

# 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

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<sup>1</sup> Note this is an updated version from February 2018 taking into account caselaw since that date.

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## INTRODUCTION

1. This update as at January 2019 is to previous version of this document (dated February 2018). The 2018 version was commissioned by the Department of Conservation (“**DOC**”) to assist it in its review of the New Zealand Coastal Policy Statement 2010 (“**NZCPS**”). This updated version reflect Court decisions since February 2018.
2. The purpose of this review is a think piece on the implications of the Supreme Court *King Salmon*<sup>2</sup> decision on the resource management planning framework and practice which identifies implications for the NZCPS. The think piece will be used to ‘set the scene’ for the current effectiveness review of the NZCPS.
3. The resources used for this review are:
  - The *King Salmon* Decision – a think piece for planners, 19 August 2014, Helen Atkins and Sarah Dawson<sup>3</sup> for the New Zealand Planning Institute;
  - *King Salmon* or Prince Fry – has the Supreme Court decision been the sea-change that was anticipated, Presentation to AusIMM September 2016 by Helen Atkins;
  - Relevant case law including the list of cases identified by the DOC legal team entitled “Cases which mention the NZCPS 2010 up to September 2018”.
4. The review starts with a brief overview of the Supreme Court’s decision (more detail can be found in **Appendix 1**) and an analysis of relevant case law, in particular from the higher courts, since the decision. The review then traverses the decision’s application to the following:
  - Directly to the NZCPS;
  - Policy and plan making matters involving the application of the NZCPS;
  - Resource consents involving the application of the NZCPS.

## SUMMARY

5. The key findings of the Supreme Court in the *King Salmon* case that has resulted in a call for change from some quarters is that Part 2 of the Resource Management Act 1991 (“**RMA**” or “**the Act**”) can no longer be resorted to as

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<sup>2</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195

<sup>3</sup> Acknowledgment is given to Sarah Dawson who co-authored the Think Piece and was lead author for the practice section – Application of the Findings

part of a broad overall judgement, to 'soften' those policies in the NZCPS which are 'directive'.

6. In addition the Court found that words mean what they say. For example, when using words like 'avoid' this means what it says, that is, do not do something.
7. As many lower order policies and plans were developed at a time when resort to a broad overall judgement under Part 2 was understood to be acceptable, these provisions may not have been crafted with the precision that the Supreme Court is saying is needed to properly give effect to the direction of provisions higher up in the policy hierarchy. As Part 2 is not able to be resorted to in order to soften the effect of directive protective provisions some proposals in the coastal marine area will not meet the statutory requirements.
8. The Supreme Court decision has been applied and followed in a number of other cases including those considering:
  - (a) the NZCPS;
  - (b) other national policy statements such as the National Policy Statement on Freshwater Management ("**NPSFM**");
  - (c) lower order provisions in policy statements and plans; and
  - (d) resource consents and designations.
9. What this mean in practice is that if policies and plans are not saying what the communities they were developed in wish them to say then they need to be reviewed to ensure they properly reflect community wishes and in light of relevant national direction.
10. In the context of the review of the NZCPS there is a call to do a number or some of the following:
  - (a) to soften the protective policies; and / or
  - (b) strength the development enabling provisions; and /or
  - (c) make the NZCPS specifically subject to Part 2.
11. However, in the absence of any amendment to the RMA such changes may not be in accordance with the purpose of the Act<sup>4</sup>. To make such changes could, in effect, render the NZCPS nugatory, providing no clear guidance or direction to those who are charged with giving effect to it.

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<sup>4</sup> Section 56 RMA essentially provides that the NZCPS is to be code for the coastal environment

12. There is guidance material on implementing the NZCPS but this needs updating to take into account the findings in *King Salmon* and subsequent case law.

## CONTEXT

13. When the ("**RMA**") was enacted in 1991 there was judicial debate over the meaning of section 5.
14. Over the years (and as early as 1994<sup>5</sup>) the Courts determined that this purpose is met by taking an overall judgment approach to the overall positive and adverse effects of a plan or consent proposal by having regard to Part 2.
15. In the *King Salmon* decision the Supreme Court disagreed with the appropriateness of an overall judgment approach, in relation to plan and policy making where there is clear direction in higher order policy documents. The Court held that such directive policies represent environmental bottom lines and are an appropriate aspect of sustainable management. Case law subsequent to *King Salmon* have commented on the application of this finding in relation to resource consents.

## OVERVIEW OF EDS V KING SALMON

16. This is a summary of the key findings from the decision. For a more detailed analysis of *King Salmon* see **Appendix 1**.

## Facts

17. On 17 April 2014 the Supreme Court released its decisions on two appeals in relation to New Zealand King Salmon's proposals to establish salmon farms in the Marlborough Sounds.
18. The basis of the proceedings began when King Salmon proposed to establish and operate nine additional salmon farms to the six it already operated in the Marlborough Sounds. King Salmon applied via the national consenting route to be heard by a Ministerial appointed Board of Inquiry ("**Board**").
19. In relation to the proposed salmon farm location that was the subject of the key aspect of the Supreme Court's decision, the Board found that this site (the Papatua salmon farm) would have high to very high adverse effects on the natural character and landscape of that location and as a consequence policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to. Despite

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<sup>5</sup> *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 (HC).



that finding the Board approved the Papatua plan change application because, applying an overall broad judgment pursuant to Part 2 of the RMA, the Board considered that (overall) the proposal would be appropriate and achieved the RMA's purpose.

20. EDS was opposed to the Papatua location because it was in an outstanding landscape and natural landscape area. EDS argued that the Board had misapplied the NZCPS and had not considered alternatives in relation to two of the sites.
21. The Supreme Court considered the following matters in reaching its findings on the appeal:
  - (a) The meaning of section 5;
  - (b) What giving effect to policies 13 and 15 of the NZCPS means;
  - (c) Whether it is necessary to resort to Part 2 in deciding on lower order policies and plan provisions;
  - (d) The meaning of 'avoid' and 'inappropriate';
  - (e) What 'giving effect to' means; and
  - (f) The application of the 'overall judgment'.
22. An overview of each finding follows. The detailed analysis is in **Appendix 1**.

## **Overview of Findings**

### **Section 5**

23. The meaning of section 5 it is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in section 5(2) are achieved.

### **Giving effect to policies 13 and 15 of the NZCPS**

24. In preparing regional coastal plans giving effect to policies 13 and 15 means a regional council must:
  - (a) Assess the natural character/natural features/natural landscapes of the region;
  - (b) Identify areas where natural character, natural features and landscape require preservation or protection; and

- (c) Ensure RPSs and plans include objectives, policies and rules which preserve the natural character and protect natural features and landscapes in particular areas.

### **Resorting to Part 2**

25. In the context of giving effect to the NZCPS resort to Part 2 is not appropriate because Part 2 has been embodied by the NZCPS. The Supreme Court held that there are three exceptions where resort to Part 2 would be appropriate, namely:
- (a) where there is a claim of invalidity;
  - (b) if the planning document does not cover the field; or
  - (c) the provisions are uncertain.

### **Meaning of 'avoid' and 'inappropriate'**

26. 'Avoid' means 'not allow' or 'prevent the occurrence of'.
27. What adverse effects are to be avoided and what is 'inappropriate' should be assessed by reference to what is being 'protected'.
28. It may be acceptable to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to policies 13 and 15 of the NZCPS where their avoidance is not necessary (or relevant) to preserve the natural character of the coastal environment, or protect natural features and natural landscapes.

### **Giving effect to**

29. To 'give effect to' simply means 'implement'. It is a strong directive creating a firm obligation on those subject to it.
30. The Supreme Court noted that the implementation of such a strong directive will be affected by what it relates to, that is, 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.

### **Policies 13 and 15 are bottom lines – application of the overall judgment**

31. Policies 13(1)(a) and 15(a) of the NZCPS are essentially bottom lines and to apply the overall judgment to their implementation would:

- (a) be inconsistent with the process of issuing the NZCPS;
- (b) create uncertainty; and
- (c) undermine the strategic region wide approach required under the NZCPS.

## CASE LAW SINCE KING SALMON

- 32. There have been a number of cases since *King Salmon* that have commented on its effect. The review does not cover every case but rather deals with cases from the higher courts creating binding precedent, and those of particular relevance in terms of analysis of NZCPS provisions.
- 33. This case law overview starts with a summary of key findings in the application of the *King Salmon* decision. A more detailed summary of the cases then follows.

### Summary of case law

- 34. The following higher order general findings of the Supreme Court have been applied.

#### Value of the matter being protected (avoid/appropriate)

- (a) Care needs to be taken in determining whether something is outstanding given the protection that *King Salmon* says should be provided in such cases (*Opoutere Ratepayers and Residents Assn v Waikato Regional Council*<sup>6</sup>).
- (b) *King Salmon* has not changed the way in which outstandingness is to be determined. This assessment should still be done based on objective criteria and on expert input (*Man O'War Station v Auckland Council* (cited below))

#### Are provisions unclear or in conflict?

- (c) It is important not to conclude too readily that provisions are in conflict where reconciliation can be achieved. Close scrutiny and analysis of provisions is necessary before it can be concluded that there is conflict. (*Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* (cited below); *Gladding v*

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<sup>6</sup> [2015] NZEnvC 105, (2015) 19 ELRNZ 254





*Queenstown Lakes District Council*<sup>7</sup>; *Saddleviews Estate Ltd v Dunedin City Council*<sup>8</sup>).

#### Use of directive language

- (d) Where directive language is used then this should be followed. If there is any doubt about adverse effects when directive language is used then a decision to ensure no adverse effects must be made (*Gallagher v Tasman District Council* (cited below));

#### Giving effect to higher order documents

- (e) Planning documents (other than the NZCPS) cannot be presumed to embody part 2 and higher order documents. As such, wherever there is a statutory obligation to give effect to documents, those documents must be assessed (*Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* (cited below))

#### Consideration of Part 2

- (f) Part 2 remains a relevant consideration when preparing plan documents, because those documents must be prepared “in accordance with Part 2”<sup>9</sup> (*Turners & Growers Horticulture Ltd v Far North District Council* (cited below)).
- (g) Part 2 remains a relevant consideration for resource consent decisions in appropriate cases, however, part 2 cannot be used to render ineffective district and regional plans under a broad overall judgement (*RJ Davidson v Marlborough District Council* (cited below)). Likewise in the case of *New Zealand Transport Agency v Architectural Centre Incorporated* where the High Court held resort to Part 2 applies to notices of requirement.

### ***Man O’ War Station Limited v Auckland Council* [2015] NZHC 767<sup>10</sup>**

35. This is a long running case that involves the identification, via a plan change promulgated by Auckland Council, of significant portions of the farm properties on Waiheke and Ponui Islands owned by Man O’War Station as outstanding natural landscapes. The *King Salmon* decision was issued after

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<sup>7</sup> [2015] NZEnvC 151

<sup>8</sup> [2014] NZEnvC 243, [2015] NZRMA 1

<sup>9</sup> Ss 61(1)(b), 66(1)(b), 74(1)(b) RMA, and *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764

<sup>10</sup> Upheld by the Court of Appeal [2017] NZCA 24

the appeal in the Environment Court was heard but before it was decided. The Environment Court considered further submissions from the parties on the application of the *King Salmon* decision. The key issue for the Environment Court was what areas ought to be mapped as outstanding natural landscapes ("ONLs"). The Court made minor amendment and its decision was appealed to the High Court.

36. In relation to the application of the *King Salmon* decision the primary concern of Man O'War farms was that the policies had been developed pre-*King Salmon* when the overall judgment was considered in the application of policy and to apply the policies post-*King Salmon* would have a serious adverse effect on farming operations. The argument made by Man O'War was that the mapping of ONLs therefore needed to be reconsidered post-*King Salmon* to ensure the areas subject to ONLs did warrant the level of protection that the ONL afforded. The High Court disagreed as follows:

[58] I do not accept the submission for MWS that as a consequence of the *King Salmon* judgment, the identification of ONLs must necessarily be changed, and made more restrictive. There is no justification for such a submission in the *King Salmon* judgment, and it is not justified by reference to the RMA.

[59] It is clear from the fact that "the protection of outstanding natural features and landscapes" is made, by s 6(b), a "matter of national importance" that those outstanding natural landscapes and outstanding natural features must first be identified. The lower level documents in the hierarchy (regional and district policy statements) must then be formulated to protect them. Thus, the identification of ONLs drives the policies. It is not the case that policies drive the identification of ONLs, as MWS submits.

[60] As identified by the Council, the RMA clearly delineates the task of identifying ONLs and the task of protecting them. These tasks are conducted at different stages and by different bodies. As a result it cannot be said that the RMA expects the identification of ONLs to depend on the protections those areas will receive. Rather, Councils are expected to identify ONLs with respect to objective criteria of outstandingness and these landscapes will receive the protection directed by the Minister in the applicable policy statement.

#### Key findings

37. The key finding in this case is that defining and mapping ONLs is to be done not by reference to the protection the area defined and mapped will receive (and therefore the limitation placed on development within the ONL) but by reference to the objective values the area concerned has. In short, *King Salmon* has not changed the way in which defining and mapping should occur for ONL and other outstanding areas.

### ***New Zealand Transport Agency v Architectural Centre Incorporated* [2015] NZHC 1991**

38. This case was an appeal to the High Court from a Board of Inquiry decision not to approve a notice of requirement that would have allowed a bridge over the Basin Reserve in Wellington. The *King Salmon* decision was released part way through the hearing. The High Court noted that while the decision did not concern notices of requirement, the discussion of Part 2 and the overall judgment were relevant. The key consideration for the High Court was whether the *King Salmon* findings had any relevance to notices of requirement.
39. One of the issues for the Court was what the phrase 'having particular regard to' means. The High Court was guided by the Supreme Court discussion of this matter in the context of 'giving effect to' in that the phrase 'have regard to' is a lesser requirement than giving effect to.
40. The remaining issue was considering what the words 'subject to Part 2' meant and what the relevance of 'overall judgment' is in the context of notices of requirement. Again guided by *King Salmon* the High Court held that the Basin Reserve Board clearly understood the difference between the matters under consideration before it and the matters under consideration before the Supreme Court. In short, as this was a notice of requirement expressly subject to Part 2, then consideration of Part 2 matters was completely appropriate.

#### Key findings

41. The Basin Reserve case found (without saying so in so many words) that decisions on notices of requirement are subject to Part 2.

### ***Gallagher v Tasman District Council* [2014] NZEnvC 245**

42. Mr and Mrs Gallagher appealed a decision of the Tasman District Council in respect of Plan Change 22 to the Tasman Resource Management Plan. This plan change sought to impose controls on subdivision and development of land situated in the Mapua/Ruby Bay area.
43. In deciding on whether the plan change gives effect to the NZCPS the Court noted that if there is a requirement to "give effect" to something, as long as it is "specific", then it gives more direction than a requirement to give effect to a policy even if it is considered a higher level document when the two things are looked at separately.
44. As noted by *King Salmon* the more specific and directive the clearer the obligation to give effect of implement the provisions.

#### Key findings

45. This case was a policy development case and is authority for the point in *King Salmon* that the more specific and directive a provision then the clearer the obligation to give effect to it is.

***Appealing Wanaka Inc v Queenstown Lakes District Council [2015] NZEnvC 139***

46. The appeal concerned a private plan change that was proposing residential development between Wanaka and Clutha.
47. The Court considered the position post *King Salmon* in relation to looking at the hierarchy of documents and the application of Part 2 as follows:

The recent decision of the Supreme Court in *EDS v NZ King Salmon* sets out an amended - and simpler - approach to assessing plan changes under the second set of obligations in sections 74 and 75. The principle in *EDS v NZ King Salmon* is that if higher order documents in the statutory hierarchy existed when the plan was prepared then each of those statutory documents is particularised in the lower document. It appears that there is, in effect, a rebuttable presumption that each higher document has been given effect to or had regard to (or whatever the relevant requirement is). Thus there is no necessity to refer back to any higher document when determining a plan change provided that the plan is sufficiently certain, and neither incomplete nor invalid.<sup>11</sup>

48. The Court went onto to say:

The Supreme Court makes it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is usually no need to look at Part 2 of the RMA, at least on a plan change.<sup>12</sup>

49. The Court is therefore endorsing and applying the Supreme Court's approach to assessing plans and policies in the context of plans and changes to plans at the local authority level.

Key findings

50. The key finding in this case, which related to policy and plan development is that resort to Part 2 is not necessary except where one of the exceptions set out in *King Salmon* apply. **NB** this case has subsequently been overturned in the following High Court cases.

***Turners & Growers Horticulture Ltd v Far North District Council [2017] NZHC 764***

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51. Turners & Growers Horticulture Ltd ("**Turners & Growers**") appealed against the Environment Court ("**EC**") decision relating to Plan Change 15 to the Far North District Plan.
52. Turners & Growers, which operates an export fruit-processing facility in Kerikeri, raised concerns about the potential for incompatible, non-rural, industrial and commercial activities to co-locate in the Rural Production Zone. Turners & Growers sought that increased setbacks apply in the Zone and this was rejected by the EC.
53. Turners & Growers appealed on the ground that the EC erred in its evaluation of the plan change under s 32(3)(b) of the RMA, and in particular that the EC: wrongly considered Part 2 under s 31 of the Act. Turners & Growers submitted that, following the decision in *King Salmon*, the EC should not have considered the council's function under s 31, nor the purpose and principles under Part 2. Turners & Growers argued that the EC needed only to consider whether the proposed methods were the most appropriate for achieving the plan's objectives.
54. The High Court rejected this argument because it was evident from the EC's decision overall that its approach was whether the methods proposed by Turners & Growers were the most appropriate to achieve the plan's objectives. Further, the Court stated that s 74 of the RMA specifically required a territorial authority to change its district plan in accordance with its functions under s 31 and Part 2 of the RMA. The Court in *King Salmon* had not suggested that such mandatory functions should be disregarded. The issue in *King Salmon* was the obligation to comply with the statutory objective in the particular circumstances where a higher order planning document required a lower-order decision maker to avoid adverse effects. The Court now stated that it was obvious that the circumstances in the present case were far-removed from those in *King Salmon*. It was directly contrary to s 74 to suggest that the council was wrong to have regard to Part 2 and s 31 of the Act. Turners & Growers' appeal was dismissed.

#### Key Findings

55. Consideration of Part 2 and a council's functions remain mandatory considerations under s 74 where decision makers are considering methods in light of settled objectives and policies. This is a different context to *King Salmon*.

#### **Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council [2017] NZHC 3080**

56. Royal Forest and Bird Protection Soc of New Zealand Inc ("**Forest & Bird**") appealed against the Environment Court's decision concerning the wording

in certain policies in the proposed Regional Coastal Environment Plan of the Bay of Plenty Regional Council relating to the location of regionally significant infrastructure in areas identified in the RCEP as being Indigenous Biological Diversity Areas A.

57. The basis of the appeal concerned whether the EC erred in its consideration and application of the decision of the Supreme Court in *King Salmon* when considering policies in the NZCPS and other national policy statements, the Bay of Plenty Regional Policy Statement and the unchallenged objectives in the Regional Coastal and Environment Plan.
58. The High Court considered the Plan policies in dispute and the relief sought by *Forest & Bird*, noting that Natural Heritage Policy 1 provided that certain activities might be appropriate in the natural heritage areas of the coastal environment in certain circumstances. However, Natural Heritage Policy 4 provided that adverse effects must be avoided in any Indigenous Biodiversity Area. Further, Natural Heritage Policy 5 provided that for consideration to be given to development proposals which would adversely affect areas listed in Policy 4, the proposal must have transient or minor effects or relate to regionally significant infrastructure. For a proposal to be appropriate under Policy 5, it had to be demonstrated that there were no practical alternative locations and that the avoidance of adverse effects was not possible.
59. The High Court reviewed the EC decision and addressed the alleged errors of law. These were that the EC erred: in its interpretation and application of *King Salmon*; in its interpretation and implementation of various provisions in the NZCPS and Regional Policy Statement; in its interpretation and implementation of relevant Coastal Plan objectives; and in its interpretation of ss 87A, 104 and 104D of the RMA.
60. Regarding the application of *King Salmon*, *Forest & Bird* submitted that the EC did not try to find a way to reconcile the evident tension between certain policies in the higher order planning documents and erred by holding that the meaning of the word "avoid" was contextual. The High Court made certain findings with regard to the EC's interpretation and application of *King Salmon*. First, the statutory provisions required that a proposed plan give effect to both any NZCPS and any Regional Policy Statement; neither the obligation to implement a proposed Coastal Plan objective, nor the requirement for an evaluation report under s 32 of the RMA removed that necessity.
61. While accepting that the ratio of *King Salmon* was relatively narrow, the Court did not consider that it could be distinguished in the present case, nor that it was of limited assistance only. The EC was not entitled to take the approach it did, in focusing on largely unchallenged provisions of the Coastal Plan and ignoring or glossing over the higher order documents. The EC erred when it proceeded primarily by reference to the RCEP objectives, with only limited

reference to the NZCPS and RPS, so failing to “give effect to” such documents, within the meaning of *King Salmon*. Further, the EC failed to seek to analyse the tensions between various policies in the Coastal Plan, which approach was in conflict with the observations of the Supreme Court in *King Salmon*, and was an error. Decision makers must undertake “a thoroughgoing attempt to find a way to reconcile” the provisions considered to be in tension.

62. The EC also erred in its interpretation of the word “avoid”. The EC should have considered the relevant avoidance, or “environmental bottom line”, policies in the NZCPS. By finding that the word “avoid” was contextual, the EC erred. This was an overall broad judgment by a different name.
63. Turning to the second ground of appeal, the Court stated that the EC referred only to a limited number of specified NZCPS provisions despite the fact that there were a large number of other more relevant provisions, including policies 6(1)(a), 7, 11, 13 and 15. Similarly, the EC did not address the directive nature of specified policies in the Regional Policy Statement.
64. In terms of interpreting the NZCPS's provision for regionally significant infrastructure, the High Court held that policies 6 and 7 are subject to the directives in policies 11(a), 13(1)(a) and 15(a):

[120] In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 – which is in more prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.

[121] It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8.

[122] As I have noted, the Environment Court's consideration of the NZCPS policies was brief and incomplete. The Court concluded that policy 11(a) is “not absolute or binary” but it did not attempt to reconcile policy 11, or policies 13 and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.

[123] In my judgment, the Environment Court erred in approving policies and a rule that do not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a).

65. Regarding the third ground of appeal, relating to the interpretation of the Coastal Plan, the Court found that the EC misconstrued the objectives

contained in the Plan. These, following the approach in *King Salmon*, recognised that provision needed to be made for regionally significant infrastructure, but not in all locations in the coastal marine area.

66. The High Court stated that each of the errors made by the EC with relation to the first three grounds of appeal were material to the EC decisions. The Court stated that the appropriate course was to remit the matter to the EC to for reconsideration in the light of the present decision.

#### Key findings

67. In the case of settled objectives and policies, it remains necessary to consider higher order documents that must be “given effect to” by a plan. This is required by the RMA and it is not appropriate to assume that the settled objectives and policies embody Part 2 in the way the NZCPS does.
68. It is not appropriate to take a “contextual” interpretation of “avoid” in a policy setting. Avoid means do not allow.
69. It is not appropriate to superficially assume conflicts in policy, including where there are multiple national policy instruments. Careful analysis is required to assess whether the policy documents can be reconciled. Where avoidance policies also apply then policies 6 and 7 defer to the avoidance policies, even where the proposed infrastructure is regionally significant.

#### ***Port of Otago Limited v Otago Regional Council [2018] NZEnvC 183***<sup>13</sup>

70. This decision concerned how to provide for ports under the Proposed Otago Regional Policy Statement in a manner that gives effect to the NZCPS.
71. The Court stated that there is tension between Port Chalmers and Port Dunedin as part of the national shipping network that connects New Zealand's islands and are *vital* to the economic, social and cultural wellbeing of the Otago region, on the one hand; and on the other, that 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.
72. The decisions version of the Regional Policy Statement did not contain express provision for the two ports. Instead they were *covered* by general provisions relating to infrastructure. Port Otago was not satisfied with that and appealed. A key issue was whether the policy provision sought by Port Otago properly gave effect to the NZCPS, in particular policies 6, 7, 9, 11, 13, 15 and 16. A

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<sup>13</sup> At the time of this update, it is understood this case has been appealed to the High Court.



central issue was whether Policy 9's provision for ports<sup>14</sup> was directive in nature such that some provision should be made for ports in relation to the directory avoidance policies 11(a), 13(a) and 15(a), or whether policies 11(a), 13(a) and 15(a) prevail in total.

73. The Court reviewed the findings in of the Supreme Court in *King Salmon* and the High Court in *Bay of Plenty*. The Court stated that the primary legal issue for this decision was whether policy 9 (Ports) is less deferential to the avoidance policies than policy 8 (Aquaculture) as decided in *King Salmon*, or policy 6 (Infrastructure etc.) in the *Bay of Plenty* decision.
74. The Court then undertook a thorough analysis of the provisions of the NZCPS to seek to reconcile policies 6, 7, 9, 11, 13, 15 and 16. The Court found:

[91] In summary, if the NZCPS policies for avoidance of adverse effects on natural character and outstanding natural landscape (13 and 15) are (incorrectly) considered only with policy 9, then there appears to be a conflict since policy 9 does not have the deferential qualification that the infrastructure policy (6(1)(b)) has (the phrase "...without compromising the other values of the coastal environment"). However, the NZCPS is more nuanced than that. First, there is no suggestion that the avoidance policies automatically require activities which may cause adverse effects to be prohibited. Second, policy 7 (strategic planning) recognises that some activities which have the potential to cause adverse effects - and are therefore inappropriate at first sight - may need to be considered on a case by case basis so that the potential adverse effects can be considered in the context of a specific factual and predictive situation. Policy 7 suggests a procedural resolution for a substantive conflict. It suggests that the methods for resolving the conflict include methods in a subordinate plan requiring a resource consent be applied for and determined having regard to purposively framed objectives and policies.

[92] We hold that reference to policy 7(1)(b)(ii)<sup>15</sup> may be used to resolve any conflict between the directory provisions of policy 9 (Ports) and the even more directory avoidance policies of the NZCPS.

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<sup>14</sup> 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.

<sup>15</sup> Policy 7(1)(b)(ii) states:

- (1) In preparing regional policy statements, and plans:

...

- (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

...

- (ii) may be in appropriate without consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process.

75. The Court then went on to undertake a s 32 assessment of whether specific policy provision in the PORPS was required in order to give effect to these provisions of the NZCPS. The Court concluded that specific policy provision was necessary and appropriate and directed a process for the parties to provide drafting to the Court. The Court also considered that the policy should provide guidance as to the different standards that might be expected of port activities in relation to different resources. In the Court's view the seriousness of the potential for adverse effects increases from:
- effects on surf breaks, through
  - effects on natural character and ONL to
  - effects on biodiversity.
76. The Court's reasons for this were that effects on human enjoyment of surfing and landscapes, while very important - and in the latter case, are of national importance - are largely reversible and potentially amenable to mitigation. Effects on biodiversity values may be irreversible.

### **Key Findings**

77. There is no suggestion that the avoidance policies in the NZCPS automatically require activities which have the potential to cause adverse effects to be prohibited.
78. Policy 7 recognises that some activities which have the potential to cause adverse effects, and are therefore inappropriate at first sight, may need to be considered on a case by case basis so that the potential adverse effects can be considered in the context of a specific factual and predictive situation.
79. Policy 7(1)(b)(ii) provides a procedural route through which to resolve the conflict between directive provisions (such as was here) between Policy 9 and between Policies 11 and 15 via the use of resource consents, designations or plan change processes.

### ***Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council [2015] NZEnvC 50***

80. This appeal concerned a change to the Hawkes Bay Regional Plan to give effect to the National Policy Statement Freshwater Management ("NPSFM"). The Court cited *King Salmon* in relation to the hierarchy of documents as follows:

[16] Since the Supreme Court judgment in *EDS v NZ King Salmon Co Ltd* [2014] NZRMA 195 there has been an increased awareness of the need to consider the hierarchy of planning documents, and the degree of control those documents have over the required or permissible contents of the documents

ranking below them. Plainly, the senior document is the RMA, and immediately below that are the National Policy Statements (NPS). In this case, this is the NPSFM which came into force on 1 August 2014 and, with some transitional provisions, revoked the 2011 version from that date. In its own terms the NPSFM speaks of being applicable to Regional Plans, and makes no mention of Regional Policy Statements. Why that is so, we do not know, because s62(3) RMA makes it perfectly clear that a Regional Policy Statement must give effect to an NPS.

[17] Also, going up the chain rather than down, a Regional Plan must give effect to both an NPS and to a Regional Policy Statement, so it would make no sense to have a Regional Policy Statement that did not give effect to an NPS.

### Key findings

81. The case involved the application of King Salmon in the context of another national policy statement (the NPSFM). The case confirmed the hierarchy of documents as set out in the *King Salmon* case and the importance of the document down the chain giving effect to a document further up the chain.

### ***RJ Davidson v Marlborough District Council* [2016] NZEnvC 81, [2017] NZHC 52, and [2018] NZCA 316**

82. This appeal concerned a mussel farm in Beatrix Bay in the Pelorus Sound so was a resource consent matter. The majority of the Environment Court held:

[263] Whether that process can still be called an "overall broad judgment" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:

- the status of the activity for which consent is applied;
- the particularity (or lack of it) in the relevant objectives and policies about
- the effects of the activity; and
- the existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments).

83. What the Court held was that applying discretionary judgment in the context of this application for a resource consent depends on the policy framework that the activity sits within.

### High Court

84. This aspect and others were the subject of an unsuccessful appeal to the High Court ([2017] NZHC 52). In relation to the application of Part 2 to resource consents. The High Court found:

[76] I find that the reasoning in *King Salmon* does apply to s 104(1) because the relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.

[77] I also consider that the Environment Court's decision was consistent with *King Salmon* and the majority correctly applied it to the different context of s 104. I accept Council's submission that it would be inconsistent with the scheme of the RMA and *King Salmon* to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. It could result in decision-makers being more restrained when making district plans, applying the *King Salmon* approach, than they would when determining resource consent applications.

85. In terms of the inconsistency with the Basin Reserve case the High Court simply noted:

[67] The Environment Court did not apply *Basin Bridge* as it was inconsistent with *King Salmon*. To consider the appellant's argument, it is appropriate to consider the Supreme Court's judgment in *King Salmon* and its applicability to this proceeding.

#### Court of Appeal

86. The High Court's decision was appealed to the Court of Appeal. The Court granted leave for the Trust to appeal on the following grounds:
- (a) Did the High Court err in holding that the Environment Court was not able or required to consider Part 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?
87. If the first question was answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration? The Trust submitted that the EC erred by not having regard to Part 2, wrongly regarding itself as precluded from doing so by *King Salmon*. It also held that the High Court had wrongly concluded the reasoning in *King Salmon* precluded resort to Part 2 because the relevant provisions of the planning documents including the NZCPS had already applied Part 2. The Council submitted that the EC was bound to apply the NZCPS by reason of its correct assessment that the NZCPS was neither uncertain nor incomplete and, consequently, there was no reason to apply the "subject to Part 2" qualification in s 104. The Council also noted that the outcomes sought to be achieved by the Sounds Plan were harmonious with the relevant policies in the NZCPS.

88. The Court noted that the real question was whether the ability to consider part 2 in the context of resource consents was subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coastal plan. The Court discussed the Supreme Court's judgement in *King Salmon* with the Court's rejection of the "overall judgement" approach in the context of plan provisions implementing the NZCPS. However, given the particular factual and statutory context addressed by the Supreme Court, the Court did not consider it could properly be said the Court intended to prohibit consideration of Part 2 by a consent authority in the context of resource consent applications.
89. The Court held that if it was clear that a plan that had been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that had regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to Part 2 in those circumstances would likely not add anything and could not justify an outcome contrary to the thrust of the policies. Equally, the Court held, if it appeared that the plan had not been prepared in a manner that appropriately reflected the provisions of Part 2, this would be a case where the consent authority would be required to give emphasis to Part 2.
90. As such if a plan had been competently prepared under the Act it may be that in many cases the consent authority would feel assured in taking the view that there was no need to refer to Part 2 because doing so would not add anything to the evaluative exercise. Abstract such assurance, or if in doubt, it would be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.
91. The Court held that in the circumstances of the case, the error was not significant and the High Court Judge was clearly correct when she held that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications, providing the plan had been properly prepared in accordance with Part 2. The Court did not consider however that *King Salmon* prevented recourse to Part 2 in the case of an application for resource consent. Its implications in that context were rather that genuine consideration and application of relevant plan considerations may leave little room for Part 2 to influence the outcome. That was so in the present case because of both the NZCPS and the Sounds Plan.
92. The Court held that the High Court did err in holding that the Environment Court was not able or required to consider Part 2 RMA directly and was bound by its expression in the relevant planning documents, but because there was

no reasons in the case to depart from Part 2's expression, the error was of no consequence.

93. Court held the High Court should not have remitted the case back to the EC for reconsideration.

#### Key findings

94. The Court of Appeal has held that consideration of Part 2 in resource consent decisions is not limited to the three exceptions defined by the Supreme Court in *King Salmon* (uncertainty, invalidity, or incomplete coverage). Part 2 may be considered as a check in appropriate cases where there is any doubt that the relevant planning documents may not properly embody Part 2. For instance, if a plan has not recognised and provided for a matter of national importance, then recourse to Part 2 would be appropriate.
95. However, the Court of Appeals' judgment should not be read as endorsing an "overall broad judgement" approach under Part 2 as a means to render ineffective district and regional plans. The emphasis from *King Salmon* on the importance of the words used in plans remains.

### **APPLICATION OF THE FINDINGS IN PRACTICE**

96. As noted in the case law that has been developing since the Supreme Court decision, the context to the *King Salmon* decision is an important consideration in terms of how the decision applies to other situations.
97. While the Supreme Court made determinations about the meaning of some words (avoid and appropriate) and determined that policies 13 and 15 of the NZCPS operate like bottom lines, the decision is still very much based on the factual situation it was dealing with. This factual situation included the finding of the Board that the Papatua salmon farm would have high to very high adverse effects on natural character and outstanding natural landscapes. Equally, the High Court has held that the broader statements from the Supreme Court regarding the scheme of the RMA are important and cannot be ignored.
98. While some commentators consider that the *King Salmon* decision has resulted in a fundamental shift in the way in which the NZCPS ought to be applied this is not the case as a matter of law. It has always been the case that plans and policies should be interpreted in the way the Supreme Court has ruled. The difficulty is that with the early introduction of the concept of the overall judgment the drafting of provisions has not been done with the level of precision and clarity that the Supreme Court has considered in the context of the NZCPS. For this reason the *King Salmon* case will have implications in cases where the wording of provisions, while clear on their face, do not actually say what they are meant to say.

## **Policy and plan making matters involving the application of the NZCPS**

99. Clearly the findings of the Supreme Court are directly relevant to policy and plan making involving the application of the NZCPS and this has been confirmed in subsequent case law. For policy and plan making involving the application of the NZCPS the following matters are considered:
- (a) The importance of identification of the extent of the coastal environment;
  - (b) Taking care when identifying areas of high/outstanding values; and
  - (c) Drafting RPS and plan provisions with precision and clarity.

### Identification of the extent of the coastal environment

100. RPSs and/or plans must identify areas of natural character, and natural features and natural landscapes, in the coastal environment.
101. The first step in identifying these areas is to define the extent and characteristics of the coastal environment, particularly the inland extent of the coastal environment, as this (including the coastal marine area) is where policies 13 and 15 of the NZCPS apply.
102. Identifying too extensive an area may have unintended consequences for the implementation of NZCPS objectives and policies, although the strong direction of these NZCPS policies should not be used to justify an unreasonably restrictive extent.
103. Policy 1 of the NZCPS addresses this, however, it may be helpful for further guidance to assist in relation to the varying nature of coastal environments and the need to not only preserve naturalness but also allow for development in appropriate cases.

### Identification of Areas with High / Outstanding Values

104. The Supreme Court found that the 2010 NZCPS has a plain and strong policy direction relating to areas of natural character, features and landscapes in the coastal environment:
- Policies 13(1)(a) and 15(a) – avoid adverse effects of activities on natural character in areas with outstanding natural character; and on outstanding natural features and landscapes;
  - Policy 13(1)(b) and 15(b) – avoid significant adverse effects of activities on natural character in all other areas; and all other natural features and landscapes.

105. With the policies using the word avoid, the Court has held this to mean prevent the occurrence of – i.e. no adverse effects can occur. This means that areas of outstanding natural character, features and landscapes in the coastal environment may need to be treated differently in RPSs and plans, compared with those away from the coastal environment.
106. When identifying these areas, a careful and clear approach and a strong methodology for identification and mapping is required. Within the coastal environment, policy makers need to be aware of the implications of the NZCPS policies for areas identified as outstanding, and the level of protection that must be afforded to them to give effect to the NZCPS. The Supreme Court observed that the classification of such areas as outstanding will not be the norm.<sup>16</sup> However, where an area does justify this identification, the strong direction of the NZCPS policies should not be used to adopt an even higher threshold in the coastal environment than would normally apply, such as ‘unique’.
107. In giving effect to policies 13 and 15, when identifying areas of natural character, features and landscapes, it is important to address and document the following:
- What are the characteristics, attributes, elements that contribute to an area being identified as having outstanding natural character or being an outstanding natural feature or landscape – what are their key/outstanding values?
  - What changes to these characteristics, attributes, elements would (or would not) adversely affect their key values, and why?
  - Where already modified environments are identified as having outstanding values, do the existing modifications / activities contribute to, or adversely affect, these values; and:
    - (a) can they continue to be accommodated, maintained, upgraded, be further modified,
    - (b) can consenting of existing activities with finite consent terms be provided for (such as in the coastal marine area), whilst avoiding adverse effects on the identified outstanding values?

#### Formulation of RPS/Plan Provisions

108. Clearly and systematically addressing and defining the above matters can provide the context for the RPS and/or plan policies, zoning and rules. As the

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<sup>16</sup> At [131]



Supreme Court noted, the adverse effects to be avoided relate to this context - what characteristics of an area contribute to its outstanding natural character or to its being identified as an outstanding natural feature or landscape, and which therefore require protection from adverse effects (and conversely which do not)? Similarly, what subdivision, use and development is inappropriate will also relate to this context.

109. Giving effect to the "avoid adverse effects" requirements of policies 13 and 15 will be assisted where:
- This context is clearly stated in formulating RPSs and/or plans;
  - Policies are formulated that are specific to the characteristics / values of each area that need to be protected, the relevant adverse effects that need to be avoided, and what activities are inappropriate; and
  - The zoning and rules reflect these policies.
110. The Supreme Court noted that developments with minor or transitory adverse effects may be considered appropriate – those with minor effects or those which enhance values may be able to be provided for. Another way of looking at this can be derived from this contextual evaluation – what effects are of concern for the outstanding values identified for each area – and what effects will not be adverse to, or even enhancing of, those values.

What does this mean in practice

111. In practical terms what the decision does mean is that there is a very tough threshold to meet for any policies and rules which would enable activities to be located in areas with high/outstanding value.
112. As described above, each natural character area and landscape has its own set of characteristics / values that may result in it being identified as outstanding.
113. The decision highlights the need to be very careful with mapping and terminology. Councils should have a clear and strong methodology for their identification and mapping. This should lead to well-defined statements of the characteristics / values of each area that needs to be protected, the relevant adverse effects to be avoided, and what activities are inappropriate. The policies, zoning and rules in RPSs and plans should clearly reflect this context.
114. Determining that an area has outstanding natural character or landscape values will mean that the protection of those values by avoiding adverse effects must be given effect to over other policies in the NZCPS, e.g. policies 6, 7, and 8, unless one of the three caveats identified by the Supreme Court apply.

115. In considering Policy 9 (ports) the Environment Court has held that as this policy is directive in its nature such that provision must be made for a resource consent process (pursuant to policy 7(1)(b)(ii)) to assess on a case by case basis activities which have effects on the matters regulated by policies 11(a), 13(a) and 15(a). In such cases, strong policy support is needed to guide assessment of resource consents. There may be other instances where directive policies cannot be reconciled even after careful analysis.
116. The Court noted that this approach could apply in relation to the other directive policies in the NZCPS, not just to Policy 9.

### **Policy and plan making matters involving the application of other NPSs**

117. The specific findings of the Supreme Court may be relevant to policy and plan making involving the application of other NPSs depending on the nature of the wording of those NPSs. This has been confirmed in case law<sup>17</sup>.
118. The NPSFM has one provision that uses the word 'avoid' in any absolute sense and this is in Objective B2 that states '*To avoid any further over-allocation of fresh water and phase out existing over-allocation.*'<sup>18</sup> It is clear from the context of this objective that avoiding further over-allocation of fresh water in over-allocated catchments is to be prevented and regional policies that do not achieve this objective would not be giving effect to the NPS. The NPSFM contains a National Objectives Framework that sets out the national values for freshwater and requires regional councils to follow certain processes in applying these values at the regional level. The framework also provides a series of attributes which are intended to operate as national bottom lines allowing for flexibility to go below the bottom lines in certain circumstances<sup>19</sup>.
119. The NPSs on **Electricity Transmission** and **Renewable Energy Generation** are enabling of the matters they relate to. The primary provisions in those NPS's do not focus on avoiding adverse effects on the environment per se but rather on providing a more positive national development framework for nationally significant infrastructure. However, both these NPSs include provisions with directive wording, giving strong directions to councils to provide for renewable electricity generation and the National Grid. They both also require decision-makers, to the extent reasonably possible, to avoid reverse sensitivity effects on these national resources. These directives must be implemented unless one of the caveats identified by the Supreme Court are present. As such, the application of these NPSs in the coastal environment is the scenario that is most likely to give rise to the situation where tensions

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<sup>17</sup> *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50

<sup>18</sup> Note this objective is unchanged from the 2011 NPS.

<sup>19</sup> See Policy CA4.

between directive policies occur. In these instances, the *Bay of Plenty* and *Port Otago Limited* decisions means that providing strong policy guidance for a consent process that seeks to reconcile seemingly conflicting higher order directives is appropriate and where this has not occurred the decision maker must seek to analyse the tensions between various policies and undertake "a thoroughgoing attempt to find a way to reconcile" the provisions considered to be in tension.

120. The implications of the application of the *King Salmon* decision on these other NPSs very much depends on the wording of the objectives and policies adopted by councils in the lower order RPSs, regional and district plans

### **Policy and plan making generally**

121. For planning practice, there is much that is positive about the approach taken by the Supreme Court. The Court's decision (albeit based on the factual situation it was dealing with) reinforces:
- The hierarchy of planning documents required under the RMA and the importance of the higher level documents in directing those that must follow them;
  - That the planning documents are intentional documents and mean what they say;
  - That language is important, and wording (and differences in wording) does matter;
  - The need to be precise and careful with words, to create certainty of meaning;
  - That policies, even in higher level documents, can be strong and directive, and then need to be implemented as such;
  - That reconciling the potential for conflicts between different provisions of a planning document is important.
122. Statutory directions that planning documents be prepared in accordance with Part 2<sup>20</sup> must still be complied with (albeit that Part 2 is likely to be properly reflected in higher order planning documents). However, lower level planning documents cannot be assumed to have given effect to those higher in the hierarchy. As such it is necessary for decision makers to assess proposed plans

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<sup>20</sup> Ss 61(1)(b), 66(1)(b), 74(1)(b) RMA, and *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764

to ensure they properly give effect to higher order documents as required by the statute.<sup>21</sup>

123. The Supreme Court noted that although sections 6(a) and (b) of the RMA do not give primacy to preservation or protection within the concept of sustainable management, this does not mean that a particular planning document may not give primacy to preservation or protection in particular circumstances<sup>22</sup>. The provisions of an RPS or plan cannot, therefore, be challenged just because they go beyond the “inappropriate” qualifier in ss6(a) and (b), and give full priority to protection or preservation, as the NZCPS does not provide for adverse effects in areas of outstanding natural character, features or landscapes.
124. The specific findings of the Supreme Court are likely to be relevant to policy and plan making generally, where the wording of higher order policies (such as may be found in other NPSs or RPSs) is directive, triggering a similar interpretation to that in *King Salmon*. See below for a discussion on case law interpretations of this matter.
125. The Court has said the higher the value given to something, the higher the level of protection it ought to benefit from. So if the Minister (in an NPS) or a council (in an RPS) has identified certain areas as having certain values and directs that adverse effects on those values are to be avoided in those areas, then the lower order documents that follow must give effect to this policy direction and essentially prevent activities that would have adverse effects on those values. This can be through the use of prohibited activity status or through the use of non-complying or discretionary activities with carefully worded policy direction. The use of prohibited status will be appropriate where an activity invariably gives rise to effects that are to be avoided. The use of non-complying would be appropriate for activities that do not invariably give rise to effects that are to be avoided, but are not supported in any national direction. Discretionary activity status would be appropriate in those situations where there are conflicting tensions between national policy. This would be for those activities that may give rise to adverse effects that are to be avoided per parts of the NZCPS, but are also given directive support in other national directions such as other parts of the NZCPS, the NPSET or NPSREG.

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<sup>21</sup> Ss 62(3), 67(3), 75(3) RMA and *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080

<sup>22</sup> At [149]

## RPS and Plan making matters

126. The direct outcome from the Supreme Court decision is a move away from an overall judgment approach to the implementation of provisions in higher order planning documents, when giving effect to them. These documents now need to be written in the knowledge that there will be no reverting to the uncertainty (or flexibility) of the previous overall judgment approach when they come to be implemented. Subsequent case law has confirmed this approach.
127. The Court's decision supports the importance of certainty in planning documents, or at least clarity. A disciplined focus is required to create clear policy direction, to define what outcomes are sought and what adverse effects or inappropriate activities are to be avoided, where, and under what circumstances. This does not mean that there can be no flexibility in RPS and plan provisions, however, the flexibility itself needs to be specifically determined and clearly applied – what provisions (and therefore outcomes) can be flexible in their implementation (with resulting in uncertainty) and what is to be directive?
128. The inability to deal with specific circumstances flexibly, as and when they arise, may result in a reluctance to use directive terms in higher level planning documents. There is potential for wider use of qualifiers to such policies, for example, “*as far as practicable*”, “*where appropriate*”. However, for any such qualifiers, good policy writing demands that the context for application of the qualifier is clear, directing the policy maker to define what flexibility is available and under what circumstances it should be applied.
129. The Supreme Court undertook a detailed analysis of the relevant NZCPS objectives and policies, in order to reconcile apparent conflict. The Court emphasised the importance of undertaking such a reconciliation for any differences in policy / planning provisions. It stated that there should be infrequent occurrences of policies pulling in different directions, and effort should be made to avoid this. Apparent conflict between particular policies should dissolve if close attention is paid to the way in which the policies are expressed. This would apply to both the preparation and the interpretation of policies.
130. One implication relates to the tendency to prepare “Chapter-based” RPSs and plans, where each topic is covered in a separate chapter, with any conflicts between the policies in different chapters being worked through in an overall judgment, potentially referring back to Part 2. An example could be potentially conflicting provisions in RPS chapters on natural character and landscapes, and on infrastructure, when considering how to give effect to the RPS in the utilities provisions of a district plan. Without reverting to an overall judgment approach, an enabling policy in relation to infrastructure may well

not be able to be implemented in a way that over-rides a more specific avoidance policy regarding adverse effects on high /outstanding natural character or landscape values. This may lead to RPSs and plans being more complex in structure, with exceptions stated or allowable adverse effects (or activities) defined throughout the chapters, qualifying any avoidance policies.

131. However, none of this is really new, and in relation to RPS and plan making, the Court's decision acts to strengthen the focus on good policy and plan making practice.

### **Resource Consents (and notices of requirement)**

132. Part 2 may be considered as a check in appropriate cases where there is any doubt that the relevant planning documents may not properly embody Part 2. For instance, if a plan has not recognised and provided for a matter of national importance, then recourse to Part 2 would be appropriate. Where the exceptions of invalidity, uncertainty or not covering the field apply, then resource to Part 2 will be necessary and appropriate.
133. However, where a plan's provisions are settled, clear and direct in relation to the relevant matters, and have been prepared in a way that specifically gives effect to the relevant provisions of the higher order planning documents, there would appear to be no need to consider Part 2 for resource consents. Irrespective of the requirement in s104 for consideration to be subject to Part 2, where plan provisions are settled and relevant, and have been tested in relation to the higher order planning documents (including Part 2), the focus should be on consideration of the particular plan provisions and the reconciliation or weighting of the direction provided by those provisions.
134. In addition many of the broader principles applied by the Court in *King Salmon* will also apply to consideration of resource consents:
- Words mean what they plainly say – language is important, as are differences in wording;
  - Prescriptive policies should be awarded more weight than flexible ones;
  - A thorough attempt should be made to reconcile apparent conflicts between policies, so as to minimise interpretation of policies as pulling in different directions;
  - Careful consideration should be given to any remaining conflicts between policies and appropriate weighting determined for differing policies.

## CONCLUSION

135. The Supreme Court decision in *King Salmon* has been noted and followed in a number of cases involving both policies and plans and resource consents and notices of requirement. While this case law is still developing, a much clearer picture is emerging of the application of the myriad of issues the Supreme Court traversed relevant to resource management decision making. A more nuanced approach to the application of *King Salmon* is clearly supported in the decisions in *Davidson*, and *Port Otago Limited* in particular.
136. In terms of the effectiveness review of the NZCPS there are two overall issues to take into account:
- (a) Does the NZCPS say what it means, protect what it intends to protect, and enable what it intends to enable?
  - (b) Does the guidance material need amending to assist those developing policies and plans to apply the *King Salmon* finding during the development of these.