], [88]-[89]. See also *King Salmon Appellant's Authorities 11*, [132].

<sup>42</sup> RMA, s 87A(4); *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 **Joint Respondents' Authorities [X]**, [151]-[155].

<sup>43</sup> See generally [2021] NZCA 638 **COA Vol 1 / Tab 3**, [33]-[34].

do, the most relevant provisions in *East West Link* being D9.3(9) and (10) of the AUP), a non-complying activity must be “contrary to the objectives and policies of the plan” for the purposes of s 104D(1)(b) if it does not comply with the local avoidance policy. The plan cannot allow other objectives and policies, such as those providing for regionally significant infrastructure (the relevant provisions in issue in *East West Link* being found in chapter E26 (infrastructure) of the AUP), to override the local avoidance policy and nor can s 104D(1)(b) be interpreted to allow in substance the same result. Port Otago appears to accept this in its submissions.<sup>44</sup>

90. More generally:<sup>45</sup>

Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that King Salmon would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act’s requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to King Salmon and expose the consent authority to being overturned on appeal.

91. Any other approach would mean that the plan as implemented does not give effect to the NZCPS. It would also import into the consenting context an approach with all the frailties of the former “overall broad judgment” approach to planning, rejected in *King Salmon*. What is required is a “fair appraisal of the objectives and policies read as a whole”; as explained by the Court of Appeal in *R J Davidson*, this requires

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<sup>44</sup> Appellant’s submissions, paragraph 3.10.6 and 4.5.

<sup>45</sup> *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 **Joint Respondents’ Authorities [X]**, [71].



the kind of careful reading and reconciliation of the plan provisions as this Court mandated for the NZCPS in *King Salmon*.<sup>46</sup>

92. All of this means that the avoidance policies of the NZCPS have a prescriptive effect on activities within the coastal environment. But that effect is not as draconian as that which is suggested by Port Otago.
- a. The avoidance policies provided a graduated level of protection. Areas which are “outstanding” receive the greatest protection: the requirement is to “avoid adverse effects”. Areas that are not “outstanding” receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.<sup>47</sup>
  - b. The adverse effects to be avoided are not any adverse effects, but those which affect the significant or outstanding qualities of the area which lead to its protection under the avoidance policies.<sup>48</sup>
  - c. The effects to be avoided are unlikely to include minor or transitory adverse effects.<sup>49</sup>
  - d. As explained by the Court of Appeal in *Man O’ War Station*, the avoidance policies apply to the environment as it exists now.<sup>50</sup> Port Otago operates in an environment in which commercial port activities have been taking place for over 150 years. That environment has been shaped by the effects of those activities.<sup>51</sup> While the avoidance policies might bite on a future expansion, it is implausible that an application of the avoidance policies would constrain the continuation of the Port’s existing activities. These factual considerations, rather than any difference in legal

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<sup>46</sup> *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 **Joint Respondents’ Authorities [X]**, [71]-[75]; *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 **Joint Respondents’ Authorities [X]**, [79].

<sup>47</sup> *King Salmon Appellant’s Authorities 11*, [62].

<sup>48</sup> See paragraph 62 above.

<sup>49</sup> See paragraphs 66 to 67 above.

<sup>50</sup> *Man O’War Station Limited v Auckland Council* [2017] NZCA 24 [2017] NZRMA 121 **Joint Respondents’ Authorities [X]**, [66].

<sup>51</sup> [2021] NZCA 638 **COA Vol 1 / Tab 3**, [86]. Note also section 10 and 20A of the RMA regarding existing uses.

approach, are how the significance of the port as an existing operation is taken into account.

93. Port Otago has in any event recently obtained a suite of new “next generation” resource consents to enable port and channel works over the next 20-25 years to meet the needs of increasingly bigger ships. Current and proposed works include extension of the multi-purpose wharf at Port Chalmers, maintenance dredging, disposal of material at three sites, including to maintain the nationally significant surf break at Aramoana, and deepening the channel to 15 metres.<sup>52</sup>
94. In its submissions Port Otago does not really suggest that application of the NZCPS avoidance policies will affect its existing operations. Instead it says it is concerned about its future activities. The principal example is “possibly being required to widen the shipping channel so that it further encroaches into the Aramoana salt marsh to accommodate large ships (especially cruise ships)”.<sup>53</sup>
95. Although decisions on which areas in and surrounding the Otago Harbour will be classified as “significant”, “outstanding” or otherwise protected and therefore how any such activity would be regulated must await detailed information at the regional plan and, potentially, consent stage, some observations can be made.
96. The Environment Court found that:<sup>54</sup>

[...] Otago Harbour (which contains both ports) is an ecosystem which contains considerable indigenous biodiversity and some “key” habitats for indigenous flora and fauna. In addition parts of the harbour have at least high natural character and may be classified as within an outstanding natural landscape.

97. The Environment Court described the Aramoana saltmarsh briefly:<sup>55</sup>

This is described as a Coastal Protection Area (“CPA”) by the Council in the Otago Regional Plan: Coast. It is also an “Area of Significant Conservation Value” in the Dunedin City District Plan and is highly valued by Kāi Tahu for mahika kai and other waahi taoka. The

<sup>52</sup> [2018] NZEnvC 183 **COA Vol 1 / Tab 7**, [20].

<sup>53</sup> Appellant’s submissions, paragraph 2.14 and 4.5. Port Otago led no evidence on this possibility. It is raised only in submissions.

<sup>54</sup> [2018] NZEnvC 183 **COA Vol 1/ Tab 7**, [1].

<sup>55</sup> [2018] NZEnvC 183 **COA Vol 1 / Tab 7**, [11](b).

assemblage of organisms found on this saltmarsh is diverse and contains communities common on sheltered intertidal areas of southern New Zealand.

98. The evidence includes a landscape assessment report commissioned by the local councils to identify areas of natural character.<sup>56</sup> It includes a description of the Aramoana saltmarsh under the heading "Unit D18". The authors assessed the saltmarsh overall as having high natural character (largely on the basis of its significant ecological values), though outstanding status was, in their view, precluded due to a degree of modification on its landward edge. Its eastern portion is essentially unmodified.<sup>57</sup> The evidence also includes a map demonstrating the location of the saltmarsh and other natural features identified in the report, relative to Port Otago's activities.<sup>58</sup>
99. Based on the above, it appears that the saltmarsh is very likely to attract protection from significant adverse effects as a protected saltmarsh under policy 11(b)(iii) of the NZCPS and likely to attract some level of "natural character" protection under policy 13. It is not clear whether this will extend beyond protection from "significant" adverse effects under policies 11(b) and 13(1)(b) to include protection from all adverse effects under policies 11(a) and 13(1)(a).
100. The effect of the PRPS on a future expansion of the channel by Port Otago will depend on the classifications actually given to the salt marsh in due course, and findings on the likely effects of the expansion on the protected values. If the salt marsh is only absolutely protected from "significant" adverse effects, or regardless if the effects of further encroachment into the saltmarsh could be described as "minor" or "transitory", Port Otago may be able to get consent. If not, it appears likely that Port Otago would indeed face difficulties in expanding its channel into the protected saltmarsh. Forest & Bird does not shy away from that fact. The saltmarsh is an area of high or outstanding natural

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<sup>56</sup> Note that this is not brought forward into any classifications in the PRPS.

<sup>57</sup> Ryder Consulting, Coastal Environment of Otago: Natural Character and Outstanding Natural Features and Landscape Assessment, 28 April 2015 **COA Vol 2 / Tab 12**, internal page 16.

<sup>58</sup> **COA Vol 2 / Tab 13**.

character and ecological values of the kind that the avoidance policies in the NZCPS are intended to protect. From Forest & Bird's perspective, the protection of the saltmarsh against further encroachment is a feature of the NZCPS, not a defect.

101. Forest & Bird acknowledges that perspectives on these planning issues, and how to balance development and environmental issues, differ. But whatever one's perspective, if the balance struck in the NZCPS prevents Port Otago from encroaching further into a protected area of high or outstanding natural character, that is far from an outcome that demonstrates that something must have "gone wrong" with the planning process, as Port Otago seeks to portray it.

**Port Otago's real complaint is about the drafting of the NZCPS**

102. Forest & Bird submits Port Otago's real complaint is that the NZCPS does not privilege its activities over environmental protection in the manner that it would prefer. This is not a complaint about this Court's approach to the interpretation of the RMA or NZCPS, or about the drafting of the PRPS (which is bound to give effect to the NZCPS).
103. There is no evidence that this Court's interpretation of the NZCPS in *King Salmon* does not give effect to the Minister's intention when she recommended its gazettal. That issue is in a sense irrelevant: courts are concerned with objective interpretation, not discerning subjective intentions, and in any event that interpretation has already been settled in *King Salmon*. However, there is a flavour of it in MDC's submissions.
104. Whether it is strictly relevant or not, Forest & Bird does not accept the point. It is quite clear from the legislative history that both the provisions of the RMA and the provisions of the NZCPS were deliberately strengthened so as to give the NZCPS more directive force and to strengthen the avoidance policies in the NZCPS.<sup>59</sup> The fact that the NZCPS strongly protects areas of outstanding natural character and other similar areas appears to be the outcome that was intended.

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<sup>59</sup> See *King Salmon Appellant's Authorities 11*, [78] and [133]-[134]. See also the materials referred to in paragraph 23 of MDC's submissions: **MDC Authorities 19, 20, 21**.

105. The *King Salmon* approach supports good policy and plan making practice.<sup>60</sup> It does not appear to have caused undue difficulty. The National Policy Statement of Freshwater Management 2020 is an example of a national policy statement drafted following *King Salmon*.<sup>61</sup>
106. The fora for Port Otago and others to advocate for the amendment of the NZCPS or the RMA are executive and legislative, not judicial.
107. There has already been one mandated review of the NZCPS post-*King Salmon*. The review canvassed stakeholders about the effect of *King Salmon* and of the NZCPS. It recorded an understanding among industry groups of the effect of the NZCPS:

The industry groups' response to the 'avoid' focus of Policies 11, 13 and 15 was that they 'trumped' those policies seeking to enable or encourage economic activity and the productive use of resources. While the industry groups acknowledged the 'subdivision, use and development' provisions, they considered that since they were drafted with the terms 'recognise', 'consider' 'promote' and 'take into account', they are to be read as 'subservient' to Policies 11, 13 and 15.

108. The review recorded polarised views on the appropriateness of this balance. The Review deferred any decisions and recommended that "a stakeholder process could be used to consider sharply contrasting views on these policies, and to explore the potential for consensus".<sup>62</sup>
109. More recently, legislative reform has been considered through the Resource Management Review Panel report to Government.<sup>63</sup>

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<sup>60</sup> Atkins Holm Majurey, Review of implications for planning practice of the Supreme Court *King Salmon* decision and its impact on the interpretation of the New Zealand Coastal Policy Statement (published on the "New Zealand Coastal Policy Statement 2010 and related guidance notes" page of the DOC website) **Joint Respondents' Authorities [X]**, paragraphs 121, 131.

<sup>61</sup> **Joint Respondents' Authorities [X]**.

<sup>62</sup> Department of Conservation, Review of the effect of the NZCPS 2010 on RMA decision-making, June 2017 **Joint Respondents' Authorities [X]**, part 1 (paragraphs 17-27, 109-135) and part 2C (pages 37-40). The quotes are taken from part 2C, page 40 and part 1, [208].

<sup>63</sup> New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel, June 2020. The Report recommends the retention of "environmental bottom lines" as part of the legislative framework (Chapter 2, paragraphs 78-81) and the retention of the key elements of the *King Salmon* judgment generally, including the rejection of the overall broad judgment

**Port Otago’s argument that revisiting *King Salmon* is required by subsequent legislative changes**

110. Port Otago argues that a change in the *King Salmon* interpretation of the NZCPS is required by two subsequent legislative changes.<sup>64</sup> Both changes are minor and do not affect the reasoning in *King Salmon*.
111. First, Port Otago points to the amendment to s 56 of the RMA under the Resource Legislation Amendment Act 2017 to add “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.
112. Port Otago submits that this is a significant amendment because it means that the interpretation of policies must now take into account that they are intended to achieve the objectives.
113. This was always the case. This is evident from *King Salmon* itself which makes clear that the NZCPS policies are to be interpreted in accordance with the objectives, and takes this approach to the interpretation of the policies at issue.<sup>65</sup> The amendment is immaterial, as confirmed by the departmental commentary.<sup>66</sup>
114. In any event, because the PRPS was publicly notified on 23 May 2015 the applicable version of the RMA includes all amendments up to and inclusive of the Resource Management Amendment Act 2013, but not subsequently.<sup>67</sup> The amendment relied on by Port Otago is not part of the legislation that applies to this appeal.
115. Second, Port Otago relies on the replacement of section 5(1) of the Interpretation Act 1999 with section 10 of the Legislation Act 2019. It

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approach and the recognition of the hierarchical approach under the RMA (Chapter 2, paragraph 131).

<sup>64</sup> Appellant’s submissions, section 7.

<sup>65</sup> *King Salmon* **Appellant’s Authorities 11**, [88] and [96].

<sup>66</sup> Resource Legislation Amendment Bill, Departmental Report No 2 **Joint Respondents’ Authorities [X]**, clauses 35 and 36. “Clause 35 amends section 56 (purpose of NZCPSs) to include objectives. This brings it in line with section 58 (contents of NZCPSs), which already includes objectives, and with the purpose of NPSs (section 45). [...] The proposed change is very minor and seeks to remedy an omission in the drafting of provisions for NZCPSs.”

<sup>67</sup> [2018] NZEnvC 183 **COA Vol 1 / Tab 7**, [6].

says that the significance of the amendment is that the courts must now consider "context" in the statutory interpretation exercise.

116. Again, this was already the case. The explanatory note to the Bill says:<sup>68</sup>

Clause 10 differs from section 5(1) of the 1999 Act by requiring the meaning of legislation to be ascertained from its text and in the light of its purpose and its context. Addition of a reference to context was not proposed in the discussion paper, but is intended only to align this general interpretation direction with existing law and practice, and not to alter significantly its substance.

117. Neither of the legislative amendments relied on by Port Otago has any bearing on the issues in this case.

### **Conclusion and relief**

118. Forest & Bird submits that Port Otago's appeal should be dismissed.

119. Forest & Bird seeks costs with certification for second counsel. If the appeal is allowed, Forest & Bird seeks to be heard on costs and will argue that it is a public interest litigant and that costs ought not to be awarded against it.

### **Certification**

120. Counsel certify that these submissions are suitable for publication under paragraph 7(2) of the Supreme Court Submissions Practice Note 2021.

Dated 5 April 2022

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M C Smith / S Shaw / M Downing  
Counsel for Forest & Bird

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<sup>68</sup> Legislation Bill 2017 (275-1), explanatory note **Joint Respondents' Authorities [X]**, citing *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32] per Glazebrook J and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22] per Tipping J.

## List of authorities

### Legislation

1. Resource Management Act 1991

### Case law

2. *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593
3. *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673
4. *Man O'War Station Limited v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121
5. *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1
6. *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283
7. *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492
8. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127

### Other materials

9. Department of Conservation, Review of the effect of the NZCPS 2010 on RMA decision-making, June 2017
10. Atkins Holm Majurey, Review of implications for planning practice of the Supreme Court *King Salmon* decision and its impact on the interpretation of the New Zealand Coastal Policy Statement (published on the "New Zealand Coastal Policy Statement 2010 and related guidance notes" page of the DOC website)
11. National Policy Statement for Freshwater Management 2020
12. Resource Legislation Amendment Bill, Departmental Report No 2, commentary on clauses 35 and 36
13. Legislation Bill 2017 (275-1), explanatory note