IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-683
[2013] NZHC 1346

IN THE MATTER OF	an appeal under s 299 Resource Management Act 1991
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	BULLER DISTRICT COUNCIL AND WEST COAST REGIONAL COUNCIL First Respondents
	BULLER COAL LIMITED Second Respondent
AND	WEST COAST ENVIRONMENTAL NETWORK INCORPORATED Interested Party

Hearing: 27, 28 and 30 May 2013

Appearances: P D Anderson and S R Gepp for the Appellant
J O M Appleyard, B G Williams and T A Lowe for Respondents
Q A M Davies for Interested Party

Judgment: 7 June 2013

JUDGMENT OF FOGARTY J

Contents

Introduction

[1] This is an appeal against an interim decision of the Environment Court, delivered on 27 March 2013.[1] In that decision the Environment Court was considering an application by Buller Coal Ltd (BCL) for consents to establish an open cast coal mine (the escarpment mine proposal or EMP) on the Denniston Plateau. The decision did not grant the consents. However, it advised that it considered that consents to the EMP could be achieved, but invited the parties to consider, discuss and negotiate changes to the proffered conditions. Notwithstanding its interim character, the Environment Court made findings which it intends to apply when considering the conditions to be imposed. So there is a decision which can be appealed, see s 299.

[2] This is the second decision by the Environment Court on this application. The first was another interim decision, delivered on 21 March,[2] on a preliminary point as to whether Solid Energy's possible open cast Sullivan Mine adjoining the EMP was part of the "existing environment" that would otherwise trigger a need for assessment of cumulative effects. The Environment Court answered no, and that decision was the subject of a separate appeal. The appeal was dismissed.[3]

[3] The decision on that appeal precedes this decision. The two decisions can be regarded as companion decisions, for the purpose of assimilating and understanding the facts. While there is some overlap in the descriptions of the facts, to enable this decision to be read standing alone, most readers of this decision will also have occasion to read the decision on the Sullivan Mine point. For this reason, this decision assumes a degree of familiarity with the Denniston Plateau setting of the mine and the escarpment mine proposal.

[4] The Denniston Plateau is in the Buller. It has been the subject of coal mining activity in the past. It contains a valuable resource, "coking" coal, which is very suitable for the manufacture of cement and steel. The parent of BCL, Bathurst,

---

1 *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

2 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 42.

3 *Royal Forest and Bird Society of New Zealand Inc v Buller District Council and West Coast Regional Council & Anor* [2013] NZHC 1324.

has exploration licences over most of the Denniston Plateau, except for the possible Sullivan Mine, where a coal mining licence has been granted for 40 years, now held by Solid Energy. The Minister has just altered Solid Energy's licence to allow open cast mining. BCL is seeking consents to operate the escarpment mine to the south of the Denniston Plateau. The intention is that this will be mined as an open cast mine 24 hours/7 days for 5 or 6 years.

[5] BCL's primary mitigation programme is to remove fauna: lizards, snails, etc, before mining, and rehabilitate the site at the end of mining, to create an environment compatible with the natural landscape from which a stable indigenous ecosystem will develop long term. Bathurst will, it is likely, at some stage after that, move on to further mining on the plateau.

[6] BCL accepts its primary mitigation and remediation programme will not completely avoid or mitigate the adverse effects of the mining. So, in addition, BCL offered to carry out a programme of biodiversity enhancement, mainly by predator control, in two different areas:

(a) On an area of the Denniston Plateau and surrounds, termed the Denniston Biodiversity Enhancement Area (DBEA), for 50 years; and

(b) Within the Kahurangi National Park (some 100 kilometres north of the EMP site), termed the Heaphy Biodiversity Enhancement Area (HBEA), for 35 years.

[7] Within the course of the hearing, the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) raised concerns about Bathurst's longer term intention to open cast mine a large part of the DBEA. Recognising this, the Environment Court issued a minute in which it suggested there would need to be a lasting environment enhancement in compensation for unremediated effects. As a result BCL filed a proposal to establish a Denniston Permanent Protection Area (DPPA), an area within the DBEA. BCL proposed a condition that:

> The consent holder shall ensure a form of permanent legal protection from land disturbance of any type within the DPPA.

[8] Because Bathurst does not own the land, which is owned by the Crown, there are unresolved issues as to how Bathurst can make the DPPA promise. The DPPA falls within the DBEA, so will also be part of the biodiversity enhancement programme.

[9] BCL describes the DBEA, the DPPA and the HBEA as a "comprehensive offset mitigation and compensation" package. Overall, together with the primary rehabilitation programme, BCL contends it will provide a "net conservation gain for the escarpment mine proposal, EMP."

[10] The questions of law dividing the parties in this appeal centre on the BCL description of the DBEA, DPPA and HBEA as "offset mitigation".

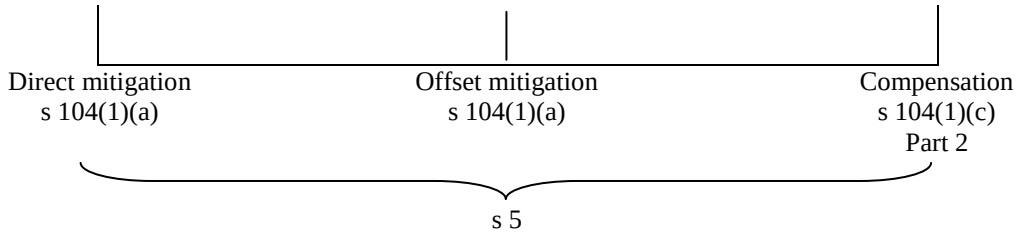
[11] The Environment Court's key conclusions are:

(a) measures within the mine site connected with the manner of mining are direct mitigation;

(b) measures to enhance places on the Denniston Plateau outside the mine site, and species that are displaced from the mine site, may properly be regarded as (offset) mitigation of the adverse effects of the mine, at [212], [227] and [325];

(c) the Court refers to the HBEA as compensation on a number of occasions (rather than a form of hybrid offset/compensation contended by BCL). The Court does however accept that species benefitted by the proposal, which would suffer adverse effects on Denniston, could be compensation in kind (ie, an offset), and necessary, since there is uncertainty about the extent to which Denniston populations will be benefitted by the predator control there, at [213]-[215], and [234]-[235].

[12] BCL submitted that there is a continuum which can be visually represented as:



[13] BCL relies on a distinction, drawn by a Board of Inquiry in the *Transmission Gully* decision:[4]

> What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term *"offsetting"* encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
>
> Offsetting relating to **the values affected by an activity** was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> (Emphasis added)

[14] Forest and Bird argue that the DPPA offer adds nothing. For it is over a site which does not have valuable coal, so that it is never going to be mined. Alternatively, that as there is no resource consent to mine in the DPPA, there is no credible mining threat to protect against; applying [84] of *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[5] Third, in the alternative, that the offer to have a predator control programme over the Denniston Biodiversity Enhancement Area (DBEA) is qualified by the fact that large parts of that area are going to be mined over the course of the biodiversity programme so the benefits are not significant. This argument assumes a mining threat in the future.

[15] Forest and Bird argues there were errors when the Environment Court examined and weighed these offers. That the Court confused "mitigation" of adverse effects with "offset" benefits. It says that these confusions are material because

---

4 Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072) at [210].

5 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

mitigation is directly addressed in s 5 (2) of the Resource Management Act 1991 (RMA), and thereby considered when applying s 104. Forest and Bird agree with BCL, that offsets can be offered by applicants and taken into account; but only as a relevant consideration in either s 5(2) or in s 104(1)(a). Forest and Bird argue that as a matter of law offsets are a materially lesser value under the RMA than mitigation. Thereby a confusion between mitigation and offsets is a legal error and can lead to error in weighing the pros and cons of a proposal. Forest and Bird says these errors are material in this decision, for the Environment Court found the case "quite finely balanced".[6]

[16] The proposed open cast mine will produce a lot of surplus material which has to be disposed of on the plateau. There is an area known as Barren Valley, located towards the eastern end of the proposed escarpment mine footprint. It is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge, due to the presence there of the nationally critical umbrella fern *Sticherus tener*. During the hearing, the Environment Court asked for evidence on whether the mine could be developed in such a way to avoid the Barren Valley and the Sticherus Ridge. Otherwise, if the valley was going to be used as an overburden dump, the volumes of overburden were sufficient to overtop the valley and cover the ridge, to the detriment of the umbrella fern habitat. BCL argued that there would be significant economic consequences to avoid the Barren Valley; there being impacts on logistics, including a greater distance for fill to be hauled, and double handling of material. The Court accepted that argument, and allowed the Barren Valley and Sticherus Ridge to be used, citing the logistics and consequent cost as a reason for not protecting that area. Forest and Bird argue that as a matter of law it was an error for the Environment Court to take into account the cost of the condition, and the impact of that cost on the commercial viability of the mine.

---

6 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [335].

The issues

[17] In the notice of motion of appeal, Forest and Bird pleaded eight errors of law. In the course of the hearing, three were abandoned. They were numbers one, four and five; leaving two, three, six, seven and eight.

[18] The remaining pleadings are:

Second error of law – Biodiversity offset and compensation as mitigation

[19] The proposed biodiversity offset and compensation would not mitigate the adverse effects of the activity on the environment in terms of s 104(1), and the Environment Court applied the wrong legal test in finding to the contrary.

Third error of law – proposal to increase protection status of land

[20] Increasing the protection status of land, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1).

Sixth error of law – security of benefits of offsets

[21] The benefits of a biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration under s 104(1).

Seventh error of law – offset of significant habitats of indigenous fauna

[22] When recognising and providing for the protection of significant indigenous vegetation and significant habitats of indigenous fauna, as required by s 6(c), the Environment Court applied a wrong legal test, by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvement to other habitats of these species.

Eighth error of law - mining the Barren Valley and Sticherus Ridge

[23] Forest and Bird sought that, even if consent was granted, conditions be imposed to protect the Barren Valley and Sticherus Ridge. The Barren Valley is

located towards the eastern end of the proposed escarpment mine footprint, and is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge due to the presence of the nationally critical umbrella fern *Sticherus tener*.

[24] In the course of its submissions, particularly in its closing submissions on materiality, Forest and Bird usefully made these intentions as to error of law more concrete.

[25] As to the second error, it is submitted that the Court erred in finding the DBEA (and aspects of the HBEA) constitute mitigation.

[26] In respect of the third error, Forest and Bird submitted that increasing the protection status of the DPPA, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1)(a).

[27] In respect of the sixth error, Forest and Bird submitted that the benefits of the DBEA predator control are dependent on the habitat of the DBEA persisting. The Court accepted that there are proposals afoot to mine parts of the DBEA, but held it could not have regard to those proposals (or impose conditions protecting against the effects of those proposals on the habitat of the DBEA), because that is a matter for future consent authorities. It therefore considered the benefits of the DBEA as if those proposals did not exist. Forest and Bird submits that the Court took into account an irrelevant consideration when it considered the benefits of the DBEA in circumstances where those benefits could not be secured through conditions of consent.

[28] In respect of the seventh error, Forest and Bird submitted that it was an error for the Environment Court to include the HBEA in its consideration of whether granting consent would achieve protection of significant indigenous vegetation and significant habitats of indigenous fauna as required by s 6(c). That it included the HBEA in what it described as "offset mitigation". Given the Court's finding, which was inevitable, that the HBEA constitutes a different habitat to the EMP site (Heaphy

is 100 kilometres north), the HBEA proposal is only relevant to protecting by compensating/offsetting for significant fauna, not the significant habitat.

Second error of law – biodiversity offset and compensation as mitigation

[29] The DBEA covers the whole of the Denniston Plateau and surrounds. The part of the DBEA that is on the plateau mostly covers the same vegetation, habitat and types of species that will be adversely affected by the EMP.

[30] The HBEA covers vegetation, habitat types and (mostly) species that are different to those that will be adversely affected by the EMP.

[31] The Environment Court found that the DBEA would largely (but not completely) mitigate adverse effects on fauna:

> [226] In short, there would be some species that would be lost to the mine site, and there could be some local extinctions.
>
> [227] **The principal offset** offered for these effects on the mine site is a predator and weed control programme over a 4,500 ha area on the Denniston Plateau. It is clear to us that there would be some benefits from this control to a number of threatened or at risk species on the plateau. That is because there is evidence of rats at moderate density in forested areas of the plateau in years when far fewer might reasonably have been expected. And we are satisfied that there were even more rats in areas just off the plateau proper, but at comparatively high altitudes. The evidence is that both riflemen and kiwi use the forested area on and adjacent to the plateau and mine site. We also recall that while no study has been made of fernbird's use of coal measures habitat, they spend much of the time on the ground in thick, but lower, vegetation. Dr Parkes's evidence is that ship rats are major predators of small birds, and take eggs and chicks of both arboreal and ground-nesting species. We have no evidence that this general proposition would not apply in respect of the specific species on the Denniston. Introduced predators also take snails, even if a smaller percentage of *patrickensis* on Denniston than of other species in other habitats.
>
> (Emphasis added)

[32] Naturally enough, the Court did not make similar findings as to flora. Later in the judgment, it repeated its findings as to fauna, and made an observation as to flora:

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation

> in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)
>
> [326] That is not the situation with areas of significant indigenous vegetation.
>
> [327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[33] With respect to the HBEA, the Environment Court found that the Heaphy package offered protection for important fauna in the Heaphy as compensation for loss of significant flora on Denniston:

> [234] Dr Ussher, restoration ecologist called by BCL, opined that the benefits to fauna in the Heaphy Biodiversity Enhancement Area were not needed to offset or compensate for adverse effects on fauna and their habitat on the mine site. That, in his view, was achieved by the predator protection programme on Denniston Plateau. We do not believe the evidence is certain enough to accept that assertion. Dr Ussher added:
>
> > Benefits to plant communities in the Heaphy BEA are the most relevant benefits for comparing against residual losses of plant communities in the EMP footprint; however an exchange ratio would be needed to account for differences between vegetation types at Denniston and the Heaphy.
> >
> > Ultimately broader considerations around sustainable, landscape level management of broad eco-systems and the benefits that this brings beyond a reductionist approach may outweigh the need to engage in biodiversity accounting practices as described here.
>
> We suspect Dr Ussher was offering this justification for the Heaphy package, which he acknowledged was in large measure a "like for unlike" form of compensation. The Heaphy package in our view offers protection for important fauna in the Heaphy as compensation for the loss of significant

> flora on Denniston. That may be important since the extent of benefits to fauna on Denniston from the predator control package is, on the evidence of Dr Parkes, not known.
>
> ...
>
> [237] On the surface, the "desiderata" in ***JFI Limited*** would suggest that we give limited significance to the compensation package in the Heaphy. To the extent that species are benefitted which would suffer adverse effects on Denniston, we consider that to be compensation in kind, and necessary, since there is uncertainty about the extent to which the Denniston populations will be benefitted by the predator control there. But in terms of the Denniston flora, the compensation would be what Dr Ussher acknowledged to be "unlike for like." That could be given weight only on the basis of the much broader approach to the management of eco-systems to which Dr Ussher referred in his initial evidence. We consider the different types of effects at issue in ***JFI Limited*** and this case give us scope to accept as **offset mitigation** benefits to those same species that are adversely affected by the EMP proposal.
>
> (Emphasis added)

[34] The Court had earlier found that the DBEA (and aspects of the HBEA) constituted mitigation of the adverse effects of the EMP on the wider environment.

> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, **as a mitigation of the adverse effects** of the mine on the wider environment.
>
> (Emphasis added)

[35] It then later found that the DBEA proposal was supported by plan provisions favouring mitigation:

> [307] For the reasons we have given, we hold that the proposal is somewhat inconsistent with, rather than contrary to the provisions on wetlands, significant indigenous fauna and significant habitats of indigenous fauna to which Mr Purves referred. But these are provisions of considerable significance to this case. We accept that provisions which enable mining and encourage these types of **mitigation/offsetting** proposed pull in the opposite direction. Overall we find that the provisions of the plans are evenly balanced with respect to the proposal rather than consistent.
>
> (Emphasis added)

[36] Section 104, considered as a whole, confers a discretion on consent authorities (which include the Environment Court) to grant resource consents.

Section 104 gives a number of directions. It is sufficient for this case to focus on s 104(1), which provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[37] Part 2 of the Act contains four sections (ss 5, 6, 7 and 8). The argument of the parties in this Court focussed only on some of these provisions. First on the application of s 5(2)(a) and (c), which provides:

> **5 Purpose**
>
> ...
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> ...
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment

And on s 6(c), which provides

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[38] It is only necessary to consider part of s 104 and these parts of ss 5 and 6, because it is a core characteristic of law that it is the context which makes considerations relevant. This is particularly a characteristic of the RMA, which provides for numerous considerations, not all of which are made relevant in a particular context.

[39] It is common ground in this case that the open cast mining proposal, the EMP, cannot be undertaken avoiding any adverse effects of activities on the environment, or completely protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[40] "Effect" is widely defined. Section 3 of the Act provides:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

[41] It will be seen that the definition includes any positive effect, and enables a forward-looking examination of future effects, whether temporary or permanent.

[42] "Mitigating" is not defined.

[43] "Offset" is used only once in the Act. It appears in s 108(10), which is the section addressing conditions of resource consents. Section 108(9) defines "financial contribution" as meaning a contribution of money or land, or a combination. Subsection 10 then provides:

108 Conditions of resource consents

...

(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—

(a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) the level of contribution is determined in the manner described in the plan or proposed plan.

[44] The consequence of subsection 10 is that financial contributions can only be made in accordance with purposes specified in the plan or proposed plan. No such purposes are specified in the plans before this authority.

[45] There is competing jurisprudence on how regulatory statutes should be interpreted and applied. One school is that, where the terms of the statute allow, Judges can develop policy within the boundaries allowed by the language of the statute. The other school argues that Judges should take the text in regulatory statutes and apply it to the facts without adding new criteria, or elaborating on the language in the statute.

[46] In New Zealand, I think the law is that additional criteria can only be taken into account in the application of regulatory statutes when the text of the statute, read

in the light of its purpose, applying to a particular context, implicitly makes relevant a consideration. The authority for this proposition is the decision of the Privy Council in *Mercury Energy Ltd v ECNZ*.[7] This was a judicial review application, but it was concerned, as I am in this case, to identify whether or not an authority has contravened the law. The Privy Council re-endorsed the relevance of Lord Green MR's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[8] That judgment includes this proposition:[9]

> If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters...

[47] The use of the term "compensation" dates back to the decision of the Environment Court in *J F Investments Ltd v Queenstown Lakes District Council*.[10] In that judgment, J F Investments Ltd applied to the council for a subdivision consent to make a boundary adjustment, and for a land use consent to identify a building platform/build a house on its land. As part of the package, the applicant offered to spend up to $100,000 removing wilding pines which marred the outstanding natural landscape. The Court was considering the application of s 6(a), which provides:

> (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.

---

7 *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 (PC). See also *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HL), which also applies the *Wednesbury* case, and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (The *Wednesbury* case).

9 See *Mercury* at 389.

10 *J F Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch C48/2006, 27 April 2006.

[48] The Court recognised that s 6 does not function to ensure the preservation of matters of national importance, citing *New Zealand Rail Ltd v Marlborough District Council*.[11] The Court reasoned:[12]

> [27] We conclude that, since activities which meet other agendas of national importance are allowable under the RMA even though they create permanent adverse effects on nationally important natural resources, it is inconsistent to suggest that environmental compensation is outside the scope of the Act. If adverse effects on the environment can be justified as providing a net benefit because they are in the national interest, then adverse effects offset by a net *conservation* benefit allowed by enhancement or the remedying of other adverse effects on the relevant environment, landscape or area must logically be justifiable also. They are certainly relevant under both s 5(2)(c) and s 7 of the RMA.

[49] To my mind, that paragraph would read the same if, instead of the phrase "environmental compensation" one replaced it with the phrase "environmental offset". "Offset" is used in the next sentence. Both in that paragraph and in this case, I have noticed that counsel and the Court seem to use the term "offset" and "compensation" as synonyms.

[50] Offsets also fit into the formulation expressed in the House of Lords in *Newbury District Council v Secretary of State for the Environment*, endorsed by the Court of Appeal in *Housing New Zealand Ltd v Waitakere City Council*,[13] being:[14]

(a) For a resource management purpose.

(b) Fairly and reasonably related to the proposal.

[51] I think it is particularly important when applying the RMA, to exercise a discretion, to conform with that principle. This is because the history of the enactment of this Act reveals that it has borrowed some international concepts, particularly sustainable management. Secondly, it has selected numerous criteria, all contained in Part 2, giving them different scales of importance. These criteria reflect the New Zealand-ness of the RMA. For example, s 6 starts with the preservation of the natural character of the coastal environment. New Zealand is an island nation.

---

11 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at [86], Greig J.
12 *J F Investments Ltd v Queenstown Lakes District Council* at [27].
13 *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).
14 *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 at 739.

Section 7(a) requires particular regard to kaitiakitanga. Section 6(e) provides for the recognition of and provision for the relationship with Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. In

short, at a glance, it can be seen that Parliament has given particular and careful attention to the values and goals that should be pursued in the application of the RMA.

[52] It is clear that Parliament did not intend the RMA to be a zero sum game, in the sense that all adverse effects which were unavoidable had to be mitigated or compensated. Section 17 contains a duty to avoid, remedy or mitigate adverse effects, gives power to the Environment Court to grant enforcement orders, but is qualified in s 319 so that the Environment Court cannot make an enforcement order against a person if the person is acting in accordance with a rule in a plan, a resource consent or a designation, the adverse effects of which were recognised at the time of the granting of the consent, unless the Court considers it is appropriate to do so because of an elapse of time and change of circumstances.[15]

[53] Sections 17 and 319 reinforce the natural inference that s 5(2) envisages that sustainable management will, from time to time, make choices which may prefer the development of natural and physical resources over their protection, including the special protection "required" in s 6.

[54] As already noted, the RMA does refer to the concept of offset. Furthermore, it uses the concept of offset where there may be a financial contribution of land, clearly being land other than the site upon which the activity is sought to be pursued. Nor is there any qualification in s 108(10) confining offset to situations where it operates as mitigation of the adverse effect. The term "offset" naturally has a different normal usage from the term "mitigate". The term "offset" carries within it the assumption that what it is offsetting remains. So, for example, if there is an adverse effect that continues, but those adverse effects can be seen as being offset by some positive effects.

---

15 Sections 17(4), 319(2) and (3).

[55] For these reasons, I am satisfied that, where an applicant offers an offset providing positive effects, depending on the nature of the offset and the context, the consent authority can by implication decide it ought to have regard to them, in an appropriate context, made relevant by s 5(2).

[56] There was no contest between counsel before me that the Environment Court ought to have had regard to the DBEA and the HBEA. The argument of Forest and Bird was not as to the relevance of consideration, but to the classification of the consideration. This was because implicitly Forest and Bird was arguing that mitigation deserves a greater weighting in the scheme of the Act than an offset.

[57] Both BCL and Forest and Bird used compensation as a synonym for offset. So does the Environment Court in a number of authorities, starting with *J F Investments*, as already noted above. I have not heard full argument as to the justification for using the term "compensation". In principle, High Court Judges should confine themselves to resolving disputes that are brought to the Court. However, I do not find it possible to use the word "compensation".

[58] The RMA has numerous provisions which use the word compensation. But no provisions which provide for compensation if adverse effects are not completely avoided, remedied or mitigated. The compensation provisions are directed, as one would expect for constitutional reasons, to addressing the extent of compensation payable if property rights are taken.[16] To compensate can be limited to counterbalancing, but it frequently is used in a way which carries the value that there ought to be the making of amends. That value has been addressed in the RMA but given limited functionality in the provisions that have just been footnoted. It is not deployed in Part 2 or in s 104.

[59] However, I am satisfied that it is sufficient in this case to resolve whether or not offsets can be regarded as a form of mitigation, sometimes called "offset mitigation".

---

[16] Sections 85, 86, 116A, 150F, 185, 186, 198, 237E, 237F, 237G, 237H, 331, 414, 416 and 429.

[60] There was general agreement between counsel, and the Court, that s 104(1)(a) allows the taking into account of positive effects on the environment proffered by the applicant in consideration for allowing the activity. In short, offsets can be had regard to when exercising the discretion in s 104.

[61] The core problem set for resolution in these proceedings is whether or not the concept of "offset mitigation" is relevant, or whether the two concepts should be kept apart. BCL argues for the utilisation of offset mitigation. Forest and Bird opposes it. Forest and Bird's point is that mitigating adverse activity warrants greater weighting in deliberations than offsetting.

[62] I agree that that offset is not "mitigation" as the word is used in s 5(2)(c). There is no reason to go beyond the normal meaning of the term mitigate, particularly as it occurs in a phrase, "avoiding, remedying or mitigating".

[63] Counsel for Forest and Bird's main submission was that two other decisions overlook the distinction between actions that address effects of the activity for which consent is sought (which can be mitigation), and actions that address the effects of other activities (offsets), and so are not correct. These are the Board of Inquiry's decision in *Transmission Gully*[17] and *Mainpower NZ Ltd v Hurunui District Council*.[18]

[64] In *Transmission Gully*, the Board of Inquiry found that:

> ...offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[65] In *Mainpower*, the Environment Court noted that the terminology associated with offsets was becoming loosely employed and confusing. The Court in *Mainpower* applied the *Transmission Gully* approach to offsetting. It found that:[19]

---

17 Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072).

18 *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384.

19 *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at 463.

> The offsetting for Mt Cass clearly relates to the values being affected, and secondly, it is being undertaken on the same site. Therefore we consider it to be a "form of remedy or mitigation of adverse effects" rather than environmental compensation.

[66] The decision of the Environment Court in *Day v Manawatu-Wanganui Regional Council*[20] is in contrast. That case was concerned with the appropriate wording in the policy framework for considering the resource consents in the proposed One Plan. The Court was specifically considering whether offsetting should be required by the plan for residual adverse effects following appropriate avoidance, remedy and mitigation. The decision states:

> [3-61] An argument was made that a biodiversity offset is a subset of remediation or mitigation (and even, potentially, avoidance) and should not be specifically referred to or required.
>
> [3-62] Meridian submitted that the Final Decision and Report of the Board of Inquiry into New Zealand Transport Agency Transmission Gully Plan Change Request has close parallels with the matter considered by the Court and that it had taken this approach. The appeal to the High Court against this decision did not deal with this particular matter.
>
> [3-63] With respect to the Board of Inquiry, we do not consider that offsetting is a response that should be subsumed under the terms remediation or mitigation in the POP in such a way. We agree with the Minister that in developing a planning framework, **there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation – at the point of impact.**

[67] Counsel for BCL supported the *Transmission Gully* reasoning. Although it modified the reasoning by saying there was a continuum. Counsel submitted:

> At one end of the continuum are offsets. They are regarded as actions which are most directly related to avoiding, remedying or mitigating an adverse effect, in this case works on Denniston Plateau; and
>
> At the other end of the continuum is compensation – ie, positive effects which although they might be less to do with actual mitigating, remedying or avoiding a particular adverse effect arising from a proposal – ie, involve an unlike trade, are nevertheless positive effects that should be incorporated into the wider balancing process under s 5.

---

[20] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

[68] Counsel for BCL argued that the Environment Court in this case was taking a similar approach as that in *Transmission Gully*. Counsel particularly referred to [211] and [212], which provide:[21]

> [211] These desiderata were applied and developed in ***Director-General of Conservation v Wairoa District Council***, and ***Royal Forest and Bird Protection Society Inc v The Gisborne District Council***. Particularly in more recent cases, the Court and Boards of Inquiry (presided over by Environment Judges) have tended to draw a distinction between various types of offsetting, some of which they tend to include in the category of remedy and mitigation, and some to be regarded as compensation. The Board of Inquiry into the proposed Transmission Gully Plan Change expressed it like this:
>
> > What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term "offsetting" encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
> >
> > Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, as a mitigation of the adverse effects of the mine on the wider environment.

[69] I agree that the Environment Court in this case was directly applying *Transmission Gully* and adopting the proposition, cited above, that:

> Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[70] That explains why the Environment Court in this case did refer to offset mitigation.

[71] There is obviously an attraction to give greater weight to offsetting, where the offsetting relates to the values adversely affected by an activity for which resource

---

[21] *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

consent is being granted. That can be done without calling the offset "mitigation" or "offset mitigation".

[72] I am of the view that counsel for Forest and Bird are correct, that such offsets do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, for example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was on the environment that is being destroyed was lifted and placed in the new environment. Merely to say that the positive benefit offered relates to the values affected by an adverse effect is, in my view, applying mitigating outside the normal usage of that term. And the normal usage would appear to apply when reading s 5(2). The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

[73] This reasoning is supported by the helpful submissions I received from Mr Davies, counsel for West Coast Environmental Network Inc. He submitted that "mitigation" by definition must be at the point of impact. He invited this Court to follow the Environment Court in *Day v Manawatu-Wanganui Regional Council*.[22]

[74] Like the other counsel, Mr Davies agreed that offsetting is a positive benefit and may be taken into account, he said, under s 104(1)(a). He submitted that in order for an adverse effect on the environment to be mitigated, that effect must be mitigated both at an ecosystem level and at the level of their constituent parts. That submission was drawing upon the definition of intrinsic values which appears in the statute. Intrinsic values is defined:

> **2 Interpretation**
>
> ...
>
> **intrinsic values,** in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—

[22] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

(a) their biological and genetic diversity; and

(b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience:

...

I agree. I accept his submissions, that offsets best operate at the ecosystem level. (This is not to say they cannot be wider.) They are not mitigating, in that they do not address effects at the point of impact, they are better viewed as a positive environmental effect to be taken into account, pursuant to s 104(1)(a) and (c), and s 5(2).

[75] Coming back to the context, I am referring here to the DBEA, which is improving other parts of the same ecosystem, part of which is lost by the open cast mining. That can be distinguished from the ecosystem in the Heaphy, 100 kilometres away. Then again, perhaps if one wants to, one can refer to the ecosystem of the Buller. It is, in one natural use of the term, the same environment.

[76] But overall, I think there was an error of law in the Environment Court, in its interim decision, treating the DBEA, and possibly the HBEA, as offset mitigation. Neither mitigate the adverse effects of the loss of the flora and the habitat and fauna caused by the open cast mining and associated activities in the EMP.

[77] The next question is whether or not this is a material error of law warranting any reconsideration of the reasoning so far by the Environment Court. I deal with materiality of error at the end of this judgment.

[78] This analysis resolves the first error of law. The proposed biodiversity offsets in the DBEA and the HBEA do not mitigate the adverse effects of the activity on the environment. They cannot also be characterised as offset mitigation. They are offsets and are relevant considerations to be weighed in favour of the application by reason of s 104(1)(a) and (c), and s 5(2).

Third error of law – proposal to increase protection status of DPPA

[79] The Environment Court discussed the DPPA:

[247] The appellants' objections relate not only to the legality of condition 145, but to its merits. They rely on a statement in the evidence of Dr Ussher **that land offered as an offset must have a credible threat against it**, and contend that the condition as proposed by BCL does not require the DPPA to contain coal and be under such threat.

[248] After its closing submissions were written, BCL defined more precisely the area for which it proposed to suggest further legal protection. In the last two days of the hearing it produced a map which purported to show that the area does contain coal. It accepted that the vast majority of the DPPA, as mapped in coal values, shows very low values, and if there is coal of any value in it the vast majority of it is of low value. **Mr Welsh could not tell us whether or not mining it was a practical proposition. This is all rather speculative, and might not advance matters greatly.**

[249] We remind ourselves however that the purpose of additional protection is not to deny potential miners coal, but to provide the best possible conditions for indigenous eco-systems with indigenous flora and fauna to flourish. We are not persuaded by BCL's submission that only open-cast mining could damage the ecosystems of the DPPA. We accept that the phrase "land disturbance" could capture minor activities. **But the purpose of an offset is to mitigate adverse effects on one site by enabling improved environmental values on, in this case, another site in the vicinity.**

[250] We have not reached the point of forming fixed views about the precise form of protection that would be desirable. We consider it desirable that mechanisms be explored and active steps taken to bring the separate but parallel consenting processes to greater consistency if at all possible. We stress that the Court has no part to play in the processes that are not before it, but would hope that all concerned would be assisted if a co-operative approach were to be taken. As we have said, we do not as yet have fixed views about mechanisms, but we urge BCL to think carefully about the purpose of the DPPA, and what is necessary to secure the achievement of that, rather than simply concerning the effects of open-cast mining. **As we indicate later, it is at least possible that the question of whether consent is able to be granted could turn on this issue.**

...

[312] We have read carefully the thorough decision of the commissioners at the first instance hearing. However, we do not interpret the Buller District Plan in quite the same way as them with respect to its approach to mining. Further, there have been a number of quite significant changes to the proposal since the first instance hearing. The area over which weed and predator control is proposed has increased, and there is a proposal to establish a DPPA**, presumably with greater security against open-cast mining than presently** exists. Moreover, both applicants and appellants have carried out significant research between the two hearings, so that the Court has before it much better evidence than did the original commissioners, along with the benefits of cross-examination. As we have indicated, the commissioners' decision is very considered, and we have had quite considerable regard to it, but ultimately it is the evidence before us that is more important.

...

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)

[80] Forest and Bird argued that the DPPA was a legally irrelevant consideration. Counsel relied upon an expert witness, Dr Ussher, who argued that to be a valid averted loss offset, the proposal must avert a "credible threat" – which he considered could only be achieved in this case if *"BCL ...[identified] land with coal under it that is currently economically recoverable and set aside that land such that vegetation is protected from the effects of mining."* Forest and Bird submitted that there was no valid threat for the offset to qualify as a positive effect. There needed to be an unimplemented resource consent to mine in the DPPA, otherwise mining is not part of the existing environment. This reasoning relies upon [84] of *Hawthorn*, discussed in the first decision.

[81] In reply, BCL pointed out that the DPPA is proposed to be a minimum of 745 hectares. That it will have a 500 hectare offset mitigation area, 30% by land area of pakihi, 30% by land area of manuka shrubland, 30% by land area of forest, and 10% by land area of sandstone pavement, of which at least 200 hectares will be within the known current distribution range of the snail *Powelliphanta patrickensis*. That within the DBEA, of which the DPPA is part, BCL will be required to have a biodiversity enhancement programme, with a goal of achieving and sustaining improvements and key biodiversity attributes. That it is intended to offset the residual effects on biodiversity values from the EMP to achieve and sustain statistically significant improvements and abundance for certain named species, including the great spotted kiwi, *Powelliphanta patrickensis*, the South Island fern bird, rifleman, forest gecko and West Coast green gecko. BCL argue that the DPPA offer is of permanent protection of at least 500 hectares of land.

[82] The fact that the DPPA comes with an offer of permanent protection invites consideration of the long term implications of the offer. There is no suggestion that this area at present is under threat of mining, because of the low quality of the coal reserves under that land. The Denniston Plateau, however, has been mined before. The mining history goes back for a long time. Permanent protection of the DPPA land protects it not only against mining but, as the Environment Court noted, any use for ancillary operations of mining.

[83] As noted, it was argued that, when considering the benefits of a condition like this, [84] of *Hawthorn* again applies, and one cannot take into account anything other than the environment as it exists, permitted uses and existing resource consents. In this context, I disagree. It is a fact that Bathurst holds an exploration permit over the DPPA. The subject of environment protection by way of conditions was not before the Court in *Hawthorn*, and [84] of *Hawthorn* should not be read out of context. I will not burden this judgment with my past reasoning in *Queenstown Central Ltd v Queenstown Lakes District Council*,[23] which argues that the Court of Appeal in *Hawthorn* held environment is the future environment, and that [84] is a summary that should not be read out of context, let alone be applied like a statutory provision to any context. I do not repeat my reasoning in the first and companion judgment, but it applies here.

[84] Section 104(1) is expressed to be subject to Part 2. Part 2 includes the all important s 5, particularly s 5(2):

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

[23] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[85] "Sustainable management" requires long term thinking. It is usually reflected in the plans, which are themselves applications of s 5. Section 104 is expressly subject to Part 2. Long term thinking must be intended to be carried over in s 104 analysis, as to apply short term thinking would be inconsistent with s 5.

[86] Here the relevant plans provide for mining, and as restricted discretionary or discretionary activities, over the whole of the Denniston Plateau. Because of the scale of the plateau, and the need for copious quantities of water to be taken and discharged, it is of the nature of things that mining of the valuable coking coal on the plateau will be staged over time. Bathurst and Solid Energy have an understanding. The terms are confidential. But before me, counsel agreed it is about staging exploration of the Denniston Plateau resource.

[87] In order to take into account intrinsic ecosystem values of the Denniston Plateau, s 5(2)(b), the values have to be examined against a long timeframe. This must include the uncertainty of the commercial value, in the future, of the coal under the DPPA.

[88] I think there is no doubt that a condition providing for the DPPA can be taken into account as a relevant consideration by the Environment Court, in s 104 analysis, as a Part 2, s 5(2) consideration. The weight that it gives to that consideration is for the Environment Court.

[89] For reasons I develop further in analysis of the next issue, the proposed DPPA does not mitigate any actual or potential effects on the environment of allowing the Buller Coal escarpment proposal. It does not fall directly within s 5(2)(c). Forest and Bird submitted that s 104(1)(a) makes relevant offers of environmental compensation, which will be an actual and potential positive effect on the environment of allowing the activity. I agree, if that proposition is read as

"offset" rather than compensation. It is accordingly a relevant condition under s 104(1), and sustainable management in s 5(2)..

Sixth error of law – security of benefits of offset

[90] This contention, arguing that the benefits of biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration, addresses the efficacy of the promise of permanently setting aside the area in the DPPA, and the prospect of further mining elsewhere in the DBEA.

[91] The Environment Court is currently seeking conditions designed to lock in place the DPPA. It needs to be understood that the land is Crown land. I think that Forest and Bird, wittingly or unwittingly, are trying to draw this Court into a merit judgment, which is the responsibility of the Environment Court. The Environment Court may well be faced with a set of terms relating to the DPPA which fall short of legally binding locking up of the DPPA. That may have to be done by statute. But there is nothing to stop the Environment Court forming a judgment on the merits as to the utility of the DPPA.

[92] The DBEA covers all of the Denniston Plateau except the Sullivan Mine licence area, and some areas adjacent to the plateau. The DBEA is a proposal to enhance the habitat for fauna by reducing pest numbers across the whole area.

[93] The Environment Court found, applying [84] of *Hawthorn*, that it could not consider the possibility of future applications for mining that might be undertaken within the DBEA.[24] The primary submission of Forest and Bird is that the Sullivan coal mining licence forms part of the existing environment in the *Hawthorn* sense, in [84]. That submission has been rejected. It will be recalled that the Environment Court called for the setting aside of some land because of the prospect of further mines. Forest and Bird submit there is no logical basis for the Environment Court excluding consideration of prospective mines in Whareatea West and Coalbrookdale in the Denniston Plateau because they do not have consent, but giving weight to the

[24] *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [230].

proffering of the DPPA. Mining in the DBEA is more likely to occur on those other sites than within the DPPA. Forest and Bird submit the same test should apply to each of these circumstances. I agree.

[94] For the reasoning already given, it follows that this Court is of the view that it is open to the Environment Court to find as a matter of fact that Bathurst is likely to achieve the resource consents for mining elsewhere in the DBEA, and indeed in the DPPA.

[95] It is a matter of fact for the Environment Court to judge whether the prospect of future mining in the DBEA affects the weight that it gives to the benefits of the DBEA.

[96] Forest and Bird then submitted that in that case the purported benefits of the DBEA are not able to be secured through consent conditions, because those conditions cannot prevent destruction of the habitat that is to be enhanced. Therefore, it is submitted that the benefits of the DBEA were an irrelevant consideration.

[97] I do not agree. The DBEA is a very large area. Future open cast mining on the plateau is likely to follow the same mode of operation as the EMP, namely opening up a particular part of the Denniston Plateau, taking out the coal, then rehabilitating the site. It does not follow that there is not continued efficacy in the continuation of the biodiversity programme elsewhere on the plateau. It is a fanciful criterion that the whole of the huge area of the Denniston Plateau is going to be one open cast coal mine.

While Forest and Bird may have identified an error of law in the Environment Court's reasoning, by applying [84] in a completely different context to that in which it was set in *Hawthorn*, it is another question as to whether the error is material and/or cannot be re-addressed in the upcoming resumed hearing of the Environment Court on 12 June 2013. That is a hearing to examine the conditions being proposed. It is also a hearing to make the final decision as to whether or not to grant consent.

Seventh error of law – offset of significant habitat of indigenous fauna

[98] Forest and Bird alleges that the Court applied the wrong legal test by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvements to other habitats of the same species for the purpose of s 6(c).

[99] Section 6(c) of the RMA provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[100] The Heaphy predator control area (the HBEA) contains a few species in common with the EMP footprint, but it consists of a very different habitat. The Court found that the HBEA "comprises some 24,000 ha of forest and other vegetation types that differ from those on the Denniston Plateau".[25]

[101] In terms of s 6(c), the Court found that where there was an adverse effect on the significant habitat of indigenous species, it could take into account improvements to other habitats of that species.[26]

[102] Forest and Bird were submitting that in considering whether s 6(c) was met, the Court had regard to the HBEA. Forest and Bird particularly focussed on [325]. I think, however, it is important to read [325]-[335].

> [325] Offset mitigation for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form

---

25 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [232].

26 At [214].

of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.

[326] That is not the situation with areas of significant indigenous vegetation.

[327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[328] That qualifier is included in s 6(a) which requires us to recognise and provide for the preservation of the natural character of (inter alia) wetlands and lakes and rivers and their margins. As we have indicated, there will be adverse effects on pakihi wetlands, seepages and a small area of *Chionochloa rubra* wetland which would be removed entirely during the mining operation. Likewise, 6.7km of streams would be removed during mining, to be replaced by 4km of streams on the ELF. It is acknowledged that the natural character of the reinstated streams would for some time be less than that now existing. Recolonisation by bryophytes is expected to be slow, and Dr Stark, while confident that invertebrates would re-establish, does not have the evidence to suggest a likely timeframe.

[329] For the sake of completeness we add that some of the affected tributaries of the Whareatea River are ephemeral, and it is unlikely that the loss of stream length would have any effect on water quality and quantity further downstream. Further, the take proposed from the Waimangaroa would in our view leave the natural character of that river intact.

[330] We return to the question of whether the adverse effects on wetlands result in the development of the mine being "inappropriate." The adjective calls for a value judgement. Ms Bodmin's evidence that both pakihi and seepages would remain well represented on the plateau and the efforts BCL has taken to reduce the extent of *chionochloa rubra* fenland affected, considerably reduce the degree to which the proposal constitutes development from which wetlands require preservation.

[331] Overall, in terms of s 6, we find that the requirement to protect areas of significant indigenous vegetation tells against the proposal. The requirement to recognise and provide for the preservation of wetlands from inappropriate development also does so, but not as strongly.

[332] Buller Coal properly referred us to the judgement of the High Court in ***NZ Rail v Marlborough District Council*** citing the following passages:

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose ... It is certainly not the case that the preservation of natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs must all play their part within the overall consideration and discussion.

The same considerations apply when considering wetlands under s 6(a) and significant indigenous vegetation under s 6(c).

[333] In turning to s 5 of the Act, we remind ourselves from that decision that:

> ... the application of s 5 involves an overall broad judgement of whether a proposal will promote the sustainable management of natural and physical resources., that approach recognises that the RMA has a single purpose, and such a judgement allows for comparison of conflicting considerations, and the scale and degree of them and their relative significance or proportion in the final outcome.

In this case we find the task more than usually complex. The proposal provides significant enablement in the form of high quality employment in the Buller District. It provides enablement to the New Zealand economy by stimulating a "shuffling upwards" in the labour market. These benefits are not to be underestimated.

[334] Alongside this enablement, the proposal, if implemented, will have adverse effects of some proportion on areas of significant indigenous vegetation, including locally and nationally endangered plant species and ecosystem. Together with these effects there are effects on wetlands, perhaps of lesser significance because of what will remain on the plateau, and a considerable reduction for some time in the amenity of the mine site and its surrounds. In addition to these adverse effects which are not avoided, remedied or mitigated, the life that the rehabilitated ecosystems support on the mine site will be less fit, rich and diverse than those presently existing. We hold that to be a relevant matter under s 5(2)(b).

[335] Overall this case is quite finely balanced, rather as was found by the first instance hearing commissioners. So finely balanced indeed that while our present inclination is to grant consent, much will ultimately turn on whether appropriate conditions can be worked out and whether some others can be offered by the applicant on an *Augier* (volunteered) basis. These matters have been discussed extensively throughout this decision. Our preliminary view as just said is that with such conditions appropriately framed, consent is likely. But we share the view of the respondent that the conditions presently offered to the Court would not alone satisfactorily underpin consent to the application. For the guidance of the parties, we set out our concerns.

[103] Forest and Bird submitted that in [326] the Court found that s 6(c) was not met for significant indigenous vegetation. Forest and Bird then submitted that the implication of singling out that part of s 6(c) is that the Court must have concluded that a decision to grant consent would recognise and provide for the remainder of s 6(c), the protection of significant habitats of indigenous fauna, and that this appears to be its conclusion in [325].

[104] I do not agree. Reading all the paragraphs, and in the context of the whole case, it is clear that the open cast mining entailed in the EMP would remove some of the significant habitat of indigenous fauna. Second, I do not read these paragraphs as intending to provide for the protection of significant habitats which were inevitably going to be partly removed.

[105] Rather the Environment Court recognised, when citing *New Zealand Rail and Marlborough District Council*, that notwithstanding the strong language of s 6(c), the preservation of significant indigenous flora and significant habitats of fauna might have to bow to the promotion of the mine as part of the promotion of sustainable management of natural and physical resources, applying s 5(2).

[106] Having recognised that, the Environment Court then turned not to protecting what was going to be lost, s 6(c), but intending addressing the issue of the partial loss of the ecosystem, in the conditions, [335]. They were not just confined to addressing plant species, they refer to the ecosystem. I am not persuaded that the Environment Court lost sight of the terms of s 6(c). More pertinently, they recognised that s 6(c) may have to bow to sustainable management under s 5(2), in this case. That is a decision on the merits, yet to be completed by the Environment Court.

[107] Forest and Bird submitted that the HBEA is not relevant to s 6(c), as it does not contain a common habitat with the EMP footprint. This is not a proposition of law. It is, at best, a merit argument. Once it is acknowledged that it is not possible to maintain protection of habitat within the EMP footprint, then it is not possible to apply s 6(c) as requiring protection of the habitat, let alone of significant fauna. They will go, habitat and fauna.

[108] It is, however, a relevant consideration for the Environment Court to consider the positive effects of the HBEA when considering the implications of not being able to protect habitat and fauna in the EMP footprint.

[109] For these reasons, I do not think there is an error of law in these paragraphs of the decision.

Eighth error of law – Barren Valley – relevance of cost and viability of the mine

[110] The Environment Court found that the mine footprint was significant indigenous vegetation in terms of s 6(c) and the applicable plan criteria, and that Sticherus Ridge was outstanding, following agreed evidence from witnesses from both parties. This was due to the presence of a number of threatened and at risk plants. The mining proposal will result in the destruction of the Barren Valley and the Sticherus Ridge, as it is to be used as an overburden dump, with the volumes of overburden sufficient to overtop the valley and cover Sticherus Ridge.

[111] During the course of the hearing, the Court asked for evidence on whether the mine could be developed in such a way as to avoid the Barren Valley and Sticherus Ridge. Mr McCracken prepared a brief of evidence on behalf of BCL, in which he advised that the Barren Valley could be avoided, but this would have impacts on logistics, including greater distance for fill to be hauled and double-handling of material. Mr McCracken concluded there would be a number of consequences of avoiding the Barren Valley, including in relation to costs and minable coal and rehabilitation, which would have an overall impact on project economics.

[112] The Environment Court refused to impose conditions protecting the Barren Valley and the Sticherus Ridge:

> [339] We have come to the conclusion that the logistics and likely consequent cost of endeavouring to preserve these features, which are essentially just off centre in the mine footprint, would on balance be too great.

[113] Included in that analysis was a judgment that the likelihood of successful transplantation is low, so that in the event of a consent the most probable outcome is that these rare plants would be lost.[27]

[114] Forest and Bird submitted that it was long established in a number of Environment Court decisions that cost and economic viability, or profitability of a project, are not matters for the Environment Court. Rather, they are decisions for the promoter of the project. Otherwise the Environment Court would be drawn into making, or at least second guessing, business decisions.[28]

[115] All of these decisions are addressing the big question as to whether or not a project will be economically viable. The leading decision is that of the High Court in *NZ Rail Ltd v Marlborough District Council*, Greig J. It concerned the proposals and plans of Port Marlborough to develop and expand the port of Picton into the neighbouring Shakespeare Bay, and to construct and establish there a port facility to service the export of bulk products, including timber and coal. The local authorities concerned gave approval to the development, so far as it related to the expansion of the port for the purpose of export of timber, and refusal to approve the extension/expansion of the port as a coal export service. There were appeals and cross-appeals to the Planning Tribunal.

[116] One of the planks of NZ Rail's challenge of the proposed development was a claim that the cost of the whole development was likely to be significantly greater than had been estimated. The result of this would mean that, in order to service the cost, port fees would have to be increased, but because, for competitive reasons, it would be necessary to hold costs to the users of the timber and the coal berths, the costs would therefore fall on other port users, and in particular on NZ Rail as the predominant principal user of the port. Counsel for NZ Rail, Mr Cavanagh submitted that financial viability was a relevant consideration under Part 2 of the RMA.

---

27 At [340]-[341].

28 See *NZ Rail v Marlborough District Council* [1994] NZRMA 70 (HC); *Re Queenstown Airport Ltd* [2012] NZEnvC 206 at [211]; *Friends of Community of Nhawha Inc v Minister of Corrections* High Court Wellington AP 110/02, 20 June 2002 at [20]; *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC).

[117] Greig J found:[29]

> Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic wellbeing is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual or potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

[118] The scope of the remarks of Greig J, which are appropriate to that context, have no application to the discrete issue being examined by the Environment Court in this case: the proposal to shift the place for the overburden to be placed in order to protect some rare plants. This latter issue is a mitigation of one adverse effect in a complex project. There is nothing in the Act which prevents a consent authority from making a proportionate decision assessing the cost of a particular proposed condition. This is quite a different exercise from embarking on judging the merit of an application against the financial viability of the project. The Environment Court's treatment of this issue does not disclose any error of law.

Materiality of error

[119] The High Court sitting on appeal on questions of law will only intervene in the decision making of the Environment Court if an error of law has been identified and, as a matter of judgment, the Court considers the error is of materiality to the decisions being made by the Court.[30]

[120] In this case, the appeal is against an interim decision. The Environment Court is sitting again on 12 June 2013 to consider the efficacy of submissions. The Environment Court has not yet made a decision whether or not to grant the application.

---

[29] At 88.

[30] *Manos v Waitakere City Council* [1996] NZRMA 145 (CA).

[121] Had this been an appeal against the final determination of the Environment Court to grant a decision, then a real issue of whether the errors identified are of sufficient materiality would confront the Court. This is not the case, because of the interim character of the Environment Court decision.

[122] The most important aspect of this judgment is the view of this Court that the RMA keeps separate the relevant consideration of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.

[123] Forest and Bird wanted also a clear finding that mitigation considerations should get a greater weighting than offset considerations. I have not made that finding. This is because it all depends on the context, including the degree of mitigation and the scale and qualities of the offset.

[124] While I have disagreed with the Environment Court's use of the concept of "offset mitigation", and of using "offset" and "compensation" interchangeably, I have no basis to judge whether refining the use of these terms, on the basis of this judgment, will materially affect the deliberations of the Environment Court.

Conclusion

[125] That said, given that the Environment Court has not yet finally decided the case, I think it is appropriate that I do refer this decision back to be considered by the Environment Court, who, as a result, are required to keep mitigation considerations separate from offset considerations.

[126] I do not make a formal finding against the use of the term "compensation" or "environmental compensation", because it was not directly put in issue.

[127] Costs are reserved. Forest and Bird has been partially successful.

Solicitors:
Royal Forest and Bird Protection Society of New Zealand, Christchurch
Chapman Tripp, Christchurch
Gascoigne Wicks, Blenheim

ORIGINAL

Decision No: C 117/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for declarations under section 311 of the Act

BETWEEN **MARK ALAN GEBBIE**

ENF: 116/98

Applicant

AND **THE BANKS PENINSULA DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge Jackson (sitting alone under section 279 of the Act)

HEARING at CHRISTCHURCH on 2 December 1998

APPEARANCES

Mr R J Somerville QC and Mr M R D Guest for the applicant
Mr K G Smith for the respondent
Ms M Perpick for the Canterbury Regional Council under section 274 of the Act
Mr O R Cassidy for himself and Mrs B M Cassidy under section 274 of the Act

DECISION

[A] The Application for declarations

1. On 20 July 1998 the Court received an application by Mr M A Gebbie for declarations ("the application") under section 311 of the Resource Management Act 1991 ("the RMA" or "the Act"), naming the Banks Peninsula Council ("the Council") as respondent. Subsequently other

persons including the Canterbury Regional Council ("the CRC") and Mr O R and Mrs B M Cassidy gave notice that they wished to be heard under section 274 of the Act. Only the persons named under "Appearances" actually appeared at the hearing. The application was for the following declarations:

(a) *The act of quarrying minerals, including rock and stone, from an existing quarry site on the land being contained in Certificate of Title 21A/450, will* ***not*** *contravene the Resource Management Act 1991; or*

(b) *The act of quarrying minerals, including rock and stone, from an existing quarry site on the land being contained in Certificate of Title 21A/450, will not contravene the Banks Peninsula* ***Transitional*** *District Plan; and*

(c) *The act of quarrying minerals, including rock and stone, from an existing quarry site on the land being contained in Certificate of Title 21A/450 will not contravene the Banks Peninsula* ***Proposed*** *District Plan; or*

(d) *The act of quarrying minerals, including rock and stone, from an existing quarry site on the land being contained in Certificate of Title 21A/450, is an* ***existing use*** *within the meaning of section 10 of the Resource Management Act 1991* (my emphasis).

2. The grounds of the application are that Mr Gebbie has an equitable interest in the land located in Gebbies Valley, Banks Peninsula, containing an area of 10.0488 hectares ("the land") and comprising Certificate of Title 21A/450 (Canterbury Land Registry). The land was granted to his family in December 1869, with no reservation on the title or subsequent titles as to the minerals on, in or under the land. Those minerals (with the exception of gold, silver, petroleum, and uranium) are privately owned by Mr Gebbie.

3. A number of affidavits were filed in support of the application. Mr Gebbie submitted two affidavits, the first sworn on 13 July 1998 ("the first affidavit") and the second on 20 November 1998 ("the second affidavit"). The first affidavit set out a general history of the land whilst the second affidavit was specifically aimed at proving existing use rights[1]. A planner, Mr J Kyle, also filed two affidavits. Their purpose was to outline the relevant provisions of the Council's planning instruments. Mr J C Dunbier, a geologist, filed an interesting but minimally relevant affidavit describing the geology of the area and the minerals on the site. Finally there was one affidavit in opposition by neighbouring land owner Mr O R Cassidy, on behalf of himself and his wife. Their property encircles the land on three sides, and they oppose any quarrying on the land.

4. This decision is set out in the following way:

- the background is set out in ***[B]***;
- the application for a declaration that quarrying the land will not contravene the RMA is dealt with in ***[C]***;
- the applications concerning the Council's plans are in ***[D]***;
- the 'existing use' issues are in ***[E]***;
- the Court's conclusions are in ***[F]***.

[B] Background

5. Mr Gebbie states in his first affidavit that he wants to reopen and operate an existing quarry on the land in Gebbies Road so as to extract minerals including rock and stone. He says that in December 1869 the Crown granted the land to his family. In 1902 the land was sold to Mr S F Tait.

[1] See declaration (d) in paragraph 1 of this decision.

After further owners had come and gone, in 1957 his father repurchased the land and it has been in the family since. During the renewed Gebbie ownership the land has been used for farming. The quarry site on the land ("the quarry site") is covered largely by gorse and scrub and is of little value from a farming perspective. Mr Gebbie states that in 1988 his father died leaving a half share of the land in the name of his trustees and the other half in the name of his mother. She died in 1996 and since then a Deed of Family Arrangement has been signed making Mr Gebbie the sole beneficiary of the land.

6. In both the 1920's and again in the 1940's a commercial quarry had operated on the site. Mr Gebbie states that in late 1990 his family "decided to re-open the quarry in order to extract the rock and stone for building purposes ... including road metal and export". Written consent from the Ministry of Commerce was obtained. Mr Gebbie also says that he was given oral approval by officers of the Council, but that the Council later withdrew its consent. Mr Gebbie says he was informed he would need land use consent, which he duly applied for.

7. On 13 December 1991 the Council granted an application to quarry rhyolite and greywacke from the quarry site. This was appealed by a number of parties and on 20 May 1993 the Planning Tribunal issued an interim decision permitting a modest degree of quarrying for the purpose of obtaining samples. In the meantime Mr Gebbie had obtained consents from the CRC to discharge to air and water. He states that in May 1997 the Environment Court cancelled the interim decision with the result that he can now not quarry the minerals on the land.

[C] Will quarrying the land contravene the RMA?

Summary of the issues

8. The first issue is whether quarrying the land will contravene the RMA. The argument of Mr Somerville QC for the applicant was lengthy and multi-faceted. I will traverse what I perceive as the important aspects of it shortly, but first I paraphrase Mr Somerville's summary of the argument. Its steps are:

(1) the minerals on the land are privately owned;
(2) the right to mine privately owned minerals is a common law right;
(3) Mr Gebbie had authority to mine the minerals in 1991 under the Mining Act 1971 ("the MA") and the Quarries and Tunnels Act 1982 ("the Q & TA").
(4) the right to mine or quarry continues today;
(5) the Town and Country Planning Act 1977 ("the TCPA") did not apply to the common law right; OR
(5A) if the TCPA did apply, then
(6) (in any event) the common law right is not abrogated by the RMA.

None of the parties challenged assertions (1) and (2). On reflection I consider assertion (3) is inaccurate; assertion (4) is an oversimplification in that it may need to be qualified; assertion (5) is incorrect and (5A) is not relevant. I return to those matters later. The real question concerns assertion (6) and is whether the common law right(s) to quarry or mine land are abrogated or qualified by the RMA.

Counsel's submissions

9. Mr Somerville's starting submission was that it is presumed that a statute is not intended to interfere with or prejudice established property rights or other economic interests, except under clear authority of law construed according to the legislative intent.[2] He referred to the decision in ***Ashburton Borough v Clifford***[3]. The Court of Appeal there adopted a passage from the High Court decision in the same case[4] where Wilson J, referring to the Town and Country Planning Act ("the TCPA 1953") stated:

> *In construing its terms, the courts, in accordance with established principles, will not adopt a meaning which takes away existing rights of property owners further than the plain language of the statute, or the attainment of its object according to its true intent, meaning and spirit, requires.*

10. Counsel also submitted that there is a presumption that an Act is not intended to limit common law rights, or otherwise alter the common law, or completely alter the principle of law contained in a law which it amends, unless the Act does so clearly and unambiguously.[5] He said that in this case, the effect of the presumption is that the RMA may be given a limited construction so that it does not destroy a fundamental common law right, involving the use of one's private property in a reasonable manner. He quoted from Statute Law in New Zealand:[6]

---

2 ***Halsbury's Laws of England***, 4th Edition, Vol 44(1), para 1464 and ***The Laws of NZ***, "Statutes", Garth Thornton page 173, 174-177.

3 [1969] NZLR 927 at 943.

4 ***Clifford v Ashburton Borough*** [1969] NZLR 446.

5 ***Mitchell v Licensing Control Commission*** [1963] NZLR 553 at 558 and ***Hawkins v Sturt*** [1992] 3 NZLR 602 at 610.

6 J F Burrows, Statute Law in New Zealand, Butterworths 1992 at p.161.

Once the courts were most protective of private property. This protection has, understandably, diminished in the area of planning and land use legislation: here the public interest in the control of land use prevails. Even now, however, the courts will not adopt a construction which takes away existing property rights more than the Act and its proper purpose require.

11. Mr Somerville also said that the presumption against altering established principles of common law complements and is reinforced by the New Zealand Bill of Rights Act 1990 ("the NZBR"). He cited section 6:

> 6. *Interpretation consistent with Bill of Rights to be preferred - wherever an enactment can be given a meaning that is consistent with the rights or freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.*
>
> ....

Section 21 of the NZBR also provides that everyone has the right to be secure against unreasonable seizure of property. He referred to ***Falkner v Gisborne District Council***[7] in which the appellant argued that if the Council did not place coastal protection works, that would effectively be "seizure" of property[8] because land lost to the sea vests in the Crown. The High Court rejected this because "seizure" suggests forcible taking of possession, capture or confiscation and is suggestive of some sort of human agency rather than a gradual process of nature.

12. Mr Somerville submitted that unlike ***Falkner*** any restrictions on Mr Gebbie's common law right to mine minerals results from intervention of

---

7 [1995] NZRMA 462.
8 Under s.21 of the NZBR.

human agency by imposing land use controls for the purposes of managing natural and physical resources pursuant to the RMA, which can amount to a removal of the right to use the minerals. He also cited section 85 of the RMA saying that that indicates land should be capable of reasonable use. He concluded by saying that the policy of the RMA and the ordinary words in the legislation indicate the common law right to mine private minerals is not abrogated by the ability of territorial local authorities to impose land use controls in the RMA.

13. It was Mr Somerville's submission that the overall purpose of the RMA focuses not on mining minerals as a land use, but rather on the effects that mining might have on air and water. He said this is consistent with section 107 of the Crown Minerals Act 1991 ("the CMA") as amended in 1993, the intention of this being that mining operations should be subject to environmental controls relating to air and water, but the actual removal of the minerals from the land is addressed pursuant to the CMA when it comes to the granting of mining privileges such as a mining licence, and by the common law with regard to privately owned minerals.

Consideration

14. My first concern is that assertion (6) is not appropriately worded, so that in a sense Mr Somerville has been pulling a straw man to pieces. Mr Somerville phrased assertion (6) with a reference to the RMA abrogating - that is, nullifying or repealing - common law rights to quarry or mine. In my view that it is not correct because it is an over-statement. The core question in this case is whether the common law rights to quarry or mine may be controlled/modified under the RMA? In my view the answer to that question is "yes" for the reasons I give below. However it does <u>not</u> follow that the common law rights are automatically and completely abrogated.

15. The purpose of the RMA is expressly defined as being to promote the sustainable management of "natural and physical resources".[9] That term is defined as including

> *...land, water, air, soil, minerals and energy, all forms of plants and animals ... , and all structures*[10].

The term "mineral" is defined indirectly. Section 2 of the RMA adopts the definition in the CMA and that states:[11]

> *"Mineral" means a naturally occurring inorganic substance beneath or at the surface of the earth, whether or not under water; and includes all metallic minerals, non-metallic minerals, fuel minerals, precious stones, industrial rocks and building stones, and a prescribed substance within the meaning of the Atomic Energy Act 1945.*

Thus if one looks simply at the definitions in the RMA it appears that minerals are within the resources to be managed under the Act. If one looks more widely - at the purpose and scheme of the Act according to the accepted principles[12] of statutory interpretation - I consider the same result emerges.

16. I look first at the purpose of the Act, which is the promotion of sustainable management of natural and physical resources,[13] in more detail. That term is defined to mean:[14]

> *...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while -*

---

9 Section 5(1) RMA.
10 Section 2.
11 Section 2 CMA.
12 J F Burrows Statute Law in New Zealand, Butterworths 1992 at p.99.
13 Section 5(1) RMA.
14 Section 5(2) RMA.

(a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

(b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

(c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment* (My emphasis).[15]

Thus while natural and physical resources including minerals have to be managed sustainably there is one express exclusion. There is no duty to manage the use of **minerals**[16] so as to sustain their potential to meet the foreseeable needs of future generations. In other words any attempt under the RMA to control the rate at which New Zealand runs out of minerals is illegal. I consider that the exclusion of use of minerals from section 5(2)(a) makes it clear that the use of minerals and especially the activities of extracting them (i.e. mining and quarrying) are to be managed sustainably in every other way.

17. The most relevant part of the scheme of the RMA is in Part III, in particular, in the restrictions on use of land contained in section 9. This states (relevantly):

(1) No person may use any land ...

...

(4) In this section, the word "use" in relation to any land, means -

...

(b) Any excavating, drilling, tunnelling, or other disturbance of the land ....

15 Section 5(2).
16 Section 5(2)(a).

Section 9 has the result that anyone who owns the minerals on any land[17] may mine or quarry them as they wish unless there is a rule in a district plan controlling that activity.

18. On the interpretation of section 9, Mr Somerville submitted that the definition of "land" in the RMA does not include "minerals" and therefore the restrictions in relation to "land" in section 9 should not include restrictions over minerals as well: Parliament would have expressly included "minerals" if it intended them to be there. He then submitted that privately owned minerals should not be included as "land" because that would be contrary to the purpose of the RMA which specifically excludes minerals from being sustainably managed for future generations (section 5(2)). He said that using the land for mining, quarrying or extracting private minerals cannot be sustainably managed and therefore should not be read as being covered by the RMA. Straining the word "use" to include quarrying for minerals would not promote the purpose of the RMA. It was his opinion that if this purposive interpretation is given to section 9, it would give effect to the underlying purpose of the RMA. He said that the RMA was not meant to control the use of private minerals and it is of note that it did not repeal the Mining Act 1971 or the Quarries and Tunnels Act 1982.

19. In my view "land" is deliberately not defined precisely in the RMA as it is meant to encompass most of the general senses in which the word is used. A dictionary definition[18] of "land" includes:

(1) the solid part of the earth's surface (opp. SEA, WATER, AIR)

(2) an expanse of country; ground; soil

...

---

17 Of course gold, silver and some other minerals are owned by the Crown: see the Crown Minerals Act 1991.

18 The Concise Oxford Dictionary 8th ed, (1990)

To those two senses I would add "land" in the sense of legal interests or estates. In my view minerals are a part of the land in the general sense in which the term is used in the RMA. This is emphasized by section 9(4) quoted earlier which defines "use" in relation to land as including any *"disturbance of land"*.

20. Nor is Mr Somerville correct when he asserts using the land for mining cannot be sustainably managed. He referred only to section 5(2)(a) which expressly does not apply to quarrying or mining. However the remaining parts of section 5(2) do not (as Mr Somerville appeared to claim) only relate to air and water; they also relate to safeguarding the life-supporting capacity of soil and ecosystems.[19]

21. Common law rights are rarely, if ever, absolute. For example in ***Paprzik v Tauranga District Council***[20] , Fisher J held that

> *... the ordinary citizen's common law right to use a publicly dedicated highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, the reasonable requirements of other road users, and any superimposed legislation.*[21]

In a similar way common law mining rights are subject to the various duties imposed under the common law of mining[22]; the law of tort[23]; and (I hold) 'superimposed' legislation such as the RMA.

---

19 Section 5(2)(b).
20 [1992] 3 NZLR 177.
21 At p.184.
22 See Halsbury's Laws of England 4th Ed. Vol 31.
23 ***Rylands v Fletcher*** (1868) LR3 HL 300; [1861-73] All ER 1 and ***Pride of Derby and Derby Angling Association Ltd v British Celanese Ltd*** [1953] Ch.149, [1953] All ER 179 (CA).

22. Thus I hold that the common law rights of a property owner - including the right to mine or quarry - can be modified or even abrogated under the Act. I respectfully apply the principles in ***Falkner v Gisborne District Council***[24]. Barker J stated:

> *The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime and the regulation and control of the use of land, sea and air. There is nothing ambiguous or equivocal about this.*
>
> ...
>
> *It is a necessary implication of such a regime that common law property rights to the use of land or sea are to be subject to it.*[25]

Really Mr Somerville has over-emphasised the issue by asking whether the common law right has been "abrogated". Section 9 of the RMA makes it clear that common law rights are not modified, let alone removed, unless and until a district plan takes that step.

23. It has always been assumed under the TCPA and also under the RMA that landowners who also own the right to minerals (other than gold and silver) but do not have a mining licence (under the MA) or a mining permit (under the CMA) need to obtain planning or, latterly, resource consent. *Planning and Development Law in NZ*[26] states:

> *... the implementation of mining without a mining privilege granted by*

---

24 [1995] NZRMA 462 (HC).
25 [1995] NZRMA 462 at 477.
26 Volume II, Professor KA Palmer, The Law Book Company Ltd (1984) at p961.

the Minister would be subject to consent by the District Council in accordance with the district planning scheme provision. The Council on a planning application, could impose conditions as to land utilisation.[27]

In *"Environmental and Resource Management Law"*[28] it is said:

If the legal ownership of a mineral resides with the Crown, the Crown Minerals Act regulates any prospecting, exploration or mining of such minerals.[29] *If a particular mineral is not owned by the Crown, then its allocation will be a decision for the mineral owner under private law.*[30] *Accordingly a minerals permit will not be required under the [Crown Minerals] Act.*[31]

I agree with that passage provided that it is recognized that the extraction process (the activity of quarrying or mining) may be controlled under the RMA generally, and section 9 in particular. I consider that application of the general principle in ***Falkner*** is a complete answer to the general question in this case: the common law rights are subject to qualification (and sometimes abrogation) under the RMA.

24. Nor can Mr Gebbie rely on section 85 of the RMA indirectly. If he thinks he has a remedy under that section because one of the Council's plans renders the land incapable of reasonable use, then he should apply directly

---

27 Private mining contrary to the District Scheme could be prohibited.

28 *Environmental and Resource Management Law* 2nd Edition, D A R Williams, Butterworths,1997 at p218.

29 The footnote refers to section 8 of the CMA.

30 The footnote states: "See the long title to the Act and ss8, 25(1A) and 30(1). However, the owner of the fee simple in the land will not necessarily own the minerals located on or below his or her land."

31 The footnote states "Although, there may be RMA implications in relation to the use of the relevant land, water and air resources in exploring for or developing the relevant mineral."

under section 85.[32] As for the argument that the RMA is a breach of the NZBR, or at least inconsistent with it, because there has been a seizure of Mr Gebbie's common law rights, I consider that there are three answers to that:

(a) there has been no seizure under the RMA itself - section 9 recognizes that people may exercise their common law rights until a plan states otherwise;

(b) if there is any kind of seizure under the district plan(s) then there is a remedy under section 85;

(c) in the end section 6 of the NZBR concedes there may be inconsistencies - although I consider if there is any seizure in this case it is a relatively minor one and it may not be unreasonable (although that has not been argued).

Subsidiary Arguments

25. I have held that Mr Somerville's assertion (6)[33] can be dealt with directly, rather than as a necessary consequence of the earlier steps in his argument. In other words assertion (6) is a *nonsequitur*: it does not follow from steps (1)-(5). However, in deference to Mr Somerville's argument I now deal with his arguments on assertions (3) and (5) as summarized in paragraph 8.

26. Mr Somerville submitted that at common law a tenant in fee simple was *prima facie* entitled to all minerals under his or her land, except for gold and silver which belong to the Crown by prerogative right. He said that minerals could be reserved to the Crown, when land was alienated from the Crown to individuals, by Crown grant and some statutes reserved land to the Crown. However on or after 1 April 1973 in all alienations from the Crown every mineral existing in its natural condition on or under the

32 See ***Steven v Christchurch City Council*** [1998] NZRMA 289.
33 See paragraph 8 above.

surface of the land is reserved in favour of the Crown[34]. I note in passing that Mr Smith, for the Council, was wrong when he said that tracing lineage was not necessary because the owners of land (if the title is silent as to minerals) owns the minerals (other than gold and silver). I think the position is accurately stated in Butterworths Land Law in New Zealand[35] when it states:

> *As certificates of title do not always disclose statutory mineral reservations it is necessary in order to ascertain whether a landowner owns the minerals on or under the land, to search the title back to the original Crown grant or certificate of title in lieu of grant and to consider the effect of the relevant legislation in force at the time when the land was alienated from the Crown or, as the case may be, at the time when the fee simple was acquired from the Crown.*

27. Mr Somerville submitted that NZ has inherited this common law right, and prior to 1991 this right was recognised by statute (sections 35 and 41(2)MA) and was not modified by statute except for operational and safety purposes to do with quarrying and tunnelling (section 32 of the Q&TA). He reminded me that Mr Gebbie gave written notice to the Inspector of Quarries in 1990 and received approval from the Inspector. The Inspector was there when Mr Gebbie commenced quarrying, and section 32 of the Q&TA was complied with. He also submitted that before 1991 there were specific statutory criteria[36] for discontinuance of quarries, requiring the occupier of the quarry to give written notice to the Inspector within seven days after the date on which work on the quarry ceased. In this case there is no evidence that such notice was given.

---

34 Section 8 of the MA and sections 10 and 11 of the CMA.
35 Section 8 of the MA and sections 10 and 11 of the CMA.
36 Section 33 of the Q&TA.

28. Mr Somerville then went on to submit that the MA was an exclusive code and the TCPA 1953 had no application to or authority over the MA. He referred to the decision of the Court of Appeal in ***Stewart v Grey County Council***[37] where it stated:

> *On our analysis, the Mining Act 1971 was intended to be an exclusive code in respect of the use of land for mining purposes under the mining licences granted under that Act.*

He also noted that the MA was amended to make it clear that:

> *4A. Town and Country Planning Act 1977 not to apply -*
> *Except as specifically provided in this Act, nothing in the Town and Country Planning Act 1977 shall apply to the granting and lawful exercise of any mining privilege granted under this Act.*[38]

29. Counsel stated that the mining which was covered in the MA, Coal Mines Act 1979, Petroleum Act 1937 and the Iron & Steel Industry Act 1959 is now addressed by the CMA. He referred to the long title to the CMA which states that it is:

> *An Act to restate and reform the law relating to the management of Crown owned minerals.*

He said that the CMA contains transitional provisions which recognise mining privileges granted under the MA[39] and also has provisions recognising access agreements[40]. The RMA has transitional provisions

---

37 [1978] 2 NZLR 577 at 584 (Richardson P).
38 Cases that recognise this are: ***Kopara Sawmilling Co v Birch and Grey County Council*** 8 NZTPA 166, ***re Application by Westland Catchment Board*** 10 NZTPA 190.
39 Section 107 CMA.
40 Section 115 CMA.

which recognise current mining privileges relating to water as deemed permits[41] but is silent on the common law. The CMA also recognises the fact that a holder of a mining privilege may need to get resource management approval to use common property such as air and water for mining purposes[42].

30. Mr Somerville submitted that the CMA does not abrogate the common law right, with the privileges granted under the MA surviving under the transitional provisions of the CMA. He said that the MA recognised owners of private minerals in that they were obliged to comply with Part VII of the MA (relating to working, regulation and inspection of mines) or in the case of quarries with the Q&TA. Under section 35 of the MA, private land could be open for mining where minerals were not owned by the Crown and under section 41(2) of the MA the owner of private minerals could not be prosecuted for mining without a mining privilege.

31. He submitted that the control of mining of privately owned minerals was not within the ambit of the TCPA or any district scheme prepared under it. Also, the scheme is not given additional status in law so as to allow minerals to come within the provisions of it after 1991, by changing the provisions in the transitional plan in 1993 or by relying on the ordinances in it as deemed rules pursuant to section 374 of the RMA. The effect of this would be to give the RMA a retrospective effect that would lead to conflict between section 41(2) of the MA and section 374 of the RMA.

32. I consider there are short answers to both steps (3) and (5) in Mr Somerville's argument. They fail on the assumption or assertion that Mr Gebbie had authority to mine under the MA and the Q&TA, because he did not. His rights were and are the common law rights, unless modified or

41 Section 413 RMA.
42 Section 107.

even extinguished by a plan under the RMA. As to the assertion that the TCPA did not apply to the common law right, that is of academic interest only now. But ***Stewart*** did not decide that. The CA in that case held that the TCPA did not apply to rights under the MA; it did not decide anything in respect of common law rights to mine.

33. Mr Gebbie cannot travel through legislation (now repealed) and amend his common law rights by a sort of osmosis giving him statutory rights as well. He does have common law rights but they are exactly as they always were. If he had statutory rights then they might continue because of the operation of the Acts Interpretation Act 1924, or because of savings/transitional provisions in the CMA. But there is no claim by Mr Gebbie in his application that he holds a mining privilege under the Mining Act 1971 and Mr Somerville confirmed that was not Mr Gebbie's case. The only rights Mr Gebbie has are the common law rights, and they may be modified, as I have already held, under the RMA. Accordingly I cannot make the first declaration sought to the effect that quarrying will not contravene the RMA.

[D] Declarations concerning the district plans

34. The second and third declarations sought by Mr Gebbie are that quarrying of the land will not contravene the transitional district plan and/or the proposed district plan respectively. There was a difference between the approach of Mr Kyle in his affidavits and that of Mr Somerville in his arguments. Mr Kyle goes through the two district plans in considerable detail trying to ascertain what the status of quarrying and/or mining would be. Mr Somerville, on the other hand, basically argued that no resource consent was required for quarrying or mining because Mr Gebbie had his common law rights and they were not abrogated or, by implication, qualified by the RMA. Thus his argument goes back to the issues I have discussed in part [C] of this decision, where I held that common law rights

to quarry or mine may be qualified and/or abrogated under the RMA. I hold that it is a consequence of those powers, that a territorial authority has power to introduce rules controlling mining and/or quarrying of land.

35. I do not have to consider the issues in respect of the plans much further. On the applicant's own evidence it is clear that under the Council's transitional plan the activity of quarrying or mining the land is at least discretionary, and may be non-complying. That entails that it is difficult for me to make the declaration sought. At present it is illegal to quarry the land since a resource consent needs to be obtained. On the other hand, quarrying the land will not contravene the transitional district plan if a resource consent is obtained. In the circumstances I consider there is no useful purpose in making the second declaration sought. Mr Gebbie should apply for a resource consent if he wishes to quarry the land under the transitional plan.

36. I have the same problem with the third declaration as I had with the second, that it is misconceived or at least premature. If Mr Gebbie thinks his quarrying is a permitted activity then he should apply for a certificate of compliance.[43] If it is a discretionary or non-complying activity then he should apply for a resource consent. It is quite inappropriate to make a declaration when there are factual questions which should be considered and resolved by the Council.

[43] Under section 139 RMA.

[E] Existing use issues

37. Mr Gebbie states, in his second affidavit, that since 1970 he has undertaken prospecting on a regular basis, especially from 1985 onwards, as he was sending a lot of samples to Australia to try and gauge the interest in the rock. He explained that the quarry has been established for approximately 57 years, it originally being used, amongst other things, to provide base material for roading. Mr Gebbie says that in 1990 he decided to enlarge the quarry but wanted to explore overseas marketing opportunities before committing himself. In April 1991, after contacting the Ministry of Commerce, he was informed that as it related to private minerals the Ministry did not have to be involved. On 24 April 1991 he wrote to the District Council outlining his plans and inquiring as to what he should do but he did not receive any response. In addition he spoke to a representative of the Mines Department in Greymouth, a specialist construction blaster, Mr R G McGiffin, and road transport operators.

38. At the same time he put in a track to be used for farm operations and exploring the quarrying prospects. Mr McGiffin recommended he put in a further track slightly higher up the slope so it would be easier to remove rock samples. A limited amount of blasting, with the approval of the Department of Mines, was undertaken to complete this. An inspector, Mr A Best, was present in June 1991 when blasting commenced. Mr Gebbie says that Mr Paulin, the County Engineer, informed him on behalf of the District Council that he could remove some sample rock, but only up to 200 tonnes, and in accordance with this, in mid-June 1991, he removed 2 cubic metres of rock, weighing approximately 3 tonnes. He says that he liaised at all times with the District Council and Mines Department and complied with all their requirements.

39. He was then advised by the District Council that permission to take rock samples had been withdrawn so he lodged a planning application with the District Council on 17 June 1991. As stated earlier he was granted consent but this was appealed and only modest quarrying was allowed under an interim decision. Pursuant to this he took more samples in early 1994. Some was sent to Christchurch Boy's High School and testing of the rest showed it was suitable for aggregate requirements. The Planning Tribunal's interim decision was cancelled on 5 May 1997 because the terms of the interim decision were not observed.

40. Mr Gebbie says that the first sampling in 1991 gave good samples of rhyolite. He took approximately three-quarters of a tonne to the Canterbury Stone Company; some stone was crushed; ten kilograms of the rhyolite and seven samples of cut coloured stone were sent to Japan; some samples were delivered to Mr P Yeoman (who had proposed the gondola project); part of the stone was delivered to local stone masons, John Tait & Co.; and samples were sent to Australia, England and Europe. He says that he also had discussions with the Canterbury Business Development Council who indicated they were prepared to assist with finance. He also spoke to other persons and received an enthusiastic response from most people, especially Japan and the United Kingdom.

41. On those facts Mr Somerville submitted with respect to the existing use argument[44] that the applicant had commenced quarrying work before the 1 October 1991 and continued taking material from the quarry after this date. He cited from a High Court decision under the T & CPA:

> *Similarly, extension to an existing quarry within the same title may not constitute a change to the use of land,...*[45]

---

44 Section 10 of the RMA.

45 ***AG v Cunningham***[1974] 1NZLR 737 at 742, Cooke J.

He submitted that the common law right was established lawfully many years ago and the effects of the use of the land as a quarry are the same now as they would have been then. Section 10 of the RMA relates to land use, not mineral use and there is no suggestion that the land has not been a quarry site and the implications for the use of that land as a quarry have not changed for many years. He concluded by saying that the quarry does not have to be a day to day operation.

42. For the Council Mr Smith contended that the critical ingredients for establishing existing use under section 10 RMA are lawfulness, character, intensity and scale. He submitted that Mr Gebbie's evidence is so lacking in detail that it would not be appropriate for the Court to make any finding in his favour. Mr Smith also pointed out inconsistencies between Mr Gebbie's two affidavits. He asserted that Mr Gebbie's reference to "re-open" a quarry is inconsistent with continuous operation to which section 10 directs the enquiry. He also said that Mr Gebbie making the resource consent application, decided on by Judge Treadwell, is arguably inconsistent with the claim now made. He said the Court's decision is couched in language suggesting that the activities were not then underway. He also pointed out that in his second affidavit Mr Gebbie states that the use of the site as a quarry has been established for approximately 57 years and that he deposes a desire to explore quarrying prospects which appear to have occurred in April 1991. However in his first affidavit he talks of reopening and operating the quarry and also says how the land up until now has been used for pastoral farming. Mr Smith was also of the view that the word "quarry" written on the topographical maps falls well short of proof of existing use.

43. Mr Smith stated that Mr Gebbie in his second affidavit, directed at the existing use argument, does not distinguish between quarrying and

prospecting and the quantities removed in prospecting are only vaguely stated. What is contemplated by Mr Gebbie as quarrying is a larger enterprise than prospecting. He mentioned the distinction identified in the MA which creates different classes of licence between prospecting and mining.

44. Mr Smith submitted that it would appear there have been large periods of time during which there was no quarrying activity. He said there is no evidence as to what happened once the Gebbie family alienated the land in 1902 and there is no evidence as to the use to which the quarry site was put by Mr Gebbie's father from 1957 until 1988. Mr Gebbie does say in his second affidavit that since 1970 prospecting has been undertaken however even if this is sufficient Mr Smith submitted that there is no explanation of what happened between 1985 and late 1990. He said that even it if is accepted that from 1985 to the present Mr Gebbie has been prospecting, that is not sufficient to preserve an existing use for anything other than prospecting. Mr Smith submitted that Mr Gebbie's approaches to the Ministry of Commerce in April 1991 to set up a quarry, implies that Mr Gebbie sees a qualitative distinction between prospecting and quarrying and in any event Mr Gebbie is silent on what has occurred between 1991 and now.

45. Mr Smith also pointed out that at no stage during Mr Gebbie's application for a resource consent did he instruct counsel to reserve his position with respect to the existing use claim. A limited consent was granted and Mr Smith pointed out that the subject-matter of the consent may be of such a character that implementation of the consent has the effect of extinguishing existing use rights.[46]

46 *Newbury District Council v Secretary of State for the Environment* (1980) 1 All ER 731 (HL).

46. Mr Smith was also of the view that Mr Gebbie's own evidence raises issues as to the character, scale and intensity of what is proposed. Mr Smith likened the current situation to that in ***Wellington Rugby Football Union Inc. v Wellington City Council***[47] where it was held that the proposed development of Athletic Park would change its character, intensity and scale because of increased magnitude of effects generated by the floodlights and use of function rooms for non-match activities. Mr Smith said at best Mr Gebbie demonstrates prospecting but he does not say how much material is proposed to be abstracted over any given period of time. He also said it is not clear what Mr Gebbie proposes doing as part of his existing use however he submitted that it is reasonable for the Court to infer that a commercial enterprise is contemplated. Mr Smith finally submitted that the onus is on the person seeking to establish that a use qualifies as an existing use to satisfy the Court that the intensity and scale of the activity has not increased.[48] In his submission those tests have failed here.

47. Ms Perpick was also of the view that Mr Gebbie is only entitled to an existing use right to continue prospecting. Past prospecting cannot give him existing use rights to operate a quarry. She cited a passage from ***Russell v Manukau City***[49] where she submitted that Justice Elias made it clear that the reference point for assessment of the use is the time when it was established, before the planning controls were changed. She said that this approach was adopted in ***Waitakere City Council v Gordon***[50]. Applying it to this case, the existing use rights are limited to whatever was first "lawfully established" by Mr Gebbie.

---

47 W84/93.
48 ***Waitakere Forestry Park Limited v Waitakere City Council*** A77/94.
49 [1996] NZRMA 35 at 41.
50 A11/98, noted [1998] BRM Gazette 29.

48. Ms Perpick submitted that by operation of section 10(2) of the RMA, any existing use rights Mr Gebbie may have had will have expired. She said Mr Gebbie's prospecting use has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified and he has not made any application for an extension. She too noted that Mr Gebbie's affidavits are at odds with each other as to what up until this point of time has taken place on the quarry site. Ms Perpick cited ***Barlow and another v Christchurch City Council***[51] as authority that Mr Gebbie in the present situation cannot rely on the intermittent quarrying activities which may have taken place on this land in the past to establish existing use rights.

49. I consider Mr Smith and Ms Perpick are correct in their submissions that the evidence falls short of establishing that Mr Gebbie has existing use rights to quarry the land. It even falls significantly short of establishing that Mr Gebbie has existing use rights to prospect, or if he did have them, that he has not lost them by dis-use. I have considered whether I should make a negative declaration in view of Mr Gebbie's sworn statement quoted in paragraph 6 of this decision. In the circumstances I have decided simply to refuse to make the declaration sought, thus leaving it open to Mr Gebbie to reapply, if he can provide (much) more information to the Court and reconcile a 're-opening' of the quarry with the alleged existing use. I do this because Mr Somerville's main arguments were directed at the earlier issues rather than to the existing use issue.

[51] (1975) 5 NZTPA 174.

[F] Outcomes

50. In the circumstances I exercise my discretion under section 313 of the RMA so as to decline to make any of the declarations sought, or any other declaration. Costs are reserved.

DATED at **CHRISTCHURCH** this 24th day of **June** 1999.

J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

ORIGINAL

Decision No. C 48 /2006

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN J F INVESTMENTS LIMITED

(RMA 485/03)

Appellant

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)
Environment Commissioner C E Manning
Environment Commissioner H A McConachy

In Chambers at Christchurch

Mr W P Goldsmith and Mr J R Castiglione for J F Investments Limited
Mr G M Todd and Ms K Rusher for the Queenstown Lakes District Council

FINAL DECISION

Table of Contents

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

The issues

[1] Can an applicant contribute work which improves the environment to offset adverse effects of an activity for which consent is sought? That general question arises in this proceeding because the applicant and appellant J F Investments Limited ("JFIL") has offered, as part of a package of mitigating and remedial work, to spend up to $100,000 removing pine trees which mar the outstanding natural landscape of the Queenstown Lakes District including the land on which it wishes to build a house.

[2] The specific issues in this case are:

(1) whether the applicant's offer of remedial work (mainly off-site) is relevant under the Resource Management Act 1991[1] ("the RMA or "the Act")? and

(2) whether the remedial work is an 'other matter' which we should have regard to under section 104(1)(i) of the Act and whether that section imposes any restraints on environmental compensation? and

(3) if we find we have jurisdiction, whether the environmental compensation in JFIL's offer is, with the other proposed mitigation, sufficiently important to outweigh the negative effects of the house.

[1] In its form prior to the 2003 and 2005 Amendments.

Background

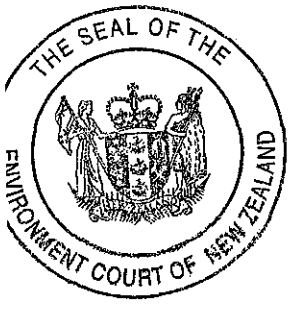
[3] Late in 2002 or early in 2003 JFIL applied[2] to the Queenstown Lakes District Council for subdivision consent to make a boundary adjustment and for land use consent to identify a building platform/build a house on its land (Lot 8 RM 040059, containing 35.4 hectares) at Seven Mile Creek near Queenstown. The Council refused consents and JFIL then brought this appeal. By the end of the hearing before this Court, the land use application[3] for the residential building platform was the only issue to be determined.

[4] This Court issued an Interim Decision[4] on 24 September 2004, in which it allowed the appeal, reversed the Council's refusal of consent, and granted land use consent to the appellant/applicant J F Investments Limited ("JFIL") for a residential building platform on an identified position subject to resolution of conditions. Building a house on an approved building platform is a controlled activity.

[5] There have been two delays in resolving the conditions and giving a final decision. First, on 20 October 2004 the Queenstown Lakes District Council appealed to the High Court. On 18 March 2005 Doogue J delivered a judgement[5] holding that the High Court had no jurisdiction to consider the appeal when the relevant conditions had not been settled.

[6] On 26 April 2005 the Environment Court issued a timetable for the service of submissions on conditions. The parties duly lodged and served submissions as follows:

- On 10 June 2005 from Mr J R Castiglione for JFIL with a full suite of conditions annexed;
- On 4 July 2005 from Mr G M Todd for the Council;
- On 28 July 2005 for JFIL in reply.



2 The copy application on the Court's file is undated.

3 The undated application by JFIL only ticks the box showing a 'subdivision' consent was sought. It is clear from the description of the proposal and assessment of effects that a building platform is also applied for.

4 Decision C132/2004.

5 H C, Invercargill CIV 2004-485-2278.

Mr Todd's memorandum raises jurisdictional issues. The second delay has been caused by this Court's members not having had time in late 2005 to consider and resolve the interesting and important issues raised by the Council.

The matters to be regarded when determining the application

[7] After ascertaining the facts, the first important evaluative task of a consent authority is to ascertain what matters are to be had regard to in making its decision. In compliance with section 104(1) of the Act the Environment Court, in its Interim Decision[6], considered the actual and potential effects of the proposed activity and the objectives, policies, rules and other provisions of the proposed district plan and concluded:

> ... Although it will form a small part of an extensive landscape, the introduction of a residence at an altitude considerably higher than elsewhere on the western side of Seven Mile Creek would have unacceptable effects on the landscape were not additional environmental compensation offered ...

The 'environmental compensation' considered by the Court under section 104(1)(i) is the offer by JFIL to remove wilding pines from the uphill half of its site; and to carry out work up to the value of $100,000 removing pines from elsewhere in the surrounding landscape and covenants not to further subdivide the allotment nor to place additional houses on it.

[8] Since the term 'environmental compensation' is not used in the Act we should first define what we mean by it. The concept arises in this way: an applicant for a resource consent may choose or be required to avoid or mitigate or, occasionally, to remedy the adverse effects of a proposal. Or the applicant may volunteer to remedy or mitigate adverse effects of other activities. The offer may be fungible, that is of the same kind as the values or resources being lost, or different; it may be to remedy or mitigate adverse effects on-site or off-site. We define as 'environmental compensation' any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects[7] of activities on the relevant area, landscape or environment as compensation for

6 Decision C132/2004 at para [20].

7 Theoretically any action under section 5(2)(a) and (b) may also be the positive limb of environmental compensation.

the unavoided and unmitigated adverse effects of the activity for which consent is being sought. We also note that land may be offered by the applicant to ensure that the work is carried out, services performed or restrictions complied with. The corollary of the definition is that normal conditions to avoid, remedy or mitigate the adverse effects of the activity for which consent is sought do not supply environmental compensation.

JFIL's offer of environmental compensation and the Council's concerns

[9] The application by JFIL for subdivision and land use consent does not mention off-site compensation. That was first mentioned, we understand, at the Council hearing. It is certainly referred to in the Notice of Appeal[8]. The contentious aspects of JFIL's offer is that part of its proposed condition which reads (relevantly):

> Wilding Tree Management Plan
>
> 8. That a Wilding Tree Management Plan shall be submitted for certification by the Principal: Landscape Architecture (CivicCorp) within 6 months of the consent being granted. In this instance, the Wilding Tree Management Plan shall detail the following works:
>
> (a) The removal of wilding trees on the site outside of the containment line as shown on plan 7667_7 (aerial view), dated 1 February 2002, attached to this [consent][9] and marked "B". The management plan shall specify the technique and timing of the wilding pine removal and the maintenance necessary to ensure the eradication of wilding pines on the site in perpetuity.
>
> (b) The removal, containment and control of wilding pines up to a cost of $100,000 (ie: cost of the works carried out):
>
> (i) in and around Moke Lake and Lake Kirkpatrick as shown on the plan attached to this [consent] and marked "C"; and/or
>
> (ii) in any other area described in the management plan.

8 At para. 9(c) and (d).

9 The condition states 'decision' but we consider 'consent' is a more accurate term, especially since we do not attach those plans to this decision.

(c) That a bond be entered into in a form to be determined by the Council's Solicitors, to secure performance of the work required by condition 8.(b) above. The bond shall be for the sum of $100,000.

...

The applicant thus proposes to compensate the Queenstown community for the adverse effects on the rural landscape of another house, by cutting down pine trees on another person's land. The offer is to carry out work up to a limit of $100,000.

[10] Mr Todd's submissions on condition 8(b) trenchantly state:

(a) That the Respondent's Partially Operative Proposed District Plan does not contain any policies, objectives, implementation methods, rules or assessment matters which provide for environmental compensation.

(b) ... that the area of land to be subject of the management plan proposed in terms of proposed condition 8 and the extent of works to be undertaken do not achieve a net conservation benefit given the adverse affects that will arise from the construction of the dwelling in the location proposed and in particular within the Outstanding Natural Landscape of the Queenstown Lakes District Council.

(c) ... that the environmental compensation proposed is inadequate given the extent of the areas to be subject of the management plan and the subsequent eradication control and management in terms of wilding pines and the fact they are in a separate visual catchment to that within which the proposed residential building platform is proposed.

(d) ... that for there to be environmental compensation the same must be related directly to the adverse affect which is to be compensated.

(e) That other than to the small extent of works proposed on Department Conservation land, it is submitted that the primary beneficiaries in terms of the works proposed by condition 8 are the owners of the land as distinct from the public generally who will suffer the adverse affects of the proposed dwelling.

(f) ... that to allow the appeal on the basis that the Applicant will meet the costs of remedying what is acknowledged as an adverse affect on the environment (wilding pine spread) is sending the wrong message to the community that resource consents for development in the Outstanding Natural Landscapes of the district can be purchased. The Council asks the question as to how much environmental compensation would have to be paid to justify a dwelling on the faces of Cecil Peak?

Cases considering environmental compensation

[11] Before we turn to the issues as stated, there are a number of cases about or at least relying on environmental compensation, which we discuss briefly to explain the concept. In *Di Andre Estates Limited v Rodney District Council*[10] the Environment Court was considering an application to subdivide a 60 hectare coastal property into four allotments each with an identified house site. The applicant/appellant proposed to protect existing pockets of bush and to revegetate much of the rest of the property[11] - measures which the Court accepted as 'environmental enhancement'[12] relying (later) on section 7(c) and (f) of the Act[13].

[12] The most important decision is *Arrigato Investments Limited v Rodney District Council*[14]. There the Environment Court considered a proposed subdivision of a farm in the coastal environment north of Auckland. The farm to be subdivided contained steep spurs and faces above the sea which were degraded as a result of farming operations. A significant part of the proposal was the volunteered covenants to plant a large area of the site – especially the coastal faces – in indigenous species, and to covenant against further subdivision. The Court held that weighing[15] all relevant matters, including the improvements to the environment against any possible adverse effects of houses on the matters of national importance in section 6(a) and (b) of the RMA, the subdivision consent should be granted.

[13] Like most Environment Court decisions, *Arrigato* does not refer to environmental compensation as such; rather it refers to 'incentives' and 'enhancement'. Despite that the decision has been criticised as allowing a resource consent to be purchased. Professors Ali Memon and Skelton with Ms N Borrie write in their research

---

10 Decision W187/1996 (Environment Judge Treadwell presiding).
11 Decision W187/1996 at pp. 4-5.
12 Decision W187/1996 at pp. 9 and 13 (and elsewhere).
13 Decision W187/1996 at p. 12.
14 (1999) 5 ELRNZ 547; [2000] NZRMA 241 (EC); reversed by the High Court in [2001] NZRMA 158 as *Auckland Regional Council v Arrigato Investments Limited*, but reinstated on further appeal: (2001) 7 ELRNZ 143; [2001] NZRMA (CA) 486; [2002] 1 NZLR 323.
15 [2000] NZRMA 241 at para [102].

monograph, *An International Perspective on Environmental Compensation: Lessons for New Zealand's Resource Management Regime* [16]:

> ... Perhaps the major difficulty with [*Arrigato*] ... is that the perceived adverse effects of the proposed subdivision (additional houses in a coastal environment) had no connection with the existing degraded landscape. Consequently, it is not really a case about environmental compensation as understood internationally but rather a case about trading off one value for another or as some might see it "buying" a resource consent.

Unfortunately that issue was not raised in the appeals to the High Court and Court of Appeal in *Arrigato*. Nor is that part of the *International Perspective* paper consistent with its earlier description of international practice where off-site compensation is discussed at some length as environmental compensation, e.g. the USA's 'mitigation banks'[17] whereby development of one wetland is mitigated by protection of another elsewhere.

[14] Counsel did not refer us to them but we are aware that there are other cases where environmental compensation was assessed by the Environment Court although the remedial or enhancement work was not identified as such. For example, in the Waipara landfill case – *Transwaste Canterbury Limited v Canterbury Regional Council*[18] – the Court allowed preparation for a new landfill site to remove areas of remnant lowland forest, in return for increased protection and maintenance of other larger and hence ecologically more desirable remnants, as part of 400 hectares of land being turned into a conservation area[19]. The Court concluded[20]:

> Overall the application has been presented to the Court as a package. Discernable benefits to the wider environment of Kate Valley and to the region as a whole are proposed as part of this total package. Thus in any consideration under Part II and in the integration necessary under section 5, these benefits are advanced as a critical feature.

It appears the environmental compensation was all accepted by the Court in the end[21].

16 [Lincoln University, 2004] at p. 33.
17 [Lincoln University, 2004] at para 3.
18 Decision C29/004 (Environment Judge Smith presiding).
19 Decision C29/2004 at para [108].
20 Decision C29/2004 at para [113].
21 C29/2004 at para [266].

[15] In the *Whangamata Marina* case (*Whangamata Maori Committee et al v Waikato Regional Council*[22]) the Environment Court recommended to the Minister of Conservation that resource consent for a new marina be granted on condition (amongst many others) that remedial work be carried out upstream in the same estuary. At the beginning of its overall evaluation the Court stated that it agreed with counsel for Environment Waikato in his submission that[23]:

> When read as a whole, the biodiversity provisions of the RPS provide for avoiding, remedying and mitigating adverse effects of use and development through a variety of means, including appropriate **off-site mitigation** which recognises the specific characteristics of the site that is proposed to be developed. [Our emphasis]

It seems to us that the Court relied on the concept of environmental compensation in coming to its decision.

[16] Mr Castiglione referred us to two cases in which 'environmental compensation' has been expressly discussed: *Rutherford v Christchurch City Council*[24] and *Memon and others v Christchurch City Council*[25]. Both those cases concerned the transfer of parts of the rural land owned by the appellants to the Council in return for urban zonings of the balance which allowed subdivision. The decisions are not particularly useful because 'environmental compensation' was specifically provided for in the proposed City Plan[26] and thus the lawfulness of the concept under the Act was not considered. That is the legal issue we turn to shortly.

[17] We conclude that it is not uncommon for the Environment Court to allow some adverse effects, even on matters of national importance, if there are sufficiently useful and appropriate offsetting or remedial works. Next we examine the text, purpose and scheme of Part 2 of the RMA to see if it provides authority for that environmental compensation.

22 Decision A173/2005 (Principal Environment Judge Bollard presiding).
23 Quoted in Decision A173/2005 at para [56].
24 Decision C26/2003.
25 Decision C116/2003.
26 Christchurch City Plan, Explanation of Policy 6.3.14 [Volume 2, p. 6/14].

(1) Is environmental compensation envisaged by the Act?

Section 5 of the RMA

[18] Section 5(1) of the RMA states that the purpose of the Act is to promote sustainable management of natural and physical resources. The definition of sustainable management in section 5(2) provides two instructions as to how that purpose is to be achieved. First, natural and physical resources should be **managed** so as to enable people and communities to maximise their wellbeing, health and safety. Secondly, section 5(2)(a), (b) and (c) provide an environmental safety net underneath the management of those resources. Practically one can focus on paragraph (c) which requires that the **adverse effects** of activities are to be avoided, remedied and mitigated, because section 5(2)(a) and (b) are merely some examples (albeit very important ones) of the resources which are to be sustained or safeguarded from adverse effects of activities. Combining the two general instructions, we hold that one general theme of the Act's purpose is that all past, present and future adverse effects of all activities on the environment are to be managed in an integrated way (including by use of markets) for the purpose set out in section 5(2) of the Act as illuminated by the remainder of Part 2.

[19] The machinery – including resource consent procedures, policy statements and plans – for management of resources is given in the subsequent parts of the Act. When applying those procedural parts of the RMA it needs to be borne in mind that 'managing so as to enable' people and communities is to be contrasted with, say, the more directory and paternal/maternal formula of 'controlling so as to provide for' people and communities – hence the emphases in section 5 on 'enabling' and in section 32 of the Act on thorough testing of proposed objectives, policies and methods in plans and other statutory instruments. In the context of these proceedings, the enabling concept suggests that landowners should be allowed to *volunteer* environmental compensation as a set-off for creating some adverse effects. If the compensation is inadequate, resource consent will still be declined.

Section 5(2)(c) of the RMA

[20] Section 5(2)(c) states that one component of sustainable management is the:

> (c) Avoiding remedying or mitigating [of] any adverse effects of activities on the environment.

At first sight that means that any adverse effects of any activities are always relevant under the RMA because avoiding, remedying or mitigating those effects is part of the purpose of the Act.

[21] A 'remedy' is defined (relevantly) as[27]:

> ... **2** a means of counteracting or removing anything undesirable. **3** redress; legal or other reparation.

So the use of the word 'remedy' in section 5(2)(c) means that adverse effects of an activity may be allowed to occur as part of sustainable management if redress or reparation for those effects is later given. In fact, remedial work is directed less often than avoidance or mitigation. One of the few cases we can think of in which adverse effects were contemplated as possibly occurring and then required to be remedied is *Alexandra District Flood Action Society Incorporated v Otago Regional Council*[28]. There the Environment Court suggested rules whereby if (when) Alexandra is flooded by the Clutha River as a result of the Roxburgh Dam – for which consents were being sought – then the consent holder will compensate houseowners and other occupiers for the costs of flood damage and inconvenience.

[22] The very wide and inclusive definition of 'effects' in section 3 of the Act suggests that effects in section 5(2)(c) may be (in addition to the characteristics specifically mentioned) direct or indirect, simple or confused. Further, observed 'effects' may have multiple causes. Water and air pollution are classic examples: who can say from which farm downstream bugs (faecal coliforms) come, or which fireplace or car is emitting particles to the air? Since the RMA recognises such causal complexity we consider it also contemplates complex solutions to achieve better overall environmental outcomes.

[27] The New Zealand Oxford Dictionary [OUP 2005].
[28] Decision C 102/2005.

[23] The final part of section 5(2)(c) should also be read in a broad way. First, the remedying of adverse effects of 'activities on the environment' in section 5(2)(c) does not only refer to effects caused by the activity for which a resource consent is sought. We hold that the phrase refers also to adverse effects of other, including past, activities on the site and offsite on neighbouring parts of the relevant environment[29], area or landscape. Secondly, and more importantly 'environment' is very widely defined[30] in the Act. Most human activities involving natural and physical resources could be said to have some positive effects on the 'environment'. In every decision under the Act a choice or compromise is almost always made between limiting the economic and social conditions of people by avoiding the adverse effects of their activities or enabling individual's wellbeing by allowing some adverse environmental effects to occur, duly remedied or mitigated to the appropriate extent. Environmental compensation is one type of choice or compromise.

[24] Those choices and the assessment of adverse effects under the RMA are greatly assisted by sections 6 and 7 of the Act[31] which give Parliament's guidance to functionaries under the RMA as to which resources are (in general terms) the most important ones, and, by inference, how to rank the seriousness of adverse effects on those resources.

Section 6 of the RMA

[25] The matters of national importance in section 6 mean that if adverse effects on one of them are contemplated then the safety-net represented by section 5(2)(a) to (c) becomes much more rigid, and may only be stretched (or lowered) if there is something appropriately important (heavy) which has that effect. Cases where that has occurred are: *New Zealand Rail Limited v Marlborough District Council*[32] (port facility at Shakespeare Bay in the coastal environment); *Auckland Volcanic Cones Society Incorporated v Transit New Zealand*[33] (motorway requiring excavation of an

29 'Environment', 'area' and 'landscape' are taken from the settings described in section 6 of the Act.
30 Section 2 of the Act.
31 The matters section 8 requires to be taken into account are largely subsumed in section 6(e) and 7(a) of the RMA – *Ngati Hokopu v Whakatane District Council* (2003) 9 ELRNZ 111.
32 (1993) 2 NZRMA 449 confirmed by the High Court on appeal: [1994] NZRMA 70.
33 [2003] NZRMA 54 (EC) confirmed on appeal: [2003] NZRMA 316 at paras 27 to 36 (HC).

outstanding natural feature); *Genesis Power Limited v Franklin District Council*[34] (wind farm in the coastal environment).

[26] As Greig J stated in *NZ Rail Limited v Marlborough District Council*[35]:

> It is certainly not the case that preservation of the natural character is to be achieved at all costs.

So the decisions show that at least in the cases of the coastal environment[36], and outstanding natural landscapes[37] (and the same would apply to historic heritage[38]) there is no absolute protection for those nationally important matters; rather there is protection in each case from 'inappropriate' use and development. That implies there may be use and development which is appropriate.

[27] We conclude that, since activities which meet other agendas of national importance are allowable under the RMA even though they create permanent adverse effects on nationally important natural resources, it is inconsistent to suggest that environmental compensation is outside the scope of the Act. If adverse effects on the environment can be justified as providing a net benefit because they are in the national interest, then adverse effects offset by a net *conservation* benefit added by enhancement, or the remedying of other adverse effects on the relevant environment, landscape or area must logically be justifiable also. They are certainly relevant under both section 5(2)(c) and section 7 of the RMA.

Section 7 of the Act

[28] Section 7 provides that certain matters must be had particular regard to. They include:

> ...
>
> (b) The efficient use and development of natural and physical resources;
>
> ...
>
> (f) Maintenance and enhancement of the quality of the environment.

34 [2005] NZRMA 541.
35 [1994] NZRMA 70 at 86.
36 Section 6(a) of the Act.
37 Section 6(b) of the Act.
38 Section 6(f) of the Act.

If any part of the environment is degraded then those paragraphs both contemplate that the local authority look at improving the environment[39]. The RMA does not regard the present Environment – being the sum of all environments – as the best of all possible New Zealands. Section 7(f)'s reference to *enhancement* of the quality of the environment requires that improvements may be made in appropriate circumstances. That is consistent with the purpose of the Act which requires remedying of the adverse effect of activities, including past effects (of past activities). For example air and water quality were in the past regarded as public goods – people could pollute air and water nearly (subject to the common law of nuisance) as much as they wished. It is clearly contemplated by section 7(f) together with sections 5(2)(a) to (c) of the RMA that improvements to air and water quality may be very desirable ends of resource management. The same applies to degraded land and related natural resources.

[29] There is a link between enhancement and efficiency. Where there are well-defined property rights it is often efficient to allow adverse effects to occur without interference by local authorities or Courts hence the principle in section 9 of the Act that all land uses are allowed unless forbidden by a rule in a district or regional plan. Again section 5(2)(c) contemplates that any adverse effects may be remedied or repaired if, in retrospect, the costs they impose are too great. That is efficient because the costs of the pollution are then known and the clean up effects can be quantified too. It is relatively easy to ensure the remedial costs are not greater than the pollution costs.

Conclusion

[30] Every applicant for resource consent is entitled to have their application considered on the basis that if the positive effects of the proposed activity outweigh the adverse effects of that activity when they are weighed in the light of all relevant objectives and policies and with the appropriate multipliers (as described in *Baker Boys Limited v Christchurch City Council*[40]) constituted by the duties to 'recognise and provide for'[41] and 'have particular regard to'[42] in Part 2 of the Act, then they should be

39 Indeed enhancing public access to the coastal marine area, lakes and rivers is a matter of national importance: section 6(d) of the RMA.
40 [1998] NZRMA 433 at para 109.
41 Section 6 of the RMA.
42 Section 7 of the RMA.

granted consent unless in the particular case the objectives and policies of the relevant plan, or Part 2 matters trump everything. However, if an applicant fears that consent will be refused because some of those matters will not be satisfied – then under the enabling and efficiency provisions of Part 2 of the Act he or she can offer environmental compensation to add to the positive benefits of their proposed activity. Of course all the environmental compensation in the world will be of no assistance if it is not something which a consent authority may have regard to. We now turn to that issue.

(2) Does environmental compensation come under section 104(1)(i)?

The words of section 104(1)(i)

[31] Section 104(1)(i) requires that, subject to Part 2 of the Act[43], the consent authority should also have regard to :

> (i) any other matter [it] ... considers relevant and reasonably necessary to determine the application.

The meaning of the words 'relevant' and 'reasonably necessary' are relatively straightforward. The test of relevance is that the matter relates in some way to the consent authority's decision so as to achieve the purpose of the Act.

[32] Being 'reasonably necessary' imports a concept somewhere between 'expedient' on one hand and 'essential' on the other: *Environmental Defence Society Incorporated v Mangonui County Council*[44]. There may be some confusion about whether that pre-RMA decision is applicable because the Full Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[45] after referring to the *EDS* case found the meaning of 'necessary' in section 32(1)(a)(i) of the RMA to be 'expedient or desirable rather than essential'. We consider that in section 104(1)(i) of the Act 'reasonably necessary' is used in the *EDS* sense as requiring something more than mere expediency but less than essentiality. The word 'reasonably' introduces an objective test for the desirability of the matter being considered.

43 As stated in the opening words of section 104(1) of the RMA prior to the 2003 amendment.
44 [1989] 3 NZLR 257 (at 260 per Cooke P): (1989) 13 NZTPA 197.
45 [1994] NZRMA 145; (1992) 1B ELRNZ 150.

[33] The qualifying phrase in section 104(1)(i) which reads '... to the determination of the application' is more obscure. What it does not say is that the relevance of other matters must be 'to the avoidance, remedying, or mitigation of adverse effects of the activity'. That would be mere repetition of the negative aspects of section 104(1)(a). Section 104(1)(i) must be read as adding to the matters relevant under section 104(1)(a).

[34] Take the hypothetical case of a landowner who wants to build a helipad for use not more than twice per month. Assume that activity would breach noise rules in the district plan. Assume further that either elsewhere on the site or next door to it there is a sawmill which continuously breaches noise rules but operates under existing use rights; and that the landowner offers to shut down the sawmill so that the overall noise levels are less than before. Is consideration of that offer reasonably necessary to determine the application? We think the answer must be 'yes, it is material'. Questions of weight are then to be decided on the facts.

[35] The ultimate question for the consent authority on any application for resource consent is to determine whether granting or refusing consent better achieves the purpose of the Act. As we have discussed, part of that determination involves resolving whether adverse effects of activities on the relevant environment are being appropriately avoided, remedied or mitigated. We conclude that consideration of environmental compensation – being remedying of adverse effects of other activities than that for which consent is sought – may be, to a greater or lesser extent depending on factors we identify shortly, reasonably necessary to the ultimate determination.

The context of the section

[36] The purpose and principles of Part 2 of the Act must always be very important, and in certain circumstances may over-ride a strict interpretation of the section 104(1) tests as to the matters to be had regard to: *Reith v Ashburton District Council*[46] adopting *Environmental Defence Society Incorporated v Mangonui District Council*[47]. Within Part 2 there is an asymmetry in section 5(2)(c) which makes 'avoiding, remedying and mitigating **adverse** effects' relevant, but not the positive effects of activities: *BP Oil*

46 [1994] NZRMA 241 at 252.
47 [1989] 3 NZLR 257; (1989) 13 NZTPA 197.

New Zealand Limited v Waitakere City Council[48]. However, the contrast between positive effects of an activity (or even a crude offer of cash to purchase a resource consent) and offering to remedy adverse effects of the activity on the environment is not a matter of either/or. There is a continuum of remedial or mitigating actions which may be appropriate. A payment of compensation to persons adversely affected may in unusual circumstances be the best remedy[49].

[37] We accept that how to value environmental compensation is very complex as it requires comparing apples and oranges: see Currencies and the Commodification of Environmental Law[50]. How can one wetland or landscape be validly compared with another? The difficulties of obtaining such (e)valuations must not prevent the attempt if sustainable management of resources requires it. The practical answer is usually that if the proposed remedial or mitigatory action is the repair of damage of the same kind as the adverse effects of the activity, it is easier to accept as not only relevant, but reasonably necessary as well. Similarly, if the proposed remedy is also in the same area, landscape, or environment then its benefits, compared with the costs of the proposed activity, are more easily seen. Conversely, if the offered environmental compensation is too far in distance, kind or quality from the adverse effects caused by the proposed activity then it may be no longer reasonably necessary, but merely expedient for the developer to offer.

[38] One kind of 'other matter' has limits imposed elsewhere in the RMA: section 108(10) forbids financial contributions of land or money[51] to a consent authority unless their purpose is spelled out in a plan[52] and the level[53] of the contribution is also specified. However, financial contributions are payments of cash or transfers of land to local authorities. That is not explicit in section 108 but it does appear from sections 110 and 111 which relate respectively to the return of a financial contribution by a consent

48 Decision W37/1994.
49 See the *Alexandra District Flood* case referred to earlier (Decision C102/2005).
50 J Salzman and J B Ruhl (2000-2001) 53 Stan LR 607.
51 Section 108(9) of the RMA.
52 Section 108(10)(a) of the RMA (quoted below).
53 Section 108(10)(b) of the RMA.

authority if an activity does not proceed, or its use by the authority in 'reasonable accordance with the purposes for which it was received'. This set of sections about financial contributions does not contemplate them being received by any other person. In our view the limits on financial contributions which may be required by a consent authority are to ensure that it does not seek contributions (unless clearly signalled in advance in the relevant plan) for adverse effects that are too remote or which can be equally or better provided for by market forces, e.g. provision of new hospitals, telephone services.

[39] We note that in an *obiter* passage in the majority decision of the Court of Appeal in *Estate Homes Limited v Waitakere City Council*[54] Baragwanath J wrote:

> To the extent that [a subdivision] imposed what in England are called "external costs", that is, consequences involving loss or expenditure by other persons or the community at large (see *Tesco Stores* at p771 F-G), the developer might lawfully be required by conditions to bear or at least contribute to such costs within the limits of s 108(9)-(10), when those provisions apply.

With respect, that appears to be an over-generalisation. As the learned Judge wrote earlier in *Estate Homes*[55]: ' ... the first general theme of the [RMA] concerns the effects of the proposal'. It appears to us that except in the special case of forced contributions of land or money to the consent authority[56], the Act does not impose limits on the extent and cost of work or services to avoid, remedy or mitigate adverse effects. In our view it is important that section 108(10) is not interpreted so as to defeat the purpose of the Act, which includes avoiding, remedying or mitigating all adverse effects of activities[57] on the environment. Further, we are respectfully concerned that Baragwanath J's interpretation could lead to perverse results in that it will remove landowners' rights rather than enhancing them. If a landowner cannot volunteer environmental compensation such as a covenant not to subdivide in order to remedy or mitigate wider external costs in return for causing limited and acceptable adverse effects in appropriate cases, then their application will be decided at the cost of significant net conservation benefits.

54 CA 210/04, 11 November 2005 at [161].
55 CA 210/04, 11 November 2005 at [103].
56 Under section 108(10) of the Act.
57 Section 5(2)(c) of the Act.

[40] Applications for a resource consent must be accompanied by an assessment[58] of environmental effects. The general contents of that assessment are specified in the Fourth Schedule to the Act. It contains several references to identifying the adverse effects 'of the activity'. That is as one would expect because the primary emphasis of the RMA is on consent-holders avoiding or mitigating the effects – especially those which are true[59] externalities – caused by them. There is nothing in the requirements for such an assessment which precludes consideration of volunteered work to remedy past effects on, or to enhance, that environment.

[41] Finally, another important aspect of the Act which must be borne in mind when considering environmental compensation is the importance of public participation in the application of the RMA – see the Supreme Court decision in *Westfield (New Zealand) Ltd v North Shore City Council*[60]. That public participation allows scrutiny of environmental compensation at both generic (district plan) and specific (resource consent) stages; ensures it is adequate; and that it is not subject to political or bureaucratic capture for improper or inadequate ends.

Conclusions

[42] We conclude that off-site work or service or a covenant, if offered as environmental compensation or a biodiversity offset[61], will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:

(1) it should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;

---

58 Section 88(2)(b)) of the RMA.

59 "Externalities (or spillover effects) occur when ... people impose costs or benefits on others *outside the marketplace*": Microeconomics P A Samuelson and W D Nordhaus [Irwin/McGraw-Hill (16th Edition) 1998] p. 36 (our emphasis: the significance of those words is usually ignored).

60 [2005] NZRMA 337.

61 The term used in Biodiversity Offsets: Views, experience and the business case: by K ten Cate, J Bishop and R Bayon [IUCN November 2004] – this paper has been useful in considering the following list.

(2) it should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;

(3) it must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;

(4) there should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;

(5) it should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.

(3) Is JFIL's compensation relevant and reasonably necessary?

[43] Some background facts need to be borne in mind. First, while the site is in an outstanding natural landscape[62] (ONL), it is both on the edge of that landscape and at the lower end of the scales of 'naturalness' and 'outstandingness'. The site is on the border between an urban enclave within exotic conifers near Glenorchy Road and the more open (but with pines encroaching) landscape of the hills surrounding Moke Lake. All of the pines, the neighbouring houses and potential house sites significantly reduce the naturalness of the landscape enfolding the site. Secondly, pines[63] are to be removed from the site above a wilding pine containment line set by the Council so that there are other environmental benefits as a result of the proposal. Thirdly, the JFIL site is both a source of wilding seedlings and a potential growth area for further wildings. Fourthly, we described the Council's 'Wakatipu Wilding Control Strategy' in the Interim Decision[64]. Clearly it is important to stop the spread of wilding conifers into the outstanding natural landscapes of the district, and JFIL's offered compensation assists with that.

[44] The two proposed areas for removal of wilding pines are a minimum of two and five kilometres from the site respectively. At first sight it is difficult to see how removing those trees can be the remedying or mitigating of relevant adverse effects,

62 Under section 6(b) of the RMA.
63 Decision C132/2004 at para [21].
64 At paragraph [21] et ff.

although that is obviously desirable in a more general way for the environment. After considerable reflection we hold that the wilding pines are relevant adverse effects. That is because this case is about a natural resource – the landscape – which is, by definition, larger in scale than many other resources. We now refer to some important evidence and provisions of the District Plan which support that view.

[45] The evidence of Mr B J Espie, the landscape architect called for the Council, is that[65]:

- The site is part of a memorable, eminent mountainous landscape that includes Bobs Peak, Wedge Peak and Moke Lake.
- When this landscape is assessed as a whole a 'cloak of human activity' is not dominant, the naturalness of the landscape is dominant.
- The aesthetics of the landscape of which the site is a part are of a natural, romantic landscape.
- Openness of the landform allows legibility of the area's formative processes.

We defer to Mr Espie's expert opinion in these regards, although in our view there is much to be said for identifying the site as part of the Lake Wakatipu landscape separated from the alpine landscape around Moke Lake by the saddle one kilometre up the Moke Lake Road.

[46] The site is, as we have written, on the edge of the outstanding natural landscape. Immediately to the south-east and south-west of the site are rural residential enclaves. The wilding pine removal areas are both part of the same landscape, although the wildings in those areas are not the result of pine seed escaping from the site. Mr N J Ledgard, the forester called for JFIL, identified[66] two historical sources of pines in this landscape:

(1) Several, now felled, Scots pine (*Pinus sylvestris*) by an old crofter's cottage nearer Moke Lake; and

[65] B J Espie, evidence-in-chief, para 3.12.
[66] N J Ledgard, evidence-in-chief, para. 4.2.

(2) Corsican pine (*P. nigra*) which have spread from old trees by Close Burn Station homestead near Lake Wakatipu.

The Corsican pines have spread up into the creeks and faces to the south of Wedge Peak immediately above the site, onto the site, and further East, whereas the Scots pines are a minimum of one kilometre to the North. Coming from the south the Corsican pines are less of a threat to the outstanding natural landscape than the Scots pines to the north.

[47] Mr Ledgard wrote that[67]:

> The scattered outlier trees occurring closer to Moke Lake and on the Hanley Faces are Scots pine, indicating they have come from Bob's Peak or the 'woolshed' stands, from seed blown by a southerly wind. Their low numbers and relatively uniform age (around 20) indicates that such a spread event from the south occurs only rarely. Many have been removed, but not before they started coning, so a few young seedlings exist close to them.

JFIL's proposal does not relate to removal of any of the Corsican pines, except some on the site itself. Rather the JFIL proposal is to remove mainly Scots pine from two areas north of the site. Other factors favouring the removal of the Scots pine are that they can cone at higher altitudes (900 m or more) than Corsican pine, and are thus more of a threat to the ONL; the age of the various patches of trees (coning does not occur for the first eight to twelve years of a pine tree's life); and the prevailing winds and their character – warm nor'westers open cones and thus spread seeds more readily than southerlies. Those winds would spread seed in the direction of the site.

Outcome

[48] The net environmental benefit proposed by JFIL in this case is that while the quality of the edge of the ONL will be reduced slightly by the building of a house and the attendant signs of domesticity, there will be an improvement in the rest of the same outstanding natural landscape.

[49] The Council's position against the proposed house is supported by the important policy for outstanding natural landscapes in 'the District-wide Issues' chapter of the

[67] N J Ledgard, evidence-in-chief, para 4.8.

District Plan providing for[68] the protection of the naturalness and amenity values of views from public places. The Council view does not, in our opinion, give sufficient weight to three other equally important policies which we did not quote in the Interim Decision. Two relating to the nature conservation values of the District are[69]:

> 1.5 To avoid the establishment of, or ensure the appropriate location, design and management of, *introduced vegetation* with the potential to spread and naturalise; and to encourage the removal or management of *existing vegetation with this potential and prevent its further spread.*
> [our emphasis]

and:

> 1.7 To avoid any adverse effects of activities on the natural character of the District's environment and on indigenous ecosystems; by ensuring that opportunities are taken to promote the protection of indigenous ecosystems, including at the time of resource consents.

Mr Todd submitted that the district plan does not provide for 'environmental compensation'. He is literally correct in that the phrase is not used. However, we consider that those policies recognise that it may be appropriate to impose a condition as to removal of 'introduced vegetation' when determining an application for resource consent.

[50] The third policy supporting the JFIL offer is also the policy for outstanding natural landscapes. It is[70]:

> (a) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.

Removing pines from the ONL which includes the site will undoubtedly have a desirable effect on maintaining the openness of that landscape.

[68] Policy 4.2.5(2)(c) District Plan p.4-9 [October 2004 reprint] – although we note this policy is not yet operative.
[69] Policy 4.1.4 (1.5) and 1.7 [District Plan, p. 4-3].
[70] Policy 4.2.5(2)(a) [District Plan, p. 4-9].

[51] We also recall, as we noted in our Interim Decision, that one of the methods by which the PODP aims to achieve its district-wide objectives and policies for nature conservation does provide for what we have described as environment compensation. It states[71] that the Council should consider:

> ... conditions on resource consents to remedy or mitigate the adverse effects of an activity, such as allowing development in some areas of diminished conservation value in return for contributions or enhancement of other more significant nature conservation areas.

The plan clearly contemplates that adverse effects may be remedied by work in a different area. In such cases proximity may not be as significant as would otherwise be the case, and weight may be given to the type of environmental benefit conferred, e.g. enhanced protection of habitat for loss of other habitat.

[52] Like *Arrigato*[72] this is a case where a development is proposed in a degraded but important landscape. The enhancement to the immediate environment both on-site and off-site volunteered by the applicant meets most of the desiderata we discussed earlier: it is transparent even if not identified in the original application; it achieves important and directly relevant policies in the district plan; it is to be ensured by conditions and it heavily outweighs the adverse effects of a new house and its attendant signs of domesticity in its current largely coniferous and alien part of the landscape. We confirm our preliminary view in the Interim Decision that after weighing all the relevant matters under section 105 of the (pre 2003 amendment) RMA – including the views of neighbours over the site and all the other matters discussed in our earlier Decision – the resource consent for the residential building platform should be granted upon the conditions suggested by JFIL but including an amended condition 8.

[53] We have not overlooked that there is a potential challenge to condition 8(b) on the grounds that it does not comply with the *Newbury* tests[73]. If consent is granted it is unlikely that the Council would challenge the condition and the consent-holder could

71 PODP section 4.1.4 [page 4/4].
72 [2000] NZRMA 241.
73 See *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 at 739 (HL per Viscount Dilhorne).

not – because of the principle in *Augier v Secretary of State for the Environment*[74] (applied in *Mora v Te Kohanga Reo Trust*[75]). To ensure compliance we record that we regard amended condition 8 in its entirety as essential to our decision, and non-severable.

[54] We are concerned that the proposed bond may be ineffective – if the neighbouring owner(s) refuse consent for work to be carried out on their land, how would the Council use the forfeited bond? We consider that the bond condition should be deleted, and instead the off-site compensation should be a condition precedent to any preparation of the building platform or building permit being issued. We also agree with Mr Castiglione's final submission that certification of the Management Plan should be by an independent expert. Accordingly we consider that condition 8 should be amended to read:

> (1) That a Wilding Tree Management Plan shall be submitted for certification by a suitably qualified expert, appointed with the agreement of the applicant and the Council or failing such agreement appointed by the Court within six months of the consent being granted …
>
> (2) The Wilding Tree Management Plan shall detail the following works:
>
> (a) The removal of wilding trees on the site outside of the containment line as shown on plan 7667_7 (aerial view), dated 1 February 2002, attached to this [consent] and marked "B". The management plan shall specify the technique and timing of the wilding pine removal and the maintenance necessary to ensure the eradication of wilding pines on the site in perpetuity.
>
> (b) The removal, containment and control of wilding pines up to a cost of $100,000 (ie: cost of the works carried out):
>
> (i) in and around Moke Lake and Lake Kirkpatrick as shown on the plan attached to this [consent[and marked "C"; and /or
>
> (ii) in any other area described in the management plan and within the Moke Lake – Seven Mile landscape.
>
> (3) The Wilding Tree Management Plan must be completed as to all works specified in condition (2)(b) above before:
>
> (i) the preparation of the approved building platform on the site; and/or
>
> (ii) the issue of any building permit for a house on the land.

[74] (1979) 38 P & CR 219.
[75] (1996) 2 ELRNZ 290; [1996] NZRMA 556.

[55] Costs are reserved.

DATED at CHRISTCHURCH 27 April 2006

J R Jackson
Environment Judge

Issued[76]: 27 APR 2006

76 Jacksoj/Jud_Rule/D/RMA 485-03(v2) Final.doc.

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

Table of Contents

Para No

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

---

1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 [RMA], s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

7 At [1341].

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with

---

8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

---

14 *King Salmon* (Board), above n 6, at [1235]–[1236].

15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

---

16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

---

23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the

---

33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
>
> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
>
> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

---

40 See s 87A.

41 *King Salmon* (Leave), above n 10, at [1].

Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

---

[42] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters …

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

---

43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

---

[46] The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

[47] See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of ss 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 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; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that 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. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

---

49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] 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 (that is, ss 6(a), (b) and (c)). 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. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

---

[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 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. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry

---

54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.
>
> …

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47 to 52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

---

60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
>
> …
>
> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
>
> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

---

64 *King Salmon* (Board), above n 6, at [1227].

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

> … may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource … is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

---

65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

---

71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

---

77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

---

81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

---

85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> 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 coastal environment contains renewable energy resources of significant value;

- 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;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **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.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

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;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. 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.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

---

[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

---

89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

---

93 Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

---

94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

---

97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

---

101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "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. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

---

105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a 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.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

---

[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

---

[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises 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"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

[111] *Man O'War Station*, above n 46, at [48].
[112] *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, 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

---

113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

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.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> 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;

[116] RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make 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;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says 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", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider 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. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

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.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. 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 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.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will 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: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

---

[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

---

119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

---

122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

---

124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that 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. If this is so, 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.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

---

129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, 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.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

---

[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. 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 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. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

---

[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

---

[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But 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.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

---

143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

---

147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

---

148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. 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. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

---

149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. 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, however, 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. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

---

150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

---

151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
>
> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

(b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

…

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

---

154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

---

156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

---

158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

---

163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

---

[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

---

166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(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 … use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:

…

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

13 Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate … 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;

…

15 Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

…

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

---

170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … 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 proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

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.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

[172] At [98]–[105] of the majority's reasons.

> (a) avoid adverse effects of *such* 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 *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

---

[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

---

[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

---

[175] At [144] of the majority's reasons.
[176] See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Russell McVeagh, Wellington for First Respondent
Dyhrberg Drayton, Wellington for Second Respondent
DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002064
[2015] NZHC 767

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under s 299 of the Resource Management Act 1991
BETWEEN	MAN O'WAR STATION LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing:	24 and 25 March 2015
Appearances:	M E Casey QC and M J E Williams for Appellant B O'Callahan and J Burns for Respondent R B Enright and M C Wright for Environmental Defence Society Incorporated (s 301 party) R Gardner for Federated Farmers of New Zealand (s 301 party)
Judgment:	21 April 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 21 April 2015 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Introduction

[1] The appellant, Man O'War Station Ltd ("MWS") owns a 2,364 hectare rural property at the eastern end of Waiheke Island and on Ponui Island in the Hauraki Gulf, known as Man O'War farm ("the farm property"). Proposed Change 8 to the Auckland Regional Policy Statement ("Change 8") introduced new policy provisions for Outstanding Natural Landscapes (ONLs) and the Auckland Council prepared a new set of ONL maps for the Auckland region. The new mapping resulted in approximately 1,925 hectares of the farm property (more than 75%) being mapped as ONLs, referred to as "ONL 78" (on Waiheke Island) and "ONL 85" (on Ponui Island).

[2] MWS appealed to the Environment Court against the Council's mapping. In its decision given on 29 July 2014, the Environment Court accepted that areas in Man O'War Bay and Hooks Bay, and the whole of Ponui Island (apart from the eastern coastal margin and sea scape), should be excluded from the ONL.[1] However, the Court rejected MWS's submission that only coastal areas and particular inland areas should be included in the ONL.

[3] MWS has appealed to this Court, pursuant to s 299 of the Resource Management Act 1991 ("the RMA"), on the grounds that the Environment Court made errors of law.

Interim or final decision?

[4] The decision of the Environment Court is headed as an "Interim Decision". At [152] the Environment Court directed that the mapping of ONL 78 and ONL 85 in Change 8 was to be revised as set out in the decision, "subject to possible further consideration of mapping should wording in the [Auckland Regional Policy Statement] change after further agreement or input from parties".

---

1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167.

[5] An interim decision of the Environment Court decision cannot be appealed.[2] However, counsel for MWS accepted that in relation to the mapping of ONLs, the decision is final. There is, therefore, no issue as to MWS's ability to appeal.

Relevant statutory provisions

[6] The applicable law is set out in the provisions of the RMA as they were when Change 8 was publicly notified in September 2005. In Part 2 of the RMA "Purpose and principles", s 5(1) provides that the purpose of the Act is to promote the sustainable management of natural and physical resources. "Sustainable management" is defined in s 5(2) as including "avoiding, remedying, or mitigating any adverse effects on the environment". Section 6 is headed "matters of national importance" and provides that in achieving the purpose of the Act, persons exercising functions and powers under it "shall recognise and provide for the following matters of national importance", including at s 6(b): "the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development". Those sections have remained unchanged since 2005.

[7] Provisions relating to the sustainable management of the environment are set out in a three-tiered system, moving from the general to the specific: national, regional, and district.[3] Section 57(1) of the RMA (unchanged since 2005) provides that "there shall at all times be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation …" Section 60(1) provides that there must be a regional policy statement for each region, prepared by the regional council. Section 61(1) provides that the regional policy statement must be prepared and changed in accordance with (among other things) Part 2 of the Act, and the regional policy statement must, pursuant to s 62(3) give effect to a New Zealand coastal policy statement. Sections 60 to 62 are also unchanged since 2005.

[8] Policies 13 and 15 of the New Zealand Coastal Policy Statement 2010 (NZCPS 2010) are particularly relevant in the present case. Policy 13 "Preservation of natural character" is:

---

2 See *Mawhinney v Auckland Council* HC Auckland CIV 2010-404-63, 26 October 2011 at [90]-[99] and *Motiti Avocados Ltd v Minister of Local Government* [2013] NZHC 1268.

3 See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [9]-[16].

(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; …

[9] Policy 15 relates to "Natural features and natural landscapes" and begins:

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on activities on other natural features and natural landscapes in the coastal environment;

Policy 15 then sets out means by which the policy is to be achieved, including:

(c) identifying and assessing the natural features and natural landscapes of the coastal coastal environment of the region and district, at minimum by land typing, soil characterisation and landscape characterisation …

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies, and rules; …

[10] The term "outstanding natural landscape" is not defined in the RMA. The Environment Court referred to the approach and factors set out in the Environment Court's decisions in *Wakatipu Environmental Society Inc v The Queenstown-Lakes District Council ("WESI")*,[4] and in *Maniototo Enviromental Society v Central Otago*

[4] *Wakatipu Environmental Society Inc v The Queenstown-Lakes District Council* [2000] NZRMA 59.

District Council ("Maniototo"),[5] in which the Court will first identify a "landscape", then consider whether the landscape is sufficiently "natural" to be classified as a natural landscape, then assess whether the natural landscape is "outstanding". That latter assessment is undertaken by reference to the factors set out in *WESI*. In essence, these require the landscape to remarkable, exceptional, or notable.

The judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited*

[11] In submissions to this Court, counsel made extensive reference to the judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd ("King Salmon")* delivered on 17 April 2014 (after the hearing of MWS's appeal to the Environment Court).[6] The Environment Court received and considered submissions from counsel as to its impact on the proceeding, before issuing its decision.

[12] *King Salmon* concerned a proposed salmon farm in an area of the Marlborough Sounds (Papatua, in Port Gore) that was accepted as being "an area of outstanding natural character and an outstanding natural landscape". It was also accepted that the proposed salmon farm would have significant adverse effects on that natural character and landscape.[7] The appeal concerned whether a plan change, which would allow the salmon farm, but would not give effect to Policies 13 (1)(a) and 15(a) of the NZCPS 2010, should have been refused.

[13] The Supreme Court held by a majority that the Board of Enquiry considering the proposed plan change was required to give effect to the NZCPS policies,[8] that "avoid" (in the phrase "avoid adverse effects") means "not allow", or "prevent the occurrence of",[9] and that the Policies provided "something in the nature of a bottom line".[10] The NZCPS is "an instrument at the top of the hierarchy" of environmental instruments, and gives effect to the protective element of sustainable management.[11]

---

5 *Maniototo Enviromental Society v Central Otago District Council* Decision C103/2009.
6 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3.
7 *King Salmon*, at [5].
8 At [77].
9 At [96].
10 At [132].
11 At [153].

In reaching this conclusion, the majority rejected the "overall judgment" approach adopted by the Board of Enquiry, and the High Court on appeal.

[14] In his dissent, William Young J noted the possibility of overbroad consequences of the majority's decision: "severe restrictions being imposed on privately-owned land in areas of outstanding natural character", and the potential to be "entirely disproportionate" in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted."[12]

[15] Counsel for both MWS and the Council agreed that the Auckland Regional Policy Statement would need to be revised following the *King Salmon* judgment, and that the Policy Statement will inevitably be more restrictive as regards the coastal environment.

Application to adduce new evidence on appeal

[16] MWS applied to adduce further evidence on appeal, being a statement of Mr Andrew Christopher McPhee, principal planner in the Central and Islands area planning team at the Auckland Council. Mr McPhee's statement considers the planning implications of the Supreme Court's judgment in *King Salmon*, in particular, whether changes are required to be made to planning instruments as a result of the judgment.

[17] At the hearing in this Court, counsel for the Council, Mr O'Callahan, advised the Court that the Council acknowledges that there needs to be revisions to the Auckland Regional Policy Statement, and that the policy in respect of the coastal environment will inevitably be more restrictive. Mr O'Callahan submitted that there would be no purpose in allowing the evidence to be adduced.

[18] In the light of that acknowledgment, I agree that there is reason to adduce Mr McPhee's evidence.

---

[12] At [201].

Environment Court decision

[19] The Environment Court noted that it was agreed by the parties that all of the areas that were in dispute as being ONLs were "landscapes", and had sufficient "natural" qualities for the purposes of s 6(b) of the RMA.[13]

[20] The Environment Court considered a submission for MWS that (in particular as a result of the *King Salmon* judgment, and the inevitability of more restrictive policies) a more conservative (higher) threshold should be adopted for determining what comprises an ONL, and that the assessment should be made at a national scale. However, the Court accepted a submission for the Council that the planning consequences would flow from the fact that the land is an ONL, and are not relevant the determining whether it is an ONL or not.[14]

[21] Further, the Court was not comfortable with MWS's submission that the assessment of "outstandingness" should be made on a national rather than a regional scale, for two reasons. First, the task would be enormously complex, if not impossible, and secondly, if pristine areas of New Zealand such as parts of Fiordland, the Southern Alps, and certain high country lakes were to be regarded as the benchmark, nothing else might qualify to be mapped as outstanding.[15]

[22] The Environment Court then considered in detail evidence given for MWS and the Council concerning ONL mapping. It is evident from the maps presented in the Environment Court that the principal witnesses for both parties agreed that the entire coastline and sea scape, and the prominent landscape in the higher parts of the property were properly assessed as ONLs, and that areas in Man O'War Bay and Hooks Bay were properly excluded.

[23] The debate focussed on intermediate areas between the coastal and interior landscapes. MWS's witness, Ms Gilbert, distinguished between the "coastal environment landscape area" and the "interior landscape character area". The

---

13 Environment Court decision, above n 1 at [4].
14 At [37]-[39].
15 At [57]-[67].

Council's witness, Mr Brown, disagreed with this separation. The Environment Court said that during a site visit:[16]

> … it became obvious to us that [MWS's] property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. … In particular, we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception … we do not find it appropriate the separate coastal and inland landscape …

[24] Accordingly, the Environment Court allowed only limited amendments to the ONL mapping.

Approach on appeal

[25] It was common ground that the principles to be applied in approaching an appeal to the High Court under s 299 of the RMA are as summarised by French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*:[17]

> [33] An appeal to this Court under s 299 is an appeal limited to questions of law.
>
> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
>
> i) applied a wrong legal test; or
>
> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
>
> iii) taken into account matters which it should not have taken into account; or
>
> iv) failed to take into account matters which it should have taken into account.
>
> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

---

16 At [128]

17 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]-[36].

> [36] Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.
>
> (Footnotes omitted)

[26] Further, as Mander J observed in *Young v Queenstown Lakes District Council*:[18]

> The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, nor will it delve into questions of planning and resource management policy. The weight to be attached to policy questions and evidence before it is for the tribunal to determine, and is not able to be reconsidered as a point of law.

[27] Finally, it is appropriate to note the observation of Wylie J in *Guardians of Paku Bay Association Inc v Waikato Regional Council*:[19]

> The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

Appeal issues

[28] On behalf of MWS, Mr Casey QC first submitted that the Environment Court had erred in its consideration of the effect of the Supreme Court's judgment in *King Salmon*. In particular, it was submitted, the Environment Court erred in:

a) failing to address the *WESI* factors when determining whether the landscapes in question were ONLs;

b) failing to undertake the assessment of whether areas of the farm property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

---

[18] *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19].

[19] *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

c) failing to recognise that as a result of the level of protection required for ONL's in the coastal environment being clarified in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under Change 8; and

d) failing to recognise that given the implications of the judgment in *King Salmon*, it was required to determine which parts of the farm property fell within the coastal environment, and which did not.

WESI factors

(a) Submissions

[29] Mr Casey and Mr Williams submitted for MWS that while the Environment Court listed the factors set out in *WESI* and other decisions, it did not actually evaluate whether the landscape was "outstanding", by reference to the factors. Rather, the Court simply adopted the approach taken by the Council's expert witness. They further submitted that the Court failed to give adequate consideration to the "naturalness" of the disputed landscape: the MWS land is a working farm, and so heavily developed that it cannot properly be described as "natural".

[30] Mr Williams also submitted that the Environment Court was wrong to reject MWS's submission that it is necessary to separate coastal and non-coastal areas for the purposes of identifying ONL's. He submitted that there is a "fourth dimension" involved in assessing non-coastal land, which is not present in relation to the coastal environment. He described this as a "real world enquiry", which allows for the dynamic nature of farming, and the fact that a simple farming step (such as spraying weeds to reclaim pasture) may lead to a substantial change in a landscape. He submitted that the Environment Court had erred in law in failing to take this factor into account.

[31] It was submitted that, as a result of the above errors, the Environment Court had identified as ONLs landscapes which, while picturesque or handsome, were best

described as "fairly normal rural landscapes". Counsel referred to the comment in *High Country Rosehip*, that not all handsome landscapes are "outstanding".[20]

[32] Mr O'Callahan submitted for the Council that the Environment Court was not in error. He submitted that the Court was not required to consider whether the farm property was "landscape" and "natural", as that was agreed by the expert witnesses for MWS and the Council. Further, there was agreement that substantial parts of the farm property were ONLs. The debate was as to drawing the line between the ONLs and areas that were not ONLs. The Environment Court was dealing with areas around the fringes, so did not have to rank the "outstandingness" of particular areas.

[33] Mr O'Callahan submitted that in deciding whether a natural landscape is "outstanding", the Environment Court had to have regard to the appropriate factors and synonyms used to understand "outstandingness", as set out in cases such as *WESI*, *Maniototo*, and *High Country Rosehip*. Those factors and synonyms were derived in cases that did not involve the coastal environment. He submitted that, in any event, the assessment of "outstandingness" is essentially the same whether carried out in the coastal or non-coastal environment.

[34] Mr O'Callahan submitted that the Environment Court had appropriately set out and understood the relevant factors, and had set out and considered the competing evidence and submissions. Ultimately, he submitted, the Court's determination was a matter of the specialist court exercising its judgment on the expert evidence. It was not necessary for the Court to set out and analyse the individual factors. The Court's determination was a factual determination, which cannot be appealed.

[35] Mr Enright submitted for the Environmental Defence Society that the real issue on appeal was whether the Environment Court undertook the exercise of deciding whether the land at issue was "outstanding". In that assessment, divisions of the Environment Court have in other cases referred to synonyms, or qualifying adjectives, such as those set out in *WESI* and *High Country Rosehip.* In the present case, he submitted, in identifying disputed ONL areas, the Court had in mind the

---

[20] *High Country Rosehip v MacKenzie District Council* [2011] NZEnvC 387 at [104].

relevant adjectives, or synonyms, used to assess whether the land was outstanding. Ultimately, whether land is outstanding is a factual determination.

(b) Discussion

[36] I am not persuaded that the Environment Court failed to undertake an appropriate assessment of the disputed ONL areas. I accept that the Court was not required to consider whether the disputed areas were "landscapes" and "natural landscapes", as those issues were agreed. The sole issue for the Court was whether they were "outstanding".

[37] The Court referred to the discussion of the concept of "outstandingness" as set out in *WESI*, and the qualifying adjectives and synonyms noted in the evidence of MWS's expert witness. There was no error in the Court's analysis of the evidence before it. Its conclusions as to which areas were ONLs were then factual determinations, and cannot be appealed.

[38] So, too, was the Environment Court's rejection of the MWS submission that there must be a separation of coastal and non-coastal land for the purposes of identifying ONLs. The "real world enquiry" is recognised in the factors set out in *WESI* and *Maniototo*, where human intervention was accepted as being part of the development of the natural landscape. In *Maniototo*, in particular, the element of human engagement and interaction with the landscape is recognised. Far from detracting from the "naturalness" of the landscape, the human engagement and interaction contributes to the intrinsic value of the landscape.

[39] I am not persuaded that the Environment Court has been shown in the present case to have failed to take that factor into account. The Court had the evidence of the expert witnesses for MWS and the Council before it, and referred to both in its decision. It is not an error of law to have accepted one over the other.

Regional or national reference?

[40] As noted earlier, the second aspect of MWS's appeal concerned the scale against which the assessment of "outstandingness" is carried out: whether it should be on a national, regional, or district-wide scale.

(a) Submissions

[41] Mr Williams submitted that the Environment Court was wrong to assess the "outstandingness" of the MWS farm property at a regional level; he submitted that the assessment should be at a national level. Mr Williams accepted that in *WESI* the Environment Court had referred to a regional basis for assessment, but submitted the in later decisions, for example *Maniototo*, the assessment was on a national basis. He submitted that this is appropriate, as an "outstanding" landscape must, by definition, "stand out against the rest". He submitted that it follows from the fact that protection of ONLs is a matter of national importance, that the assessment of them must be on a national, not regional or district basis.

[42] Mr O'Callahan submitted that the MWS submission on this point misinterpreted the provisions of the RMA. He submitted that the MWS submission would equate to saying that the RMA is to be read as "protecting nationally significant landscapes" and "nationally significant indigenous flora and fauna. However, that is not how the RMA is framed. The RMA provides that *protection* is of national importance; it is of national importance to protect ONLs and other matters that are of significance.

[43] Mr O'Callahan further submitted that if it had been intended that only "nationally outstanding landscapes" were to be protected, then the RMA would have provided accordingly, and would have provided the machinery for such protection at the national level. Further, various divisions of the Environment Court have developed the law concerning the identification of ONLs at the district or regional level; albeit on occasion (as in *Maniototo*) asking how the landscape in issue compared with other New Zealand landscapes.

[44] Mr Enright, for the Environmental Defence Society, submitted that there is no reason to interfere with the well-established factors for assessing "outstandingness" which were developed at the regional or district level and were agreed upon by all parties before the Environment Court.

(b) Discussion

[45] There is no basis on which I could accept that the assessment of "outstandingness" in this case should have been undertaken on a national, rather than regional or district basis. I accept the submissions for the Council and the Environmental Defence Society that the wording of the RMA does not support MWS's submission. Section 6 is clear in its terms, that it is protection of ONLs (and the other matters listed) that it is national importance. It does not say that it is only natural landscapes that are of national significance that are to be protected.

[46] There is force, too, in Mr O'Callahan's submission that if it had been intended that only nationally significant natural landscapes were to be protected, the RMA would have included an express provision to that effect. It is significant that the jurisprudence surrounding the identification of ONLs has developed through divisions of the Environment Court considering the issue on a regional or district basis.

[47] Further, I am not persuaded that it is necessary to incorporate a "national" comparator (or even a regional or district one) into the consideration of "outstandingness". The Courts in which the jurisprudence has been developed have not been asking "is this a nationally significant outstanding natural landscape?" They have been asking simply "is this an outstanding natural landscape". That is the issue that they are required to consider, under the RMA.

Effect of King Salmon

(a) Submissions

[48] On this point Mr Williams submitted that mapping of ONL's on the farm property for the purposes of Change 8 had been undertaking in the policy context

that prevailed before the Supreme Court judgment in *King Salmon*. That context included the adoption of the "overall judgment" approach to planning decisions. Mr Williams referred to *North Shore City Council v Auckland Regional Council*, in which the Environment Court said: [21]

> We have considered … the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paras (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and principles of statutory construction, which are not applicable to the broad description of the statutory purpose. To do so would not allow room for the exercise of the kind of judgment by decision makers (including this Court – formerly the Planning Tribunal) …

[49] Mr Williams submitted that a different paradigm now applied, with the clear direction that higher order documents in the hierarchy of environmental management have primacy over lower order documents. He submitted that *King Salmon* would have a substantial and serious impact on its farming operation. It has a reasonable fear that the judgment will translate into a prohibition on all activities on the farm property, in order to comply with the directions in higher order documents. Working within a policy framework where farming activities could continue (on an overall judgment approach) is vastly different from a situation where those activities could be prohibited, under a requirement to "avoid adverse effects".

[50] Mr Williams further submitted that *King Salmon* has substantially changed the nature of environmental policies and objectives. The corollary must be, it was submitted, that there must be a change in mapping, as the nature of the protection to be provided (in the present case, for ONLs) must inform the process of mapping. ONL's are not mapped for their own sake, but for the purposes of protecting them from inappropriate subdivision, use, and development, and from adverse effects (if they fall within the coastal environment). In essence, Mr Williams argues that the definitions of ONLs was contextual and depended on the extent of protection that that status would grant.

---

[21] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59

[51] He submitted that as a result of *King Salmon*, it necessarily follows that the manner in which ONL criteria are applied must change; the increased level of protection required for ONLs necessitates a higher threshold for identification of an ONL.

[52] Federated Farmers of New Zealand supported the submissions for MWS. Mr Gardner also expressed concern as to the consequences of the *King Salmon* judgment for the level of landscape protection required under the RMA. He submitted that the issue of the threshold for identification of an ONL is of crucial importance for any farm that is in the coastal environment and is "outstanding" in terms of s 6 of the RMA.

[53] Referring particularly to rural production activities, Mr Gardner submitted that, following *King Salmon*, it was implausible that the many and varied activities associated with rural production (such as construction of farm tracks, planting exotic shelter belts, or constructing some farm buildings) which would previously have been considered appropriate in an ONL in the coastal environment would now have to be avoided (prohibited) because of their adverse effect.

[54] Applying *King Salmon* would necessarily mean that the very activities Change 8 relies on as warranting classification as an ONL should no longer take place. Thus, it is "logically difficult" to identify working rural landscapes as ONLs, and the underpinning of the landscape identification and mapping under Change 8 is undermined.

[55] Regarding the impact of *King Salmon*, Mr O'Callahan submitted that MWS was wrong, at a conceptual level, to submit that if the level of protection for ONLs set out at the policy level increases, the threshold for identifying ONLs must be stricter. He submitted that policies do not drive identification as ONLs. Rather, the RMA clearly provides a delineation between identifying ONLs, and the policies for protecting them.

[56] Mr O'Callahan further noted that in *King Salmon*, it was accepted that the area where the proposed salmon farm was to be sited was an ONL. There was no

suggestion that, as a result of the Supreme Court's judgment, the local authority should reconsider the ONL identification. Rather, the policies for protecting the area identified as an ONL had to be reconsidered.

[57] Mr Enright submitted that the *King Salmon* judgment does not affect mapping of ONLs. It impacts upon the wording of objectives, policies and methods to protect ONLs. He submitted that *King Salmon* could not, by a side wind, change anything relating to identification of ONLs. More particularly, it could not have been in the Supreme Court's mind that the identification of ONLs should be more confined, and their numbers reduced as a consequence.

(b) Discussion

[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.

Decision

[61] For the reasons set out above, MWS's appeal against the Environment Court decision must fail. The appeal is dismissed.

_____

Andrews

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

12/11

AP No. 169/93

UNDER the Resource Management Act 1991

A N D

[redacted]

IN THE MATTER of an appeal under section 299 of that Act against an interim decision, and report and recommendation, of the Planning Tribunal dated 11 June 1993

BETWEEN NEW ZEALAND RAIL LIMITED a duly incorporated company having its registered office at 4th Floor, Wellington Railway Station, Bunny Street, Wellington, transport operator

Appellant

A N D MARLBOROUGH DISTRICT COUNCIL a territorial authority pursuant to section 37N of the Local Government Act 1974

First Respondent

A N D PORT MARLBOROUGH NEW ZEALAND LIMITED a duly incorporated company having its registered office at 14 Auckland Street, Picton, port operator

Second Respondent

Hearing: 27, 28 and 29 September 1993

Counsel: P T Cavanagh QC and D H Jenkins for Appellant
R D Crosby for First Respondent
R A Fisher and M MacLean for Second Respondent
Sally Brown for Coal Corporation of New Zealand Ltd

Judgment:

JUDGMENT OF GREIG J

This is an appeal by New Zealand Rail and a cross-appeal by Port Marlborough against the decision of the Planning Tribunal dated 11 June 1993. It concerns the proposals and plans of Port Marlborough to develop and expand the port of Picton into the neighbouring Shakespeare Bay and to construct and establish there a port facility to service the export of bulk products, including timber and coal. New Zealand Rail has opposed the proposal in its entirety throughout. It appealed to the Tribunal against the original decisions of the local authorities concerned giving approval to the development, as far as it related to the expansion of the port for the purpose of the export of timber. That appeal was disallowed by the Tribunal. The Tribunal went further than the original approvals and recommendations and allowed the appeal by Port Marlborough against the refusal at the local authority's level to approve the extension and expansion of the port as a coal export service and approved that subject to some terms. New Zealand Rail appeals against the whole of the decision of the Planning Tribunal. Port Marlborough cross-appeals against that part of the decision which determines some conditions of review which are to be contained in the latter.

The decisions given by the Tribunal were not final but comprised interim decisions subject to amendments, modifications and the settlement of the terms of conditions which were necessary to comply with the rulings and observations of the Planning Tribunal in the course of its decision. Furthermore, a part of the decision is a report pursuant to s 118 (6) of the Resource Management Act 1991 directed to the Minister of Conservation as to the recommendations made by a joint hearing committee. Nothing turns on the formal nature of the decision or the inquiry made by the Planning Tribunal or undertaken by the Planning Tribunal. It was common ground that this Court was properly seized of the issues of law raised on the appeal.

Port Marlborough is a limited liability company established under the Port Companies Act 1988. It has two shareholders, the Marlborough District Council as to 92% of the shares and the Kaikoura District Council as to 8% of the shares. Port Marlborough operates the Picton Harbour which caters for a wide range of recreational and tourism activities, and commercial fishing fleets. It also caters for bulk shipping cargoes including, particularly, outgoing cargoes of logs, sawn timber, salt, tallow, meat and coal, and incoming cargoes of cement. Most importantly, however, it is the railhead for the top of the South Island with a ferry terminal for the New Zealand Rail Service between Wellington and Picton for passengers, roll-on/roll-off cargo, stock and other general cargo. Approximately

99% of the tonnage of cargo going through the port is carried through the rail ferries.

Shakespeare Bay is adjacent to Picton Harbour, separated by a peninsula. The bay, which is said to comprise between 60 and 70 hectares, is described in the decision as something of a backwater. Upon the isthmus of the peninsula in a saddle there is a derelict freezing works. There are a few dwellings but the greater part of the area seems to be taken up by reserves and rural uses. The bay has natural deep water. The Port Marlborough proposal is to excavate the saddle on the isthmus to provide road access from the Picton Harbour to Shakespeare Bay, to reclaim an area of some 8 hectares at or near the base of the peninsula. That will, in the end, provide a total area of flat land of approximately 11.4 hectares. It is then intended to provide storage, marshalling back-up areas and other facilities for two deep water berths, one to be dedicated to the export of timber and the other for bulk products generally but in particular for coal.

To obtain the necessary approvals under the Act, Port Marlborough made application to what was then the Nelson/Marlborough Regional Council and to the Marlborough District Council for a number of resource consents. They included applications for coastal permits for the reclamation and development and for the disposal of storm-water into Shakespeare Bay. An application was made for a discharge permit to discharge contaminants to the air and land use consents for the various earthworks and land clearance and for non-complying activity. These applications were duly notified.

In the course of the procedure, beginning with these various applications, the Director-General of Conservation, acting pursuant to s 372 of the Act, issued a direction which required the activities for the two coastal permits to be treated as applications for restricted coastal activities. This transferred the decision to grant these consents to the Minister of Conservation after considering the recommendations of a committee of the Regional Council made pursuant to s 118. As a result it was decided that a joint hearing committee should deal with all the applications and in due course a public hearing was held by that joint hearing committee on 2 and 4 March 1992. Evidence and submissions from a large number of bodies and persons, who had given notice of their desire to take part in the procedure, were heard. The joint hearing committee made its recommendation to the Minister of Conservation that the two coastal permits should be granted except insofar as the consent was sought for the construction of a coal berth and

an associated mooring dolphin. Other consents, as applied for, were granted subject to detailed conditions which were then promulgated. The matter came before the Planning Tribunal by way of appeal against the grant of consents and inquiries against the recommendation of the restricted coastal activity which is treated in all respects as if it was an appeal pursuant to s 118 (6) of the Act.

The distinctive nature of the various appeals and inquiries posed some potential problem to the Planning Tribunal, but if I may say so, with respect, they decided sensibly and properly that all matters should be considered together and be reported upon in one document. As was made clear in their decision, the principal issue in the case was whether land use consent should be granted to allow the port facilities to be established.

After a number of pre-hearing conferences which assisted in clarifying the issues and the parties who remained interested in the matter, the substantive hearing before the Tribunal took place between 1 and 18 February 1993. The principal parties were all represented by counsel. The Tribunal heard detailed evidence from 39 witnesses who were subjected to cross-examination by counsel. As the Tribunal in its decision was able to say, with confidence, "... this proposal has now been the subject of close scrutiny in the course of two detailed hearings, ..." The decision of the Tribunal is set out in 203 pages and deals fully and in close detail with every issue, whether of fact or law, which had been raised before it.

The appeal and the cross-appeal are brought pursuant to s 299 of the Act. They are limited to a point or points of law and that must never be lost sight of. It is often appropriate and necessary for an understanding of the issues at law that the facts should be canvassed but the decisions on the facts are for the Tribunal and not for this Court. It is seldom the case that a decision on the facts can qualify as a question of law or a point of law. In particular, the weight to be given to the evidence is especially a matter for the Tribunal alone.

New Zealand Rail raised a number of points of appeal which, as is not unusual, became refined in the course of submission and one of the points originally raised was not pursued at all. I will deal with each of the points in order but not necessarily the order in which they were presented by Mr Cavanagh Both the District Council and Port Marlborough opposed the appeal, supported the Tribunal's decision and made independent submissions. Coal Corporation joined

the appeal late and without opposition. It adopted the agreement and submissions of the other respondents.

The first point, as presented in Mr Cavanagh's submissions, was "whether the Planning Tribunal misdirected itself or erred in law when holding that a relevant resource management instrument for the purposes of its decision, and report to the Minister of Conservation, was the proposed Regional Coastal Plan as it existed prior to Variation 3."

It was common ground on this appeal that the Tribunal correctly dealt with all the five resource consents as integral parts of the one development, all as non-complying activities, and that the tests to be applied in respect of each are substantially the same except for two small particulars. In that event, therefore, s 105 (2) (b) of the Act applied as a threshold or a prerequisite to the Tribunal's consideration of the other matters to be considered pursuant to s 104. Sections 104 and 105 have been amended by the Resource Management Amendment Act 1993 (see ss 54 and 55 (2)) but the original versions of these sections still apply to this appeal. Section 105 (2) (b) is as follows:

> " 105. (2) A consent authority shall not grant a resource consent— ...
>
> (b) For a *non*-complying activity unless, having considered the matters set out in section 104, it is satisfied that—
>
> (i) Any effect on the environment (other than any effect to which subsection (2) of that section applies) will be minor; or
>
> (ii) Granting the consent will not be contrary to the objectives and policies of the plan or proposed plan; .... "

The Port conceded, as clearly was the case, that the effect on the environment by the proposed development would not be minor so that the objectives and policies of the plan or proposed plan became important.

There were five planning instruments against which the applications were to be considered under this subsection. The first of these was the Marlborough Regional Planning Scheme. On the coming into force of the Act on 1 October 1991 the scheme ceased to have effect pursuant to s 366A except that pursuant to s 367 (1) in carrying out its functions under ss 30 and 31 of the

Act, a territorial authority shall have regard to its provisions. The second was the Marlborough County District Scheme and the third was the Picton Borough District Scheme Review No. 1. Those were deemed to be transitional district plans by virtue of s 373 (1) of the Act, for the Marlborough District Council and divided into the two sections. The last and most relevant to this particular point of appeal, was what was the former proposed Marlborough Sounds Maritime Planning Scheme which was being undertaken pursuant to Part V of the Town and Country Planning Act 1977. Under s 370 of the Resource Management Act that became a Proposed Regional Coastal Plan.

That scheme was publicly notified in July 1988 by the Marlborough Sounds Maritime Planning Authority. The Planning Authority was, at the time, the Marlborough Harbour Board which was the predecessor of Port Marlborough. From November 1989 until 30 June 1992 the scheme was administered by the Nelson/Marlborough Regional Council and thereafter has been administered by the Marlborough District Council. There were a number of objections made to the scheme as originally notified. Some of these objections and submissions were heard by the Planning Authority and appeals were lodged with the Planning Tribunal in some instances. In September 1991 a document described as Variation No. 3 to the proposed maritime scheme was publicly notified. The purpose of this variation was to withdraw all those parts of the scheme that were still the subject of objections that had not been heard. Among other things, parts of the scheme that were withdrawn were those parts which included proposals and policies for port development generally and particularly in relation to Shakespeare Bay. In October 1992 the Marlborough District Council, as Planning Authority, resolved, pursuant to s 104 (6) of the Town and Country Planning Act, to withdraw all proposed variations including Variation 3. By that means it purported to reintroduce into the proposed Regional Coastal Plan the proposals originally included for port development in Shakespeare Bay.

In essence, it is the appellant's contention that the Planning Authority had no jurisdiction to withdraw Variation 3 for two reasons. The first is that, in accordance with s 104 (6) of the Town and Country Planning Act, the Planning Authority's jurisdiction was limited to withdrawal of the whole of the proposed scheme and not just a part of it. The second reason is that, pursuant to Reg 48 (3) of the Town and Country Planning Regulations 1978, the variation had merged with the proposed Regional Coastal Plan. In other words Variation 3 had ceased to be an independent document and could only be withdrawn by withdrawal

of the whole of the proposed scheme or by another variation which was not the step taken.

Under Part V of the Act, after the constitution of a maritime planning area and its planning authority, a preliminary statement of intention to prepare a maritime planning scheme was to be published within six months or within such further time as the Minister might allow. Unlike District Schemes, there was no express obligation to provide and maintain a scheme. Under that part of the Act there was no power for the District Authority to withdraw a proposed scheme in its entirety. The next step was the preparation and public notification of the Draft Scheme pursuant to s 104. The scheme had to make provision for the matters referred to in the Second and Third Schedules of the Act and to be prepared in accordance with regulations. Under s 105 of the Act the provision of ss 45 to 49 of the Act were applied so far as they were applicable and with the necessary modifications. Those sections provided for submissions and objections, alterations and variations of the schemes and the way in which consideration and hearing of submissions and objections should be made and, finally, a right of appeal to the tribunal.

Section 47 (4) of the Act, dealing with variations, provided that:

> " The Council may at any time before a proposed variation is approved, or (if an appeal has been lodged in respect of it) before the Tribunal has made a decision on the appeal, withdraw the proposed variation. "

Following the hearing of the submissions and objections, in accordance with the regime applicable to District Schemes and subject to any amendments required, the Planning Authority then approved the scheme and it became operative.

Section 109 provides authority or jurisdiction to alter by way of change, variation and review of any planning scheme Subsection (4) of s 109 provides:

> " All the provisions of this Part of this Act relating to the preparation and approval of maritime planning schemes shall, so far as they are applicable and with the necessary modifications, apply to every review "

And subs (1) provides likewise in respect of any variation or change.

On a proper reading of the Act the Planning Authority had jurisdiction to change and vary and to withdraw a variation at any time. By reference, the power to withdraw a variation contained in s 47(4) was incorporated into the scheme of maritime planning and applied, expressly, pursuant to s 109 (1) and 105. The provision of s 104 (6) as to withdrawal of the whole of the scheme was an additional right or authority, a right which was not available to District Councils or other Authorities under the earlier part of the Act, whose obligation was to provide and maintain a scheme. It is not the intention of subs (6) of s 104 to limit but is to extend the jurisdiction and rights of the Maritime Planning Authority so that it could withdraw the whole of a scheme and start anew.

Regulation 48 of the Town and Country Planning Regulations 1978 provides as follows:

> " 48. (1) Where the Maritime Planning Authority wishes to vary the draft maritime planning scheme or to change an operative scheme it shall, so far as it is applicable and with the necessary modifications, follow the procedure set out in regulations 46 and 47 of these regulations:
>
> Provided that the time for receiving submissions and objections shall be not less than 6 weeks after the date of public notification.
>
> (2) Every variation and every change shall include a report setting out the reasons for the variation or change and the likely economic, social and environmental effects. Copies of the report shall be included with the public notice and a copy of the variation or change sent to the bodies and persons referred to in regulation 46 (5) of these regulations.
>
> (3) Every variation of a draft scheme shall be merged in and become part of the scheme as soon as the variation and the scheme are both at the same stage of preparation:
>
> Provided that, where the variation includes a provision to be substituted for a provision in the scheme against which an objection or appeal has been lodged, that objection or appeal shall be deemed to be an objection or appeal against the variation. "

Paragraph (3) is to be compared with the corresponding regulation about the variation of district schemes, that is to say reg 28 (3). That opens with the words, "Except as expressly provided in the Act," and instead of referring to the stage of preparation speaks of the same procedural stage. The authority and effect of reg 48 is procedural but it cannot alter or amend the effect of the statute to which it is subordinate. There is nothing in the regulation which expressly provides against a withdrawal of a variation. It is implicit, so it is said, that by requiring merger then the withdrawal is no longer possible but that does not follow dramatically or logically. Although a variation has merged it can still be extracted and excised from what has gone before.

In any event the powers of regulation-making under s 175 of the Town and Country Planning Act were limited to those regulating the procedure to be adopted with respect to the preparation, recommendation, approval, variation and change of maritime planning schemes. That would not permit a regulation which provided substantively for the or against the withdrawal of a variation once made.

There was an argument as to whether, in the circumstances of this case, the scheme, as far as it had gone, and the Variation 3 were at the same stage of preparation. However I have already noted the distinction in the regulations and the reference on the one hand to the stage of preparation and the procedural stage. In Part V there is particular reference to preparation and approval in various sections, as I have already cited, and that seems to point to a particular distinction. It is not necessary to make a decision on this point but I would incline to the view that the variations and the scheme itself were at the same stage of preparation although not at the same factual procedural stage.

In the result the Authority had jurisdiction to withdraw Variation 3 and there being no further challenge to what it did that variation was properly withdrawn and the Tribunal made no error of law in considering that planning instrument in its condition with Variation 3 withdrawn, that is to say in its original terms.

The next point of appeal was whether the Planning Tribunal misdirected itself as to the interpretation of the relevant objectives and policies of the relevant plans when holding that the development was not contrary to those objectives and policies. In its decision the Tribunal, having identified the relevant

resource management instruments and dealt with the question of Variation 3, then undertook a lengthy discussion of the particular parts of those instruments and the evaluations proffered in evidence by the planning witnesses. There is a detailed comparative discussion of the evidence, in particular of Mr R D Witte, Senior Planner with the Marlborough District Council and later Senior Strategic Planner with the unitary authority on the one hand, and on the other of Mr D W Collins, Planning Consultant called by New Zealand Rail.

The Tribunal gave its summary and conclusions at p 164 to 166, referring to each of the planning instruments and coming to a conclusion as to their overall effect, concluding at p 167:

> " It is our judgment that, taken overall, the relevant objectives and policies earlier discussed support such a development in this locality. Indeed, in the proposed regional coastal plan which is relevant to the land use consent because it refers specifically to port development as well as an associated reclamation, it is indicated that Shakespeare Bay might be developed to a much greater extent than Port Marlborough's present proposal. "

And concluded that the -

> " ... the consent to port development ... would not be contrary to those objectives and policies. "

Mr Cavanagh, in the course of his submissions, dealt in some considerable detail with the provisions of the various resource management documents, drawing attention to various parts of them and contending for their meaning and effect. By way of submission he interpreted and demonstrated the various policies and objectives, either expressed or implied in those various documents, analysing each of them and making submissions overall about them individually and collectively. He conceded that the appellant cannot challenge the Tribunal's factual findings in themselves or any value judgment, as he put it, that the Tribunal made as a result. The way he put it, however, was that this was not a challenge on the facts or the findings on the facts, but asserted that the Tribunal had misdirected itself in its interpretation of the relevant objectives. It was the appellant's submission that a proper consideration of the totality of the objectives

and policies in the relevant resource management documents did not support the establishment of such a major project as that proposed by Port Marlborough.

It was not suggested that the Planning Tribunal had failed to have regard to any of the documents or the content or any part of the content of them. It was not contended that the Tribunal had made any error in law in construing s 105 (2) (b) (ii), or that it had incorrectly construed the words "objectives and policies" and the word "contrary", or at least there was no challenge to that. It was not suggested that this was a case of unreasonableness in the *Wednesbury* sense (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223) although Mr Cavanagh did express himself in his submissions that the finding by the Tribunal was not one open to a reasonable tribunal properly directed as to the correct interpretation of the objectives and policies in the various relevant documents.

In the end what the appellant submitted was that the proposed development is contrary to the policies and objectives of the relevant resource management documents and that the Tribunal was in error in reaching the opposite conclusion. That was no more and no less than a challenge on the factual findings. It was a challenge as to the inferences and the conclusions drawn by the Planning Tribunal from the facts before it. It was for them to give the weight that they thought fit, both to the evidence that was given and to the very words and meanings of the documents before them. That they attended to the evidence and the documents is plain. That they came to conclusions upon them without error in law is equally plain.

I have myself considered the various words and documents and the tenor of the conclusions reached by the Tribunal. Among the matters that have to be borne in mind, and which I think was clearly in the minds of the Planning Tribunal, as the essential question was whether the consent to the proposed use and development was "contrary" or not to the relevant objectives and policies. The Tribunal correctly I think, with respect, accepted that that should not be restrictively defined and that it contemplated being opposed to in nature different to or opposite. The Oxford English Dictionary in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying.

It is relevant here to observe what was said by the Court in *Batchelor v Tauranga District Council (No. 2)* (1992) 2 NZRMA 137 at p 140:

> " There are likely to be difficulties in reconciling the regime of the new Act to an operative district scheme created under and treated as a transitional plan, for plans under the new Act are intended to be different in concept and form from the old district schemes. Yet during the transitional period, the old must be treated as if it were the new. That is a necessary consequences of the statutory situation and must be dealt with in a pragmatic way. "

In my view this point is not a point of law at all but is a question of fact. Insofar as it might be described as a point of law, I am satisfied that there was ample material before the Tribunal which justified the factual finding and the conclusion that it came to, namely, that the proposal and the development was not contrary to the policies and objectives of the plans and the documents.

The next point of appeal was whether the Planning Tribunal misdirected itself in holding that the Act "does not require the proposed development to be dealt with by way of plan change procedure". This issue was a fundamental plank of New Zealand Rail's position in its opposition to the proposed development. It had submitted, as it did before the Court, that it was inappropriate that a proposal of this magnitude and nature should be advanced and concluded by way of a resource consent application as a non-complying activity. As a major development with substantial impact on Picton, Marlborough and the whole of the South Island it was said that it needed to be assessed in the context of a plan change procedure under which, in particular, the provisions of ss 74 and 32 would have been important matters for consideration and disposal.

This was dealt with at some length by the Planning Tribunal. In particular the Planning Tribunal compared the provisions which apply to the plan change procedure under the new Act with the former provisions under the Town and Country Planning Act and concluded at the top of p 458 as follows:

> " Whereas under earlier legislation a disappointed developer had no recourse if consent to a specified departure was refused, unless the territorial authority was prepared to take the initiative by promoting a

> scheme change. Now, if a resource consent is refused, a disappointed developer can itself take steps to have the Plan changed. This is entirely consistent with a finding that to grant a resource consent would be contrary to the relevant objectives and policies of the Plan. "

The Tribunal concluded that the Act does not exhibit a preference for plan change procedures over resource consent procedures.

I think that little assistance is to be gained in this regard from a consideration or a comparison with the previous legislation. This is new legislation which, as the full Court in *Batchelor* said, imposes a significantly different regime for the regulation of land use by territorial local authorities. The Court went on to refer to the concept of direction and control under Town and Country Planning Act and distinguished the movement towards a more permissive system of management focussed on control of the adverse effects of land use activities. The Act expresses importantly the objectives and the purposes of the Act in Part II which sets the scene overall for the construction and application of the Act.

What the appellant submitted was that, where a planning consent application will have implications of significance beyond the proposed site, the matter should be dealt with by way of plan change or review. As noted by the Tribunal and in the submissions before the Court, the Resource Management Act now authorises any person to request a change of a district plan: see s 73 (2). At the same time application for resource consent may be made in accordance with the particular procedure set out in Part VI of the Act. There is nothing in that part of the Act or elsewhere which provides any limitation but, as is crucial in this case, a resource consent application which fails to meet s 105 (2) will not be granted. Thereafter the applicant, if the matter is to be pursued, would have to proceed by way of a request for a change of the plan. That is not to say, however, that that shows any tendency to require an application for plan change in cases in which that threshold might not be passed or where, although it was passed, there could be said to be some significant impact otherwise in the scheme. The legislation authorises the distinct procedures. I agree, with respect, with the conclusions of the Tribunal.

In any event it must be recognised that in this case the proposals and the opposition to them was given a very close and detailed consideration by two tribunals over an extensive period of time. Many, if not all, of the various

considerations which would be relevant to a change of plan procedure were canvassed before the Tribunal and were considered by it. The Tribunal identified ten particular topics for discussion and consideration in the course of the decision and these were each given careful consideration. The ten topics were:

Forestry
The Coal Trade
Log Marshalling and Stevedoring
Coal Transportation
Construction of a Bund Wall and Reclamation
Wharf Construction
Visual Air Quality and Water Quality Effects
Shipping and Navigation
Tourism
Economics

The Tribunal correctly concluded that, although the application had not been the subject of s 32 procedures, it had not suffered as a result. Alternatives were considered, as were economic consequences. It is, I think, difficult to see what other matters or considerations could be effectively pursued simply by adopting the change of plan procedure.

The next point of appeal that I deal with, though not in the order that was presented, is whether the Planning Tribunal in holding that the provisions of Part II of the Resource Management Act are not to be given primacy when considering resource consent applications pursuant to s 104 of the Act. Section 104 sets out the matters to be considered in an application for a resource consent. Part II is particularly referred to and is one of the matters which the consenting authority should have regard to. It is referred to in subs (4) (g) which is the second last of that list, the last being any relevant regulations. That section is now made expressly subject to Part II by virtue of s 54 of the Resource Management Amendment Act 1993, but the Act must be construed for this case in its original form. It was suggested that the 1993 amendment made explicit what was previously implicit in the Act generally and in s 104 specifically. Equally, however, it may be contended that such an amendment is intended to remedy a defect in the Act and is intended to alter what was there before.

Part II of the Act sets out the purpose and the principles which include, among other things, matters of national importance and the Treaty of Waitangi. This matter was the subject of submission and it is an issue in *Batchelor's* case. At p 141 the Court said:

> " In carrying out that exercise, [namely, the regard to the rules of a plan and its relevant policies or objectives], regard must also be had to the other relevant provisions of s 104, including the general purpose provision as set out in s 5. Although s 104 (4) directs the consent authority to have regard to Part II, which includes s 5, it is but one in a list of such matters and is given no special prominence. "

Citing that view the Planning Tribunal in this case noted also the distinguishable decision in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 which depended upon the provisions in the Town and Country Planning Act which made the matters, to which regard was had, subject to the provisions in ss 3 and 4 of the 1977 Act which related to the matters of national importance and the general purposes of planning. Here, in the present Act as it was, in the absence of any such provision and with the provisions of Part II merely being one of a number of matters to which regard was to be had, it could not be said that any primacy was given to Part II over all the other Parts. That, I think, must follow from an ordinary reading of the Act.

Mr Cavanagh went on to submit that s 5 and the other sections in Part II set out the central theme of the Act, declaring a specific purpose and principles. This was, he argued, an unusual provision setting a statutory guide-line creating a primary goal and a basic philosophy which controlled and governed any and all exercise of functions and powers under the Act. It was said that the opening words of ss 6, 7 and 8 emphasised that imperative with the words, "In achieving the purpose of this Act, all persons exercising functions and powers under it, ... shall" recognise and provide for the matters of national importance (s 6), have particular regard to the matters in s 7 and take into account the Treaty of Waitangi (s 8).

Reliance was placed on the decision of the Court of Appeal in *Ashburton Acclimatisation Society v Federated Farmers of NZ Inc* [1988] 1 NZLR 78. That was a case under the Water and Soil Conservation Act 1967 to which was added, in an amendment in 1988, a section setting out the object of the Act.

The Court, in a judgment delivered by Cooke P, at p 87, having noted the unusual step of declaring a special object, said, at p 88:

> " A statutory guide-line is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light. With all respect to the contrary arguments, to treat s 2 as surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and unacceptable a mode of statutory interpretation as that which was rejected in *New Zealand Maori Council v Attorney-General* [1978] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment. "

I am told that that case was not cited to the full Court in *Batchelor.*

That case is, however, distinguishable because there there was no reference back to the object of the Act in the matters for which consideration had to be given. In this case, however, Part II is specifically referred to as one of a number of items. Whatever its importance and its guidance in the Act generally, s 104 must be taken to have deliberately brought it in as one of the matters without any indication whatsoever that it was to be given any particular primacy and, indeed, it does not even head the list let alone a section which begins with the necessity to have regard to actual and potential effects of allowing the activity. I am in respectful agreement with the view of the full Court and with that of the Tribunal in this case.

The next point was whether the Planning Tribunal misdirected itself as to the interpretation of s 6 (a) of the Act by holding that natural character of the coastal environment could justifiably be set aside in the case of a nationally suitable or fitting use or development.

The Tribunal's decision on this topic noted the wording of the present section and its difference from that of the previous corresponding section. The section now requires that persons exercising the functions and powers under the Act in relation to development shall recognise and provide for -

> " 6. (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: "

Section 3 of the 1977 Act set out the matters which were declared to be of national importance which shall "in particular be recognised and provided for" including, in s 3 (1) (c), "The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:". Having referred to the construction of that previous provision in *Environment Defence Society v Mangonui County Council* and after discussing the meaning of the word "appropriate" the Tribunal said, at p 465:

> " Having regard to the foregoing, it is our judgment that s 6 (a) of the Act should be applied in such a way that the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use, and development. Here, of course we only have to consider development. But this does not mean to say that *any* suitable or fitting development will qualify. Although the threshold, as Mr Camp put it, may be passed earlier when considering appropriateness as distinct from need, it has to be remembered that it is appropriateness in a national context that is being considered. It is not, for example, appropriateness in either a regional or a local context. This is made clear by Somers J in the passage from his judgment in *Environmental Defence Society v Mangonui County Council* that we referred to earlier.
>
> Consequently, the development being considered for the purposes of s 6 (a) of the Act would have to be *nationally* suitable or fitting before preservation of the natural character of the coastal environment could justifiably be set aside. "

Later the Tribunal concluded that the provision of log and coal export trade facilities in Shakespeare Bay was suitable or fitting on a national level and the setting aside of the preservation of the natural character of the bay was thus justified to the extent required by the development.

The appellant contended that s 6 and in particular para (a) must be read with reference back to s 5, the purpose and the promotion

> of sustainable management of natural and physical resources. It was suggested that Parliament intended that the primary object is that the effect of any modification to natural character must be adequately mitigated wherever possible and development is to occur only where it is appropriate. It was the environment which was placed in a pre-eminent position in light of the purpose of sustainable management. Preservation of natural character must be achieved even in the case of appropriate development. As Mr Cavanagh put it, an appropriate development must require the coastal location chosen for that activity to be such that it cannot be accommodated elsewhere; its effect can be so mitigated as to minimise its impact on the natural character of that environment and that the permanent modification of a coastal environment can only be justified if the development in question has significance of national importance and the economy of the nation as a whole.

I have somewhat extensively, but I hope accurately, expressed the submissions made in this matter. I have done so because I found some difficulty in understanding precisely what the appellant's contention is, particularly as the last part of the submission that I have described appears to coincide with the tenor of the Tribunal's view that national suitability would justify the setting side of the preservation of the natural character of a coastal environment. The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6 (a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.

"The protection of them", which in its terms means and refers to the coastal environment, wetlands, lakes, rivers and their margins, the items listed, but the protection is as part of the preservation of the natural character. It is not protection of the things in themselves but insofar as they have a natural character. The national importance of preserving or proteceting these things is to achieve and to promote sustainable management.

"Inappropriate" subdivision, use and development has, I think, a wider connotation than the former adjective "unnecessary". In the *Environmental*

Defence Society v Mangonui County Council case that expression was construed by considering "necessary" and the test therefore was whether the proposal was reasonably necessary, although that was no light one: see Cooke P at p 260 and Somers J at p 280 when he said that preservation, declared to be of national importance, is only to give way to necessary subdivision and development and to achieve that standard it must attain that level when viewed in the context of national needs.

"Inappropriate" has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

In the end I believe that the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the Act or its intention. I do not think that the Tribunal erred as a matter of law. In the end it

correctly applied the principles of the Act and had regard to the various matters to which it is directed. It is the Tribunal which is entrusted to construe and to apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

The next point of appeal was whether the Planning Tribunal misdirected itself or erred in law in holding that financial viability of the proposed development was not relevant to consideration of the application for resource consents or, alternatively, in failing to take into consideration the financial viability of the proposed development when considering the application for resource consents.

One of the planks of New Zealand Rail's challenge of the proposed development was a claim which it supported by evidence and cross-examination that the cost of the whole development was likely to be significantly greater than had been estimated. The result of this would mean that, in order to service the costs, port fees would have to be increased but because, for competitive reasons, it would be necessary to hold the costs to the users of the timber and coal berths the costs would therefore fall on other port users and, in particular, on New Zealand Rail as the predominant and principal user of the port.

The Tribunal was satisfied that it was feasible from an engineering point of view to construct and complete the necessary reclamation and wharf constructions. There was no suggestion that Port Marlborough would be unable to complete the works or to obtain the necessary finance for it. Thus there was no suggestion that the development would not take place for lack of funds or because of engineering or other construction difficulties. The Tribunal did express itself, however, that the port might have under-estimated the costs of achieving the results and that it would be advised to reconsider and to review its costings.

Under the heading of economics the Planning Tribunal discussed and considered the evidence of Dr R R Allan who was called as the witness by New Zealand Rail to demonstrate, from his calculations and evaluations, the thesis that New Zealand Rail might, in the end, be required to subsidise the costs of the use of the timber and coal facilities. The Tribunal noted, as they said, Dr Allan's impressive credentials in the field of transport engineering and economics and found him to be a sound, careful witness to whose opinions they paid a good deal of attention. It was noted, however, that the economic analysis depended upon the

proper calculation as to the costs and the variations which were involved in that. The Tribunal returned to this topic and, at p 172 of its decision and thereafter, said this:

> " On the matter of additional port charges, which of course applies to both timber and coal, although Dr Allan presented an attractive argument to support NZ Rail's case in this regard, in the end we do not think it was sufficiently persuasive to justify refusing consent on economic grounds.
>
> Whether increased port charges will occur depends on several variables, including importantly the final cost of the development. Then too there was no evidence about how Port Marlborough proposes to go about setting its charges for the use of these facilities, except to the extent that with regard to the log trade it intends to be competitive with the port of Nelson. However, by the time this development comes to fruition what that will mean in practical terms is unknown.
>
> It is possible as Dr Allan demonstrated to construct a scenario from which one might conclude that NZ Rail, being the single most important port user at the present time, could face increased port charges to subsidise this development. However, again as his evidence and his cross-examination demonstrated, Dr Allan's scenario is no more than one possibility. We think too that Mr Camp made a strong point when he submitted that the financial viability of a development, as distinct from its wider economic effects, is more properly a matter for the boardroom than the courtroom. "

It was the appellant's submission that financial viability, in the words used by Mr Cavanagh, is a relevant consideration under Part II of the Act. Mr Cavanagh said if the proposal is not viable then it is in conflict with Part II. With comparative reference to the decision in *Environmental Defence Society v Mangonui County Council* it was submitted that there was an onus on an applicant to establish the economic practicability of the proposal. In the result, it was said, the evidence before the Tribunal which showed some doubts as to the costings and the possibility of increased port charges, resulting in undue charges and subsidy by New Zealand Rail, put in doubt the financial viability of the proposal. It was

submitted that the Tribunal had been dismissive of the economic topic and therefore had not taken appropriate consideration of it into account.

It was Mr Cavanagh's contention that, in order that the Court should have a proper understanding of this question, it was necessary that it should consider the evidence given by Dr Allan. To that end Mr Cavanagh applied for leave to produce, as evidence, the transcript of that part of the evidence which included Dr Allan's evidence-in-chief and his cross-examination. That application was opposed by the respondents. I rejected the application on the ground that it would not be necessary or helpful in deciding the question of law, if any, involved in this topic to read or to consider the particular evidence given in the matter. The tenor of the evidence and the material before the Tribunal was, in my view, adequately described in the Tribunal's decision.

Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5 (2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7 (b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104 (1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom. In the *Environmental Defence Society* case the particular consideration to which Mr Cavanagh referred was the absence of any evidence that the proposed development would actually take place. There was no developer, there was no evidence as to any actual development proposal or their costs. In this case plainly there was a considerable body of evidence given on each side as to the costs and as to the economics and the potential viability of the proposal for the reclamation and construction of all works and buildings required.

The contention that the Tribunal was dismissive of this economic evidence is, I think, to misunderstand what the Tribunal was doing. Clearly it considered all the evidence that was put before it but in the end it dismissed the contentions and opinions of Dr Allan and set them aside It was not satisfied, on

the evidence before it, that the apprehensions of that witness and thereby of New Zealand Rail would be realised. This was a judgment on the facts, on the weight of the evidence before it. The Tribunal took into account economic questions, as it was bound to do, in a broad sense and in a narrower sense upon the projected development itself. In the result they came to the conclusion that that evidence was not "sufficiently persuasive to justify refusing consent on economic grounds". That does not raise a question of law but is a decision on the merits after considering the material before it. It is wrong to suggest, as Mr Cavanagh did, that the economic effects were not addressed. The Tribunal addressed the evidence and came to a conclusion contrary to that of New Zealand Rail. New Zealand Rail has no appeal in law against that finding.

The final point of appeal was directed to the Tribunal's decision upholding the appeal by Port Marlborough and granting resource consents for the provision for the coal export trade. The ground of appeal was expressed, in terms, as to misdirection by the Tribunal of the interpretation of ss 5 and 6 which enabled it to grant the resource consents. The essence of the case of the appellant on this ground was its submission that it is an inappropriate use or development of a coastal environment to impose a development of this nature and significance in circumstances where there is no evidence that the facilities will be used once built.

It was common ground that the proposed development involved reclamation which would be suitable for both the timber and coal facilities although the coal berth and its associated dolphin mooring would not be constructed until it was required. There was therefore no immediate intention to proceed with the coal terminal construction though the whole of the reclamation would take place to provide the necessary flat land for the further expansion into the coal berth. It was the contention of New Zealand Rail that if the coal was excluded the size of the reclamation could be reduced and thus the effect on the land could be reduced proportionately.

The Tribunal gave, as it did to all other aspects of the case, extensive consideration to the coal trade, describing and assessing the evidence given on each side in that regard. As the Tribunal said in its concluding paragraphs on its discussion of this evidence at p 47:

> " ... we have referred at times to some of the evidence about the transportation of coal because that

> evidence is relevant to the principal question here, namely whether there is sufficient justification for granting resource consents to enable a dedicated coal export berth and back-up area to be established in Shakespeare Bay. "

The Tribunal noted the submission on behalf of New Zealand Rail that this was a "straw" proposal, simply a device to enable coal exporters, principally Coal Corporation, to drive a harder bargain with New Zealand Rail for the cartage of coal by rail using the threat of a dedicated coal berth at Shakespeare Bay as a bargaining point in New Zealand Rail's need to maintain the Midland Line for the transport of coal between the West Coast and Lyttelton. The Tribunal noted, however, the evidence on the other side that, while there was no clear-cut intention as was the case with the log exporters, Coal Corporation was looking for a convenient alternative export port facility. The Tribunal concluded that it was unable to say with any degree of confidence that New Zealand Rail's view of the matter was correct. The Tribunal went on, at p 48:

> " The evidence about the need for a dedicated coal berth is less convincing than the evidence about the need for additional log exporting facilities in the Picton/Shakespeare Bay area, but the reasons for this are largely to do with the uncertainties that surround future markets. This no doubt is the reason why Port Marlborough does not propose constructing a coal berth immediately, but it does not follow from this that it is unnecessary to make provision for such a facility. Whether provision should be made as a matter of overall resource management evaluation is of course another question and one that we are not attempting to answer here. On balance, we think that the case made by Port Marlborough and Coal Corp is just sufficient to justify further consideration of this part of the proposed development under later headings. "

The Tribunal returned to this topic, and having noted that it had entertained some reservations about granting consent to provide the opportunity for the coal part of the proposed development to take place, and having referred to the Midland Line as a resource for the purpose of s 5 and making a conclusion as to that, the conclusion made was, at p 172:

" ... we think that permitting provision to be made in Shakespeare Bay for a coal export trade which we also accept is important nationally, is justified. The additional environmental impacts associated with such a development over and above those that will already occur with the timber trade are not such as to warrant refusing consent on those grounds. To the extent that they are different from those arising from the timber trade, and here we are referring in particular to the matter of coal dust, we are satisfied that they can be mitigated by management practices that can be required to be put in place through the conditions of a consent.

On the matter of additional port charges, which of course applies to both timber and coal, although Dr Allan presented an attractive argument to support NZ Rail's case in this regard, in the end we do not think it was sufficiently persuasive to justify refusing consent on economic grounds. "

Once again this is a finding of fact in which the Tribunal has assessed the evidence before it and reached a conclusion in favour of the applicant and against the opposition. This is not a case where there is no evidence, although the evidence was to the effect that there would be no immediate use of the proposed facility. It was the Rail case that this was a prospective application without any real expectation of use. The Tribunal, after considering the matters put before it, concluded that was not the case but that the case made by Port Marlborough and the Coal Corporation was sufficient to justify the further consideration which the Tribunal gave to the matter. I can see no question of law in this and so it too must fail.

I turn then to the cross-appeal by the Marlborough District Council. Only one of the points raised in the notice of cross-appeal was pursued. That was against the terms of a review condition proposed by the Tribunal which it required be incorporated in each of the resource consents. This is a requisite of s 128 which provides as follows:

" 128. A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

> (a) At any time specified for that purpose in the consent for any of the following purposes:
>
> (i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
>
> (ii) To require a discharge permit holder to adopt the best practicable option to remove or reduce any adverse effect on the environment; or
>
> (iii) For any other purpose specified in the consent; .... "

I omit the remaining parts of this section as being irrelevant to the question in issue here.

There had been proposed review conditions which were couched as to their relevant parts in these terms:

> " 5. Review of Conditions
>
> At any time after the first six (6) months of the exercise of any resource consents granted for the development of a port facility at Shakespeare Bay by Port Marlborough New Zealand Limited, the Marlborough District Council may review the conditions of consent(s) for any of the following purposes: ... "

The Tribunal took the view that the condition did not comply with s 128 because it did not specify a time with the precision required under the proper meaning of the Act. The Tribunal referred to a decision of the Planning Tribunal in *W P van Beek trading as Christchurch Pet Foods v Christchurch City Council*, Decision No. C 9/93, in which a review condition, pursuant to s 128, was worded as follows:

> " That the Council may review condition (ii) by giving notice of its intention so to do pursuant to section 128 of the Resource Management Act at any time within the period commencing one year after the date of this consent and expiring six months thereafter, for the purpose of ensuring that condition (ii) relating to vibration is adequate. "

The Planning Tribunal, in this case, then said:

> " In our view a condition authorising a consent authority to review should contain this degree of specificity, both as to time and if possible as to purpose. "

It was then left for the parties to review and to rewrite the review conditions.

It was the contention of the District Council on its cross-appeal that the Tribunal had construed s 128 and the phrase "at any time specified for that purpose" incorrectly and that the proposed terms which referred simply to "at any time after six months" was sufficient as it specified any and every day after the expiry of that first period. It was said that, contrary to the approach required under s 5 (j) of the Acts Interpretation Act 1924 and the need to ensure the Council's power to review and monitor the construction and operation of the development on a continuing basis, the Tribunal's decision was unduly restrictive.

No other party took part in this cross-appeal, it being left entirely to the cross-appellant. There was, therefore, no contrary argument put to the Court.

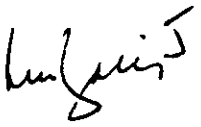
In *Sharp v Amen* [1965] NZLR 760 the Court of Appeal construed the words in s 92 of the Property Law Act 1952 "a notice specifying ... a date on which the power will become exercisable" so as to require the precise time or date to be specified. As a result the notice which expressed the date as "within one calendar month from the date of the receipt of this notice by you" was insufficient. As was said in that case, the construction of a particular statute will be controlled by the text of it and its subject matter. But it cannot be said that an expression which means that every day after a particular time complies with the meaning or purpose of this statute. Review, as the word implies, requires a consideration from time to time but the parties and the persons concerned should not be subject to the daily possibility of review under this provision. I think the Tribunal was perfectly correct in requiring a specification with greater specificity than is provided for in the draft. The proposal that has been made by the Tribunal appears to provide a reasonable guide-line. It would give scope for repeated review in months or years to come.

I think care has to be taken to ensure that what is set down by this condition is not just another policing provision to ensure compliance with the

conditions and the terms of the consent granted. It is for the purpose of reconsidering the conditions of the consent to deal with matters which arise thereafter in the compliance exercise of the consented activity. It is not, I think, in place of the other provisions in the Act for the control and enforcement of the conditions of consent.

In the result, then, the appeal and the cross-appeal are dismissed.

The respondents are entitled to costs which I fix in the sum of $5,000 for each of the first and second respondents together with reasonable travelling and accommodation expenses for counsel and all other disbursements and necessary expenses to be fixed by the Registrar. I make no order for costs in respect of Coal Corporation which took no active part in the matter.



Solicitors: Rudd Watts & Stone, WELLINGTON, for Appellant

Gascoigne Wicks & Co., BLENHEIM, for First Respondent

Radich Dwyer Hardy-Jones, BLENHEIM, for Second Respondent

Phillips Fox, WELLINGTON, for Coal Corporation of New Zealand Ltd

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 81

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	R J DAVIDSON FAMILY TRUST
	(ENV-2014-CHC-34)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner I Buchanan Dr A J Sutherland as special advisor under section 259 of the Act
Hearing:	at Blenheim on 4 to 8 and 11, 12 May 2015 and 17 July 2015
Appearances:	J D K Gardner-Hopkins, A M Cameron and E J Hudspith for Davidson Family Trust J W Maassen for Marlborough District Council J C Ironside for Kenepuru and Central Sounds Residents Assn Inc. and Friends of Nelson Haven and Tasman Bay Inc. – section 274 parties
Date of Decision:	9 May 2016
Date of Issue:	9 May 2016

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991 the Environment Court:

(1) confirms the decision of the Marlborough District Council on application U130797;

(2) refuses resource consent application (MDC ref) U13097 to establish and operate a 7.34 hectare marine farm at Beatrix Bay, Pelorus Sound.

B: Reserve costs; any application is to be made within 15 working days and any reply within a further 15 working days.

Table of Contents

Reasons of Judge Jackson and Environment Commissioner Mills

Reasons of Environment Judge Jackson and Environment Commissioner Mills

0. Introduction

0.1 The issue: another marine farm in Beatrix Bay?

[1] On 24 December 2014 the R J Davidson Family Trust applied (Marlborough District Council Application No U130797) for consent to establish and operate a 8.982 hectare marine farm in Beatrix Bay, Central Pelorus Sounds, to enable the cultivation of green shell mussels[1] and other crops. The application also seeks consent to disturb the seabed with anchoring devices, to take and discharge coastal seawater, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest.

[2] The ultimate issue for the court is whether the proposal achieves the objectives and policies of the combined district and regional plan and of the New Zealand Coastal Policy Statement. The first important subordinate issue is to obtain an accurate description of the environment — there is disagreement between the parties over the accurate description of the current and reasonably foreseeable future environment. A further important issue for the court is whether, assessed under the relevant objectives and policies, the clear financial and social benefits of the proposal outweigh the direct and accumulative environmental costs. Finally, there is disagreement about the scale,

[1] *Perna canaliculus*.

character and intensity (inter alia) of the accumulative adverse effects of the proposal on:

- the natural character of Beatrix Bay;
- the landscape values of a promontory at the northern end of the Bay;
- amenities for visitors to and (the few) residents of Beatrix Bay;
- safety through reducing navigational options;
- the marine ecology of Beatrix Bay; and
- the habitat of New Zealand King Shag.

[3] More specific issues are identified as we identify and analyse the matters to be considered.

0.2 The application, the appeal, the other parties and the service of evidence

[4] The applicant for the proposed marine farm is a family trust. The beneficiaries of which are the children of Mr R J Davidson. Mr Davidson is part-owner of a number of other consented marine farm areas in the Marlborough Sounds and is a well-known marine scientist.

[5] The application is for a site adjacent to and surrounding the southern end of an un-named promontory ("the northern promontory") which juts out into the northern end of Beatrix Bay. The amended proposal is to split the farm into two separate blocks (a south-east section of 5.166 hectares and a south-west section of 2.206 hectares) either side of the point of the promontory, with a reduced total area of 7.372 hectares. The farm is otherwise of standard design: it is to consist of a number of lines with an anchor at each end and a single warp rising to the surface. At the surface is a backbone with dropper lines extending to approximately 12m depth (not to the sea floor). Each structure set is spaced 12 to 20 m apart. Despite the array of potential crops[2], we will call the proposed farm a "mussel farm" to distinguish it from other types of marine farm like salmon farms which usually have much greater adverse environmental impacts.

[2] In addition to green shell mussels, the application seeks to cultivate scallops (*Pecten novaezelandiae*), blue shell mussels (*Mytilus galloprovincialis*), dredge oysters (*Tiostrea chilensis*), pacific oysters (*Crassostrea gigas*) and algae (*Macrocystis pyrifera, Gracilaria sp., Pterocladia lucida, Undaria pinnatifida*).

[6] The application was heard by an independent commissioner Mrs S E Kenderdine[3] on 21 May 2014 and a decision to decline was issued by the Marlborough District Council on 2 July 2014. The decision was appealed by the Appellant, which has put forward to the court an amended proposal to reduce impacts on the environment.

[7] Two incorporated societies, Kenepuru and Central Sounds Resident's Association Inc and Friends of Nelson Haven and Tasman Bay Inc, (together "the Societies"), which had lodged submissions on the Davidson Family Trust's application, then joined the appeal as section 274 RMA parties in support of the Council's decision.

[8] The service of evidence in this proceeding was rather drawn out for two reasons. First, after the initial service of evidence which largely replicated the evidence given to the hearing Commissioner, the Council decided it wished to put forward evidence on ecological matters. That was challenged, and after submissions, (a procedural[4] decision) allowed a further exchange of evidence.

[9] The Council then lodged evidence by Dr B G Stewart — an ecologist, and Dr P R Fisher — an avian ecologist. The Appellant responded with evidence from its various experts and with a statement from Mr Davidson which was nearly[5] as long as his evidence-in-chief. The Council challenged the admissibility of that evidence on the grounds it was new evidence, rather than rebuttal. Subsequently the Council lodged "supplementary" evidence from Mr R Schuckard, Dr Fisher, and Dr T Cook (an ornithologist) in response to Mr Davidson's long rebuttal statement. The Appellant objected to the admissibility of this evidence on the grounds that the Council had no right to lodge it. Finally, the Appellant applied for consent to call rebuttal evidence on methodology from Dr D M Clement a marine ecologist. The admissibility of this was in turn challenged by the Council.

---

3 A retired Environment Judge with very extensive experience in and knowledge of the Marlborough Sounds.

4 Procedural Decision [2014] NZEnvC 257.

5 26 pp evidence-in-chief [Environment Court document 6]; 22 pp further evidence [Environment Court document 6A].

[10] The questions of admissibility raised subsequent to the procedural decision were adjourned to be resolved at the hearing. We considered it appropriate to receive all[6] the information lodged for these reasons. First, the evidence received is relevant which is the main test. Second, Mr Davidson is, in effect, the Appellant and so if he wishes to raise matters he should be allowed to so that he can be reasonably satisfied the Trust has been given a full and fair hearing. Third, to the considerable extent that Mr Davidson raised new matters in his rebuttal, the Council and the Societies should, in fairness, be allowed to reply.

0.3 The mussel farm site[7]

[11] The site is an area of shallow coastal water — between 22m and 42m deep — adjacent to the northern promontory. Dr D I Taylor, an ecologist called by the Appellant, described the benthic environment below the farm's two blocks as primarily soft mud sediments with a small area of mud/shell hash and coarser sand/shell hash sediments at the inshore margin. A bedrock/boulder reef habitat extends to the southwest of the promontory to around 35m from the closest proposed mussel lines. It was to avoid interfering with this reef that the Appellant divided its proposed farm into the two blocks described.

[12] On the site current speeds are generally below 4cm per second which is considered to be in the low to moderate range. Higher flushing events of up to 10cm per second occur periodically throughout the water column and strong currents up to 20cm per second have been recorded in the lower section of the water column. Flow direction is generally balanced east/west around the end of the promontory.

[13] The northern promontory adjacent to the site extends around 700m into the bay, dividing the northern coastline of Beatrix Bay into two relatively sheltered embayments. The western slopes of the promontory are dominated by rough pasture mixed with tauhinu scrub[8], gorse, pig fern, and occasional wilding pines. Further regeneration is inhibited by dry conditions combined with grazing stock (e.g. cattle), feral pig rooting

---

6 Except the evidence of Dr T Cook who was unable to attend at hearing to confirm his evidence and be cross-examined.

7 See the Assessment Matters in rule 35.4.2.9 of the Sounds Plan [p 35-21].

8 *Olearia leptophyllus*.

and goat and hare grazing. Vegetation cover on the eastern side of the promontory is more advanced but is also inhibited by feral animals and stock.

0.4 The landscape and seascape setting

[14] Beatrix Bay, containing approximately 2,000 ha, is one of the largest bays in Pelorus Sound (total 38,477 ha). It is roughly circular with a coastline of about 22 km. Some sense of the scale of the Bay can be gleaned from the fact that the northern promontory, where the site is, cannot be identified when entering from the south, but looms quite large from close to. The western side of Beatrix Bay is a long near-island running from Kaitira, the East Entry point to Pelorus Sound (from Cook Strait), to Whakamawahi Point. It is connected by a low isthmus along the northern side of Beatrix Bay to the Mount Stoke massif. The slopes of that hill form the higher (1,000 m above sea level) east and south-east margin of the bay. The southern end of the bay descends to Te Puaraka Point. The wide south-western end of Beatrix Bay opens to the rest of Pelorus Sound: south to Clova and Crail Bays, south-west to inner Pelorus Sound and west to Tawhitinui Reach.

[15] The relatively sheltered water of the "Mid Pelorus Marine Character Area"[9] is described in the plan as "... turbid and warm and the seafloor as mostly mud with conspicuous sparse marine life fringed by narrow cobble reef"[10]. Most of Beatrix Bay is 30 to 36 m deep with a seabed of soft sediment[11] (the most common type of habitat in the Marlborough Sounds).

[16] Much of the land surrounding the northern end of Beatrix Bay is in the single ownership of Mr W Scholefield. It has been farmed for many years, but is in varying stages of regeneration (i.e. pasture to kanuka/broad-leaf scrubland). Some of the upper hillsides are administered by the Department of Conservation and support mature forest. Three small reserves reach the coast (two on the western coast of the Bay and one on the eastern coast). None of the reserves are close to the application site.

9 Map 106 Sounds Plan Vol. 3.
10 Appendix Two of Sounds Plan [p Appendix Two – 67].
11 B G Stewart evidence-in-chief para 3.1[Environment Court document 26].

[17] There are[12] 37 existing marine farms (approximately 304.4 ha in total[13]) located around the edge of Beatrix Bay. Backbones (surface structures) on the 37 marine farms span approximately 8.5 km (33%) of total shoreline length[14] at sea level (but more under water). Approximately 85% of the surface area (2,000 ha) of Beatrix Bay is not occupied[15] by mussel farms.

0.5 The matters to be considered when making the decision

[18] The site is located within Coastal Marine Zone 2 ("CMZ2") in the Marlborough Sounds Resource Management Plan (the "Sounds Plan"). That is a zone in which "appropriate"[16] marine farms are provided for, at least close to the shore, as discretionary activities[17]. In fact, because the proposed farm extends beyond 200 m from the shore, the status of the activity under Rule 35.5 of the Sounds Plan is non-complying. One of the gateways of section 104D RMA must therefore be passed before we can grant consent. Those gateways require either:

- that the adverse effects will be minor; or
- that the activity is not contrary to the objectives and policies of the Sounds Plan.

[19] If one of these tests is met, section 104(1) identifies the matters we are to have regard to in coming to a decision. In this case the relevant matters include:

- the actual and potential effects of the activity on the environment (section 104(1)(a));
- the provisions of the New Zealand Coastal Policy Statement ("the NZCPS"), the Marlborough Regional Policy Statement ("the RPS") and the Sounds Plan (section 104(1)(b));

---

12 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
13 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
14 R J Davidson rebuttal evidence-in-chief para 8.1 [Environment Court document 6A].
15 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
16 Explanation to Issue 9.2 [Sounds Plan p 9-4]; Objective (9.2.1) 1 and Policy (9.2.1) 1.14 [Sounds Plan p 9-6].
17 Rule 35.4.2.9 of the Sounds Plan where "close" means between 50m and 200m of the shore within CMZ2.

- any other relevant matters, if that is reasonably necessary (section 104(1)(c)).

Consideration of matters under section 104(1)(a)-(c) is "subject to Part 2 of the RMA". We must also have regard to[18] the Commissioner's Decision.

[20] The "environment" in section 104(1)(a) is not only the current description of its components (as identified in the section 2 RMA definition) but also the past environment as described in the relevant district plan and the reasonably foreseeable environment. Thus the environment includes the accumulated and reasonably foreseeable accumulative effects of all stressors (other than the application) on the past and current environment.

[21] The future component of the "environment" is well established. In *Queenstown Lakes District Council v Hawthorn Estate Limited*[19] ("*Hawthorn*") the Court of Appeal identified the central question in section 104 (rather than section 104D) of the Act as[20]:

> … whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future …

The court examined numerous provisions in the Act in which the "environment" was referred to, then analysed[21] the scheme and purpose of the RMA and concluded:

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

---

18 Section 290A RMA.

19 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

20 *Hawthorn* at [11].

21 *Hawthorn* at [57].

[22] More recently, in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*[22], the Court of Appeal confirmed that:

> In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. [Emphasis added].

0.6 The obligation to supply adequate information (section 104(6) RMA)

Introduction

[23] There is one other, procedural, aspect of section 104 which we need to consider in the light of the evidence given to us. It is the question how to apply section 104(6) of the RMA (as added[23] in 2009). That states:

> (6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

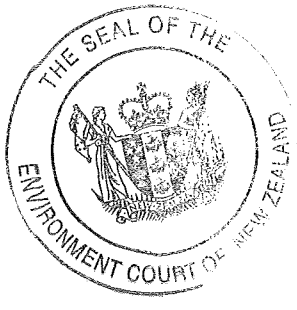
[24] For the Council Mr Maassen relied on this as the basis for his submission[24]:

> … that even though a submitter or the Council does not call evidence on a particular effect, it is open for the consent authority to determine that the information is inadequate and decline the application accordingly. The only way, for example, one can faithfully fulfil the Parliamentary direction to "recognise and provide for" [the] matters of national importance [is] to have adequate information. This supports the evidential onus that the applicant bears.

Mr Maassen carefully did not call this burden an onus of proof. For the Appellant, Mr Gardner-Hopkins did not respond directly to Mr Maassen's submission about section 104(6).

The obligation to supply adequate information

[25] Section 104(6) appears to place an onus on the Appellant for a resource consent to supply enough relevant information to the consent authority to enable it to determine



22 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [80].
23 By section 83(6) Resource Management (Simplifying and Streamlining) Amendment Act 2009.
24 Submissions for Marlborough District Council dated 29 June 2015 at [113].

the application. In particular, the decision-maker must be able to reasonably assess a credible region[25] of probabilities of the relevant adverse effect even if only qualitatively.

[26] However, in some situations there may be inadequate information to even assess the likelihood of the effects of a stressor, and it is then that section 104(6) RMA may come into play. Clearly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case. The power is also discretionary — that is shown by the use of the word "may" — so the consent authority may grant consent even if it lacks sufficient information. An example may be if there is a proposal for adaptive management to respond to uncertainties.

[27] Some assistance as to the purpose of section 104(6) RMA may be gained from Part 2 of the Act. The purpose of Part 2 is, as described in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*[26] ("*King Salmon*"), principally to guide local authorities, for example when considering a resource consent. However, as Mr Maassen observed, it is difficult for a consent authority to provide for the matters of national importance in section 6 unless it recognises them first. This suggests an applicant should put forward adequate information for the consent authority to be able to identify the relevant stressors and their effects.

[28] Another particular provision of Part 2 of the RMA that may assist application of section 104(6) is section 7(b) of the RMA, which requires decision makers to have particular regard to the efficient use and development of the relevant resources. While section 7(b) is only ever one, of many, matters to be considered (and it is silent about the protection of resources) it does imply that in many cases it is the more[27] valuable use and development of the resources which should be preferred. How often could a consent authority deliberately and rationally choose a wasteful use of resources? It appears to us that section 7(b) reinforces or creates a burden on an appellant to show that its proposed consent would use the resources better than the status quo or some other possible use if that is put forward in the evidence.

---

25 I.e. between 34% and 66%.

26 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195 at [24] and [25] per Arnold J.

27 Or most valuable if there are three or more options.

[29] Several aspects of the scheme of part 6 (Resource Consents) of the RMA are relevant as to how section 104(6) should be applied. First, section 88 prescribes[28] that an application for resource consent must include an Assessment of Environmental Effects ("AEE") as required by Schedule 4 of the Act. The information required by the Schedule (principally as to the effects of the proposal) "… must be specified in sufficient detail to satisfy the purpose for which it is required[29]". One purpose[30] is — as stated in the previous paragraph — found in the particularised objectives and policies of the relevant plan. This appears to impose an obligation to supply information of adequate quality (as well as sufficient detail) to enable grant of consent if no other information is put forward.

[30] An application may now[31] be determined to be incomplete if it does not include the information required by Schedule 4, and returned[32] to the Appellant. Then the Council has the power to request[33] that the Appellant provide further information or to commission a report[34] (in addition[35] to any standard report under section 42A RMA) before the hearing, although the Appellant has the right to refuse[36] to provide the information or even to ignore[37] the request. A similar provision[38] applies in respect of refusing to agree to the commissioning of a report.

[31] So the procedural scheme of Part 6 of the RMA emphasises the provision of information to the consent authority even before the hearing. That is to ensure the consent authority is adequately informed before making a decision. Because the appellant may refuse or ignore the request, section 104(6) still confers a power enabling the consent authority to decline if it has inadequate information.

---

28 Section 88(2)(b) RMA.
29 Clause 1, Schedule 4 RMA.
30 Another purpose is to fully and fairly inform the public of the potential effects.
31 Since the Resource Management Amendment Act 2013.
32 Section 88(3A) RMA (added by section 92(2) Resource Management Amendment Act 2013).
33 Section 92(1) RMA.
34 Section 92(2) RMA.
35 Section 92(4) RMA.
36 Section 92A(1)(c) RMA.
37 Section 92A(3) RMA.
38 Section 92B RMA.

[32] The Environment Court has the same[39] powers, duties and discretions as the consent authority in relation to section 104(6) under this appeal, so it appears the court may also decline the application if it has inadequate information to satisfy it that the purpose of the Act will be achieved. Further, when making an assessment under section 104(6) on the adequacy of the information, the consent authority (or, on appeal, the Environment Court) must have regard to[40] whether any request for further information or reports resulted in further information being available. Presumably if further information (or a report) has not been requested that is a factor against declining the application on the grounds of inadequate information.

[33] In *Saddle Views Estate Limited v Dunedin City Council*[41] Whata J, a Judge of the High Court with extensive experience of the RMA, stated:

> Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate[42].

We respectfully agree subject to two minor qualifications: first we consider it may be more accurate to move (or repeat) the phrase "in light of prescribed statutory thresholds"[43] to follow the words "assessment of future effects"; second, the statement needs to be read in the light of section 104(6) RMA.

[34] In one of the cases referred to by Whata J, *Shirley Primary School v Telecom Mobile Communications Ltd*[44], the Environment Court held that "in a basic way there is always a persuasive burden" on an Appellant for resource consent reflecting the principle that "the person who desires the Court to take action must prove the case".

---

39 Section 290(1) RMA.

40 Section 104(7) RMA.

41 *Saddle Views Estate Limited v Dunedin City Council* (2014) 18 ELRNZ 97 (HC) at [90].

42 Referring to *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84 (PT); *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC); *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP 18/02 June 2002; *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (2005) 11 ELRNZ 15 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC).

43 "Thresholds" is rather idealistic: few plans are so forthright, and the Sounds Plan is a classic plan that always qualifies its objective and policies.

44 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [121]-[122].

That approach was endorsed (obiter) by the majority of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[45].

[35] We conclude that since 2009 section 104(6) now imposes a type of legal burden on an Appellant to supply adequate information, although it may in certain circumstances be able to sidestep that if it can satisfy a consent authority that an adaptive management or similar condition is appropriate (i.e. the *Sustain Our Sounds v New Zealand King Salmon Company Ltd*[46] criteria are met — we discuss these later).

[36] The method of applying section 104(6) discussed above seems generally consistent with Principle 15 of the *Rio Declaration*[47]. That includes the statement that "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". However, we give that no weight since we did not receive full submissions on the principle. In any event, a precautionary approach is (as we shall see) included in the New Zealand Coastal Policy Statement which we will consider later.

[37] Does that mean that an Appellant must either in its AEE[48] or in its evidence "... pre-empt all possible arguments made by opponents, in order to disprove alleged effects"?[49] The answer is "no" for two reasons. First, the relevant effects should usually have been identified in the relevant plan, as should what the plan expects to be done about them. That is why the particularisation in subordinate policy statements or plans of the purpose and principles of Part 2 of the Act, as identified in the majority decision in *King Salmon*[50], is so important. Second, it is impossible to prove (or disprove) a future event, simply because it has not happened yet. The most that can be established is a probability or likelihood that an effect may (or may not) occur. Third, on the facts of this case it is quite clear that the Appellant knew from the beginning that lost feeding habitat for King Shags is an issue because its AEE records that[51].

---

45 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA) at [23].

46 *Sustain Our Sounds v New Zealand King Salmon Company Ltd* [2014] NZSC 40; [2014] 1 NZLR 673; (2014) 17 ELRNZ 520 at [124] and [125].

47 *The Rio Declaration on Environment and Development* UNESCO, 1992.

48 Required under section 88(2)(b) and Schedule 4 of the RMA.

49 Making a question of a proposition by Mr G Severinsen in his recent paper *Bearing the Weight of the World: Precaution and the Burden of Proof* (2014) 26 NZULR 375 at 384.

50 *King Salmon* above n 26.

51 Assessment of Environmental Effects para 5.7 (Seabirds) [Exhibit 6.5].

0.7 The standard of proof and prediction under the RMA

[38] As to the standard of proof, Mr Gardiner-Hopkins submitted[52] that the High Court in *"Buller Coal"*[53] stated that the appropriate standard of proof to be applied is "… the balance of probabilities". He made no distinction between the standard of proof of facts and any assessment of likelihood for predictions. We consider the differences are important.

[39] We accept that we must decide all questions of fact on the preponderance of the evidence. Of course not all disputes about the environmental setting of a proposal are factual. To the extent that the "environment"[54] includes the reasonably foreseeable future, questions about what that may look like are also predictive. However, a standard of proof for predictions that is "on the balance of probabilities" is problematic for several reasons.

[40] First the concept of a "probability of a probability" is at least awkward if not inchoate. Second, the definition of "effects" in section 3 of the Act includes "… effects of low probability but high potential impact". As the court has stated before, it is difficult to understand what is meant by determining an effect of low probability on the "balance" of probabilities.

[41] Third, in *Clifford Bay Marine Farms Ltd v Director General of Conservation*[55], the Environment Court suggested that applying "the balance of probability test to predictions of risk or any other prediction of future effects on every occasion is unhelpful". The court subsequently considered the issue further in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[56] (*"Long Bay"*) and considered it was bound[57] by the advice of the Privy Council in *Fernandez v*

52 Closing submissions dated 13 July 2013 at para 2.3(a).
53 Citing *"Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2005] NZRMA 193 (HC) at [73]". The correct reference is [2006] NZRMA 193 (HC).
54 As defined in section 2 RMA.
55 *Clifford Bay Marine Farms Ltd v Director General of Conservation* Decision C131/03 at [63].
56 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.
57 *Long Bay* at [321].

Government of Singapore[58] where Lord Diplock referred to "the balance of probabilities" as[59]:

> … a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences.

He continued:

> But the phrase ['the balance of probabilities'] is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a Court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens.

As the court said in *Long Bay* that is a clear statement of the law, equally applicable in New Zealand. Predictions of the likelihood of an effect are decided upon the preponderance of the evidence.

[42] The Likelihood Scale[60] set out by the International Panel on Climate Change is useful in this context. It suggests the following "calibrated language for describing quantified uncertainty"[61] about the future:

Table 1. Likelihood Scale

Term	**Likelihood of the Outcome**
Virtually certain	*99-100% probability*
Very Likely	*99-100% probability*
Likely	*66-100% probability*
About as likely as not	*33 to 66% probability*
Unlikely	*0-33% probability*

58 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC).
59 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC) at 696.
60 Table 1 Likelihood Scale in *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).
61 *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).

Very unlikely	*0-10% probability*
Exceptionally unlikely	*0-1% probability*

We will endeavour to be consistent with that Table in our assessment of probabilities of future events.

[43] The court also invited[62] the parties to make submissions before the hearing on the application of the probabilistic principle known as Bayes Rule to evidence (and hypotheses about future effects) but neither counsel nor the witnesses took up the opportunity. The court raised this point because most expert evidence that attempts to quantify the effects of stressors on the environment does so in a frequentist manner with 95% confidence limits. Since much data does not justify frequentist conclusions (disproving — or not — a null hypothesis, when that hypothesis is usually the opposite of what a consent authority wants to know), that information is then discarded as useless. However, such information can still be useful to assess the probabilities of potential events. As the Minute suggests, the principal method known to the court enabling consideration of more uncertain probabilities is Bayes Rule, so we regret the opportunity was not taken. That is especially so since Dr Clement, called for the Appellant, after making standard (and largely justified) frequentist criticisms of the Council's evidence, then admitted to the court that "Bayesian frameworks come in"[63] when assessing probabilities in conditions of uncertainty.

1. The marine environment of Beatrix Bay

1.1 Overview of the environmental setting

[44] The marine environment of Beatrix Bay, like the rest of the Marlborough Sounds, has been the focus of considerable historic human activity. It has been modified by physical disturbance (e.g. dredging and trawling), by runoff after land clearance, and by contaminants from residential and farming use of the land. Little data exists describing the ecological attributes of the Sounds prior to these activities. Some early publications reported on resources such as commercially viable intertidal mussel beds and subtidal scallop and horse mussel beds in the Pelorus Sound although most of these

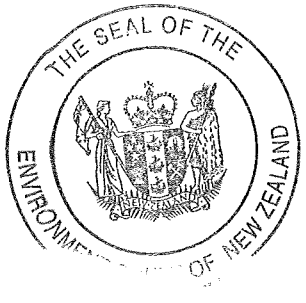
62 Minute dated 14 April 2015.
63 Transcript p 369.

have been lost as a result of dredging and/or smothering sedimentation from land use practices.

[45] Dredging still occurs in the area, however, the actual number of dredge and trawl tows is not publicly available. The consensus of the experts seemed to be that dredging only occurred once or twice a year, whereas in the past it had been more frequent. In any event the experts seemed to agree that repeated and ongoing trawling for flatfish in Beatrix Bay has resulted in significant changes to the seafloor with fine sediments remaining on the surface. This could potentially result in a turbid layer across the whole Bay, but whether that is so is unclear. Much of the soft bottom marine environment in central Pelorus Sound remains in a modified state with small remnant sites supporting biologically significant communities[64]. Close to the shore there is often domestic rubbish[65] on the seabed.

[46] The intertidal zone of Pelorus Sound is dominated by cobble and boulder substrata interspersed by areas of bedrock. Isolated areas with low gradient soft shores exist at the heads of bays where shellfish such as cockles and pipis exist. In many parts of the Sounds the intertidal biological communities have been modified by historical recreational and commercial fishing activities. For example, from 1960 to 1980, hand harvesting as well as subtidal dredging of natural green-lipped mussel beds was widespread in the Sounds.

[47] The inshore shallow subtidal edges of Pelorus Sound are dominated by relatively steeply sloping shores. These areas have not been dredged and the impact of sediment runoff is minimised due to wave action and water currents that keep these shores relatively free from the effects of sediment smothering. Inshore shallow subtidal habitats in Pelorus Sound and the wider Marlborough Sounds are therefore in a relatively natural[66] state. Where currents are strongest, a variety of filter feeding organisms such as hydroids, sponges, ascidians and tubeworms become abundant. These current-swept shallow subtidal areas have often been recognised as significant sites.



64 Davidson R, Duffy C, Gaze P, Baxter A, DuFresne S, Coutney S and Hamill P. (2011). Ecologically significant marine sites in Marlborough New Zealand (Davidson Environmental Limited) [Exhibit 6.3].

65 R J Davidson rebuttal evidence para 7.5 [Environment Court document 6A].

66 R J Davidson evidence-in-chief para 24 [Environment Court document 6].

[48] At the foot of the shore slope, the topography of the sea floor becomes relatively flat. Deep offshore flat areas are usually dominated by silt and clay (mud). Mud is the most common and widespread marine habitat in the Sounds and supports a characteristic invertebrate community in addition to benthic fish species such as flat fish. In general, the diversity of surface dwelling species in these offshore mud areas is considerably lower than on the sloping bay edges. Surface dwelling species in particular are often relatively uncommon on deep mud. These offshore areas have been dredged in the past and that still continues[67]. Dredged sites support a community dominated by opportunistic species able to cope with regular disturbance. In many instances the original community types found on these offshore soft bottoms do not recover (or recover very slowly) from activities such as dredging.

[49] In addition to dredging and trawling the stressors on coastal marine environments such as Beatrix Bay include anthropogenic effects such as accelerated climate change, sedimentation from run-off from land-based activities[68], fishing[69] and marine farming. We received minimal evidence as to how the effects of climate change might affect the habitats of Beatrix Bay or the species that live in them.

[50] Dr Taylor also observed that[70]:

> Confounding the issue of determining any cumulative ecological effects on sub-tidal and intertidal communities will be the Sound-wide impacts of stochastic (largely random but can be predicted on a probabilistic basis) environmental events. This includes a rapid succession of floods from the Pelorus River (catchment 880 km²) and the Kaituna River (catchment 155 km²), which discharge on average 43.0 m^3s^{-1} and 5.4 m^3s^{-1} respectively (Sutton & Hadfield 1997), and decadal oscillations in weather patterns like El Nino/La Nina[71]. Both of these drivers can cause

67 R J Davidson rebuttal evidence para 8.11 and Figures 5 and 6 [Environment Court document 6A].

68 D I Taylor evidence-in-chief para 36 [Environment Court document 8] referring to "deforestation, pastoral farming, clear-felling of exotic forestry".

69 D I Taylor evidence-in-chief para 36 [Environment Court document 8].

70 D I Taylor evidence-in-chief para 39 [Environment Court document 8].

71 Citing Zeldis JR, Hadfield MG, Booker DJ 2013. "Influence of climate on Pelorus Sound mussel aquaculture yields: predictive models and underlying mechanisms". *Aquaculture Environment Interactions* at 4:1-15.

large shifts in the abundance of intertidal and sub-tidal species[72], and are known to affect the distribution of species within the Marlborough Sounds[73].

1.2 The effects of the existing mussel farms

[51] We have referred to the 37 marine farms around the bay. Many of the earlier mussel farms in Beatrix Bay were — in accordance with the Sounds Plan — located close in to the shore and over rocky or reef substrates. As awareness of the ecological importance of those areas has risen, and as demand for farming space has increased, farms have extended seawards. That has had the effect of extending farms over the soft (flatter) substrate that characterises the seabed of most of Beatrix Bay.

[52] Cultured shellfish such as mussels feed on microscopic suspended particulate matter both living and non-living (collectively referred to as seston) by filtering it from the water column. Mussel diets are primarily composed of phytoplankton, but also include some zooplankton and other living and non-living material. Following digestion of food, the faeces produced by mussels are generally light and tend to break up and dissolve readily. That process releases dissolved nutrients, particularly nitrogen, into the water column. Mr B R Knight, another ecologist called for the Appellant, wrote that nitrogen is considered to be a limiting factor to the growth of phytoplankton in Beatrix Bay, so the effect of grazing by mussels — which reduces phytoplankton stocks — may be somewhat balanced by the recycling of nutrients that encourage replenishment of phytoplankton stocks[74]. However, that is somewhat academic because Mr Knight also described the current trophic status of Beatrix Bay as low-mesotrophic. Indeed basic nitrogen budgets developed for the Pelorus Sound indicate there is an excess of nitrogen inputs occurring.

---

72 Citing Schiel DR (2004). "The structure and replenishment of rocky shore intertidal communities and biogeographic comparisons". *Journal of Experimental Marine Biology and Ecology* at 300:309-342.

73 Citing Davidson R.J.; Duffy C.A.J.; Gaze P.; Baxter A.; DuFresne S.; Courtney S.; Hamill P. 2011. "Ecologically significant marine sites in Marlborough, New Zealand". Coordinated by Davidson Environmental Limited for Marlborough District Council and Department of Conservation.

74 B R Knight, evidence-in-chief para 19 [Environment Court document 9].

[53] Mr Knight relied on papers[75] which he said found no change in the base food web as a result of mussel production in Pelorus Sound. There was no indication from these studies that mussel production at a bay or Sounds-wide scale was nearing ecological carrying capacity or that mussel farming associated change in water column properties was occurring[76].

Water column effects

[54] More authoritative information on water column effects is contained in a report by Dr N Broekhuizen and others called "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound"[77]. A draft was produced by Dr Broekhuizen, under a witness summons, and the final version ("*the Broekhuizen Report*") was referred[78] to by Mr Maassen in his memorandum of June 2015 and produced to the court and parties in February 2016.

[55] *The Broekhuizen Report* presents the results from large scale biophysical modelling of Pelorus Sound designed to describe the effects of existing (at 2012) and proposed (consented since 2012) mussel and finfish farms on water quality[79]. Various marine farming and geochemical scenarios were modelled. A finding of particular relevance in this case was that bay scale effects of increased ammonium concentrations and decreased seston concentrations are predicted by the model as a result of mussel farming.

[56] Counsel submitted that *the Broekhuizen Report* shows that the Existing Mussel farms in Pelorus Sound as at January 2012 have changed the environment compared with a "No Mussel farms" scenario. The report states, as Mr Maassen for the Council quoted[80], that:

---

75 Zeldis JR, Howard-Williams C, Carter CM, Schiel DR 2008. *ENSO and riverine control of nutrient loading, phytoplankton biomass and mussel aquaculture in Pelorus Sound, New Zealand.* Marine Ecology Progress Series 371; 131-142; Zeldis JR, Hadfield M, Booker D 2013. *Influence of climate on Pelorus Sound mussel aquaculture yield; predictive models and underlying mechanisms.* Aquaculture Environment Interactions 3(4); 1-15.

76 B R Knight, rebuttal evidence at 4.9-4.10 [Environment Court document 9A].

77 Broekhuizen, N; Hadfield M; Plew D "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound" (2015) NIWA Report CHC 2014-130.

78 Environment Court document 10A.

79 Broekhuizen N, Hadfield M and Plew D 2015 *A biophysical model for the Marlborough Sounds. Part 2: Pelorus Sound.* NIWA Client Report CH2014-130.

80 Memorandum from Marlborough District Council dated 22 July 2015.

> Relative to the nominated baseline scenario (EM-EF-WD[81]), a no mussel, existing fish with denitrification simulation (NM-EF-WD[82]) yields:
>
> **Winter-time:** lower concentrations of ammonium and nitrate but higher concentrations of particulate organic detritus (dead plankton etc.,) phytoplankton and zooplankton. The largest changes in relative concentration are seen in Kenepuru Sound and the largest relative concentration changes are within the zooplankton. There, time-averaged near-surface winter-time seston3 concentrations in the NM-EF-WD simulation are more than double those of the EM-EF-WD scenario (for zooplankton in Kenepuru, substantially more than double). The Beatrix/Crail/Clova system also exhibits similar (but smaller) changes.
>
> **Summertime:** lower concentrations of ammonium, nitrate, higher concentrations of detritus and zooplankton, but phytoplankton concentrations which are similar to (or lower than) those of the EM-EF-WD scenario. During summer, mussels convert particulate organic nitrogen (not directly exploitable by phytoplankton) to ammonium (directly exploitable by phytoplankton). Phytoplankton growth is normally nutrient limited during this time, but in the immediate vicinity of the mussel farms, phytoplankton (which survive passage through the farms) find a plentiful ammonium supply. This enables them to grow quickly – more than offsetting the losses that the population suffered to mussel grazing (the 'excess' accrued phytoplankton biomass being fuelled out of the detritus that was consumed). …

[57] In summary the *Broekhuizen Report* suggests that there have been "material" changes in water column properties as a result of the development of mussel farms. However, the report does not assist with determining any threshold regarding the ecological carrying capacity of Pelorus Sound for mussel farms. Nor does it substantiate a trajectory of insidious decline (in Mr Maassen's phrase) in relation to the water column.

The benthic zone: physical effects

[58] Shell, mussels, faeces and pseudofaeces are released from mussel farms. The latter comprise inorganic and organic material filtered from the water column, but not digested. The rejected particles are aggregated into a mucus-bound mass and

---

81 The abbreviation stands for "existing mussel-farms, existing fish-farms, with benthic dentrificantion": (EM-EF-WD). This "corresponds to present-day conditions in Pelorus Sound" Broekhuizen et al para 4.9.

82 The abbreviation stands for "no mussel-farms, existing fish-farms, with benthic dentrification": (NM-EF-WD).

periodically ejected back into the water column. Pseudofaeces are heavier than faeces and settle out rapidly to the seafloor as sediment.

[59] Between 250 and 400 tonnes of shell, mussels and sediment is released under each hectare of farm each year[83]. For the 304 hectares (approximately) of current farms in Beatrix Bay, that is a minimum of 76,000 tonnes of sediment. The nutrients and fine particulate matter which are part of that sediment are dispersed at a rate which is a function of the current flow at the individual sites and the flushing characteristics of the bay as a whole. The shell hash and live mussels settle on the sea floor.

[60] The obvious visual effect of a mussel farm on the sea floor is the accumulation of live and dead mussels, increased sediment, and the increase in invertebrate predators such as the 11-armed sea star. Chapter 3 (Benthic Effects) of the *Literature Review of Ecological Effects of Aquaculture*[84] ("the *Literature Review*") published by the Ministry of Primary Industries states generally:[85]

> Visual observations suggest that shell deposition within a farm can be patchy, ranging from rows of clumps of live mussels and shell litter directly beneath long lines to widespread coverage across the farm site[86].

Further "Mussel clumps and shell litter beneath a mussel farm have been observed as acting as a substrate for the formation of reef-type communities"[87].

[61] Specifically in the Marlborough Sounds a more recent study we were referred to shows that at two sheltered farm sites[88]:

---

83 B G Stewart evidence-in-chief para 6.4 [Environment Court document 26] referring to Hartstein, N.D. and Rowden, A.A. (2004). "Effect of biodeposits from mussel culture on macroinvertebrate assemblages at sites of different hydrodynamic regime". *Marine Environmental Research* 57:339-357 and Hartstein, N.D. and Stevens C.L. (2005). "Deposition beneath long-line mussel farms". *Aquaculture Engineering* 33:192-213.

84 *Literature Review of Ecological Effects of Aquaculture* (2013) Ministry of Primary Industries ("MPI") at section 2.2.2 (Exhibit 11.2). This publication does not contain a consensus view but is a series of individual chapters by different experts on the subject of their expertise.

85 *Literature Review* at p 3-20.

86 *Literature Review* citations omitted.

87 *Literature Review* citations omitted.

88 N D Hartstein "Acoustical and Sedimentological Characterization of Substrates in and Around Sheltered and Open-Ocean Mussel Aquaculture Sites and Its Bearing on the Dispersal of Mussel Debris" (2005) *IEE Journal of Oceanic Engineering* Volume 30 No 1 p 85 at 85.

> Photography and sediment samples reveal farms are underlain by mounds of shells with biodeposits infilling intershell voids and forming a veneer over entire mounds. In contrast, the surrounding seabed is naturally sedimented soft mud. Sediment from beneath the farms had total organic contents of 8%-19% decreasing sharply to natural levels of 4%-7%, 30 m from the farm's boundaries.

The author adds[89] "Given that [the farms] have low current flows and little potential wave energy … there is likely little lateral transportation and redistribution of the shell and organic material, thus causing it to deposit directly beneath the culture site." That might suggest the mussel shells and mussels only fall directly underneath the lines so that there is soft substrate between them. However, that possible interpretation is belied by the description of the "surficial sediments" in Hartstein's Figure 8. That shows the whole footprint of both low-energy farms was "silt and clay with mussel shells" or (smaller areas of) "predominately mussel shells"[90].

[62] We find on the balance of probabilities that the whole area underneath an average mussel farm in Pelorus Sound has a changed substrate. It is no longer reef or soft mud but is usually a patchy mix of clumps of mussels and shells, and larger areas of mud and mussel shells. It is unlikely there is consistent soft mud and an absence of shells. We also find that on average the penumbra of sediment extends no further than 30 metres from the farms, and shell hash extends far less, depending on wind drifting long lines.

[63] Dr Stewart calculated[91] the total amount of soft substrate habitat available within Beatrix Bay as approximately 1960 ha. He then compared that with "… the amount of habitat likely changed due to the presence of mussel farms (approximately 365 ha), based on 320 ha of consented farm space and 15-20% extra for movement of longlines and impacts beyond farm boundaries". He concluded that "…approximately 19% of the soft substrate habitat is potentially affected" by existing mussel farms. He considered that insufficient information was available to determine the effects of mussel farms on

89 N D Hartstein, above n 88, at p 92.
90 N D Hartstein above n 88, at p 91.
91 B G Stewart evidence-in-chief para 7.4 [Environment Court document 26].

benthic communities away from the immediate farm footprint[92] or on the accumulated effects[93] from the scale of farming in Beatrix Bay on these communities.

[64] We are uneasy about Dr Stewart's calculations. The Appellant was generally critical of them, but did not attempt to put up on alternative figure. It seems to us (for example from Figure 1 attached to Dr Fisher's evidence[94]) that about 60% of the existing farms in Beatrix Bay are over water that is at least 20m deep and is thus likely to be both over soft mud seafloor and within King Shag foraging depths (which start at about 10m). Of the 320 hectares of consented space perhaps only 200 hectares is over soft substrate. In addition there is a 30 metre wide strip along the outside edge of all the total farm's length (8.5km) which adds a further 25 hectares of substrate substantially affected, albeit more by sediment than by shell hash and live mussels. Thus the total 225 hectares of affected benthic environment is very approximately 11% of the total area of Beatrix Bay (but more than 11% of the total soft substrate).

The benthic zone: biochemical and infaunal effects

[65] Dr Taylor wrote that[95]:

> … mild enrichment effects are common under mussel farms in the Marlborough Sounds, and are relatively minor and are a natural feature of mussel beds on the seabed. These effects are often result in enriched infauna (animals living in the sediments) and epifauna (animals living on the sediments) communities with greater taxa diversity and abundances[96].
>
> …
>
> In general, mussel farm-related seabed effects reduce to no near undetectable levels within 20 m–30m of farm boundaries[97].

[66] In relation to the deposition of finer sediments, Dr Taylor described how in his opinion deposition in the form of faeces and pseudofaeces from the mussel farm will

---

92 B G Stewart evidence-in-chief para 4.2 [Environment Court document 26].

93 B G Stewart evidence-in-chief paras 5.13 and 6.40 [Environment Court document 26].

94 P R Fisher evidence-in-chief p 7 [Environment Court document 28].

95 D I Taylor evidence-in-chief paras 32 and 33 [Environment Court document 8].

96 Citing Kaspar, H.F., Gillespie, P.A., Boyer, I.C. and MacKenzie, A.L. (1985). "Effects of mussel aquaculture on the nitrogen cycle and benthic communities in Kenepuru Sound, Marlborough Sounds, New Zealand". *Marine Biology* at 85: 127–136.

97 Citing Keeley, N., B. Forrest, G. Hopkins, P. Gillespie, D. Clement, S. Webb, B. Knight and J. Gardner (2009). "Review of the Ecological Effects of Farming Shellfish and Other Non-finfish Species in New Zealand". Prepared for the Ministry of Fisheries: *Cawthron Report No. 1476*. Nelson, New Zealand, Cawthron Institute: at p 144.

result in "mild" enrichment of the soft sediment directly below and immediately adjacent to the farm. This enrichment reduces to near undetectable levels within 20-30m of the farm boundary in low to moderate water flow sites.

[67] Dr Mead asserted that based on his own observations and modelling evidence on currents, he expected anoxic conditions (highly enriched) to be widespread under the majority of the mussel farms in Beatrix Bay[98]. He extrapolated from research by Christensen and others[99] in Pelorus Sound.

[68] Responding to Dr Mead's assertion[100] that enrichment of the benthic environment under existing mussel farms had not been investigated, Dr Taylor referred us to two qualitative assessment studies he had been involved with in Pelorus Sound, one of these in Beatrix Bay. Mr Ironside, in a lengthy cross-examination, took Dr Taylor through a detailed examination of all of the elements contributing to benthic changes under mussel farms reported in Christensen[101]. Dr Taylor responded that all have been taken into account in this case.

[69] In response to cross-examination by Mr Ironside on the Christensen research[102] on the "cumulative" effects of suppression of the natural denitrification process under mussel farms, Dr Taylor suggested that it was difficult to extrapolate to a bay-wide scale or even a farm-wide scale the results from three 5cm cores as reported by Christensen. He maintained his position that a gradient of effects under and moving out from mussel farms resulted in largely benign effects at a Beatrix Bay scale. In his opinion, "cumulative" effects were not distinct, marked or adverse[103]. When asked by the court

---

98 Transcript, p 412, line 20.

99 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

100 S T Mead evidence-in-chief at para 41 [Environment Court document 20].

101 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

102 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

103 Transcript, p 186, line 17.

if the sediment sampling reported in the Christensen study was adequate to establish bay-wide conclusions, Dr Mead agreed that "this wouldn't be a normal process"[104].

[70] Dr Stewart presented findings from his own dive surveys of "inshore habitats" at the proposed site, under and adjacent to an existing mussel farm, and at a control site in Miro Bay. These surveys revealed a range of differences in epifaunal community structure (diversity) and abundance between sites. Hard substrate communities showed larger differences than those on soft substrate. Dr Stewart observed[105] that without more comprehensive survey work, linking differences in diversity to any specific cause would be difficult. He did however go on to make such a linkage[106] to the presence or close proximity or absence of mussel farms. He concluded that as the benthic community "will almost certainly differ" following development of a mussel farm, the effect on that community was likely to be significant within 100m of the farm.

[71] Dr Taylor and Dr Grange were critical of the design of Dr Stewart's study in that it examined a single site beneath the mussel farm and one control site some 14 km further into Pelorus Sound from Beatrix Bay in an area influenced by freshwater and sediment-laden plumes from the Pelorus River. Dr Taylor considered[107] the lack of site replication meant that analysis of the results had a very high risk of making a type 1 error (a false positive) suggesting there is an effect when none is actually present. In Dr Taylor's opinion the limitations of the study ruled out any conclusions on mussel farm effects on inshore communities as any differences can equally be explained by natural site to site variability as evidenced by the Davidson/Grange study referred to earlier.

[72] Of particular concern in this case are the effects of the mussel farms on specialist (rather than generalist[108]) taxa and particularly on (the habitat of) the specialist King Shag. It is apparent that the 37 mussel farms in Beatrix Bay each have some effect in altering the benthic environment below and adjacent to (within 30 metres of) the direct footprint of the farm. The evidence does not, however, support the claim that bay-wide effects on benthic communities are generally significant. The same conclusion was

104 Transcript, p 416, line 14.
105 B G Stewart evidence-in-chief at 4.19 [Environment Court document 26].
106 B G Stewart evidence-in-chief at 4.24 [Environment Court document 26].
107 D I Taylor, rebuttal evidence-in-chief [Environment Court document 8A].
108 A simple everyday example is to compare nearly ubiquitous house sparrows (relatively generalist) with rock wren (mountain specialists).

earlier reached by the author of Chapter 12 of the *Literary Overview*[109] with the statement:

> While benthic effects are one of the most commonly expected changes as a result of shellfish farming, they are typically of minor ecological consequence **beyond** the boundary of the farm. (Emphasis added).

The implication is that benthic effects are of more than minor ecological significance underneath mussel farms. That is consistent with the evidence of Dr Stewart.

The photic zone

[73] Dr Stewart carried out an analysis[110] in respect of the photic zone — the sunlit zone within which photosynthesizing algae play a significant role in primary production. Using a "conservative" figure of 30 metres to define the depth of the zone in Beatrix Bay, he calculated the percentage of the photic zone likely altered by mussel farms is about 85-90%.

[74] Upon first reading, this appears to be a significant change resulting from mussel farming. However Dr Taylor wrote that[111]:

> … the level of productivity of the microphyto-benthos (the micro algal mats that grow on muddy substrata throughout the Marlborough Sounds) is known to fluctuate greatly depending on the time of year and the time elapsed since significant flood events in the Pelorus River. This is because the river plume reduces water clarity and contributes significantly to sedimentation in the Pelorus Sound[112].

He continued:

> Not only is the productivity of the microphyto-benthos highly variable in space and time, but it is also capable of remaining highly productive beneath mussel farms.

---

109 *Literature Review* above n 84: Chapter 12 (C Cornelisen) at section 2.3.2.
110 B G Stewart evidence-in-chief para 7.6 [Environment Court document 26].
111 D I Taylor rebuttal evidence para 4.1 [Environment Court document 8A].
112 Citing Handley S 2015. "The history of benthic change in Pelorus Sound (Te Hoiere), Marlborough". *NIWA Client Report No: NEL2015-001*. Prepared for Marlborough District Council.

[75] We have inadequate information to determine whether the effects of mussel farms have been adverse or beneficial generally on the photic zone of Beatrix Bay. However, since we were not given evidence of any direct link between this and any alleged adverse effect of relevance under the Sounds Plan or NZCPS we consider it no further.

Summary

[76] We find on the balance of probabilities that the effects of the existing mussel farms on:

(a) the water column is that they deplete seston supplies from the water column in winter and add to it in summer;
(b) the reef zone around the promontory are negligible;
(c) the photic zone are uncertain;
(d) the benthic zone are confined to changing the substrate to patches of shell, live mussels and sediments within an incomplete ring no wider than 30 metres from the farm boundaries;
(e) the soft seafloor of Beatrix Bay is that about 11% has been changed quite substantially.

[77] All those accumulated and accumulating effects are a key part of the environmental setting of the proposal.

1.3 Have mussel farms changed fish distribution?

[78] The soft mud floor of Beatrix Bay provides habitat for flatfish including Witch Flounder, other (right-eyed) flounder species and Lemon Sole. While fish species typically spend[113] some of their time feeding, "the remainder of the time [is spent] in other activities such as predator avoidance, where their location may be driven by benthic habitat". When not breeding or feeding, flatfish spend much of their time hidden in the soft substrate of the seafloor according to Dr Fisher. Beatrix Bay also provides habitat "for adult spawning and nursery areas for juvenile flat fish"[114].

113 P R Fisher evidence-in-chief para 4.26 [Environment Court document 28].
114 P R Fisher evidence-in-chief para 4.42 [Environment Court document 28].

[79] The *Literature Review* states[115] "Direct effects from the development of shellfish farms include alteration of essential fish habitats through the deposition of shell litter and biodeposition of particulate matter." It goes on to add "These effects can be avoided or minimised through proper site selection and effects assessments prior to development". Dr Fisher's evidence was consistent with that. In his view[116] the habitat under mussel farms is no longer soft muddy floor.

[80] The *Literature Review* continues[117]:

> The initial attraction of wild fish species to aquaculture structures (e.g., habitat creation) can lead to a variety of related effects including:
>
> - Changes in the distribution and productivity of wild fish populations due to the addition of artificial structures that create new habitats used by wild fish.
> - Changes in recreational fishing patterns and pressure, which in turn could affect wild fish populations differently than in the absence of the structures.
> - Larval fish depletion by shellfish and/or potential trophic interactions (e.g., alteration of plankton composition and food availability).

[81] Dr Stewart was also of the opinion that the "formation of reef-like communities immediately below mussel farms [both] create predator oases"[118] and cause "habitat loss and/or modification"[119] as well as "increased competition for bottom feeders …"[120]

[82] In Mr Shuckard's experience[121] "[f]ish abundance around mussel lines is small[122] and dominated by small, demersal species characteristic of rocky reefs in the area, notably triplefins (*Forsterygion lapillum* and *Grahamina gymnota*) and Spotty (*Notolabrus celidotus*)." He has also observed[123] common species of fish around mussel

---

115 *Literature Review* above n 84, at p 5-6.
116 B G Stewart evidence-in-chief para 3.15 [Environment Court document 26] (see P R Fisher evidence-in-chief para 6.2).
117 *Literature Review* above n 84, at p 5-6.
118 B G Stewart evidence-in-chief para 6.15 [Environment Court document 26].
119 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
120 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
121 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
122 Citing Morrisey, D.J., Cole, R.G., Davey, N.K., Handley, S.J., Bradley, A., Brown, S.N. and Madarasz, A.L. (2006). "Abundance and diversity of fish on mussel farms in New Zealand". *Aquaculture* 252:277-288.
123 R Schuckard evidence-in-chief para 59 [Environment Court document 25].

farms such as Smooth Leatherjacket (*Parika scaber*) and Yellow-eyed Mullet (*Aldrichetta forsteri*).

[83] Mr Davidson wrote[124]:

> ... Dr Fisher suggests[125] the "smothering of benthos" under mussel farms excludes "naturally occurring benthic species" ... There are no published data on the abundance or distribution of witch flounder (or, for that matter, flat fish) under mussel farms compared to adjacent areas. His statement is therefore unsupported speculation. As mussel farms exclude trawling it is entirely possible that flatfish abundance may be higher under and between farms. Apart from studies investigating fish species inhabiting farm structures, I am not aware of comprehensive data investigating benthic species. (Underlining added).

This is one of the points where the burden on the Appellant (as applicant) of putting forward adequate information becomes critical.

[84] We accept that it is possible that some flatfish may be found underneath mussel farms: some of the prey (e.g. polychaetes) of Witch Flounder may increase in abundance. However, we find that the overall assemblage of fish and other fauna changes quite markedly underneath and in the proximity of most mussel farms. In relation to benthic fish species, Mr Schuckard[126] referred to overseas research which shows that:

> Declining environmental conditions under and in the vicinity of farms as a result of faeces and pseudo-faeces deposition in small discrete areas in and around the farms, have a generally negative impact on oxygen-related processes for the different life stages of fish; settlement probability of juveniles; habitat utilisation of spawning fish; age structure of successful spawners; and food consumption rates of adult fish.

---

124 R J Davidson rebuttal evidence para 8.16 [Environment Court document 6A].

125 P R Fisher evidence-in-chief para 6.6 [Environment Court document 28].

126 R Schuckard evidence-in-chief para 57 [Environment Court document 25] citing Folke, C., Kautsky, N., Berg, H., Jansson, A., Troell, M.. (1998). "The ecological footprint concept for sustainable seafood production: A review". *Ecological Applications*, 8(1) Supplement, pp S63-S71; Hinrichsen, H.H., Huwer, B., Makarchouck, A., Petereit, C., Schaber, M. And Voss, R. (2011) "Climate-driven long term trends in Baltic Sea oxygen concentrations and the potential consequences for eastern Baltic cod (*Gadus morhua*)". *ICES Journal of Marine Science*, 68: 2019-2028; Diaz, R., Rabalais, N.N. and Brietburg, D.L "Agriculture's Impact on Aquaculture: Hypoxia and Eutrofication in Marine Waters". *OECD Publishing* (2012)..

That supports the third bullet point in the *Literature Review* quoted above. Further, there appears to be effects on the substrate which may decrease the quality of habitat even for feeding flatfish: increased predator numbers and potentially a poorer hiding environment.

[85] We find that the habitats of flatfish and other benthic fish species have been reduced by the introduction of mussel farms in that:

(a) it is likely that the changes in substrate underneath mussel farms are physically (a change from soft mud to mud and shell, or shell and mussels), chemically (increases in organic matter) and ecologically (a change of in-fauna and increases in predators) different from the original seafloor;
(b) it is very likely that the fish assemblages have changed;
(c) flatfish in all stages of their life-cycle and in most of their activities are largely excluded from underneath most mussel farms;
(d) it is likely that flatfish have been at least partly displaced within about 30 metres of the outside boundary of mussel farms in the Sounds.

[86] The reduction in that habitat within Beatrix Bay is an accumulated effect or stressor which is part of the environment. However, we have found it quite difficult to assess the extent of change to that part of the benthic environment which is soft mud, because by no means all of the existing mussel farms are anchored over that type of seafloor exclusively.

[87] The Appellant (through Dr Taylor) did not address the question whether the nutrients under mussel farms — whether in or on the benthos (seafloor) or in the photic zone — change the food web in a way that assists species higher up the chain, for example by providing them with more prey, or inhibits them. We now turn to that and related issues in respect of one particular species — the New Zealand King Shag.

2. New Zealand King Shags and their habitat

2.1 Description, population and conservation status

[88] One aspect of the environment in which the site is located is of particular importance in this case. It stems from the fact that Beatrix Bay is within the extent of

occurrence ("EOO")[127] of the endemic New Zealand King Shag[128]. The New Zealand King Shag[129] ("King Shag") is one of 16 taxa[130] of blue-eyed shags. Like almost all *Leucocarbo* shags, it is dimorphic: males are larger and heavier than females and they tend to feed in deeper water[131].

[89] The King Shag is a large black and white bird with pink feet and white bars on its black wings. It has yellowish-orange patches of bare skin at the base of the bill. It is smaller than the Black Shag[132] and larger than the Pied Shag[133] (with which it can be confused).

[90] We received evidence about King Shags from three witnesses. Mr R Schuckard who holds a MSc in Biology gave evidence for the Societies. Since 1991 he has conducted long term[134] studies and monitoring of New Zealand King Shag. He is a committee member of the Friends of Nelson Haven and Tasman Bay Inc[135] and is thus not completely disinterested in the outcome of this proceeding. We treat his evidence with caution as we do that of Mr Davidson for the Appellant. In fact Mr Davidson expressly renounced[136] being an expert witness in these proceedings. On the whole those two witnesses both attempted to be as objective as possible and our caution is more about subconscious biases than obvious partisanship by these two witnesses. The largest exceptions are parts of Mr Davidson's rebuttal evidence where he alternates between critical statements on the evidence of other parties' witnesses and rather broad or simplistic assertions of his own. The Council called Dr P R Fisher, a completely independent avian ecologist who has studied the King Shag.

---

127 "Extent of occurrence is defined as the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred or projected sites of present occurrence of a taxon, excluding cases of vagrancy … This measure may exclude discontinuities or disjunctions within the overall distributions of taxa (e.g. large areas of obviously unsuitable habitat) … Extent of occurrence can often be measured by a minimum convex polygon (the smallest polygon in which no internal angle exceeds 180 degrees and which contains all the sites of occurrence)". IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. iv + 34 pp11-12.

128 *Leucocarbo carunculatus*.

129 Te Kawau-a-Toru *Leucocarbo carunculatus*.

130 Seven blue-eyed species occur in New Zealand (including the Sub-Antarctic species).

131 P R Fisher evidence-in-chief para 4.5 [Environment Court document 28].

132 Better called Great Cormorant *Phalacrocorax carbo*.

133 *Phalacrocarax varius*.

134 R Schuckard evidence-in-chief para 3 [Environment Court document 25].

135 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

136 R J Davidson evidence-in-chief para 10 [Environment Court document 6].

Population

[91] Mr Schuckard estimated the average population between 1992 and 2002 as 645 birds[137] with breeding colonies restricted to four areas: Duffers Reef, Trio Islands, Sentinel Rock and White Rocks[138]. Relying on his earlier research Mr Schuckard informed[139] us that "... the numbers of shags appear to have been stable for at least the past 50 years — and possibly over 100 years[140]". Mr Davidson saw this as providing "some comfort"[141] that marine farms have not effected the population of King Shags. In Dr Fisher's opinion[142] the methodology used by Mr Schuckard was "... appropriate for the task ..." and provided accurate counts.

[92] Dr Fisher initially wrote that[143] "the most recent *estimate* for the total King Shag population was of 687 birds". That is based on a survey of the marine avifauna of the Marlborough Sounds undertaken between September and December 2006. He sounded a precautionary note that the estimate is based on "... counts at colonies when significant numbers of birds were absent feeding"[144], and that caution was justified by subsequent events.

[93] New, more thorough (and expensive) techniques for surveying the King Shag population have recently (2015) been set up. On 11 February 2015 an aerial survey by Mr Schuckard and two other experts counted more (839)[145] King Shags than ever before. The increase in numbers of birds compared to the results of his earlier surveys is attributed by Mr Schuckard[146] to a better accuracy in the count than before, to the count being done in one morning rather than over tens of days and to more colonies being counted.

---

137 R Schuckard "Population Status of the New Zealand King Shag ..." *Notornis* (2006) 53(3): 297-307.

138 All are protected as wildlife sanctuaries under the Reserves Act.

139 R Schuckard evidence-in-chief para 23 [Environment Court document 25].

140 Citing W L Buller "Notes and Observations on New Zealand Birds" (1891) *Trans. NZ Inst.* 24: 65-91.

141 R J Davidson rebuttal evidence para 8.10 [Environment Court document 6A].

142 P R Fisher evidence-in-reply para 3.4 [Environment Court document 28A].

143 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28] citing M Bell "Numbers and distribution of New Zealand King Shag ... colonies in the Marlborough Sounds, September-December 2006" (2010) *Notornis* 57:33-36.

144 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28].

145 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

146 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

[94] The highest number of birds counted by Schuckard at the four main colonies during his 1991-2002 surveys was 626 in 1994. The count for these four sites by the 2015 aerial survey was[147] 637. This suggests, given Dr Fisher's comment on the accuracy of Schuckard's 1991-2002 counts, that the numbers of birds at the four colonies has not changed significantly and thus the increase in the total number of birds is likely to be a result of a more wide ranging count.

[95] Mr Gardner-Hopkins in his closing submissions said:

> In 1992, the closest colony to Beatrix Bay, Duffers Reef, posted 168 (of 524) King Shag individuals. In contrast, the latest population count (early in 2015) has nearly 300 King Shags at Duffers Reef (out of 839 overall).[148]

It was unclear what inference he intended us to draw from that. One thing we cannot do is assume[149] there has been an increase in the total population[150].

[96] We conclude that King Shag numbers in the four main colonies have been approximately the same since 1991 and there is no declining trend in total numbers, but that finding is subject to the qualifications stated by Dr Fisher[151] who elaborated on this in his rebuttal evidence[152]: "the colony counts cannot be used to determine the long term '*stability*' of the population because the count[s] do … not reflect the number of breeding pairs, successful breeding attempts or age and sex ratio of birds, the latter determining the number of potential breeding pairs".

Status

[97] The King Shag is a Nationally Endangered[153] species in the *New Zealand Threat Classification System* published by the Department of Conservation. As at 2012 the criteria for King Shag's inclusion as a "Nationally Endangered Species" were that it had

147 R Schuckard evidence-in-chief para 30 [Environment Court document 25].
148 As summarised in the Council's submissions at para 277.
149 Transcript, p 525, line 17.
150 R Schuckard supplementary evidence para 30 [Environment Court document 25A].
151 P R Fisher evidence-in-chief para 3.4 [Environment Court document 28].
152 P R Fisher rebuttal evidence para 6.6 [Environment Court document 28A].
153 "Nationally endangered" is the second in three categories of "Threatened Species": Nationally Critical, Nationally Endangered, and Nationally Vulnerable in the Department of Conservation's Threat Classification System.

a small (250-1,000 mature individuals), stable population[154]. It was also described as "Range Restricted"[155].

[98] The *IUCN Red List Categories and Criteria* ("the *Red List*") categorises taxa by assessing them under five sets of criteria[156]:

A: Reduction in population;
B: Geographic range (EOO or AOO — see next paragraph — or both);
C: Small population size and declining population;
D: Very small or restricted population size;
E: Quantitative analysis showing the probability of extinction in the wild meets a threshold[157].

[99] Obviously the "AOO" needs explanation. The *Red List* states[158]:

> Area of occupancy is defined as the area within its 'extent of occurrence' which is occupied by a taxon, excluding cases of vagrancy. The measure reflects the fact that a taxon will not usually occur throughout the area of its extent of occurrence, which may contain unsuitable or unoccupied habitats. In some cases (e.g. irreplaceable colonial nesting sites, crucial feeding sites for migratory taxa) the area of occupancy is the smallest area essential at any stage to the survival of existing populations of a taxon. The size of the area of occupancy will be a function of the scale at which it is measured, and should be at a scale appropriate to relevant biological aspects of the taxon, the nature of threats and the available data …

[100] King Shag is identified as *vulnerable* by the International Union for the Conservation of Nature and Natural Resources ("IUCN") in the *Red List*. *Vulnerable* is one of the three 'threatened' species in the *Red List*. Dr Fisher explained that the King Shag is so categorised because[159]:

---

154 H A Robertson, J E Dowding, G P Elliot et al p 10 Conservation Status of New Zealand Birds (2012) Department of Conservation.
155 H A Robertson, J E Dowding, G P Elliott et al Conservation Status of New Zealand Birds (2012) Department of Conservation p 10.
156 IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. IV + 34.
157 50% probability means taxon is critically endangered, 20% endangered, 10% vulnerable.
158 The *Red List* above n 156, at p 12. The definition of "EOO" is given above n 127.
159 P R Fisher evidence-in-chief para 3.5 [Environment Court document 28].

> ... this **species is facing a high risk of extinction in the wild in the medium-term future** based on the criterion (D1) **population less than 1000 individuals,** *and* is restricted to four core breeding colonies (criterion D2: **five or less locations**), rendering the species susceptible to stochastic effects (e.g. infrequent, significant events) and human impacts.

The criteria he was referring to are contained in the *Red List*. Either of the two criteria referred to (D1 and D2) are sufficient[160] to place King Shag in the *vulnerable* category.

2.2 What is the geographic range of the King Shag?

[101] Neither the extent of occurrence nor the area of occupancy of King Shags is known with much accuracy. In answer to the Appellant's sustained attack on the accuracy of the Sounds Plan's inclusion of King Shag habitat as an area of ecological value (we discuss this later), Dr Fisher suggested that the extent of occupancy is the entire area of the Marlborough Sounds because individuals have occasionally been seen in remote corners. The species is known to breed at less than 10 locations.

Proximity of King Shag colonies to the site

[102] Relatively small numbers of birds breed[161] in any year across the four main colonies (Duffers Reef, Trio Islands, Sentinel Rock and White Rocks) ranging from a minimum of 70 to a maximum of 166 pairs based on census counts between the years 1992-2002.

[103] The closest main colony to Beatrix Bay is the Duffers Reef colony, with approximately[162] 240 birds. That may represent about 30-40% of the world population. There is also a small colony of up to 20 King Shags located 2 kilometres due west of the Beatrix Bay entrance at Tawhitinui Bay point[163].

---

160 The *Red List* above n 156, at p 15.

161 P R Fisher evidence-in-chief para 3.7 [Environment Court document 28] citing Schuckard, R "New Zealand King Shag (*Leucocarbo carunculatus*) on Duffer's Reef, Marlborough Sounds." (1994) *Notornis 41*: 93–108 and Schuckard, R. "Population status of the New Zealand King Shag (*Leucocarbo carunculatus*)" (2006) *Notornis* 53: 297-307.

162 P R Fisher evidence-in-chief para 3.8 citing Ornithological Society of New Zealand 2013 [Environment Court document 28].

163 P R Fisher evidence-in-chief para 3.8 [Environment Court document 28].

Foraging areas

[104] Research from the Trios and (Northern) Stewart Island[164] in Admiralty Bay shows that King Shags forage mostly within 10 kilometres of the colonies. That was an approximation from Mr Schuckard's research which found that the mean distance of foraging birds from the Duffers Reef colony was 8.2km for a total count of 219 birds[165]. The maximum distance recorded was 24 kilometres although Dr Fisher acknowledged there had been no systematic studies at greater distances.

[105] In Mr Schuckard's opinion King Shags "… feed predominately southwest from the colonies in the outer Marlborough Sounds where their distribution in the feeding areas appear[s] to be constrained by distance and direction from the colony, and water-depth"[166]. To illustrate that he referred to his Figure 3 identified as "Figure 3 Distribution of feeding King Shags in the Marlborough Sounds". Certainly to our eyes that appears to illustrate his point about distance and direction. However, it was criticised by a witness for the Appellant, Dr D Clement who when asked in cross-examination whether it was an attempt to show area of occupancy agreed but qualified that by answering "… it is an attempt but not necessarily correct"[167]. We understand Dr Clement to be implying that there may be other squares beyond that distance which are within the area of occupancy, and we accept that. However, we also accept Dr Fisher's evidence that[168]:

> The potential marine foraging areas available to King Shags are constrained by energetic and food delivery requirements during the chick rearing period and body-morphometric related physiological constraints on maximal flight distances from the colony and water depth.

[106] Mr Schuckard's first surveys of the Duffers Reef breeding colony and feeding King Shags from this colony were 12 trips in 1990-1991. The foraging surveys were repeated along the same route, but in Beatrix Bay and Forsyth Bay only, in 1997 and 2014. Fewer trips (5) were made for these than for the 1990/91 survey. Finally, a single survey was undertaken by Mr Schuckard in 2015. He considered that he has established

---

164 Davidson et al (Ex 6.3) at p 25.

165 P R Fisher evidence-in-chief para 4.8 [Environment Court document 8] citing R Schuckard "New Zealand King Shag … on Duffer's Reef Marlborough Sounds" (1994) *Notornis* 41: 93-108.

166 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

167 Transcript, p 361, line 33 dated 7 May 2015 1418.

168 P R Fisher evidence-in-chief para 4.4 [Environment Court document 28].

that the majority of feeding occurs within 15 km of the colony (although individual birds were observed beyond that distance).

[107] Usually, King Shags fly low to the sea and do not fly overland on foraging trips. There is one interesting and relevant exception. Beatrix Bay is unique in terms of foraging habitat for King Shags because they access[169] it from Forsyth Bay by flying over the narrow Piripaua Neck. In a nearly direct line the application site in Beatrix Bay is between 8 and 9 km from the Duffers Reef colony. We note that Mr Schuckard also recorded[170]:

> Some differences in foraging range between colonies does occur; about 34% of the feeding birds from the White Rock population fly between 20km and 26km from the colony into the Queen Charlotte Sound whereas most King Shags from Duffers Reef, Trio Island and Sentinel Rock feed up to 16km from their colonies.

[108] We find that Beatrix Bay is part of the area of occupancy of King Shag and that the area outside the ring of mussel farms is used for foraging and feeding.

2.3 King Shag prey and the shag's foraging depths

King Shag prey

[109] Dr Fisher stated that the "small colony sizes and solitary foraging strategy"[171] of King Shags indicate a "patchy" prey resource which is confirmed by their diet of flatfish and other benthic[172] (seafloor) species, including:

> Witch [Flounder] (*Arnoglossus scapha*), Lemon Sole (*Pelotretis flavilatus*), New Zealand or Common Sole (*Peltorhampus novaezeelandiae*), Sole (*Peltorhamphus* sp.), Flounder (*Rhombosolea* sp.), Opalfish (*Hemerocoetes* sp.), Sea Perch (*Helicolenus percoides*), Triplefins Tripterigydea, Leatherjacket (*Parika scaber*), Blue Cod (*Parapercis colias*), Red Cod (*Pseudophycis bachus*), Red Scorpionfish (*Scorpaena papillosus*), Spotty (*Notolabrus celidotus*) and Octopus (*Octipodidae* sp).

169 P R Fisher evidence-in-chief para 3.9 [Environment Court document 28].
170 R Schuckard evidence-in-chief para 16 [Environment Court document 25].
171 P R Fisher evidence-in-chief para 4.2 [Environment Court document 28].
172 P R Fisher evidence-in-chief para 4.27 [Environment Court document 28].

Not all those prey species are equally important: flatfish are the most frequently taken[173] prey, and spotties are a very small part of King Shags' diet. Lemon Sole (which are known[174] to breed in Beatrix Bay) are an unusually large component of the diet of King Shag from Duffers Reef. That is consistent with the evidence[175] of Mr Schuckard which was uncontested on this issue.

[110] Because, like many predators, King Shags have to search for their prey, the distribution and density of flatfish and other benthic species is important. Dr Fisher wrote[176] "... the foraging efficiency of shags is ... strongly influenced by the availability of prey. Even a small reduction in prey density will prevent birds meeting their energy requirements".

Foraging depth

[111] Reports by Mr Schuckard on some limited observations of foraging King Shags suggests that within Beatrix Bay they "predominantly" feed between 30 and 40 metres depth[177]. However the same survey gave 25% of foraging in Forsyth Bay[178] was in water from 10-30 metres deep. Those figures should not be regarded as conclusive because of the low sample size and differences in survey effort[179] (amongst other reasons[180]).

[112] Because female King Shags are smaller than males it is likely they forage in shallower water[181].

[113] Counsel for the Appellant summarised the evidence in respect of King Shags' use of Beatrix Bay as:

---

173 R Schuckard evidence-in-chief paras 51 et ff [Environment Court document 25].
174 B G Stewart evidence-in-chief para 3.3 [Environment Court document 26].
175 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
176 P R Fisher evidence-in-chief para 4.35 [Environment Court document 28] citing D Grémillet and R P Wilson "A life in the fast lane: energetics and foraging strategies of the Great Cormorant" (1999) *Behavioural Ecology* 10: 516-524.
177 P R Fisher evidence-in-chief para 4.11 [Environment Court document 28].
178 P R Fisher evidence-in-chief para 4.12 [Environment Court document 28].
179 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
180 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
181 P R Fisher evidence-in-chief para 4.21 [Environment Court document 28].

(a) In 1991 and 1992, when Mr Schuckard undertook his survey (upon which the 1/11 notations are based), there were approximately 33 marine farms in Beatrix Bay. However, these were smaller, not having been extended by subsequent applications[182] …

(b) Across all 12 of Mr Schuckard's surveys in 1991 and 1992, he only recorded 24 sightings of King Shags in Beatrix Bay.

Mr Gardner-Hopkins continued that later surveys showed:[183]

(i) Between 1997 and 2003, 13 King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992).[184] During that period a further eight farms and 23 extensions to existing farms were consented.

(ii) Between 2010 and 2015, nine King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992). [185] During that period it appears as if a further two farms and four extensions were consented.[186]

…

[114] Mr Gardner-Hopkins then submitted:

> … it was Mr Schuckard's evidence that King Shags in Beatrix Bay tend to feed at depths between 20-40m[187]. In fact, in Mr Schuckard's studies from 1991 to present day, very few King Shags (2) were recorded feeding between 20-30m, and 94% of all King Shags were recorded feeding at depths of greater than 30m.[188]

He put a map called "Special Map: King Shag Foraging/Water Depth/Beatrix Bay" to Dr Fisher. It showed that only one King Shag was recorded in Beatrix Bay as foraging in water less than 20 metres deep, and two between 20 to 30m (where total n = 46). We consider that the evidence does not bear out Mr Gardner-Hopkins' contention that those figures are "significant because most of the mussel farms in Beatrix Bay are situated over seabed that is shallower than 30m deep."

---

182 Referring to Exhibit 33.1.
183 Referring to Exhibit 28.1.
184 Citing Schuckard Transcript at 502, lines 25-28.
185 Citing Schuckard Transcript at 503.
186 For accounting purposes, some of the new consented farms have now been counted alongside others to reach the 39 farms currently consented within Beatrix Bay.
187 Schuckard evidence-in-rebuttal at para 11.
188 See Exhibit 28.1 and P R Fisher, transcript at 576-577.

[115] Our reason for that finding is based on Mr Schuckard's description[189] of his survey method. This involved travelling on a reasonably consistent track at around 46 kph for approximately five hours, observing for King Shags 250m either side of the boat. A total of 115 km^2 out of an estimated 240 km^2 area was covered. Survey coverage did not include much of the close inshore areas, or the centre of Beatrix Bay, as shown on the survey track[190]. Indeed his "stylistic depiction" of his survey trips shows that for most of his trips he would have been beyond range to identify any inshore or shallow (20 to 30m) water foraging. We conclude that a more plausible explanation of the data is that fewer shags were observed in the shallower (less than 30m deep) water because there was less survey effort there. To that extent Mr Schuckard's results are biased (in the scientific sense).

[116] Indeed the Appellant called some evidence directed solely to that issue. Dr D Clement challenged the statistical validity of Mr Shuckard's survey methodology in supporting the conclusions reached. In her opinion, the study was not designed to allow for relative and statistical comparisons of King Shag use between areas. Dr Clement's evidence concluded with her opinion that[191]

> In summary, the 1994 Schuckard paper … was not designed to systematically survey the stated study area for observations of feeding king shags from Duffers Reef. Based on the opportunistic distribution and feeding observations collected, this study cannot statistically presume that any survey sector may be more important as a feeding area relative to any other sector nor assess where feeding may or may not be occurring. Additionally, the stated mean foraging distance appears to represent a minimum range due to sampling design biases. As a result, it would not be appropriate to use the 1994 findings to statistically assess any potential changes in king shag distribution within the Sounds or through time.

[117] She continued[192]:

> Some readers may over- or misinterpret the study's findings based on wording and the lack of discussion around the limits of the study's methods. I attribute some of this confusion to the author's use of the collected data to drive the research questions (rather than the reverse), and the general lack of written detail in the paper. Additionally, the lack of any recent, more systematic

189 R Schuckard evidence-in-chief para 10 [Environment Court document 25].
190 Exhibit 25.5.
191 D Clement evidence-in-chief para 3.26 [Environment Court document 12].
192 D Clement evidence-in-chief para 3.28 [Environment Court document 12].

> studies focused on the distribution and / or foraging ranges of the Duffers Reef colony (unlike Admiralty Bay colonies; Fisher & Boren 2012) also precipitates the data from Schuckard (1994) being applied beyond what is considered statistically defensible.

[118] Dr Clement also states[193] with regard to the identification of King Shag feeding areas:

> … it does not appear that the 1994 study has considered or corrected for any … biases. As a result, the presence of foraging King Shags in the sector most relevant to Beatrix Bay (south) will be an under- or over-estimation in relation to the other sectors due to uncorrected biases. … Given these factors, the study's original Figure 8 map and its caption, *"Main feeding area of king shags from Duffers Reef"* is simply a conclusion that cannot be drawn based on the data collected. It would be more appropriate to say that the map simply represents *observed* feeding locations of king shags from Duffers Reef.

We accept Dr Clement's criticisms.

[119] The Appellant also relied on a report by Mr Davidson and others called *Ecologically Significant Marine Sites in Marlborough, New Zealand*[194] ("the *Davidson 2011 Report*"). This includes a statement[195] that:

> King Shags regularly feed in the middle of the main channel and side arms in the outer Pelorus, particularly Beatrix Bay.

Mr Schuckard considered that is wrong. In his opinion[196]:

> Beatrix Bay has a rather flat bottom without any channels and feeding King Shags are widespread throughout Beatrix Bay at depths ranging predominantly from 20-40m.

We prefer the latter evidence which is consistent with that of Dr Fisher.

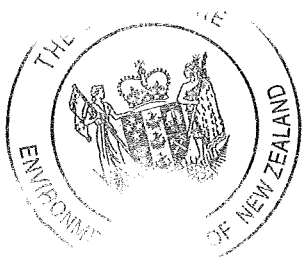
---

193 D Clement evidence-in-chief para 3.24 [Environment Court document 12].

194 R J Davidson et al *Ecologically Significant Marine Sites in Marlborough, New Zealand* Marlborough District Council and Department of Conservation 2011 [Exhibit 6.3].

195 The *Davidson 2011 Report*, above n 194, at p 83 [Exhibit 6.3].

196 R Schuckard evidence-in-chief para 19 [Environment Court document 25].



2.4 Use by King Shags of habitat within mussel farms

[120] Mussel farms provide one obvious advantageous change to King Shag's habitat: they supply buoys on which shags roost/rest/preen/loaf between flights or foraging. But do they forage within them?

[121] Dr Fisher wrote[197] that the existing and proposed mussel farms in Beatrix Bay "... exclude King Shag foraging from ... much of the soft substrate habitat ..." that is, or was, underneath them. Dr Fisher relied on the evidence of Dr Stewart to establish that about 19% of Beatrix Bay was affected. We have found that figure is an over-estimate, but we do not consider that invalidates Dr Fisher's evidence.

[122] A figure in Dr Fisher's evidence[198] appears to show that a high proportion of King Shags have been observed feeding in offshore areas both with and without mussel farms. Mr Davidson wrote[199] about this:

> Assuming these observations are representative, there are two possible reasons for this:
>
> (a) King Shags avoid mussel farms; or
>
> (b) they prefer to feed in deeper offshore areas of Bays and Reaches.

He continued[200]

> In order to determine which is the case, it is necessary to investigate shag preference in bays without mussel farms. These data have not been produced by Dr Fisher, however, in a paper by Schuckard (1994) the author delineated areas in Pelorus Sound where birds were observed feeding (Figure 4). Most feeding areas are in bays with mussel farms, however, in areas north and west of Maud Island free of mussel farms most feeding areas were located on offshore areas of these reaches. This suggests that birds select these deep offshore areas rather than avoiding mussel farms.

197 P R Fisher evidence-in-chief at para 6.2 [Environment Court document 28].

198 P R Fisher evidence-in-chief Figure 1 [Environment Court document 28] based on unpublished data from Mr Schuckard.

199 R J Davidson rebuttal evidence-in-chief para 8.4 [Environment Court document 6A].

200 R J Davidson rebuttal evidence-in-chief para 8.5 [Environment Court document 6A].

[123] Dr Fisher has conducted and published[201] research directly on this point within inner Admiralty Bay and Current Basin (also in the outer sounds, near French Pass). The most pertinent parts of the paper state[202]:

> Whilst mussel farms are sited away from breeding colonies and appear to have no appreciable direct impact, cumulative effects from habitat modification, alteration of habitat suitability for fish below the farm and wider area, and potential changes in marine species assemblages need to be considered.
>
> ...
>
> King Shags were recorded on 36% of the farms (n = 44) from 13 surveys within inner Admiralty Bay. No individuals were recorded foraging between farm lines from any of the survey methods. The low number of sightings within mussel farms suggests that farms are not important foraging areas for king shags, at least in Admiralty Bay. However, this may vary by site, prey availability and distance from colony/roost. Sightings of king shags foraging within mussel farms [reported in evidence in other proceedings before the Environment Court] show that mussel farms do not preclude king shags However, the low number of reported sightings and lack of published data would suggest that king shags do not exclusively use the areas occupied by mussel farms.

[124] After Mr Davidson relied on that passage to support the Appellant's position, Dr Fisher responded[203]:

> Less than 1% of all foraging King Shag records have been recorded within farms; of these most sightings are of birds diving between lines or on the edge of farms. Whether these individuals successfully captured fish associated with the farm structure, shell debris on the seabed or open water between the mussel lines remains to be substantiated.
>
> The comprehensive coastal strip surveys through all the mussel farms within inner Admiralty Bay between November 2006 to March 2007 (Fisher & Boren 2012) confirmed that King Shags do not feed (rarely; based on observations from Lalas and Brown) within mussel farms and have low attendance rates resting on buoys. ...

[125] Dr Fisher then hypothesised why King Shags do not use mussel farms[204]:

---

201 P R Fisher and L J Boren (2012) "New Zealand King Shag (Leucocarbo caruneulatus) foraging distribution and use of mussel farms in Admiralty Bay, Marlborough Sounds". *Notornis*, 59:105-115.

202 P R Fisher and Boren (2012) cited by R J Davidson rebuttal evidence-in-chief at paras 8.6 to 8.8 [Environment Court document 6A].

203 P R Fisher rebuttal evidence-in-chief paras 5.9 and 5.10 [Environment Court document 28A].

204 P R Fisher evidence-in-chief para 5.7 [Environment Court document 28].

> King Shags are typically not pelagic feeders or opportunistic taking prey near the surface … Whether mussel farms exclude King Shags through the physical structure of the submerged lines reducing the open marine space and ability of birds to access the sea bed and benthic prey, or through unsuitable modification to the benthos habitat where benthic fish prey hide, and changes in benthic assemblages has yet to be determined.

[126] Mr Davidson, while he did not agree that mussel farms exclude King Shag, agreed that there is inadequate information on this. He disputed[205] the first theory on the basis that the water is so opaque near the seafloor anyway that the obstacles in a mussel farm would cause King Shags no difficulties. We have insufficient information to determine this issue.

[127] In any event, Dr Fisher's answer was[206]:

> The modification of the seabed under mussel farms is well documented; whilst it is recognised that the changes in seabed infauna and epifauna are dominated by mussel shell debris that forms artificial reefs and is habitat for a range of marine invertebrates and assemblage of fish. The modified seabed environment is less than suitable for flatfish to hide from predators such as the King Shag. The adverse effects to the King Shag foraging habitat within the footprint of the farm are more than minor.

[128] Mr Schuckard added a further reason why King Shags may not forage on the seafloor under and around mussel farms is their prey may be largely absent because of the increased organic matter underneath them.

[129] There was some suggestion by the Council's witnesses[207] that there is a wider zone of influence outside the boundaries of mussel farms. Dr Fisher referred to a 50 metre exclusion zone around a mussel farm based on the *Literature Review*. This habitat exclusion describes an alleged effect of the physical presence of farm structures in reducing the habitat available for "surface feeding seabirds"[208]. This last point seems to have been overlooked by Mr Gardner-Hopkins when he cross-examined Dr Fisher[209]. King Shags are benthic feeders not surface or even mid-column feeders.

---

205 R J Davidson rebuttal evidence para 8.12 to 8.15 [Environment Court document 6A].
206 P R Fisher rebuttal evidence-in-chief para 7.3 [Environment Court document 28A].
207 We have summarised the relevant parts of Dr Stewart's evidence above in part 1 of this decision.
208 Table 6.10 *Literature Review* above n 84, at p 6-9.
209 Transcript, p 587.

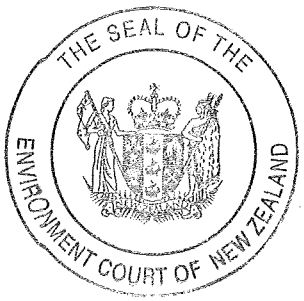
[130] The more relevant table in the *Literature Review* is Table 6.11 which describes[210] the effect of reduced habitat available for "benthic feeding seabirds, such as shags and penguins … because of changed benthic fauna due to the settlement of shell and debris from ropes used to grow filter feeders". This effect is described as taking place immediately underneath and within 200 metres of a farm. We are inclined to consider the shadow effect is largely confined to within about 30 metres of the seaward boundary of most mussel farms in Beatrix Bay, and is much narrower around the other three boundaries.

[131] The "Summary" in Chapter 6 (Seabird Interactions) of the *Literature Review* commences[211]:

> The potential effects of smothering of the seabed by debris from ropes leading to changes in the fauna are considered to be insignificant given the small area occupied by filter feeder aquaculture in New Zealand in relation to the large total area of suitable habitat available for foraging seabirds.

Mr Gardner-Hopkins said to Dr Fisher[212] "… again, you haven't given consideration to how the area of mussel farms compares with the foraging area that you define for King Shags?" and the answer was "That's correct". We have two problems with this whole cross-examination. First it appears to suggest that it was Dr Fisher's problem that he had not compared the foraging areas with the area of the mussel farms, when it is, we have held, the Applicant who has the obligation to supply adequate information for us to determine the application.

[132] Second, Dr Fisher's answer might, by itself and if the apparently superfluous word "again" is ignored, convey the wrong impression to a reader of the transcript. To obtain Dr Fisher's fuller answer one needs to read the previous page of the Notes of Evidence. There, Mr Gardner-Hopkins had asked essentially the same question in



210 Table 6.11 *Literature Review* above n 84, at p 6-9.
211 Table 6.11: *Literature Review* above n 84, at p 6-9.
212 Transcript, p 588.

respect of (the barely relevant) Table 6-10 in the *Literature Review*. That contains a summary with a similar first sentence. In answer to the same question Dr Fisher said[213]:

> No. if I can just add to that, I did comment on this, this report and prior reports in my evidence and I noted that they didn't include the DOC survey that I was involved with, which was the most comprehensive survey looking at effects of King Shags on mussel farms …

[133] Mr Gardner-Hopkins submitted that:

> Of the 9 King Shags recorded to be feeding between 2010 and 2015, over half (5) were recorded feeding within the 50m and 200m zones relied upon by Dr Fisher as "excluding" King Shags.[214] The empirical data proves there is no exclusion around the marine farms.

That submission overstates both what Dr Fisher said and any (tentative) conclusion which can be drawn from the information, which is that King Shag may still forage "close" to the outside edge of marine farms. Whether that is with the same success rate, or higher — or lower — than in the absence of marine farms is not known. Changing environmental conditions such as the introduction of mussel farms may lead to an adaptive response that maintains or even increases the productive nature of the benthic ecosystem below the farm. That may even benefit King Shags. For example, it may be that there is an 'edge' effect in which King Shags are drawn to the outer edge of the 30m shadow (of sediment and some shell) because their prey such as Witch Flounder are finding more food e.g. polychaetes in the richer sediments there. That is however, our speculation and we have no evidence for it.

[134] We find on the basis of Dr Fisher's and Mr Schuckard's evidence that King Shags forage within mussel farms only very infrequently and that likely contributors to that is the reduced presence of flatfish on or in the changed seafloor underneath the farms. King Shags' use of mussel farms is likely to be largely confined to resting on them.

213 Transcript, pp 587-588.
214 Exhibit 28.2 and P R Fisher, transcript at 579-580.

[135] While Dr Fisher considered that the whole of the Marlborough Sounds was a "significant habitat" for King Shags[215] — in reliance we suspect on the IUCN Red List and on a policy in the NZCPS[216] — he was also of the opinion[217] that Pelorus Sound (or at least the parts shown on the 1991/1992 map by Mr Schuckard) are the core feeding areas for the birds from the Duffers Reef colony.

3. The statutory instruments

3.1 The relevance of the statutory instruments

[136] The statutory instruments are of course relevant because the consent authority must have regard to[218] them. However, they are of even more importance now than previously in the light of *King Salmon*[219] because the effects on the environment to be considered are not (except in unusual circumstances) necessarily or usually the relevant effects inferred from Part 2 or alleged by opponents of an application but the potential effects particularised in the statutory instruments.

3.2 The Marlborough Sounds Resource Management Plan

[137] The Sounds Plan, made operative on 28 February 2008, is a combined[220] district, regional and regional coastal plan. It is contained in three volumes — Volume 1 sets out the objectives and policies and methods, Volume 2, the rules and Volume 3 the maps. In Volume 1 five (of 23) chapters are particularly relevant. We summarise the relevant provisions below.

Natural Character (Chapter 2.0)

[138] Chapter 2 (Natural Character) of the Sounds Plan attempts to integrate[221] the values and interests identified in other chapters which promote activities while avoiding, remedying and mitigating adverse effects on the identified values.

---

215 P R Fisher evidence-in-chief para 7.4 [Environment Court document 28].
216 Policy 11(a)(iv) [NZCPS p 16].
217 P R Fisher rebuttal evidence-in-chief para 3.29 [Environment Court document 28A].
218 Section 104(1)(b) RMA.
219 *King Salmon* above n 26.
220 Sounds Plan para 1.0 [page 1-1].
221 Chapter 2.0 para 2.1 [Sounds Plan p 2-1]. This is repeated in the explanation to policy (2) 1.4 [Sounds Plan p 2.2].

[139] The single objective simply repeats section 6(a) of the RMA. The implementing policies are[222] first to avoid the adverse effects of use or development within those areas of the coastal environment which are predominantly in their natural state and have natural character which has not been compromised[223]; to encourage appropriate use and development in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated[224]; and to consider the effects on those qualities, elements and features which contribute to natural character[225], including (relevantly):

(a) coastal and freshwater landforms;
(b) indigenous flora and fauna, and their habitats;
(c) water and water quality;
(d) scenic or landscape values;
...

[140] Other non-repetitive[226] policies require regard to be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal when considering "appropriateness"[227]; adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment are unknown[228]; recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole[229].

[141] Since this chapter attempts to integrate all the others in the Sounds Plan we will state the questions it raises at the end of this subpart, after ascertaining the other questions those chapters raise.

---

222 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].
223 Policy (2) 1.1 [Sounds Plan p 2-3].
224 Policy (2) 1.2 [Sounds Plan p 2-3].
225 Policy (2) 1.3 [Sounds Plan p 2-4].
226 Policy (2) 1.5 largely repeats policy (2) 1.1 and the start of the chapter.
227 Policy 1.6.
228 Policy 1.7.
229 Policy 1.8.

Indigenous Vegetation and Habitats of Indigenous Fauna (Chapter 4.0)

[142] Objective (4.3) 1 and its two relevant supporting implementation policies[230] are important. The objective provides for "The protection of significant ... fauna ... and their habitats from the adverse effects of use and development". The first two policies are relevant:

> Policy 1.1 Identify areas of significant ecological value which incorporate areas of indigenous vegetation and habitats of indigenous fauna.
>
> Policy 1.2 Avoid, remedy or mitigate the adverse effects of land and water use on areas of significant ecological value.

[143] Those policies are important because feeding habitat of King Shag is identified in Volume 2 of the Sounds Plan (Appendix B, notation 1/11) of the Sounds Plan as an "Area of Ecological Value" ("AOEV"[231]) with national significance. The relevant ecological overlay for King Shag habitat is shown in Map 69 of the Sounds Plan. The site is within an area subject to that notation. Ironically, since this classification was based on recommendations in a report by Mr Davidson and others[232] (and that in turn drew on the foraging range information reported in Schuckard 1994[233]), the Appellant challenged the science behind this notation and asked us to place less weight on it as a result. We will consider that issue later.

[144] Modification of values associated with the ecological overlay for King Shag habitat are to be assessed as discretionary activities[234] with the anticipated environmental result[235] of maintaining population numbers and distribution of the species. The questions that arise under policies (4.3)1.2 are therefore:

- What are the likely adverse effects on the feeding habitat?
- What is the probability of adverse effects occurring?

---

230 Policy (4.3) 1.1 and 1.2 [Sounds Plan p 4-2].

231 Not to be confused with an "AOLV" or "Area of Outstanding Landscape Value" which is the term used in the Sounds Plan for outstanding natural features or parts of outstanding natural landscapes.

232 The *Davidson 2011 Report*, above n 194.

233 Schuckard R, 1994 "New Zealand Shag (Leucocarbo Carunculatus) on Duffers Reef, Marlborough Sounds". *Notornis* 41, Collin 93 to 108.

234 Section 4.4 Methods of Implementation [Sounds Plan p 4-4].

235 Section 4.5 Anticipated Environmental Results [Sounds Plan p 4-5].

- What is the probability of adverse effects being avoided, remedied or mitigated?
- What is the probability of a decrease in the number of King Shags? (Noting this last question derives from the methods not the policies).

Landscape (Chapter 5.0)

[145] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values"[236]. Areas of "outstanding landscape value" are shown on the Landscape Maps in Volume 3. The promontory in Beatrix Bay, which the site is at the tip of, is not identified as an "Area of Outstanding Landscape Value".

[146] There are no relevant policies. However, Chapter 5 recognises as a relevant issue[237] that when deciding whether development is appropriate or not:

> ... the siting, bulk and design of structures ... on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

That is an evaluation matter raised directly in Appendix 1 of the Sounds Plan which we will refer to in due course.

Public access (Chapter 8)

[147] There is a single objective to maintain and enhance public access[238]. The relevant implementing policy expressly states[239] that adverse effects of marine farms on public access should as far as practicable be avoided and otherwise mitigated or remedied. The questions under this policy are first whether there would be any adverse effects on access? Second, can they practically be avoided, or at least mitigated or remedied?

236 Para 5.1.1 [Sounds Plan p 5-1].
237 Para 5.2.2, Landscape [Sounds Plan p 5-3].
238 Objective 8.3.1 [Sounds Plan p 8-2].
239 Policy 8.3.1/1.2 [Sounds Plan p 8-2].

The Coastal Marine Area (Chapter 9)

[148] The first objective (of three) for Chapter 9 is[240] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The relevant implementing policy (9.2.1) 1.1 identifies as values to be maintained[241]: conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, public access to and along the coast, public health and safety, recreation values, and water quality. Most of these are at issue to some extent in these proceedings. The policy also requires any adverse effects to be avoided, remedied or mitigated. Policy (9.2.1) 1.2 is at first sight rather repetitive but actually requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied.

[149] The other relevant policy is (9.2.1) 1.14 which is to enable a range of activities in appropriate places in the Sounds. Marine farming is expressly included and is zoned in the Coastal Marine Zone 2 in which marine farms are controlled or discretionary in the inshore area and non-complying beyond 200 metres from the shore. The Sounds Plan explains[242] that "the extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters".

[150] The second coastal marine area objective[243] is to manage water quality at a level that enables shellfish gathering and cultivation for human consumption. Implementing policies seek to avoid the discharge of contaminants that adversely affect significant ecological value, cultural areas, outstanding landscapes and seafood consumption. The only possibly relevant policy is that which seeks to avoid discharges affecting "significant ecological value" which seems to echo the policies relating to "areas of ecological value" already referred to, and we will consider the effects under that heading.

240 Objective 9.2.1 [Sounds Plan p 9-4].
241 Policy (9.2.1)1.1 [Sounds Plan pp 9-4 and 9-5].
242 Explanation of objective 9.2.1/1 [Sounds Plan p 9-6].
243 Objective 9.3.2 [Sounds Plan p 9-10].

[151] The third coastal marine objective[244] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy (9.4.1) 1.1 identifies the same list of values as did policy (9.2.1) 1.1 already listed and so does not raise independent predictive questions. Policy (9.4.1) 1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which emphasizes the wording of the rules.

Summary: stating the questions about the natural character of the area

[152] Returning to the policies in Chapter 2 of the Sounds Plan, the summarising questions these raise are:

(1) is the natural character of the area around the site compromised? And if so, to what extent?

(2) can any adverse effects of the mussel farm on coastal landforms, flatfish, King Shag and their habitats, water quality and scenic/landscape values be appropriately avoided, remedied or mitigated?

The rules

[153] Volume 2 of the Sounds Plan contains the rules implementing the objectives and policies. Chapter 35 covers Coastal Marine Zones One, Two and Three. General Assessment Criteria for discretionary activities are set out in Rule 35.4.1 and the specific criteria for marine farms are detailed in Rule 35.4.2.9. The former rule requires consideration of the "likely" effects of the proposal on the locality and wider community, the amenities values of the area, any significant environmental features including the habitat of indigenous species, and generally on the natural and physical resources of the area. The latter rule[245] requires specific assessments for marine farms of (relevantly):

- an assessment of the present nature of the site, both physical and biological including the nature of the sea floor and species found in the area;

...

244 Objective 9.4.1 [Sounds Plan p 9-16].
245 Rule 35.4.2.9 [Sounds Plan p 35-24].

- consideration of navigational matters …
- consideration of aesthetic and cultural matters;

…

- other matters including
  - (a) likely effect on areas used for commercial and recreational fishing;
  - (b) the visual effect of the farm and its operation;
  - (c) likely effects on water quality and ecology;
  - (d) the alienation of public space.

…

The Council only requires assessment of "likely" effects on some resources. "Likely" may mean "as likely as not" or "fractionally above the balance of probabilities" or it may, following international conventions[246], mean effects with a 66% or higher probability of occurring. Either way, we doubt whether these policies and rules can be said to fully implement part 2 of the RMA in conjunction with that part of the definition of "effects" in section 3 RMA which includes[247] "any potential effect of low probability which has a high potential impact". The Sounds Plan is incomplete on those issues especially on the risk of extinction of King Shag: that may be an event of low probability but high potential impact.

3.3 The Marlborough Regional Policy Statement

[154] We are obliged to have regard to[248] the Marlborough Regional Policy Statement ("MRPS"). However, because it became operative (1995) over a decade before the Sounds Plan (2008) its provisions are deemed to be given effect to and particularised in the Sounds Plan (unless the latter is incomplete, unclear or *ultra vires*) — see *King Salmon*[249]. On the whole it is so broad it gives us little assistance, except that there is an objective[250] to ensure that "… natural species diversity and integrity of marine habitats be maintained and enhanced".

246 See the IPCC's *Guidance Note* (2010) quoted in part 0.7 of this Decision
247 Section 3(f) RMA.
248 Section 104(1)(b)(v) RMA.
249 *King Salmon* above n 26.
250 Objective 5.3.10 [MRPS p 44].

3.4 The New Zealand Coastal Policy Statement

[155] The New Zealand Coastal Policy Statement 2010 ("the NZCPS")[251] was described in *King Salmon*[252] by the Supreme Court as "an instrument at the top of the hierarchy". We respectfully adopt the Supreme Court's description of the objectives in that document. The NZCPS is important in this case because it has not yet been implemented in the Sounds Plan. One procedural policy of potential importance in this case is Policy 3 which requires us to adopt a precautionary approach. We will consider the implications of that later.

[156] The NZCPS identifies the following issues[253] relevant to this proceeding:

- the ability to manage activities in the coastal environment is hindered by a lack of understanding about some coastal processes and the effects of activities on them;
- loss of natural character, landscape values … along extensive areas of the coast …;
- continuing decline in … habitats and ecosystems in the coastal environment under pressures from subdivision and use, vegetation clearance, … plant and animal pests, poor water quality, and sedimentation in estuaries and the coastal marine area;
- demand for coastal sites … for aquaculture …;

…

These issues recognise that in their current state some areas in the coastal environment are not necessarily being managed sustainably.

[157] The NZCPS provides for integrated management of the resources of the coastal environment by requiring particular consideration of situations where "significant adverse cumulative[254] effects are occurring"[255]. A later policy[256] requires plans to set thresholds (including zones …) where practicable "… to assist in determining when activities causing adverse cumulative effects are to be avoided". The areas of ecological value in the Sounds Plan can be seen as an anticipation of this approach.

---

251 This came into force on 3 December 2010.
252 *King Salmon* above n 26, at [152].
253 NZCPS 2010 p 5.
254 The word "cumulative" in these policies is being used in the normal (accumulative) sense not in the narrow *Dye* sense discussed below, in part 4.1 of this Decision.
255 Policy 4(c)(v) [NZCPS p 13].
256 Policy 7(2) [NZCPS p 15].

[158] We now turn to the substantive implementing policies.

Aquaculture

[159] Policy 6(2) of the NZCPS 2010 is important[257] because, in relation to the coastal marine area, it requires recognition of:

> a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area; ...
> b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
> c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
> ...

[160] Those more general policies are then elaborated on with a specific Policy 8 (b) for aquaculture which is obviously relevant in this case. It is to[258] recognise the significant potential contribution of aquaculture to the well-being of people and communities by[259]:

> ...
> 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.

These policies are clearly applicable. What is less clear is whether these are intended to refer to the net benefits of aquaculture. We assume that they are to be consistent with section 7(b) RMA, otherwise the NZCPS would be incomplete. In any event there was no disagreement over the brief evidence called for the Appellant on the social and financial benefits of the proposal.

Indigenous biodiversity

[161] Policy 11 is (relevantly):

---

257 Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.
258 Policy 8: Aquaculture [NZCPS 2010 p 15].
259 Policy 8 (a) is not relevant, because we are not here concerned with the approval of a regional policy statement or plan [NZCPS 2010 p 15].

Policy 11: Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

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

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

(iii) …

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare[260];

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

…

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, **rocky reef systems**, eelgrass and saltmarsh;

… [emphasis added].

[162] The first important aspect of policy 11 is that certain adverse effects are simply to be avoided: the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous fauna. We note that categories in (a)(i) and (ii) are not mutually exclusive. Adverse effects of activities on a taxon obviously include injury to or death of individuals and reduction in population, but they may also include reductions in EOO or AOO, and reduction in habitat area or quality. This results from the reasons (e.g. very small populations) why they have been classified as threatened or at risk in the first place.

[163] Policy 11(a)(i) and (ii) refer to the adverse effects of activities on taxa, whereas 11(a)(iv) refers to habitats of indigenous species. Subparagraph (i) and (ii) thus simply implement section 5(2) whereas subparagraph (iv) also implements section 6(c) RMA (significant habitats). We mention that because there is some potential for confusion about subparagraph (i) and (ii). They do not refer to 'habitats' or 'significant habitats' and thus do not implement section 6(c). However, to particularise and implement section 5(2)'s direction for the "… protection of natural … resources" the NZCPS adopts the

260 "Naturally rare" is defined in the Glossary as meaning "Originally rare: rare before the arrival of humans in New Zealand" [NZCPS 2010 p 27].

lists in the New Zealand Threat Classification System and in the IUCN Red List. These largely refer to population criteria. However, some of the criteria for small populations do refer to habitat (and they happen to be the relevant ones in this case). But that does not turn the criteria into section 6(c) RMA implementations.

[164] As recorded above, New Zealand King Shag is an indigenous taxon which is listed as threatened in both the New Zealand Threat Classification and in the IUCN Red List, so NZCPS policy 11(a)(i) and (ii) both apply. That means that the issue emphasised so strongly by the Appellant — whether the site's classification as a "significant habitat" for New Zealand King Shag is correct — is not really relevant at least to policies 11(a)(i) and (ii) of the NZCPS.

[165] Policy 11(a)(iv) recognises that habitats are particularly important at the edges of a species' range. This policy recognises that reduction in the quality or quantity of habitat may itself have consequences for a qualifying species, even if the consequences for individuals and/or populations are not yet known, and treats such reductions as effects to be automatically avoided.

[166] The King Shag is at the limit of its natural range primarily because its apparent area of occupation is so small. Anywhere within the AOO is close to its edges in the sense that birds from the principal Pelorus colonies are always within foraging range of the edges. The evidence is that the King Shag has a foraging range of about 25 km. Given the very small number of colonies we do not understand NZCPS policy 11(a)(iv) to apply in a way so that only the outermost ring (with an inner radius of say 20 km) is protected habitat. That would be an absurd consequence whereby potentially less important habitat is protected under the policy while more important habitat is not. Consequently we consider policy 11(a)(iv) applies in this proceeding.

[167] The court's knowledge of New Zealand King Shag suggests that neither its taxonomic status nor its (former) extent of occurrence are necessarily as black-and-white as Mr Schuckard portrayed them. It is possible, for example, that King Shag should be lumped as a northern outlier of a superspecies of "New Zealand Blue-eyed Shags" within the *Leucocarbo* genus. That would put King Shags at the limit of the (super-) species range so NZCPS policy 11(a)(iv) would still apply (i.e. a lumping of the species

with, for example, Stewart Island Shag, would make no difference to the analysis). The other matter is that the fossil record of King Shags apparently shows[261] a wider extent of occurrence (EOO) in the past. However, no evidence was given about these matters so we simply record them as potential complications in any future cases.

[168] The site is also close to the reef system wrapped around the promontory so policy 11(b)(iii) is relevant.

[169] The questions raised by these policies are: will the proposed mussel farm cause adverse effects on:

(a) the King Shag species?
(b) the habitat of King Shags?
(c) effects which are significant on the reef system around the promontory?

Natural character and natural landscapes in the coastal environment

[170] Policy 13 is (relevantly):

Policy 13: Preservation of natural character

1. To preserve the natural character of the coastal environment and to protect it from inappropriate 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; including by:
   ...

The meaning of "natural character" in section 6(a) of the RMA — as it applies to the coastal environment — now needs to be read in the light of the particularisation of that phrase in policy 13(1) of the NZCPS.

[171] Policy 15 is (relevantly):

261 P Schofield and B Stephenson Birds of New Zealand (2013) Auckland University Press p 229.

Policy 15: Natural features and natural landscapes

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

a. Avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment;

b. Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on other natural features and natural landscapes in the coastal environment;

...

[172] The important questions raised by these two policies are:

(1) Will the proposed mussel farm cause adverse effects:
  (i) to the natural character of Beatrix Bay?
  (ii) to the natural features in, or landscape of, Beatrix Bay?

(2) If the answer to question (1) is "yes" will any of those effects be significant?

(3) Will the proposed mussel farm, together with other mussel farms, cause cumulative adverse effects on the natural character/natural features/landscape of Beatrix Bay?

4. What are the predicted effects of the mussel farm?

4.1 Introduction: identifying the relevant effects

[173] Under section 104(1)(a) RMA the consent authority must have regard to the "actual and potential effects on the environment of allowing the activity".

[174] At first sight that requires a comprehensive inquiry because the word "effect" is defined very widely in section 3 of the Act as including:

3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

The wording suggests that any cumulative effects of any stressor appear to be included. For example, the ecologist Dr Stewart referred to Chapter 12 of the *Literary Overview* which describes "cumulative" effects in relation to marine aquaculture as[262]:

> *... Ecological effects in the marine environment that result from the incremental, accumulating and interacting effects of an aquaculture development when added to other stressors from anthropogenic activities affecting the marine environment (past, present and future activities) and foreseeable changes in ocean conditions (i.e. in response to climate change).*

That description appears to fit within section 3(d) RMA.

[175] However, in 1999 the Court of Appeal issued a decision in *Dye v Auckland Regional Council*[263] ("*Dye*") which held that a "cumulative effect" is not a wide concept in the context of a resource consent application. Tipping J, giving the decision of the Court, wrote[264]:

> The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effects separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. [Underlining added].

The converse appears to be that effects of other stressors (which are not the activity under consideration) are not cumulative effects as a matter of law. That is problematic in

262 *Literature Review* above n 84, at p 12-13.
263 *Dye v Auckland Regional Council* [2002] 1 NZLR 337; [2001] NZRMA 513 (CA).
264 *Dye* at paras [38] and [39].

relation to the (extensive) parts of the environment which are[265] "ecosystems and their constituent parts" because they are all affected accumulatively by all effects from all stressors. Further, *Dye* does not recognise that 'cumulative' effects of multiple stressors are the main consideration in preparations of district plans and other statutory instruments.

[176] *Dye* was explained by Cooper J in *Rodney District Council v Gould*[266] as follows:

> … I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a "cumulative effect".

[177] We record that other decisions show some disquiet over that restrictive application of the term "cumulative effects". First, *Dye* does not use the ordinary meaning of "cumulative" as pointed out by the Environment Court in *The Outstanding Landscape Protection Society Inc v Hastings District Council*[267]. Second, the learned Chief Justice, in her minority judgment in *West Coast ENT Inc v Buller Coal Ltd*[268], wrote:

> I … would have thought that contribution to the greenhouse effect is precisely the sort of cumulative effect that the definition in s 3 permits to be taken into account under s 104(1)(a) in requiring the consent authority to "have regard to any actual and potential effects on the environment of allowing the activity".

Third, *Harris v Central Otago District Council*[269] has recently pointed out that strictly *Dye* is only authority for the proposition that a potential effect on the environment which might be caused by some other activity which requires a resource consent under the relevant plan is not a cumulative effect of allowing the activity for which consent is sought. It seems that the restrictions of *Dye* are not necessary: the potential effects of

---

265 Section 2 RMA.

266 *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [122].

267 *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [50].

268 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87; [2014] 1 NZLR 32; [2014] NZRMA 133; (2013) 17 ELRNZ 688 (SC) at [91].

269 *Harris v Central Otago District Council* [2016] NZEnvC52 at [48].

another independent application for resource consent would not usually be part of either the existing or the reasonably foreseeable future environment and so are irrelevant anyway.

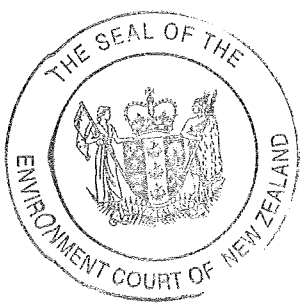
[178] We observe that the complexity of *Dye*'s discussion of 'actual and potential effects' in section 104(1)(a) RMA are also unnecessary. There is a simple reason why Parliament used that phrase rather than the defined word "effects". Obviously if a resource consent is applied for in the proper order — in advance of carrying out an activity — all its effects are potential, i.e. they have not occurred yet. However, the legislature anticipated the reality that in a small but significant percentage of cases, particularly after an abatement notice has been issued by a local authority, a resource consent is applied for retrospectively. In such a case most of the effects are "actual".

[179] To those points we can add:

(1) *Dye* does not take into account — because it did not need to — the reality that all stressors, regardless of who or what causes them, cause "cumulative" effects on ecosystems; and

(2) the *Dye* view of the world is rather static — in reality this second's effects are the next second's environment. The past effects of stressors — the accumulated[270] effects — have become and are continually becoming, part of the environment which is the setting of any proposal.

[180] It is important to realise that *Dye* does not mean that "cumulative" effects in a wider sense are irrelevant. If the potential effects of stressors, other than the activity for which consent is sought, are relevant then they may be taken into account under section 104(1)(c) RMA. Accordingly we will analyse such potential effects — which we will call "accumulative effects" — separately so as not to confuse the analysis imposed by *Dye*. The different treatment of such effects under *Dye* may have been intended to have this consequence: whereas cumulative (in the *Dye* sense) effects must be had regard to under section 104(1)(a), the consent authority has a discretion under section 104(1)(c) as to whether it takes accumulative effects into account at all. However that is probably an



270 We will use "accumulated" for the past effects of any stressors; "accumulative" for future effects of all stressors (other than the application).

over legalistic approach, because the potential (future) effects of other stressors are also part of the reasonably foreseeable future environment (under section 104(1)(a)) and that must be established in any event. In other words, there is no bright line distinguishing accumulative effects of other stressors from the future dimensions of the 'environment': to the contrary, they are the same thing.

4.2 Effects on the water column[271]

[181] As described earlier, the operation of the mussel farm will cause discharge of seawater and contaminants (mussel shells, mussel faeces and pseudofaeces) to the seawater of Beatrix Bay. The question under the Sounds Plan is whether discharges affecting significant ecological value are avoided.

[182] Mr Knight also assessed the effects of the proposed farm structures on currents, waves, shading and water column stratification, concluding that these effects would be small and localised[272]. In Mr Knight's opinion, an additional mussel farm is unlikely to contribute to oligotrophication (lowering of nutrient levels) of the region. He described his application of the *Aquaculture Stewardship Guidelines*[273] to estimate the effects of the proposed farm on phytoplankton depletion. He reported as follows[274]:

> Results of the carrying capacity analysis ... show that the estimated stocking density of the farm would filter the estimated area of influence of the farm every 13.5 days (the clearance time CT) and that the area of influence would be flushed approximately every 4.5 days (the retention time RT). Consequently, the analysis shows that the water currents at the site are sufficient to support the proposed culture at the site and that the proposal will meet with the ASC (2012) criteria, that the ratio of the clearance to retention time would be greater than one. (Footnote omitted).

This analysis of local scale effects of the proposed farm on phytoplankton productivity diversity and succession was not challenged by other expert evidence or in cross-examination. In fact, the conclusion appears to be supported by Dr S T Mead[275], ecologist for the Societies, because he stated that the farm in isolation is unlikely to exceed its localised carrying capacity or influence nutrient properties in the wider bay.

---

271 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].
272 B R Knight, evidence-in-chief at para 82 [Environment Court document 9].
273 Aquaculture Stewardship Council 2012: *ASGBivalve Standard Version 1* (January 2012).
274 B R Knight, evidence-in-chief para 56 [Environment Court document 9].
275 S T Mead, evidence-in-chief, paras 25 and 34 [Environment Court document 20].

[183] Dr Mead extrapolated the farm scale calculations by Mr Knight to show how quickly or slowly the seawater in the bay is replaced. He calculated a bay-wide CT/RT[276] score of 0.0675. In his opinion the capacity indicators[277] for clearance efficiency and regulation ratio indicated that cultured mussels control the ecosystem of Beatrix Bay (i.e. exceed carrying capacity)[278]. Based on his calculations, Dr Mead asserted that the accumulated ecological effects of mussel farms were already significant in Beatrix Bay and that no more farms should be added. Mr Knight responded to those calculations[279], noting that while they were useful tools "they do not account for the spatial complexity of an area and so will become increasingly less useful at larger scales." An equally cogent criticism of Dr Mead's opinion was that of Dr Stewart. He did not see the relevance in extrapolating the theoretical calculations because empirical observations at a base scale showed that carrying capacity was not being exceeded most of the time.

[184] We consider that the proposal is unlikely to add any adverse cumulative effects to the water column in Beatrix Bay that are more than minimal in the context of larger "natural"[280] variations. However, whether the regularity of winter/summer fluctuations changes the food web in a way that affects King Shag is unknown.

4.3 Effects on the seabed[281]

[185] Dr Taylor and Dr K Grange provided expert ecological evidence for the Appellant on the benthic effects of the proposal. Mr Davidson also gave us his expert opinions (although not claiming to be independent). Dr Stewart and Dr Mead provided expert evidence for the Council and the Societies respectively. A site-specific assessment[282] of the proposal was prepared by Mr R Forest for the original (now

276 CT=clearance time; RT=retention time.

277 Using methodology described in Gibbs M T 2007. "Sustainability performance indicators for suspended bivalve aquaculture activities". *Ecological indicators*, 7(1), 94-107.

278 S T Mead, evidence-in-chief, at para 28 [Environment Court document 20].

279 B R Knight, rebuttal evidence at para 4.11 [Environment Court document 9A].

280 "Natural" is in inverted commas to recognise the possibility that el Niño/ la Niña events may be influenced by anthropogenic global warming.

281 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

282 Forest R 2013, *Proposed Marine Farm Site Assessment for a new application located in Northern Beatrix Bay, Pelorus Sound*, (Cawthron Report No 2406) [Exhibit 6.5].

modified) application. While Mr Forest was not called by the Appellant, that report was relied on by Dr Taylor and others.

Will there be adverse effects on the rocky reef system at the promontory?

[186] We must assess the probability and degree of adverse effects on the rocky reef[283], which it will be recalled, is at least 35 metres from any part of the marine farm. There was no suggestion that there would be any shell drop on the reef. The only issue was whether finer suspended sediments would be moved on to and smother the reef.

[187] For the Appellant, Dr Taylor's evidence[284] was that the water flow regime at the site (typically less than 4cm per second), combined with the 35 metre buffer, would make farm-related deposition difficult to distinguish from background levels at the adjacent inshore reef area. Further, episodic high current flows recorded at the site (up to 20cm per second) would have the effect of re-suspending any fine organic material that might reach the reef. Dr Taylor also pointed out[285] research evidence establishing the inherent variability of rocky reef communities supporting his opinion that any "cumulative" effects from mussel farming on these communities are likely to be very difficult to detect when compared to large scale environmental processes. Finally Dr Taylor suggested that any residual concerns around potential effects on the reef habitat could be met by requiring an adaptive management approach based on benthic monitoring linked to a review of the farm's layout if significant issues were identified. Proposed conditions to this effect have been provided by Mr J C Kyle, planning witness for the Appellant[286].

[188] Dr Mead, after recalculating his figures related to flow rate and the deposition footprint, accepted that a deposition footprint limited to up to 35m from the farm was likely[287]. He also accepted[288] that the high currents experienced from time-to-time at the site may re-suspend any fine sediment that may travel further than the main footprint. Despite accepting these propositions, Dr Mead continued to assert that fine material

283 NZCPS policy 11(b)(iii).
284 D I Taylor evidence-in-chief paras 33 and 34 [Environment Court document 8].
285 D Taylor evidence-in-chief paras 38 to 43 [Environment Court document 8].
286 J C Kyle, evidence-in-reply, Appendix A [Environment Court document 32].
287 Transcript, p 394, line 28.
288 Transcript, p 396, lines 10-15.

reaching the reef area from the proposed adjacent mussel farm would have a major effect on the ecological community at the reef.[289]

[189] We see a low probability of such an effect — it is unlikely to occur on the preponderance of the evidence given to us.

Will there be adverse effects on the intertidal zone?

[190] We are also required[290] to examine whether there will be adverse effects on another indigenous ecosystem found only in the coastal environment — the intertidal zone. Prompted by concerns expressed at the Council hearing on the possible impact of mussel farms on the wider biological community at Beatrix Bay, Mr Davidson undertook a sampling project on intertidal habitats[291] adjacent to and distant from mussel farms within Beatrix Bay in collaboration with Dr Grange. Mr Davidson selected the survey sites and collected the relevant data, which was analysed by Dr Grange. While acknowledging the snapshot nature of the survey, Dr Grange concluded from his analysis that there are differences in the biological communities between sites, but these differences are not consistent with the proximity to mussel farms. In his opinion, the differences can be explained by habitat differences and inherent patchiness in the shore communities (temporal and spatial variability)[292].

[191] Dr Grange's analysis was not disputed by Dr Stewart and he agreed[293] that it provided useful data. However, he went on to suggest that effects from mussel farms on intertidal communities are less easily determined than effects on subtidal communities. This was due to the influence of factors such as time submerged, wave action, aspect, substrate type, adjacent land use and exposure to the sun. These influences are moderated in the subtidal zone by the overlying water column.

[192] For his part Dr Mead dismissed[294] the analysis and conclusions of Dr Grange as providing no evidence one way or the other of the effects of mussel farms on intertidal communities. He asserted that the effects of mussel farms on intertidal habitats have not

289 Transcript, p 397, line 2.
290 Under policy 11(b)(iii) of the NZCPS.
291 K Grange evidence-in-chief Appendix 1 [Environment Court document 11].
292 K Grange evidence-in-chief at para 8.1 [Environment Court document 11].
293 B G Stewart evidence-in-chief at para 8.23 [Environment Court document 26].
294 S T Mead evidence-in-chief 15 [Environment Court document 20].

been extensively researched. Responding to questions in cross-examination, Dr Grange disputed this, noting extensive research had been reported and that no effects had been observed.[295] On this issue we prefer the evidence for the Appellant and predict that it is likely there will be only very minor (if any) independent or cumulative effects on the intertidal zone.

What will be the effects of the marine farm on the seafloor and its macrofauna?

[193] There is no policy in the NZCPS which directly requires consideration of this ecosystem in itself. However, the Sounds Plan requires identification of likely effects on the sea floor and marine ecosystems generally. As it happens, the Appellant's experts all acknowledged that sedimentation and shell drop from mussel farms does alter infaunal and epifaunal biological communities (these include flat fish) within the direct footprint of the farm. Species diversity may diminish in some circumstances and the abundance of some species may increase. This can vary from site to site depending on current velocities and farm management practices.

[194] We have already described the shell drop from other mussel farms. No one disputed that the same will occur under the Appellant's farm. The proposal will change the 7.372 hectares of soft mud seafloor to a reef-like system of shells, live mussels and sediment to a distance of 30 metres from the seaward edge of each part of the farm.

[195] When questioned by the court on the relative impact of mussel farming alongside other anthropogenic influences and stochastic events, Dr Mead asserted that mussel farms were having by far the greatest impact[296], but without giving any detail to support this assertion other than to dismiss the impact of dredging and trawling as pulse events from which recovery was rapid. This was in contrast to the evidence of Dr Stewart, who considered the risk or threat from aquaculture to be lower than that from other influences. In his opinion, the probability of adverse effects occurring remained high, but the consequence of these effects would be orders of magnitude less than other stressors. Dr Stewart qualified this to some extent by saying that changes in dredging/trawling effort, reductions in exotic forest harvesting and native tree and shrub regeneration may mean that the gap between relative importances of major influences

295 Transcript, p 284, line 11.
296 Transcript, p 418, line 20.

may be diminishing. Mr Davidson considered anthropogenic effects from land generated sedimentation and trawling/dredging are the "biggies"[297] in driving benthic effects.

4.4 Effects on King Shag habitat and population

[196] The Council alleged that the Appellant's case was defective because its evidence-in-chief omitted to supply any information on the question whether the proposal would affect King Shags and their habitat. Mr Gardner-Hopkins, counsel for the Appellant, explained that it had not produced expert primary evidence on this issue as it was not significant in the Commissioner's decision and had not come to the fore until receipt of primary evidence from the respondent and section 274 parties. Counsel submitted that the Appellant was entitled to rely on aspects of evidence produced by other parties and to present rebuttal evidence on this. We agree with this submission and have considered all of the expert evidence, regardless of its source. However, that does not change the legal obligation on the Appellant to supply adequate information (from whatever source) to enable us to grant consent. We have already observed that some of the cross-examination by Mr Gardner-Hopkins seemed to proceed on the opposite basis.

[197] In Part 2 of this decision we found that the habitat of King Shags has been degraded (mainly by land use causing run-off of sediment and pollution, and by dredging) and reduced by installation of mussel farms. The impact of a further mussel farm will by itself generally have less than minor impacts on that habitat. On the other hand the accumulated and accumulating impacts of existing (and past) operations are adverse and more than minor, and the Trust's application can only add to those adverse effects on habitat.

[198] For convenience we summarise our findings[298] on the preponderance of evidence from parts 2 and 3 of this decision as follows:

(1) King Shags forage, feed and rest in Beatrix Bay.

297 Transcript p 85, line 20.
298 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

(2) Foraging occurs principally on or above the soft substrate of the Bay's floor at depths below 10m and mainly between 20m and 40m with female shags preferring shallower water in that range.

(3) The principal prey are flat fish including Witch Flounder and Lemon Sole.

(4) King Shags rarely forage within marine farms. There is anecdotal evidence of such foraging, but Dr Fisher's study showed none.

(5) Beatrix Bay is likely to be a better habitat for the Duffer's Reef colony than similar areas further away because King Shags require less energy to travel to (and return from) this area.

(6) A mussel farm over soft substrate modifies the habitat substantially by covering the area under it and an incomplete ring of variable width[299] (but up to 30m wide) around it under shell debris, mussel faeces and pseudofaeces.

(7) Mussel farms over soft substrate are potentially stressors of King Shag because they may reduce the presence King Shag's preferred prey or the ability of King Shag to catch them.

[199] We conclude that there are already adverse effects on King Shag in the current and reasonably foreseeable environment of the site.

[200] We have already found that the presence of mussel farms is having an adverse effect on the habitat of King Shags by excluding their benthic footprints from being foraged by King Shags. The telling figure is that less that 1% of the observations of swimming King Shags in the Marlborough Sounds have been of birds within mussel farms, and even then there is no evidence that they have been foraging, let alone successful. Further, there is a 30 metre wide (maximum) bulge outside each mussel farm in which the habitat is also likely to be modified adversely.

[201] The footprint of the 37 farms is 304.4 hectares and a 30 metre strip along the outside[300] of the farms would add (8.5 km x 0.03 km =) 25 hectares, which makes a total of 329.9 hectares subtracted from the potential optimum foraging area. That is (329.9 /

299 The "ring" is likely to be incomplete because there is unlikely to be shell drop and sediment inside the farm, and it will be asymmetric too: stretching in the direction of the predominant current.

300 We assume the inside edge of most farms is on or inside the boulder/reef zones.

2,000 =) 16% of the area of Beatrix Bay which is a more than minor reduction in foraging area[301] within the Bay. There is already an adverse accumulated effect, and the addition of the proposed farm will only exacerbate that.

[202] There is one other aspect of the application which may have a more than minor effect. It results from the fact that the site is nearly the last empty but potentially available mussel farm site around the circumference of Beatrix Bay. The site may be important as a control site for recording foraging by King Shags. If a mussel farm is installed and operated on the site, that opportunity is lost.

[203] Mr Maassen submitted[302] that a threshold of "cumulative effects" would be passed. However, we have no evidence of a threshold of effects on the habitat of King Shags. There are a number of reasons why reduction in habitat might affect the King Shag e.g. directly by killing displaced individuals by removing food (or decreasing hunting efficiency) and indirectly by fragmenting populations, increasing vulnerability to extinction from stochastic events (disease, el Niño and climate change effects and genetic problems). We have no information that any of those are causing problems at present or not.

[204] The Appellant argued that because there was no, or insufficient, evidence that any "tipping point" has been reached in respect of the cumulative (or accumulative) effects which are relevant under the Sounds Plan and the NZCPS, we can disregard these matters. We do not consider that is correct: the concept of a 'tipping point' is not found in the RMA. It is a tempting but misleading metaphor: it adds a connotation of a valued resource being at the top of a cliff, and one more push (in the form of the activity being applied for) will see the resource in pieces at the bottom. In reality it is often impossible to say where tipping points are in relation to habitats. Ecosystems and their components react to the myriad of stressors they are exposed to in a multitude of ways, very few of them known with accuracy. While dose-response relationships are often (but not necessarily) sigmoidal[303], identifying a "tipping point" on such a curve can be difficult. The point is that nobody has any idea whether a sigmoidal curve is correct, or

---

301 We note this is less than Dr Stewart's figure (19%) but consider our figure is more conservative.

302 Mr Maassen's submissions dated 29 July 2015, paras 216-218.

303 An elongated 'S' shape rather than the 'U' shaped or parabolic curve shown by Mr J Z Butler, the planner for the Marlborough District Council, at his para 9.4 [Environment Court document 33].

if Mr Butler's curve[304] or some other is correct. Further, nobody knows where on any of the curves the current population is, and what the effects of other stressors are.

[205] What the RMA actually requires is protection of significant habitats. Local authorities have worked at stating methods for evaluating areas of vegetation and habitats, see for example the criteria stated in *Minister of Conservation v Western Bay of Plenty District Council*[305]. In the statutory documents relevant to this proceeding (the Sounds Plan and the NZCPS) two other methods of responding to section 6(c) RMA have been used. Neither refers to tipping points. The NZCPS refers to the IUCN criteria which does use some thresholds, for example population decreases[306] or changes in extent of occurrence or area of occupancy[307] but they are tightly defined and are given as alternatives. Nobody attempted to apply them in this case. For the King Shag the IUCN small population criterion D[308] applies instead. As recorded earlier there are no applicable thresholds for criterion D in the IUCN Red List.

[206] In summary, we have adequate information to find/predict that:

(1) King Shag habitat will be changed by shell drop and sedimentation;
(2) the effects of the farm accumulate and are likely to be adverse; and
(3) it is as likely as not there will be adverse effects on the populations of New Zealand King Shags and their prey;
(4) there is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[207] On the other hand we have insufficient information to assess the effects in the previous paragraph (the combined effects of the Davidson Family Trust mussel farm together with the other mussel farms in the bay) against the effects of other major environmental stressors, both anthropogenic and stochastic. Pastoral farming, exotic forestry, deforestation, dredging and trawling fall into the first category, while flooding

304 J Z Butler evidence-in-chief para 9.4 [Environment Court document 33].
305 *Minister of Conservation v Western Bay of Plenty District Council* Decision EnvC A71/01 at [20].
306 See the *Red List* Vulnerable Criteria A above n 156.
307 See the *Red List* Vulnerable Criteria B above n 156.
308 The *Red List* Vulnerable Criteria D above n 156, at p 22.

in the Pelorus and Kaituna Rivers and oscillations in weather patterns fall into the latter (or both).

[208] The most direct likely effect on King Shag habitat is that an area of over 10 hectares (the 8.982 ha farm plus a 20 to 30 metre wide strip along its outside edge) is very likely to be covered in detritus from the farm at the rate of 250 tonnes/hectare (or more) each year. The studies of fish around mussel farms suggest that the new benthic habitats they form underneath them may not encourage flat fish. We hold that change is likely to be an adverse effect on King Shag habitat.

[209] In Dr Fisher's opinion benthic changes resulting from the scale of mussel farming reduce the availability of significant feeding habitat. Cross-examined by Mr Gardner-Hopkins he confirmed his view that the change in substrate under the farm meant that the "… benthic fish prey that the King Shags forage for are unable to use that habitat"[309]. This exchange occurred[310]:

> Q: The question that I think I asked was, on the basis of your paragraph 9.5 [of Dr Fisher's evidence-in-chief] and your earlier paragraph 7.4 you would consider any mussel farm in the Marlborough Sounds as having a more than minor effect because it removes foraging habitat for King Shags.
>
> A: That's correct. Yes I'd say that, yes.

Dr Fisher's approach is consistent with the approach in the NZCPS which is to avoid any adverse effect on threatened species and in particular to avoid adverse effects on the habitats of indigenous species (at the limit of their natural range).

[210] Given the scale of the proposal these will be minor (but not minimal) effects by themselves, but they are, with the accumulated and accumulative effects of existing farms, adverse to King Shag habitat (NZCPS Policy 11(a)(iv)) and to King Shags (NZCPS Policy 11(a)(i) and (ii)).

309 Transcript, p 585.
310 Transcript, p 585, lines 24 to 29.

4.5 Cultural effects[311]

[211] The local Iwi, Ngati Koata, supported the application as they apparently consider it complies with the Ngati Koata Iwi Management Plan. We have evaluated the evidence relating to effects on King Shag habitat and population above. We consider the application does not meet the protection focus for indigenous fauna and their habitats in the Iwi Management Plan. So we give the Ngati Koata support minimal weight.

4.6 The effects on the amenity and other values of the promontory

[212] On these and wider landscape/natural character issues the court read the evidence lodged by the following witnesses (and heard cross-examination on that evidence):

Landscape architects

- Mr C R Glasson for the Appellant;
- Mr A Bentley for the Marlborough District Council; and
- Dr M Steven for the section 274 parties.

Planners

- Mr Kyle for the Appellant;
- Mr J Z Butler for the Council; and
- Ms S J Allan for the section 274 parties.

[213] All of Beatrix Bay is considered by the landscape experts and planners and has been accepted by the court (in *Knight Somerville Partnership v Marlborough District Council*[312] and elsewhere) as having a high level of natural character even though 16% of its surface area is adversely affected by mussel farms. The promontory does not stand out from the rest of the bay in this regard in anyone's assessment except Dr Steven who considered that the southern third of the promontory is outstanding. While we do not accept Dr Steven's opinion, we do acknowledge the promontory's high values and sensitivity and we now consider the effects of the proposal on that.

311 See the Assessment Matters in rules 35.4.1 and 35.4.2.9 [Sounds Plan p 35-14 and 35-21 respectively].

312 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

How visible will the mussel farm be?

[214] For the Council Mr Bentley produced a table[313] as to the visibility of mussel farms at various distances. He explained that the table has been developed with his colleagues at the firm Boffa Miskell and contains an overall consensus from the Environment Court on different mussel farm appeals over the last 20 years. Mr Glasson, for the Appellant, produced his own table[314] of 'Visibility of Mussel Farms at Sea Level' (we think he means at about 1.5m above sea level). We have compiled this table:

Distance from farm	**Mr Glasson**	**Mr Bentley**
0-500m	Highly visible	Dominant
500-700m	Very visible	Prominent
700-1000m	Visible	Prominent
1000m-1.5km	Low visibleness	Prominent
1.5km-3km	Low visibleness	Visible as part of view
More than 3km	Low visibleness	Difficult to see

We find problems with both assessments. First, Mr Bentley's table seems to include two sets of value judgments — as to degree of visibility and as to its impact on the seascape — where the first might suffice. The use of the words "dominant" and "prominent" seems to make an aesthetic assessment which is arguably premature. In that regard Mr Glasson's vocabulary is preferable since it only attempts to assess the degree of visibility (albeit still in a subjective way).

[215] The difficulty with Mr Glasson's table is that it divides the units of distance so finely that we have doubts about its utility. A reasonable person on the water would struggle to identify whether they were 500 or 700 metres from a mussel farm in any conditions less than flat calm (and without other information).

[216] Mr Bentley's table describes the degree of visibility from 500 metres to 1.5km (from a farm) as *prominent*. We can accept this may be accurate (although we prefer

313 Visibility from water/Visibility from land (usually elevated) – J A Bentley evidence-in-chief, para 5.59 [Environment Court document 30].

314 Table 3.0, Visibility of Mussel Farms at Sea Level. Glasson evidence-in-chief, para 10.16 [Environment Court document 7].

"very visible") when viewing conditions are extremely favourable — flat sea with sun directly onto the farm. In other circumstances the table may not be correct, depending on both conditions and the eyesight of the observer.

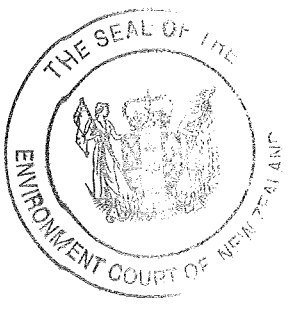
[217] In summary, on this site we predict that at a range of less than 400 metres (particularly where existing farms are not part of the foreground view) the farm would be highly visible in good conditions. In good but not millpond conditions from a range of 400m to 750m the farm may be visible depending on conditions and angle of approach. From about 750 metres to 1.5 kilometres the farm would, in many conditions, be visible. Beyond that it may be difficult to see even in good conditions.

[218] No ONL or ONF is identified for the site — it is not an Area of Outstanding Landscape Value ("AOLV") under the Sounds Plan. Thus the avoidance directives of Policy 15 NZCPS are not triggered. Given that finding, Policy 15(b) is applicable, even to an un-named promontory. That policy requires decision-makers to:

> Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

Any significant adverse effects need to be avoided and other adverse effects need to be remedied or mitigated.

[219] In Mr Glasson's opinion[315] the proposal in its modified form will still maintain the quality of the coastline and the landscape feature of the promontory. Now that the two mussel farm blocks are separated by an expanse of water *the integrity of the promontory can remain intact*. He also concluded that the proposal has avoided significant adverse effects on natural landscape, and the natural landscape values have been protected from other adverse effects due to the fact that the proposed mussel farm is integrated with a similar scale of existing farms in the area and is appropriately sited. Therefore he does not see the proposal, as amended, being contrary to Policy 15 of the NZCPS. Mr Glasson's overall conclusion was that[316]:



315 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].
316 C R Glasson evidence-in-chief, para 11.8 [Environment Court document 7].

> The proposal is of a small scale, consistent with existing marine farm activity in Beatrix Bay, and would not compromise the landscape, natural character and visual amenity of the Bay. The presence of mussel farms in Beatrix Bay has already partly compromised the natural character at the head of the Bay, along with failed pastoral farming. One further mussel farm of this size will not affect the Bay's landscape, natural character and visual quality any further, or reach a threshold beyond which the effects are unacceptable.

[220] Mr Bentley noted that due to the location of the proposed farm, it will appear from some locations to be not *wholly visually anchored to the landform* as is the case for the majority of farms around the Bay — this could in some conditions amplify the visual presence towards the unmodified waters offshore[317]. He concluded that the proposal will occupy an area of the coastal edge that is currently free from aquaculture development and the only remaining part of the promontory's naturalness that is unencumbered by mussel farms will be lost; therefore natural character will not be preserved.[318]

[221] We accept Mr Bentley's[319] answer when he described the headland which is the background landform of the proposal as:

> … it's sort of quite different in that regard from other landscape areas within the Bay … the fact that it's at the tip of that landform that in my view amplifies its prominence from a number of viewpoints and potential viewpoints, and leads to greater effects visually in that regard.

[222] We also agree with Mr Bentley when he describes some views of the proposed farm (and some existing farms) where there is a lack of (terrestrial) backdrop[320]. He cites the example of viewing the proposed mussel farms looking at the promontory and beyond towards the mouth of Beatrix Bay. In that situation:

> … existing mussel farm development from that viewpoint is not anchored towards a local backdrop, so that it appears that it's visually a part of the open water… and what I am saying about this proposal is due to its location at the tip of the promontory, and there are more locations where that would be the case.

317 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
318 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
319 Transcript, page 652.
320 Transcript, page 653.

His point is illustrated from the aerial photograph on the cover of the Council's Graphics[321] (Exhibit 30.1) with the proposed farms overlaid in red — there is a considerable area at the head of the bay where a viewer from a boat cruising inside, through or outside the existing mussel farms would observe the farm with only a sea backdrop. That experience would not align with the Appellant's slightly conflicting contentions that the proposed farm continues an existing pattern of development, and/or that the proposal will not interrupt[322] the natural sequence because the two parts of the farm are on either side of the head of the promontory.

[223] In terms of NZCPS 15(b) requiring the avoidance of significant adverse effects and the avoidance remedying or mitigation of other adverse effects, Mr Bentley's conclusion was:

> That close-up these structures would detract from the valued natural qualities of this part of the coast and reduce aesthetic coherence of the promontory.[323]

In Mr Bentley's opinion the proposal clearly failed the NZCPS 15(b) requirement. That is consistent with the evidence of Dr Steven[324]. In the latter's opinion[325]:

> The presence of the marine farm will detract from the wild state that currently exists, and that is largely responsible for the erosional forces that have shaped the southern end of the promontory. The marine farms … add a degree of industrialisation to an otherwise wild natural section of the coastal environment.

[224] As we have already noted, marine farms are traditionally located away from the most exposed parts of the headlands and promontories. While none of the witnesses could be definitive as to why this was the case it appears from their responses that adverse effects on navigation are likely to be one reason and another was the potential for adverse effects on landscape and natural character. Headlands/promontories by their very name suggest prominence and therefore potential sensitivity. NZCPS Policy 6(1)(h) requires us to:

---

321 Exhibit 30.1.
322 Transcript, pp 113 to 114.
323 J A Bentley evidence-in-chief, para 8.80 [Environment Court document 30].
324 M L Steven evidence-in-chief, para 117 [Environment Court document 23].
325 M L Steven evidence-in-chief, para 119 [Environment Court document 23].

(h) Consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects.

Dr Steven[326] noted that visual impact on the promontory can arise from structures on the surrounding sea because of the way in which the sea/land interface is experienced. That aligns with Mr Bentley's evidence described above.

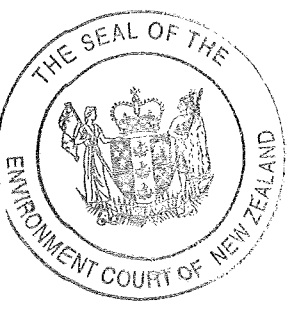
[225] We are unable to accept Mr Glasson's proposition[327] that the amended proposal (with the gap between the two farm blocks) will allow the integrity of the promontory to remain intact. We can accept from some view points (particularly from the south) that the promontory may appear unencumbered by marine farm structures. However, there are many views of the promontory that will have the proposed farm in the foreground. In such circumstances and at any distance less than 500 metres, the integrity of the promontory will, in our opinion, from a visual/aesthetic/natural character perspective be compromised. In our view that amounts to a significant adverse effect (which is clearly not avoided).

4.7 The effects on the natural character of Beatrix Bay

[226] The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in inshore areas, as appropriate use of the coastal marine area, subject to individual farm assessment. One aspect of that is to determine the "natural character" of the relevant coastal marine area.

[227] Policy 13 in the NZCPS and the Sounds Plan together require us to answer these questions:

- Does the proposed mussel farm cause adverse effects on the natural character of Beatrix Bay?
- If so, are they significant adverse effects?
- Can any adverse effects be avoided, remedied or mitigated?



326 M L Steven evidence-in-chief, para 109 [Environment Court document 23].
327 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].

Preservation of Natural Character (Policy 13)

[228] Dr Steven described how[328]:

> When viewed from the water, the farm will be viewed against a sensitive land/sea interface. … The perception of the land/sea interface contributes significantly to the natural character and aesthetic appreciation of that part of Beatrix Bay.

[229] In Mr Glasson's opinion, as a result of its already compromised natural character, the proposed mussel farm will not adversely impact further on the natural character of the headland. He considered[329] that the proposal is not contrary to Policy 13(1)(b) of the NZCPS as it avoids significant adverse effects, and will avoid, remedy or mitigate other adverse effects on natural character in all other areas of the coastal environment by co-locating in an already modified environment. In his opinion the farm site is only a small area adjacent to the promontory, access to the coastline is available and the farm is *but a small addition to the already existing development in the Bay*[330].

[230] Mr Maassen referred[331] us to the Commissioner's decision[332] on the scale of direct visual effects. Notwithstanding the care taken by the Commissioner in her assessment, backed by decades of experience assessing the effects of marine farms in the Marlborough Sounds, we were not greatly assisted by this part of her decision because the amended application which is before us is quite different to the proposal considered by the Commissioner. In the paragraphs identified by Counsel, the Commissioner mentioned on three occasions how the farm *wrapped around the headlands* or words to that effect. This was her response to the staple-shaped farm in the original application which did indeed completely wrap around the headland without any separating gap. It gave rise to a completely different set of effects all of which were more adverse than those associated with the proposal before us.

328 M L Steven evidence-in-chief, para109 [Environment Court document 23].
329 C R Glasson evidence-in-chief, para 7.17 [Environment Court document 7].
330 C R Glasson evidence-in-chief, para 7.18 [Environment Court document 7].
331 Mr Maassen's submissions dated 29 July 2015, para 13.
332 In particular paras [139] through to [151].

[231] Mr Glasson's evidence was criticised by Mr Ironside who submitted[333] that Mr Glasson's overall approach is that existing development justifies further development. This is certainly not what NZCPS Policy 13(1)(b) intends even if it is the Sounds Plan's policy. Further, Mr Ironside observed[334] that there is no pattern of developing marine farms off headlands as Mr Glasson seeks to suggest. There has been a recent exception — the mussel farm allowed by the Environment Court in the *Knight Somerville*[335] case. The Appellant may have been fortunate in that case: the evidence against the proposal was very limited especially on King Shags; a good part of the justification for the location in that case was to avoid a reef further in; and finally, the promontory in this case is a much more dominant feature than the headland in *Knight Somerville*.

[232] In Dr Steven's opinion marine farming within Beatrix Bay has reached a point of unacceptable "cumulative" adverse effects with respect to the natural character of the coastal environment, and to the appreciation of amenity and the aesthetic quality of the landscape[336]. He went on to say that:

> cumulative effects must be understood in terms of the total changes evident in the landscape, and not simply the cumulative effects arising from an additional marine farm. In this regard, the cumulative effects of marine farming generally must be considered, together with other modifications to the landscape.

He concluded with respect to NZCPS Policy 13:

> The effects will be significantly adverse, and as such should be avoided. If the effects would have been considered less than significantly adverse, I am of the opinion that the effects can neither be remedied nor mitigated, and as such should also be avoided.[337]

[233] Our overall finding is that the adverse visual effects of the Appellant's proposal on natural character might be minor by themselves if the other farms were not in the bay. It is their cumulative effect on top of the accumulated effects of the other mussel farms which makes us pause. We assess that the proposed farm does not satisfy Policy

---

333 Mr Ironside's submissions dated 6 July 2015, para 19.
334 Mr Ironside's submissions dated 6 July 2015, para 19.
335 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC128.
336 M L Steven evidence-in-chief, para 104 [Environment Court document 23].
337 M L Steven evidence-in-chief, para 111 [Environment Court document 23].

13(b) because its cumulative effect — added to the accumulated and accumulative effect of all the existing farms — will be significant and thus should be avoided.

4.8 Effects on Navigation[338]

[234] The proposed site at the head of Beatrix Bay is primarily used by commercial boats servicing mussel farms in the area and by low numbers of recreational fishers and divers. Direct access from the open water of Beatrix Bay to the reef area at the southern end of the promontory is retained by the 190m separation of the eastern and western sections of the proposed farm.

[235] Access to inshore waters and the shoreline is maintained by the siting of the nearest mussel lines 100m from the shore. Mr Brian Tear, navigation witness for the Appellant, considered navigation by recreational boats in and around mussel farms either in transit or for fishing as commonplace in the Marlborough Sounds. In his opinion, the effects of the proposed new farm are minor. While some small inconvenience may occur, this would only be to mariners transiting between the embayments on either side of the point. This was likely to affect mussel service boats only, as very few recreational boats were likely to use this route. This view was supported by Mr C Godsiff, a long-term mussel farmer and tourism operator with extensive boating experience in Pelorus Sound.

[236] Mr L Grogan, Deputy Harbour Master for the Council, considered that as the proposal breached the Maritime New Zealand *Guidelines for Aquaculture Management Areas and Marine Farms* 2005 ("the Guidelines") there was an increased risk of vessels using the area to become entangled in farm structures. Of particular concern to Mr Grogan was the placement of the farm within 200m of the promontory (a headland) and 500m of a recognised navigational route.

[237] Mr Tear responded that the Guidelines in this regard should not be applied in a blanket manner based on geography as there are many differences between headlands that determine navigational safety. Also, in his opinion, the proposed site was not on a navigational route between popular destinations since it is at the end of the promontory

338 See Assessment Matter 35.4.2.9 [Sounds Plan p 35-21].

in an isolated bay with comparatively low recreational boating use. We consider this latter point is of some importance.

[238] The Guidelines are non-regulatory and as such applications for marine farms do not need to be compliant. They do, however, identify navigational safety matters to be taken into account when assessing marine farm applications. We prefer the evidence of Mr Tear that any concern over navigational safety has been appropriately mitigated in this application.

[239] On navigational safety, the court in *Knight Somerville Partnership v Marlborough District Council*[339] said:

> Any marine farm will present some risk to navigational safety simply by its shared common space in the sea. The Sounds, and Beatrix Bay in particular, have a long history of marine farming with its associated structures and hazards and mariners in the area are familiar with these. … Prudent seamanship is required in the vicinity of all farms and the lack of serious accidents associated with marine farms in the Sounds is a clear indicator that this is generally being exercised.

We agree and predict that there will likely be no more than minor adverse effects on navigational safety from the proposal.

4.9 Effects on fishing amenity and access

[240] Most effects on amenity have effectively been considered in parts 4.6 and 4.7 of this decision. However, one particular recreation — fishing — still needs to be considered. The reef area at the southern end of the promontory is used by locals and visitors for recreational fishing and diving[340]. Access to the reef area as a recreational destination is generally by boat, travelling directly across Beatrix Bay from the south. Although the area is relatively lightly used compared to less remote reef sites in Pelorus Sound, it is nevertheless highly valued by those who regularly use it, mostly in summer months.

339 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128 at para [67].
340 Transcript, p 601.

[241] We heard competing evidence from recreational witnesses on the likely accessibility of the reef after installation of the proposed farm. These ranged from perceiving it as a complete sealing off of access to the entire southeast embayment shoreline, to having no effect at all. Observations from our site visit tend to confirm the latter. Access to the reef and adjacent shore will remain unimpeded. Indeed, it was apparent that access to inshore areas between and through mussel farms is not significantly affected in good weather conditions when most fishing takes place. We accept that a little more care may be needed, but this is not a significant limitation to a moderately competent boat user in most conditions when recreational boat users would be out on the water. In this regard we do not accept the Societies' submission that recreational use of near shore areas in Beatrix Bay is severely limited by the presence of mussel farms, making this proposed currently unoccupied site even more important. However, we do accept the evidence[341] of Mr Offen for the Societies that drift fishing around the reef at the promontory's tip for blue cod will be difficult and that trolling across the reef for kingfish may be impossible.

[242] Mr Glasson stated that while water space has been infilled, the actual effects on the amenity values will be no more than minor because there will be so few boating recreationalists passing by the proposed farm or even accessing the northern beaches. He considers that Beatrix Bay is not an attraction for recreation due to the existing number of marine farms around the coastline. He came to this conclusion because Beatrix Bay is one that boaties, recreationalists and fishermen must make a special effort to enter — rather than a place where people pass-by. As there is no road access, all public access is by boat. The nearest (and only) dwelling in the Bay is 1.37 km from the proposed farm and the distance from the seaward end of the wharf (associated with the house) to the proposed farm is 1200m.

[243] We find that the layout of the proposed farm, which provides sufficient buffer distance between the mussel farm lines and the reef, is likely to reduce substantially any adverse effects on the recreational amenity provided by the reef and its adjacent shore or on access to it. We predict (with some reservations about the effects on trolling) that the adverse effects on fishing and access are as likely as not to be minor.

[341] T Offen evidence-in-chief paras 13 and 15 [Environment Court document 19].

4.10 Economic effects

[244] Despite the court's attempt to explain how to analyse these in *Port Gore Marine Farms v Marlborough District Council*[342] we received minimal evidence on this issue. We accept that there will be a producer surplus and consumer surplus which would give benefits to society. We also take into account the social benefits of employment identified by Mr M G Holland[343] even though strictly speaking that may be double counting benefits.

[245] Beyond that we are not able to make any quantitative comparison of the net benefits of the proposed marine farm with the net benefits of the status quo (i.e. no farm).

5. Evaluation

5.1 Preliminary issues: the gateway tests and the Commissioner's Decision

The gateway tests

[246] As noted earlier, this is an application for a non-complying marine farm under the Sounds Plan. As such we must be satisfied that it passes one of the gateways in section 104(D) RMA before consideration can be given to granting consent.

[247] We have found that some of the adverse effects are likely to be more than minor, so the first gateway is not passed. As for the second, Mr Maassen submitted that the test is a blunt one: "If a proposal is contrary to any material objective or policy, it fails the second gateway test". He relied on the judgment of Fogarty J in *Queenstown Central Limited v Queenstown Lakes District Council* where Fogarty described it as an error of law to "finess… out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed as a whole the objectives allowed … the activity"[344].

342 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] and [201].
343 M G Holland evidence-in-chief para 23 [Environment Court document 5].
344 See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [39].

[248] Strictly Forgarty J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals[345]. In any event we respectfully prefer to follow the Court of Appeal in *Dye* where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole"[346]. Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: *Cookson Road Character Preservation Society Inc v Rotorua District Council*[347], *Calveley & Anor v Kaipara District Council*[348] and *Saddle Views Estate Ltd v Dunedin City Council*[349].

[249] As it happens, because the Sounds Plan tries to be "all things to all people", as another division of the Environment Court recorded a planner's view[350], it is difficult for an application to be contrary to the objectives and policies of the plan: "... nominally non-complying activities are effectively discretionary". We consider the second threshold test is met because the application cannot be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although this is quite a close-run judgment in this case.

The Council's decision (section 290A)

[250] The court is required to have regard to the Council decision which refused the consents sought. In this case the decision of the Council's Commissioner cannot guide us because the application considered by Commissioner Kenderdine is markedly different from that put to us. In bringing the appeal the Appellant has radically altered the layout of the proposed marine farm so that we are being asked to determine a different and smaller proposal than that presented to the Commissioner. This is particularly important in relation to the key findings of the Commissioner on access, natural character, landscape and amenity on which the decision to decline the application was based.

---

345 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [3] to [6].

346 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

347 *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC [194] at [46]-[51].

348 *Calveley & Anor v Kaipara District Council* [2014] NZEnvC 182 at [142].

349 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1 at [82].

350 *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvtC) at [86]. We understand the court was quoting Ms S Dawson the planner then advising the Council.

[251] On the effect of the proposal on King Shag, Commissioner Kenderdine wrote[351]:

> The protection of the King Shag habitat is a role not only for future decision makers, but for the applicant if this proposal goes ahead through monitoring and conditions. A large scale monitoring programme will assist in this regard. Meanwhile the King Shag population has been stable for 50 years and it appears to have adaptively managed its (new) aquaculture environment (s6(c)).

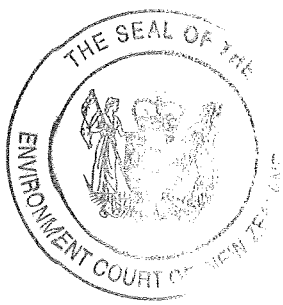
We note from the Commissioner's decision that the Council officers' section 42A report did not appear overly concerned with effects on King Shags or their habitat, and recommended that consent be granted. Mr Gardner-Hopkins submitted that the Council had (belatedly) taken a significantly different approach to this appeal than to previous applications where consents were supported. Mr Maassen's response was that this was the first application for some time that impinged on the King Shag habitat ecological overlay, which had resulted in the Council "taking a hard look" at this application to ensure the integrity of this component of the Sounds Plan. This was not a determinative factor for the Commissioner, but is for us.

[252] We now turn to consider the merits of the application as a whole under section 104 RMA, but before we do, there is a preliminary issue as to the relationship between the matters we must have regard to under section 104(1) RMA and Part 2 of the RMA.

5.2 "Subject to Part 2" in the light of the effect of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*

The correct application of 'subject to Part 2'

[253] As for the application of section 104 Mr Maassen submitted that in *KPF Investments v Marlborough District Council*[352] ("*KPF*") where the Environment Court concluded that the overall broad judgment under Part 2 whether a proposal would promote the sustainable management of natural and physical resources still applies.



351 Council Decision at para 279.

352 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [202].

[254] We now doubt whether that is quite accurate as a result of more recent decisions. In *Thumb Point Station Ltd v Auckland City Council*[353] ("*Thumb Point*") the implications of the majority decision in *King Salmon*[354] for the application of section 104 RMA were summarised by the High Court as being that:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is one exception, however, where there is a deficiency in the plan. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act.
> [Footnote omitted]

[255] In *Appealing Wanaka Inc v Queenstown Lakes District Council*[355] the Environment Court agreed with the *Thumb Point* summary, and explained[356] that the reference to any "deficiency" in *Thumb Point* was a reference to the "caveats" identified by Arnold J in *King Salmon* in the following passage[357]:

> … it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, **absent any allegation of invalidity, incomplete coverage or uncertainty of meaning**. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.
> [Emphasis added]

[256] We note that a similar issue about the phrase 'subject to Part 2 …' came before the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors*[358] ("*NZTA*"). While *NZTA* was concerned with section 171 RMA, the identical wording — "subject to Part 2 of the Act" — also occurs. The reasoning behind Brown J's decision is not completely obvious.

---

353 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
354 *King Salmon* above n 26.
355 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.
356 *Appealing Wanaka Inc v Queenstown Lakes District Council* at [44]-[45].
357 *King Salmon* above n 26, at [90].
358 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [108].

[257] Brown J quoted, and seemed to accept a passage in *Auckland City Council v The John Woolley Trust*[359] ("*Woolley*") which was an appeal about a resource consent under the RMA. Randerson J wrote:

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*[360], that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

While we doubt if anything turns on the metaphor, we respectfully question its accuracy: Part 2 of the RMA appears to us — if a nautical image is to be used — to be more akin to the bridge or, nowadays the operations room, on a flagship.

[258] In contrast, in *King Salmon* Arnold J simply described section 5 as "… a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;"[361]. Alternatively it is "… a carefully formulated statement of principle intended to guide those who make decisions under the RMA[362]". Later Arnold J also observed (presumably obiter) that the provisions in Part 2 are not operative provisions in the sense of being sections under which particular planning decisions are made[363], rather they "comprise a guide for the performance of the specific legislative functions". These passages suggest *Woolley* may need to be applied carefully in future.

[259] Brown J's other approach to the application of the phrase 'subject to Part 2 …' was simply to adopt[364] what the Board wrote[365]:

---

359 *Auckland City Council v The John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
360 *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145.
361 *King Salmon* above n 26, at [24(a)].
362 *King Salmon* above n 26, at [25].
363 *King Salmon* above n 26, at [151].
364 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [118].
365 Decision of the Board of Inquiry into the Basin Bridge (29 August 2014) para [183].

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.

The difficulty is that the phrase 'subject to Part 2' does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. As Cooke P explained for the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[366] (a case under the Town and Country Planning Act 1977): "The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict". We now know, in the light of *King Salmon*, that it is not merely a "conflict" which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.

[260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.[367]

[261] We consider that *Thumb Point* is, with respect, more accurate than *NZTA* on how to apply *King Salmon* in the context of section 104. Further, *Woolley* may now need to be applied with caution. None of those cases were cited to us by counsel but since no party relied strongly on Part 2 of the Act as over-riding considerations under section 104(1)(a) to (c), we consider it is unnecessary to seek further submissions. Rather this

366 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 (CA) at 202.

367 *King Salmon* above n 26, at [137]-[138].

exercise is simply the court trying to articulate the correct way of applying *King Salmon* in a section 104 context in the face of conflicting High Court decisions and the court's own erroneous decision in *KPF*[368].

Summary

[262] In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

(1) "Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans[369];

(2) having regard to any other relevant statutory instruments[370] but placing different weight on their objectives and policies depending on whether:

  (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;

  (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may over-ride the district plan even if it does not need to be given effect to; and/or

  (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;

(3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and

(4) weighing these conclusions with any other relevant considerations[371]

— achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"

368 *KPF* above n 352.
369 I.e. the operative district plan and any proposed plan (including a plan change).
370 Under section 104(1)(b) RMA.
371 E.g. under section 104(1)(c) and 290A RMA.

[263] Whether that process can still be called an "overall broad judgement" 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).

Consequently we consider that in *KPF*[372] the court may have overstated the width of the judgment under section 104 at least if the *KPF* approach is applied to other district plans which are more particular than the rather generalised Sounds Plan.

Incomplete tests for efficiency

[264] There is one other matter: it appears all district or regional plans are incomplete in the sense that they are not Stalinist Five-year Plans: they do not attempt to resolve the most efficient use of all resources: see *Meridian Energy Ltd v Central Otago District Council*[373]. While plans give guidance and/or directions (particularised implementations of Part 2 RMA) in policies, which are deemed to be appropriate (which includes efficient) — *King Salmon*[374] — some activities are stated by rules to be discretionary or non-complying so that more efficient uses can be ascertained on a case-by-case basis.

[265] That means that one aspect of Part 2 of the RMA may often need to be looked at as a result of *King Salmon*. That is section 7(b) which states:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (b) the efficient use and development of natural and physical resources:

372 *KPF* above n 352, at [200].
373 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at 118.
374 *King Salmon* above n 26, at [24] (d).

...

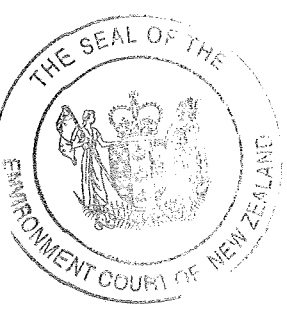
[266] Efficiency is, in our view, one of the least well understood concepts in the RMA. First it is important to understand that efficiency is a neutral concept: the efficient use of a resource cannot be ascertained until there are policies by which it can be assessed. Second, the standalone efficiency of a use of a resource can be ascertained by comparing the probability of environmental gains with the risk of adverse effects, or in 'economic' terms ascertaining whether the benefits exceed the costs. However, since those are rarely quantified, that assessment of efficiency (e.g. that refusing consent to a wind farm will "waste" the wind resource) adds little to the overall assessment. The third and potentially most useful point is that efficiency can be assessed in a practical and relative way. Efficiency asks "does the proposed use of the resource implement the relevant policies and achieve the objectives better[375] than the current (or permitted) use of the resource?" Consequently we consider there may be an extra step in the ultimate evaluation as follows:

> Having particular regard to section 7(b) RMA by assessing (at least) is the proposal more efficient in implementing the policies and achieving the objectives of the relevant plan than the status quo (or the permitted activities in the plan)?

[267] We have not needed to ask for further submissions on this issue because section 7(b) is largely irrelevant in this case. That is because the subsection is only concerned with two of the elements of sustainable management of resources — their use and development — not their third: protection. This case is essentially about the protection of the resources in the environment around the site and so we take this issue no further here.

5.3 Having regard to the potential effects of the mussel farm

[268] When considering the effects of the proposal and their consequences the consent authority should consider those effects as avoided, remedied or mitigated by any conditions of consent. We have done so in this case. However, there is one exception,



375 It is possible, especially in the absence of section 6 matters, to quantify and compare net benefits of a proposal with those of the status quo — see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

which is the proposed "adaptive management conditions". Since these neither avoid, remedy or mitigate effects but rather provide a recipe for future possible avoidance, remediation or mitigation of effects, we will consider adaptive management later.

[269] It will be recalled that in part 3 of this decision we asked a series of questions about the potential effects of concern under the Sounds Plan's objectives and policies. The answers to these questions were given in part 4. Pulling together and summarising the more important predicted non-neutral effects of the Davidson Family Trust application with the accumulative effects of the other identified stressors which we should consider under the Sounds Plan and the NZCPS, they are:

(1) likely net social (financial and employment) benefits;
(2) a likely significant adverse effect on the natural feature which is the promontory;
(3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
(4) likely adverse cumulative effects on the amenity of users of the Bay;
(5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
(6) very likely a reduction in feeding habitat of New Zealand King Shags;
(7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
(8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

5.4 Consideration under the Sounds Plan

[270] The Sounds Plan in itself requires a fairly broad judgment. In the bigger picture, the proposal is generally consistent with Chapter 2 (natural character) and Chapter 5 (landscape) provisions of the Sounds Plan. The direct visual effects on the natural character and landscape of the promontory and associated inshore area are more than minor by themselves i.e. in the notional absence of existing marine farms on either side

of the promontory. Importantly, the proposal applies the natural character policy[376] to place development in areas "where the natural character of the coastal environment has already been compromised". We have wrestled with this and find the problem nearly intractable: in the absence of this policy we would find inappropriate the cumulative effects of the proposal on the amenity of the inshore area of Beatrix Bay and the feature which is the promontory. However, this policy seems to render cumulative effects on natural character irrelevant.

[271] Focussing on Chapter 9 (The Coastal Marine Area) the first objective is[377] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The proposal achieves policies (9.2.1) 1.1 and 1.12 by (relevantly) enabling marine farming while maintaining, mitigating or remedying adverse effects on[378] cultural and iwi values, cultural and iwi amenity values, public health and safety, recreation values, and water quality. The question is whether it adequately mitigates effects on the remaining values in the policy (9.2.1)1.12 list, specifically conservation and ecological values, seascape and aesthetic values, the natural character of the coastal environment, navigational safety and public access to and along the coast — to make the site appropriate[379] in the landscape.

[272] The third coastal marine objective[380] seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the seabed. That raised the key question[381] whether the effects on the "value" of the marine habitat are sufficiently mitigated or remedied.

[273] It will be recalled that a key policy[382] in the Sounds Plan is to avoid, remedy or mitigate the adverse effects of (in this case) water use on areas of significant ecological value ("AOEV"). We have also recorded that the Appellant challenged the basis of the notation in the Sounds Plan describing the area around the site as an AOEV. We note that the challenge was not to the fact that the AOEV is habitat of King Shag. That is

---

376 Policy (2.2)1.2 [Sounds Plan].
377 Objective 9.2.1 [Sounds Plan at 9-4].
378 Policy (9.2.1)1.1 [Sounds Plan at 9-4 and 9-5].
379 Policy (9.2.1) 1.14 [Sounds Plan].
380 Objective 9.4.1 [Sounds Plan at 9-16].
381 Policy (9.4.1)1.1 [Sounds Plan at 9-16].
382 Policy (4.3) 1.2 [Sounds Plan p 4-2].

incontestable. The challenge by the Appellant was to whether the AOEV represented 'significant' habitat of King Shag. The Marlborough District Council was obliged to recognise and then to provide for the significant habitat of King Shag under section 6(c) RMA, and the AOEV was a response. It is far too late — more than a decade after the Sounds Plan came into force — to challenge the basis on which the Council made its decision to identify the area around the site as an AOEV. The proper approach on this issue would have been for the Appellant to call evidence showing that the site was not part of the habitat of King Shag, since it is likely that the whole AOO is significant for the species given its very small population. Consequently we consider policy (4.3)1.2 should be given full weight along with all the other relevant policies.

[274] Consequently, we consider that if we were to decide simply on the Sounds Plan itself and without yet considering the NZCPS we would on balance refuse resource consent on the basis that the proposal inappropriately reduces the habitat of King Shag.

5.5 Consideration under the NZCPS

[275] We recognise that mussel farms such as the application can only be located[383] in the coastal marine area. We also take into account the (social and) economic benefits[384] of the proposed farm. However, we consider the site is not an appropriate area for the reasons identified by the Council and the Societies: the change in benthic conditions within the direct footprint of the farm and nearby, particularly alterations to seabed morphology from shell drop, faeces and pseudofaeces represented an adverse effect on the foraging and feeding habitat of King Shag. Those adverse effects on King Shag habitat cannot be avoided as directed by the policy 11 of the NZCPS.

[276] We recognise that there are considerable uncertainties about the inter-relationships between stressors. The accumulative effect of marine farms on King Shag habitat may be less of an immediate threat than sediment run-off from land-based activities and bottom dredging. That does not mean it is not a threat. Further, potential effects of climate change (such as increase in water temperature) loom in the next few decades.

383 Policy 6(2)(c) [NZCPS p 14].
384 Policy 8(b) [NZCPS p 15].

[277] The point of policy 11(1) NZCPS is that if a species is at the limit of its range then it is automatically susceptible to stressors and any adverse effects on its habitat should be avoided. Applying that policy we consider that this is a strong factor against granting consent. More information and analysis is required beyond what we have been presented with here to address accumulative effects in a comprehensive manner. In the Appellant's view this is properly the province of a review of the Sounds Plan. We do not accept that an applicant can avoid the issue in this way when faced with the strong direction given in Policy 11 of the NZCPS. The applicant needs to put forward information that will satisfy the decision-maker that the risk of accumulative effects is acceptable. The onus is on the applicant because under section 104(6) RMA we may, as discussed, decline the application on the grounds that we have inadequate information.

[278] The cases for the Council and the Societies suggested the court take a precautionary approach in declining the application on the basis of uncertainty around the current knowledge of the effects of mussel farms on the environment. This was particularly the case in respect of adverse accumulative ecological effects and accumulative effects on King Shag where these effects are poorly understood. Policy 3 of the NZCPS[385] requires us to:

> Policy 3 Precautionary approach
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>
> (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

385 Policy 3 [NZCPS p 12].

[279] Policy 3 NZCPS applies where environmental effects are both "uncertain, unknown, or little understood" and "potentially significantly adverse". The Appellant submitted[386] that neither criterion is met.

[280] We have predicted that the adverse effect of the change to King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand we have also predicted that the accumulative adverse effects could be serious. Counsel for the Appellant warned us[387] against the "real risk of loading a (new) potential effect upon multiple (existing) potential effects to arrive at an unrealistic potential cumulative effect scenario". Some *Dye*-induced confusion in that submission aside, we have heeded the warning. However, the prediction remains: potentially the King Shag could be driven to extinction by the accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay. That is a low probability event, but extinction is indubitably a significantly adverse effect which would be exacerbated, to a small extent, by the Davidson proposal.

[281] The precautionary approach suggests both that we should exercise our discretion under section 104(1)(c) to take accumulative effects into account, and — to the extent we have inadequate information about those — to consider declining the application under section 104(6) RMA (after taking into account in the Appellant's favour that the Council did not, it appears, ask for further information about this before the Commissioner's hearing).

5.6 Overall weighing under the Sounds Plan and the NZCPS

[282] Weighing the proposal under the Sounds Plan and the NZCPS, we judge that the undoubted benefits of the proposal are outweighed by the costs it imposes on the environment. In particular the proposal does not avoid or (where mitigation is possible) sufficiently mitigate:

(1) the direct minor effect of changing a small volume of the habitat of King Shag;

386 Opening submissions para 6.25.
387 Closing submissions for the Appellant dated 13 July 2015 at para 2.7(c).

(2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;

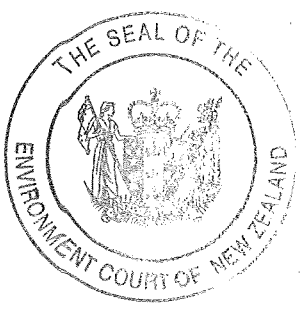
(3) the more than minor adverse effects on the landscape feature of the northern promontory; and

(4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

[283] We have spent considerable time considering the implications of the apparently stable population of King Shag. If the population is stable despite all the existing mussel farms, how can one more have an adverse effect on the taxon?

[284] The first answer is that our finding that the current population of King Shag is apparently stable needs to be qualified by the lack of information about almost all other aspects of its population dynamics. The information given to us was completely inadequate to allow us to detect any trend in the population. At present data on the number of breeding pairs, breeding success rates, or even of the age and sex ratio of birds is almost completely lacking. In particular there is no data on the survival rates and population trends of mature female King Shags. These last are particularly important because it is the likely preferred foraging grounds of females which mussel farms have been extended into over the last 10 to 15 years.

[285] A second additive answer is that it is generally recognised that the precise effects of combinations of stressors on bird populations are not known. Thus the *Red List* works usually on the basis that if there is a percentage reduction in population of a taxon over time then that puts the species at risk. There are elaborate criteria depending on initial population; size of population reduction, declines in EOO or AOO or habitat quality, and so on[388]. However, when a taxon is reduced to less than 1,000 individuals on the planet, because of the risk of stochastic events, waiting for a reduction in population is no longer regarded as an appropriate trigger for protecting the taxon.



388 "V The Criteria for Critically Endangered, Endangered and Vulnerable" The *Red List* above n 156, at p 16 et ff.

[286] The NZCPS has also recognised[389] that continuing decline in habitats is a key issue in the coastal marine area. That is one of the reasons that policy 11(a)(iv) expressly avoids adverse effects (not only significant adverse effects) on habitats of indigenous species where the species is at the limit of its natural range.

[287] No party argued that the NZCPS was uncertain or incomplete so there is no need to apply the 'subject to Part 2' qualification in section 104 RMA.

5.7 Would the difficulties be met by adaptive management?

[288] The Appellant has proposed that any uncertainty over the effect of the proposed mussel farm on the environment can be met by adaptive management conditions. In *Sustain our Sounds Inc v Marlborough District Council* ("*SOSI*") the Supreme Court stated that there are two questions[390] to be answered:

> … [First] what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

The second question is whether any adaptive management regime is considered consistent with a precautionary approach[391] or whether consent should be refused.

[289] Giving the judgment of the Supreme Court, Glazebrook J elaborated[392]:

> As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see"

389 Issues [NZCPS p 5].
390 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [124].
391 *SOSI* at [129].
392 *SOSI* at [125].

approach[393]. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

[290] The proposed regime is claimed[394] by the Appellant to meet the requirements for adaptive management in respect of "proximate benthic effects" by[395]:

> (a) establish[ing] effective baseline monitoring to accurately assess the existing environment at the Application site and at least two control sites (in addition to the already existing data);
> (b) introduce[ing] clear and strong monitoring, reporting, and checking mechanisms; and
> (c) enable[ing] the removal or reduction in farming or other mitigation if monitoring results warrant such action.

[291] However that was qualified as counsel for the Davidson Family Trust explained in their opening submissions[396]:

> This adaptive management regime is offered by the Trust to assist in confirming the relationship between mussel farms and nearby reef habitats, and is offered notwithstanding the lack of any evidence that reef and rocky habitats inshore of mussel farms have been substantially altered by mussel farming.
> No other adaptive management conditions are required (or offered).

Thus the adaptive management regime is not proposed for the habitat (soft substrate) actually occupied by the farm.

[292] Given the apparent stability of the King Shag population, we have considered whether, despite the Appellant's disavowal of any other kind of adaptive management, we should impose an adaptive management condition involving research into (at least):

---

393 Referring to *SOSI* at [121] and adding: "See also the comments of Tremblay-Lamer J quoted at [123] above; the explicit consideration of the two options in *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199, at [113]; and the threshold question discussed in *Crest Energy Kaipara Ltd v Northland Regional Council*, ..., at [229]."

394 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].

395 See proposed conditions of consent in Appendix A to J C Kyle evidence-in-rebuttal [Environment Court document 32].

396 Opening submissions paras 6.31 and 6.32.

- Use of the areas covered by mussel farms and their shell shadow by preferred prey (flatfish) of King Shags.
- Whether there are seasonal or other periodic changes to use of Beatrix Bay by flatfish?
- Use of different substrates and depths by male King Shags and (separately) by females.
- Survival rates of male versus female King Shags.
- The other matters raised by Dr Fisher.

[293] If the Davidson Family Trust's proposal was for one of the first mussel farms in Beatrix Bay, that sort of condition might work. Unfortunately, its site is one of the few still available on the soft substrate immediately outside the rocky inshore substrate. If research is carried out, as it urgently needs to be, into the various questions posed in the previous paragraph, then this site will likely be needed as an unmodified or control site.

[294] A further, more important, difficulty in this case is that there is still considerable uncertainty over the probabilities as to whether marine farms are stressors of King Shags. Clearly what is needed are before and after controlled studies, but none have been conducted in Beatrix Bay or indeed elsewhere in the Sounds. Consequently we have little confidence that amendments of the proposed[397] adaptive management conditions would reduce uncertainty and manage any remaining risk.

[295] Finally, relying on an adaptive management condition triggered by a change in King Shag population is in our view precisely what the IUCN Red List criteria suggest is inappropriate for very small populations. The geographic range criteria B and the very small population criteria D are independent of the "change in population" criteria[398]. A population change condition is inappropriate because by the time a population change (at whatever relatively arbitrary level of change — 5%, 10% or 20% — is chosen) has been established to the appropriate degree of certainty, the species may be doomed to extinction.

397 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].
398 The *Red List* above n 156, at pp 21 and 22.

[296] We find that the adaptive management threshold test of *SOSI* is not met and therefore it would be inappropriate to rely on adaptive management of adverse effects in relation to these applications.

6. Result

[297] After considering all the matters raised by the parties and after weighing all the relevant factors we judge that the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, require that we should refuse the consents sought.

[298] We have attempted to assist the Appellant by assessing the information and making predictions where we can. For example we have attempted to assess the probable area of mud seafloor covered by mussel farms in Beatrix Bay. However, if that or any of our other assessments are too inaccurate, then the alternative outcome is clear: we were simply given inadequate information by the Appellant (and other parties) to determine that the application should be granted. Accordingly we would exercise our discretion under section 104(6) RMA to decline to grant consents.

Afterword

[299] We have also briefly considered the implications of refusing consent in this case for other applications in the area of occupancy of King Shags. In the short term this decision may cause difficulties. For the Appellant, Mr Gardner-Hopkins gained admissions[399] from a number of witnesses that the impetus for gathering information "should" occur at an industry level or higher (referring to local or even central government). The answer is that the Aquaculture Industry and the Council[400] may need to commission rather more sophisticated and detailed research into King Shags than appears to be carried out at present. In particular all the matters covered by the IUCN Red List criteria would be a minimum requirement of any research programme.

[300] The survival of a very rare species of bird is at risk here. With a population of less than 1,000 individuals it is at high risk of extinction. Much more robust research needs to be carried out both on New Zealand King Shag population structures and on the

399 For example — Transcript, p 485, line 24.

400 See the Methods of Implementation in the Sounds Plan at 9.3.3.

interrelationship between stressors on this species before the industry can expand (or even perhaps continue at the same level) in outer Pelorus Sound.

Reasons of Environment Commissioner Buchanan

Preliminary comment

[301] The application to establish a marine farm at the head of an unnamed promontory in Beatrix Bay by the RJ Davidson Family Trust was declined by the Marlborough District Council following a hearing before an independent Commissioner in July 2014. The decision to decline the application was based on the adverse effects of the proposal on navigation, natural character values, landscape values and recreational amenity being more than minor. As noted in the majority decision, the Court was presented with a modified marine farm layout at the site that sought to avoid many of the adverse effects noted in the Commissioner's decision.

[302] The majority conclude that there is an adverse effect on the habitat of King Shag and significant adverse effects on visual perceptions of natural character of the promontory and of Beatrix Bay. For this reason, the majority is of the view that the application should be refused. I disagree with the weight given to the effects on King Shag habitat and the evaluation of adverse visual effects of the proposed marine farm in an environment already containing 37 similar marine farms. The application should be granted.

King Shag

[303] I agree with the description of King Shag biology, population and status set out in Part 2 of the majority decision, including the findings:

(a) That King Shag numbers have remained constant since 1991 and that there is no declining trend in numbers.
(b) Beatrix Bay is part of the area of occupancy of King Shag.
(c) That King Shag forage very infrequently within mussel farms, likely due to reduced flatfish numbers under the farms.

[304] In relation to (a) Schuckard (2006)[401] established that the population of King Shag has on average been not less than around 650 birds over the past 50 years. Daytime counts reported from the four main colonies prior to 1992, taken when part of the population was away feeding, were adjusted by Mr Schuckard using a correction factor described in his 2006 paper. This correction factor was adopted by Bell (2010)[402] as an acceptable multiplier to estimate population and size from daytime counts at the colonies. Mr Schuckard was of the opinion that the population numbers of King Shag had remained stable for at least 50 years. The uncontested evidence he produced supports this. I therefore extend the finding of the majority decision to include the period from 1951 when full colony counts were first recorded.

Statutory instruments

[305] The questions that arise from Policy 4.3(1.2) of the Sounds Plan regarding the likely adverse effects on King Shag habitat relate only to those areas of the Sounds mapped as an area of ecological significance in Appendix B notation 1/11 of the Plan. Activities within the area of ecological value are to be assessed as discretionary and the anticipated environmental result is the maintenance of population numbers and distribution of the species, in this case King Shag.

[306] The New Zealand Coastal Policy Statement Policies 11(a)(i) and (ii) refer to threatened taxa. Taxa is a generic term used to refer to a taxonomic category at any level, such as phylum, order, family, genus or species. In this case we are dealing with a threatened seabird of the genus Leucocarbo and species carunculatus. The threatened taxon for the purpose of Policies 11(a)(i) and (ii) is the species *Leucocarbo carunculatus.* These policies direct the avoidance of adverse effects of the activity on a threatened species (King Shag).

[307] Policy 11(a)(iv) refers to the habitats of indigenous species where the species is at the limit of its natural range. Species range limits are the spatial boundaries beyond which individuals of the species do not occur. The natural range of King Shag is the Marlborough Sounds. Populations of species occupying habitats at the outer limits or

401 Schuckard, R. (2006). Population status of New Zealand King Shag (Leucocarbo carunculatus). Notornis, 53: 297-307.

402 Bell M. (2010). Numbers and distribution of New Zealand King Shag (Leucocarbo carunculatus) colonies in the Marlborough Sounds, September-December 2006. Notornis 57: 33-36.

periphery of the species' natural range are significant to ecology, evolution and conservation in that they provide opportunities to understand the conditions under which populations expand or contract or evolve new forms. Adverse effects of activities at these margin habitats may not affect the wider population of the species, so the maintenance of biological diversity in these areas of the marine environment is dependent on the avoidance of adverse effects on their habitats. This is the purpose of Policy 11(a)(iv).

[308] We are dealing here with a species that has a very limited range. The subject site is recognised as within the central feeding range of the population of King Shag centred on the Duffers Reef colony, which in turn is the largest colony of this species found within the natural range of the species.

[309] The majority decision finds that *Leucocarbo carunculatus* is at the limit of its natural range because its extent of occupancy (natural range) is small. Policy 11(a)(iv) NZCPS is not qualified by any size constraints large or small. The natural range is just that, the natural range, irrespective of its size. The majority decision also introduces the finding that *Leucocarbo carunculatus* is an outlier of a superspecies (collection of related species of largely sub-antarctic blue-eyed shags (genus Leucocarbo). This misinterprets Policy 11(a)(iv) which refers to indigenous species, not superspecies. The species *Leucocarbo carunculatus* is not found outside the Marlborough Sounds. The limit of its range is determined by the geography of the Sounds and physiology of the birds themselves that limit the foraging flight range to about 25 kilometres. King Shag are therefore not a qualifying species under Policy 11(a)(iv) NZCPS where any reduction in habitat at the limit of its range is to be avoided. King Shag cannot be considered as "naturally rare" under the NZCPS definition of that term for the purpose of the second qualifying requirement of Policy 11(a)(iv) as we have little knowledge of the status of the species in pre-human times.

Effects on King Shag

[310] The majority decision examines at length the likelihood and scale of adverse effects on the habitat of King Shag, both directly as a result of this proposal and cumulatively from all mussel farms in Beatrix Bay. The conclusion from this examination is that the altered environment under the proposed farm is likely to cause an

adverse effect on King Shag habitat. Given the scale of the proposal these effects will be minor (but not minimal) by themselves, but taken together with all the other existing farms will be adverse to King Shag habitat.

[311] The majority decision summarises that there was adequate information to find/predict that:

(1) King Shag habitat is changed by shell drop and sedimentation;
(2) The effects of each farm will accumulate and are likely to be adverse;
(3) That it is as likely as not there will be adverse effects on the population of King Shag and their prey;
(4) There is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[312] I did not dispute that (1) and (2) above are supported by the evidence and that regard should be given to these effects under section 104(1)(a) RMA. I disagree that there is adequate information to support (3) or (4). The accepted population information establishes that King Shag numbers are not declining and have not done so for the past 50 years at least. This cannot be dismissed. The likelihood of this farm resulting in the extinction of the species is so remote that it cannot be considered as a credible threat in the context of the definition of effect under Section 3 RMA.

[313] The majority decision states that completely inadequate information was available to detect any trend in the population, as data on breeding pairs, breeding success rates, and age and sex ratios was almost completely lacking. This does not recognise the reality that it is these and many other aspects of a species' population dynamics that contribute to the balance of recruitment and mortality that results in a static or stable population over time. Adverse effects from environmental stressors having a substantial impact on critical aspects of King Shag population dynamics would be reflected in the population counts available since 1951. King Shag are adapted to a specialist niche habitat, provided only in the Marlborough Sounds. This niche habitat has been subject to a range of anthropogenic and stochastic stressors over the past 50 years with no observed effect on the population of King Shag. A complete understanding of the population dynamics of the species will not alter this fact.

[314] I find there is adequate information to support the alternative finding that it is extremely unlikely that there will be adverse effects on the population of King Shag from the proposal.

Evaluation

[315] The subject site is within the ecological overlay (Map 69) described in Appendix B, Notation 1/11 of the Sounds Plan defining the significant foraging habitat of King Shag. A very small proportion of mussel farms occupy space within this Area of Ecological Value as it primarily covers areas seemingly favoured by foraging King Shag at depths below 30 metres. The adverse effect of a reduction of 10 hectares available to King Shag for foraging in the context of the extent of the ecological overlay is minimal and extremely unlikely to result in a decrease in the number of King Shag. The significant habitat identified within Beatrix Bay remains viable. Policy 4.3(1.2) of the Sounds Plan is satisfied.

[316] There is no question that Policies 11(a)(i) and (ii) NZCPS apply. Adverse effects on King Shag may include reduction in the area occupied by King Shag and reduction in habitat quality. While the existing mussel farms may have displaced King Shag from feeding in that area of the species' habitat occupied by mussel farms in Beatrix Bay, this has resulted in no harm to the population. The numbers of King Shag foraging in Beatrix Bay has not diminished over the 25 years since snapshot foraging bird surveys were first carried out in 1991 and the population of King Shag has not shown any downward trends since mussel farms were first established in the Sounds.

[317] Policies 11(a)(i) and (ii) are satisfied by this finding. Indigenous biodiversity in Beatrix Bay is not compromised by adverse effects on the habitat of King Shag. That habitat remains viable and the population of King Shag as far as it exploits this part of its natural range is not adversely affected by mussel farms.

[318] Policy 11(b)(iii) NZCPS refers to avoiding significant adverse effects on rocky reef systems. Adverse effects of the proposal on the rocky reef area at the head of the promontory have been evaluated in the majority decision which found there to be a low probability of there being a more than minor effect on the ecology of the reef. The

majority decision also evaluates the adverse effects on the indigenous eco-system within the intertidal range as required by Policy 11(b)(iii) finding that it is likely there will be only minor (if any) independent or cumulative effects on the intertidal zone. Policy 11(b)(iii) it is therefore satisfied by these findings.

Comment

[319] Concern for the effects of new salmon farms being introduced into the area of occupancy of King Shag was raised at the Board of Inquiry (BOI) into the New Zealand King Salmon proposal. The BOI found that there were potential adverse effects of low probability but high consequence that needed to be considered. The Board adopted a precautionary approach to these effects in granting consents within King Shag habitat by including in consent conditions the requirement for an adaptive management approach under a King Shag Management Plan (KSMP). This approach was confirmed as part of the wider consideration of adaptive management conditions by the Supreme Court[403].

[320] The KSMP is required to include a baseline survey of King Shag numbers followed by repeat surveys at least every three years. The BOI identified a statistically significant decline in King Shag numbers of 5 percent as a threshold for investigation of whether the marine farm was contributing to the decline and possible remediation measures if such a contribution was identified. The baseline counts for the KSMP were those included in the evidence of Mr Schuckard and Dr Fisher and recorded in the majority decision. If, as the majority decision suggests, a residual low risk remains that the reduction in King Shag habitat from this proposed farm either directly or cumulatively with all other mussel farms may adversely affect the King Shag population, then a similar adaptive management approach would seem to be appropriate.

[321] The scale of this proposal in comparison to the King Salmon application does not justify a specific adaptive management approach for King Shag as applied by the BOI decision. It is very important, however that the mussel industry within the Sounds generally becomes linked in some manner to the KSMP. A way needs to be found to involve the mussel industry in monitoring the KSMP results as they are published on the

403 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [140] and [158].

New Zealand King Salmon website and contribute to any subsequent investigation if the threshold 5 percent decline in King Shag population is exceeded in order to establish whether mussel farming is contributing to that decline and response measures that could be adopted. This would be a sensible and pragmatic marine farming approach to a potential effect of low probability but high consequence, but is not one we can impose on a single consent holder in this case.

[322] The alternative approach is to decline all future applications for marine farms in the natural range of King Shag until such time as sufficient information is available to determine with certainty the risk posed by marine farms on the King Shag population. This seems to be the approach taken in the majority decision.

Conclusion on King Shag

[323] The majority decision largely turns on the interpretation of Policy 11(1)(iv) NZCPS and the directive within that policy to avoid adverse effects on habitats of an indigenous species and the risk this poses as a potential contributor to the decline (or indeed demise) of King Shag. This, in my view, is not a correct application of the policy.

[324] The real issue (under Policies 11(a)(i) and (ii)) is the effect of the small adverse reduction in habitat on the population of King Shag. The primary indicator of the population status of King Shag is the reliable data set on the trend in the population over time. This indicates to me that marine farming in the Sounds has not had a negative influence on that population.

[325] The very low residual risk of the adverse effects of mussel farming in the Sounds on King Shag habitat having an adverse effect on King Shag population warrants an industry wide adaptive management approach that piggybacks on the KSMP now in place for New Zealand King Salmon.

Effects on the Promontory

[326] Competing evidence on the effects of the proposal on the promontory was provided by three independent experts as summarised in the majority decision. All of Beatrix Bay is considered by the experts and accepted by the Court (in *Knight*

Somerville Partnership[404] and elsewhere) as having a high level of natural character. The promontory does not stand out from the rest of the Bay in this regard. The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in the inshore area of Beatrix Bay, as appropriate use of the coastal marine area subject to individual farm assessment. The proposed farm is not exceptional in this environment. The small (2 percent) extension of occupied space at the southeast and southwest ends of the promontory does not differ in effects on natural character from any other farm in the Bay, including the recently consented (by the Court) farm adjacent to the headland between Tuhitarata and Laverique Bays (*Knight Somerville Partnership*).

[327] Mr Glasson's opinion and conclusion set out in paragraph [217] of the majority decision provides an evaluation of the proposal in the context of the land/water interface of the promontory and the presence of existing mussel farms. I accept Mr Glasson's proposition that the proposal will allow the integrity of the promontory to remain intact. When viewed from the south, the most common approach by sea, the end of the promontory and its background are unencumbered by marine farm structures even with this proposal in place. From all other viewpoints, the visual effects of the proposal on the natural character of the promontory cannot be viewed in isolation from existing farms that stretch to the outer margin of the feature. The visual perspective in this regard is already compromised with the seaward extension resulting from the proposal having only a minor additional effect.

[328] The majority decision accepts that cumulative effects on the natural character of Beatrix Bay reported by Dr Steven are significantly adverse. This conclusion does not appear to recognise the collective advice of the landscape experts that the natural character of the Bay remains high. This is inclusive of the presence of 37 marine farms. It was not suggested by anyone that the assigned high status would be revised to some lower assessment category as the result of adding this additional farm. As such, the very small change on a Bay-wide scale of an additional 7.34 ha of mussel buoy lines cannot be considered as significant. To do so would require the acceptance that some concept of threshold for the area covered by marine farms existed, beyond which additional

404 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

marine farms had significant cumulative effects and were therefore inappropriate despite the CMZ2 zoning. No case for this was made other than Dr Steven's assertion that it was a *reasonable and defenceable proposition* that such a threshold had been reached.

[329] For the above reasons, I give greater weight to the evidence of Mr Glasson than to that of Mr Bentley and Dr Steven in concluding that the adverse effects on the visual/natural character perceptions of the promontory in particular, and Beatrix Bay in general, are likely to be no more than minor.

[330] In considering the Sounds Plan, I agree with the evaluation in the majority decision that Policy 2.2(1.2) seems to render cumulative effects on natural character irrelevant in that it encourages development in already compromised areas of the coastal environment.

[331] In considering the NZCPS, my finding on the absence of significant adverse effects on natural character and landscape means the "avoidance" directives of Policy 13(1)(b) and Policy 15(b) respectively are not triggered. In having regard to the policy alternative to avoid, remedy or mitigate any adverse effects on natural character and landscapes, I consider that it is not possible to achieve any of these in operating a marine farm that requires visible suspension infrastructure, although the ability to remove this infrastructure can be seen as a mechanism to remedy any unacceptable adverse effects of the mussel farm over time. The adverse visual effects of this proposal in the context of existing marine farms in the visual catchment are of a scale that is not determinative on its own.

Summary

[332] In summary:

(a) An adverse effect on King Shag habitat is likely that is more than minor but less than significant at a cumulative Bay-wide scale.

(b) There is no evidence that the adverse effect on King Shag habitat is having any adverse effect on the population of King Shag generally and the Duffers Reef Colony in particular.

(c) There is a low risk that mussel farms in the outer Pelorus Sounds may have adverse effects on the Duffers Reef Colony of King Shag.

(d) The proposal is unlikely to have significant adverse visual effects on the natural character and landscape of the promontory or cumulatively on the natural character and landscape of Beatrix Bay.

(e) The proposal is likely to have no more than minor adverse effects on non-visual aspects of natural character including benthic and water column effects, recreational amenity, navigation and King Shag.

Result

[333] The application should be granted with standard mussel farm conditions to be advised by the Council.

[334] The majority decision to refuse the application is a disproportionate response to the extremely unlikely risk that an additional marine farm in Beatrix Bay may contribute to a decline in the King Shag population in the Marlborough Sounds. In my view, the proposal represents an appropriate development in the coastal marine area.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

J R Jackson
Environment Judge

J R Mills
Environment Commissioner

I Buchanan
Environment Commissioner

Jacksoj\Jud_Rule\d\Davidson Family Trust v Marlborough DC