BEFORE THE EPA
CHATHAM ROCK PHOSPHATE MARINE CONSENT APPLICATION

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

AND

IN THE MATTER of a decision-making committee appointed to consider a marine consent application made by Chatham Rock Phosphate Limited to undertake rock phosphate extraction on the Chatham Rise

CASEBOOK FOR CHATHAM ROCK PHOSPHATE LIMITED

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TAB 1

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill – Explanatory Note
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill

Explanatory note

General policy statement

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill sets up an environmental management regime for New Zealand's Exclusive Economic Zone (EEZ) and continental shelf. The EEZ Bill fills gaps in the environmental management regime in the EEZ; existing laws such as the Fisheries Act 1996 and Maritime Transport Act 1994 will continue to operate largely as at present. Activities covered by the Bill include seabed mining, some aspects of petroleum activities, energy generation, carbon capture and storage, and marine farming.

The Bill gives effect to New Zealand's obligations under the United Nations Convention on the Law of the Sea to manage and protect the natural resources of the EEZ. The EEZ is the area of sea, seabed, and subsoil from 12 to 200 nautical miles offshore over which New Zealand has jurisdiction. The continental shelf is the seabed and subsoil of New Zealand's submerged landmass from the territorial limits of New Zealand and in some places extending beyond the EEZ. New Zealand has exclusive sovereign rights for the purpose of exploring the continental shelf and managing, conserving, and exploiting its natural resources. These resources are limited to those found on or under the seabed.

The Bill aims to achieve a balance between the protection of the environment and economic development. It also includes a general duty for adverse effects to be avoided, remedied, or mitigated. The Bill recognises that some adverse effects are avoided, remedied, or mitigated under other legislation.

The Bill sets up the general framework for the regulatory system, but the specific controls and standards will be set out in subsequent regulations. When regulations are developed, or consent decisions are made, decision-makers will be required to consider a number of matters relating to the purpose and principles of the legislation.

The Bill sets up a consent regime to regulate activities. Activities will be classified as permitted, discretionary, or prohibited by regulations. For discretionary activities, persons will need to apply for a marine consent. An impact assessment will form the basis of an application and will allow the Environmental Protection Authority (EPA) to assess the effects on the environment and existing interests. The EPA will be the decision-maker for all marine consents.

Regulatory impact statement

The Ministry for the Environment produced a regulatory impact statement on 20 April 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill. A copy of this regulatory impact statement can be found at:

Clause by clause analysis

Clause 1 states the Title.

Clause 2 is the commencement clause. The Act comes into force on 1 or more dates appointed by Order in Council. However, any provisions not brought into force by 1 July 2013 come into force on that date. The Ministry for the Environment advises that commencement by Order in Council is desirable because regulations will need to be developed before the Act will be effective. The Ministry plans to
produce a discussion paper as the basis for consultation on the proposals and anticipates regulations could be made and the Act brought into force by the end of 2012.

**Part 1**

**Preliminary provisions**

Subpart 1—Outline, definitions, and application

Clause 3 is an outline provision and indicates the scope and purpose of the Bill. Clauses 4 to 7 define terms used in the Bill. Clause 4 is the general interpretation clause. Clause 5 provides that a reference to a person includes a reference to the person’s successor. Clause 6 defines effect and clause 7 defines marine management regime.

Clause 8 provides that the Act binds the Crown, except as provided in that clause and clause 9, which provides for the application of the Act to the ships and aircraft of the New Zealand Defence Force and foreign States.

Subpart 2—Purpose and principles

Clause 10 states the purpose of the Bill. Clause 11 requires the Act to be interpreted, and all persons who perform functions and duties under it to act, in a manner that is consistent with New Zealand’s international obligations under the United Nations Convention on the Law of the Sea.

Clause 12 sets out matters that decision-makers must take into account to achieve the purpose.

Clause 13 requires decision-makers to take a cautious approach to the lack, or inadequacy, of information and to consider whether an adaptive management approach would allow an activity to be undertaken.

Clause 14 indicates how the Bill provides for the Crown’s responsibility to take appropriate account of the Treaty of Waitangi.

Subpart 3—Duties and restrictions

Clause 15 restricts certain activities in relation to the EEZ and continental shelf. The restricted activities may be authorised by regulations or a marine consent.

Clause 16 allows existing mining activities to continue if they are authorised by a permit under the Crown Minerals Act 1991 or a licence under the Continental Shelf Act 1964 granted before 1 July 2011, or if they were authorised by a mining privilege to which section 107 of the Crown Minerals Act 1991 applies.

Clause 17 allows certain activities to continue for 6 months after the regulations affecting them change to require the activities to be authorised by a marine consent. During the 6 months, the persons undertaking the activities may apply for new consents. If a person applies for a new consent during the 6 months, the person may continue with the activities for as long as needed to get a final decision on the application.

Clause 18 allows certain activities to continue for a limited period after regulations are made that prohibit the activities. If the activity was authorised by a consent, it may continue for the duration of the consent. If the activity did not require a consent, it may continue for a period specified in the regulations.

Clause 19 imposes duties on persons operating in the EEZ or on the continental shelf—

- to avoid, remedy, or mitigate the adverse effects of their activities on the environment; and
- to train and supervise their employees and provide them with sufficient resources to ensure compliance with the Bill.

Clause 20 clarifies that compliance with the Bill does not relieve persons from their obligations under other legislation or rules of law and vice versa.

Subpart 4—Functions, duties, and powers

 Functions, duties, and powers

Clause 21 sets out the functions of the Environmental Protection Authority under the Bill. The EPA will decide applications for marine consents, and have monitoring, enforcement, and other functions.
Clause 22 provides that the Minister must not direct the EPA to give effect to a Government policy when the EPA is making decisions on applications for consents or making decisions in relation to objections, appeals, or enforcement.

Clause 23 provides that the EPA has all the powers that are reasonably necessary to carry out its functions.

Clause 24 restricts the EPA's power to delegate. It must not delegate the power to decide an application for consent under clause 61 except to a committee appointed under the Crown Entities Act 2004 or a board of inquiry appointed under the Resource Management Act 1991 to decide an application for resource consent where part of the activity is in the coastal marine area and part of it is in the EEZ or on the continental shelf.

Clause 25 requires the EPA to keep records and make information available to the public.

Maori Advisory Committee
Clause 26 provides for the functions under this Act of the Maori Advisory Committee appointed under the Environmental Protection Authority Act 2011.

Part 2
Requirements and consents
Subpart 1—Regulations

 Regulation of activities and environment of exclusive economic zone and continental shelf
Clause 27 empowers the making of regulations prescribing standards, methods, or requirements in relation to the EEZ or continental shelf for activities restricted by clause 15, the effects of those activities, or for the environment.

Clause 28 provides that regulations made under clause 27 may identify and provide for areas of the EEZ or continental shelf that have features that require a location-specific approach. This may include closing an area of the EEZ or continental shelf.

Clause 29 provides that regulations made under clause 27 may classify activities as permitted, discretionary (allowed with a marine consent), or prohibited. Regulations may not classify an activity as permitted if the Minister considers that the activity has or is likely to have significant adverse effects on the environment or existing activities and it is more appropriate to address the effects in relation to an application for a marine consent.

Regulations generally
Clause 30 empowers the making of regulations relating to the following:
- the provision of information and keeping of records;
- forms relating to enforcement orders and the appointment of enforcement officers;
- charges to recover costs;
- other matters.

Provisions applying to all regulations
Clause 31 provides that regulations may apply to all or any part of the EEZ and continental shelf, and any or all activities restricted by clause 15 and resources in the EEZ or on the continental shelf.

Clause 32 sets out a consultation process for the making of regulations under clause 27 or 30. However, the process is not mandatory for minor amendments and corrections.

Clause 33 sets out the matters the Minister must considering in developing regulations. The Minister must—
- give the matters in subpart 2 of Part 1 the consideration required by the different provisions of that subpart;
- have regard to matters that include—
  - the potential adverse effects of activities on the environment and existing interests;
  - existing interests in and around the area being regulated;
  - the cumulative adverse effects on the environment of all activities undertaken in an area of the EEZ or continental shelf, including activities not regulated under the Bill.

Clause 34 provides that a regulation must not classify an activity as permitted or discretionary in relation to a particular area if the Minister considers that such status would be contrary to the purpose
of a prohibition or restriction on the use of the area under another marine management regime. 

Clause 35 provides that a marine consent may be more stringent than a regulation, but not more lenient. An existing consent will prevail over a regulation made later until the consent is reviewed. However, if the regulation prohibits the activity authorised by the consent, clause 18 applies and the activity may continue for the duration of the consent.

Types of activity

Clause 36 provides that a permitted activity is one described as such in regulations and a person may undertake a permitted activity without a consent provided that the activity complies with any terms and conditions specified in the regulations. A person intending to undertake a permitted activity must first notify the EPA if regulations require.

Clause 37 provides that a discretionary activity is one described as such by regulations or allowed with a marine consent. If an activity is not classified by regulations, it is a discretionary activity.

Clause 38 provides that a prohibited activity is one described as such by regulations. No application for a marine consent can be made or granted for a prohibited activity.

Subpart 2—Marine consents

This subpart establishes a regime for activities to be undertaken in the EEZ and on the continental shelf. There are only 3 categories of activity: permitted, discretionary, and prohibited. Marine consents are required for discretionary activities and all applications for consents must be publicly notified. Any person may make a submission. There may be a hearing if requested by the applicant for consent or a submitter. The EPA may grant or refuse a consent, and if a consent is granted, the EPA may impose conditions, including a requirement for a bond or the appointment of an observer.

Consent conditions may be reviewed and amended or cancelled and consents may be cancelled in some circumstances. The duration of a consent may also be reviewed and extended provided, it does not exceed 35 years in total.

Clause 39 allows a person to apply for a marine consent for a discretionary activity. The application must be in the prescribed form (which may be prescribed by regulations or approved by the EPA), fully describe the proposal, and include an impact assessment and any other information required by regulations.

Clause 40 sets out the requirements for the impact assessment. The impact assessment must:

- describe the activity;
- describe the current state of the area where the activity may be undertaken and the local environment of the area;
- identify the effects of the activity on the environment and existing interests wherever those effects occur;
- identify the persons whose existing interests are likely to be adversely affected;
- describe any consultation undertaken with those persons;
- include copies of any written approvals to the activity from persons whose interests are affected;
- specify any alternative locations for, or methods for undertaking, the activity that could avoid, remedy, or mitigate the adverse effects of the activity;
- specify the measures that the applicant intends to take to avoid, remedy, or mitigate the adverse effects of the activity.

The level of detail of the information to be included in the impact assessment must reflect the scale and significance of the effects that the activity may have on the environment and existing interests and be sufficient to enable the EPA and persons whose existing interests may be affected to understand the nature of the activity and its effects. The applicant need only make reasonable efforts in the circumstances to identify the activity may have on the environment and existing interests and be sufficient to enable the EPA and persons whose existing interests are likely to be affected.

Clause 41 imposes an obligation on the EPA to deal with applications promptly.

Clause 42 allows the EPA to return an application within 10 days of receiving it if the EPA considers that it is incomplete in that it does not include an adequate impact assessment or any information required by the Bill. If the applicant sends the application to the EPA again, it is treated as a new application.
Clause 43 allows the EPA to request further information concerning an application from the applicant. The EPA must provide a copy of any information provided to every submitter.

Clause 44 provides that an applicant who receives a request for further information may provide the information, agree to provide the information at a later date, or refuse to provide the information. If the applicant agrees to provide the information, the EPA must set a time within which the information must be provided. If the applicant does not provide the information or does not respond to the request, the EPA must still consider the application under clause 59.

Clause 45 allows the EPA to commission a report relating to the application or the activity or an independent review of the impact assessment. The EPA may also seek advice from the Maori Advisory Committee or any person in relation to the application or the activity. The report and advice must be made available to the applicant and submitters.

Clause 46 requires the EPA to give public notice of an application for consent and serve a copy of the notice on:
- Ministers with relevant responsibilities:
- Maritime New Zealand:
- iwi authorities, customary marine title groups, and protected customary rights groups that may be affected by the application:
- persons with existing interests that may be affected:
- regional councils whose regions may be affected.

Submissions

Clause 47 allows any person to make a submission.

Clause 48 requires submissions to be made no later than 20 working days after public notification of the application.

Clause 49 requires the EPA to give the applicant a list of submissions it has received.

Clause 50 allows the EPA to invite the applicant and submitters to discuss matters in dispute or to enter into mediation.

Clauses 51, 52, and 53 allow the EPA to conduct hearings if it wishes, but must conduct a hearing if requested to do so by the applicant or a submitter.

Clause 54 provides for the hearing date, notice of the hearing, and the location.

Clause 55 specifies provisions of the Commissions of Inquiry Act 1908 that apply to hearings.

Clauses 56, 57, and 58 allow the EPA to make directions relating to the provision of briefs of evidence, the order of business at the hearing, the recording and presentation of evidence, and the striking out of submissions.

Decisions

Clause 59 sets out the matters that the EPA must consider in deciding an application for a marine consent. The EPA must:
- give the matters in subpart 2 of Part 1 the consideration required by the different provisions of that subpart:
- have regard to matters that include:
  - submissions, evidence, advice, reports, and information it has received in relation to the application:
  - the adverse effects of an activity on the environment and existing interests:
  - best practice in relation to the industry or activity involved:
  - in relation to an application for a replacement consent, the value of the applicant's investment in the activity.

The EPA must not consider trade competition or the effects of trade competition, the effects on climate change of discharging greenhouse
Nature of consent

Clause 70 provides that a consent is neither real nor personal property and provides for its vesting following the death or bankruptcy of the consent holder (if the holder is a natural person). A consent must be treated as property for the purposes of the Protection of Personal and Property Rights Act 1988 and as personal property for the purposes of the Personal Property Securities Act 1999.

Duration of consent

Clause 71 provides that a consent may have a term of 35 years or less. In deciding what the appropriate term should be, the EPA must consider the matters in subpart 2 of Part 1 and take into account the duration of any other legislative authorisations granted or required for the activity.

Clause 72 allows the holder of a consent that expires to continue the activity authorised by the activity if the holder had applied for a new consent for the activity at least 6 months before the expiry of the original consent. If the application for a new consent is made between 6 and 3 months before the expiry of the original consent, the EPA may allow the consent holder to continue the activity. If the holder of the consent is allowed to continue the activity after the expiry of the original consent, the holder may do so until the application for the new consent is finally decided.

Transfer of marine consent

Clause 73 allows the holder of a consent to transfer it to another person but not to another location. Written notice of the transfer must be given to the EPA before the transfer takes effect.

Review of duration and conditions of consent

Clause 74 provides that the EPA may review the duration or conditions of a consent—

- if the consent provides for review to deal with adverse effects on the environment that may arise from the exercise of the consent that are better dealt with later, or for any other purpose;
- to ensure that conditions are consistent with standards that are prescribed:
- to deal with unanticipated adverse effects on the environment or existing interests:
- if the applicant provided materially inaccurate information to the EPA as part of the application and the effects of the exercise of the consent are such that more appropriate conditions are required:
- if new information becomes available to the EPA that shows more appropriate conditions are required.

The EPA must review a consent if required by an enforcement order made by the Environment Court.

Clause 75 specifies the information that must be in a notice of review. Clause 76 requires public notice of a review and individual notice to be served on specified people.

Clause 77 applies clauses 43 to 58 to a review of a consent. The clauses provide for the EPA to request further information, obtain advice and commission reports, to call for and receive submissions, and to conduct hearings. Clause 45(1)(a) does not apply because it relates to the commissioning of a review of the impact assessment included in an application for consent and there is no equivalent document in this context.

Clause 78 specifies the matters to be considered in reviewing the conditions of a consent. These are the same matters that must be considered in relation to an application for a consent but, in addition, the EPA must consider whether the activity authorised by the consent will continue to be viable after the conditions are changed and any reasons a court provided for making an order requiring a review. The EPA may consider the manner in which the activity authorised by the consent has been undertaken.

Clause 79 provides that following a review, the EPA may change or cancel a condition of a consent only if 1 or more of the circumstances in clause 74 apply. The provisions of the Bill that relate to the imposition of conditions on a consent, decisions, notification, commencement of the consent, and appeals apply to the review as if it were an application for a consent and the consent holder were the applicant for the consent. The EPA may cancel a consent if—
- the review was initiated because the information provided by the applicant for the consent contained material inaccuracies influencing the decision to grant the consent and there are significant adverse effects resulting from the exercise of the consent:
- the review was required by an enforcement order made by the Environment Court following the conviction of a person for an offence relating to breach of a consent and there are significant adverse effects resulting from the exercise of the consent.

Clause 80 provides that following a review of a consent, the EPA may shorten the duration of a consent only if the effects of the activity authorised by it were not anticipated when the consent was granted and shortening the consent is the only way to avoid, remedy, or mitigate the effects appropriately. The EPA may extend the duration of a consent only if monitoring of the activity shows that the effects are minor or may be adequately addressed imposing by conditions. However, the duration may not be extended so that the term is longer than 35 years.

Clause 81 provides for minor changes to consent conditions to be made without notifying the consent holder, although the EPA must allow the consent holder to make a submission.

Clause 82 allows the EPA to amend a consent within 15 working days after it is granted to correct minor mistakes or defects.

Cancellation of marine consents
Clause 83 provides that a consent lapses on a date specified in the consent or, if no date is specified, 5 years after it commences if the consent is not given effect to during that period and the applicant does not apply to the EPA to extend the period before it expires.

Clause 84 allows the EPA, by notice to the consent holder, to cancel a consent if the consent has been exercised in the past but has not been exercised during the preceding 5 years. The consent holder may ask the EPA to revoke the notice within 3 months after it is served.

Clause 85 allows a consent holder to request the EPA to change or cancel consent conditions. The request is dealt with as if it were an application for a consent, although the EPA has discretion to dispense with notification, notify only persons the EPA considers may be affected, or deal with the request under clause 81 (minor changes).
Subpart 3—Marine consents for cross-boundary activities

Clause 86 defines terms used in this subpart, including cross-boundary activity, which is an activity carried out in both the coastal marine area and the EEZ or continental shelf, and joint application for consent, which is an application that comprises both an application for a resource consent under the Resource Management Act 1991 (the RMA) and an application for a marine consent. Clause 87 provides that subpart 3 applies to a proposal to undertake a cross-boundary activity that requires both a resource consent and a marine consent. Subpart 3 does not apply if the part of the activity that is to be undertaken in the coastal marine area is a restricted coastal activity under the RMA.

The EPA may decide whether joint or separate applications for consent required

Clause 88 allows a person intending to undertake a cross-boundary activity to make a joint application for consent or separate applications for a resource consent and a marine consent. Clause 89 requires a joint application for consent to be sent to both the relevant consent authority under the RMA and the EPA. The assessment of effects included in the application must comply with both the RMA and clause 40. The applicant may specify that the part of the joint application that is the application for a resource consent to be dealt with as a matter of national significance. If the resource consent is called in by the Minister or the Minister of Conservation and referred to a board of inquiry under the RMA, clauses 97 and 98 apply to the joint application.

The RMA time periods for processing applications for consent may not be the same as the time periods under this Bill and allows the EPA to extend time periods so that the applications can be jointly notified, submissions on the applications close on the same date, and the applications are heard at the same time and place. Clause 95 requires the EPA to provide a board of inquiry that will hear and decide an application for a marine consent with the application, submissions received, and all other information the EPA has received that relates to the application or the activity. The EPA must also prepare or commission a report on the key issues relating to the processing of the joint application.

Nationally significant cross-boundary activities

Clause 97 provides that the EPA may delegate its decision-making functions in relation to an application for a marine consent that is part of a joint application to the board of inquiry appointed under the RMA to hear and decide the application for a resource consent. If the EPA delegates these functions, the EPA will administer the process under the provisions of the RMA that apply when a board of inquiry is to decide an application.
application and the activity and provide it to the board, the relevant consent authority, the applicant, and the submitters.

Part 3
Objections, appeals, and enforcement

Subpart 1—Objections and appeals

Objections

Clause 99 provides for a right of objection in relation to certain decisions of the EPA. The applicant for a marine consent may object if the EPA returns an application as incomplete, decides to commission a review of the impact assessment or a report, or decides to seek advice. A submitter may object if the EPA strikes out its submission or a part of its submission. A consent holder may object to a decision made by the EPA following a review of the consent, or its conditions or duration.

Clause 100 sets out the procedure for making an objection.

Clause 101 provides for the EPA to uphold or dismiss an objection and to send a copy of the decision to the person who made the objection, or any other person it considers appropriate no later than 5 working days after making the decision.

Clause 102 allows the person who made an objection and who is dissatisfied with the EPA’s decision on the objection to appeal to the High Court on a question of law.

Appeal to High Court on question of law

Clause 103 provides for appeals against decisions of the EPA on applications for consent and reviews of consents to be made to the High Court on questions of law only.

Clause 104 sets out the requirements for a notice of appeal.

Clause 105 requires the applicant or consent holder and any submitters who wish to appear to give notice of intention to appear to the appellant, the Registrar of the High Court, and the EPA within 10 working days of the person being served with the notice of appeal.

Clauses 106 and 107 deal with the parties to an appeal. Clause 106 provides that the parties are the appellant, the EPA, a person who gives notice of intention to appear under clause 105, and a person who becomes a party under clause 107. Clause 107 allows the following persons to be a party to proceedings by giving notice to the High Court and other parties:

- the Attorney-General, representing a relevant aspect of the public interest;
- the relevant consent authority in relation to proceedings affecting a cross-boundary activity.

Clause 108 allows the High Court to dismiss an appeal if the appellant does not proceed with the appeal with due diligence and another party applies to have the appeal dismissed or the appellant does not appear at the hearing.

Clause 109 requires the Registrar of the High Court to arrange a hearing date as soon as practicable after being notified that the notice of appeal has been served on all parties.

Clause 110 applies the High Court Rules to an appeal if a procedural matter is not provided for by clauses 103 to 109.

Appeal to Court of Appeal

Clause 111 provides for a further appeal to the Court of Appeal.

Subpart 2—Enforcement

Clause 112 provides that all proceedings in relation to enforcement orders are to be heard by an Environment Judge sitting alone or by the Environment Court. An Environment Judge or a District Court Judge who is also an Environment Judge may hear proceedings relating to an interim enforcement order. Prosecutions must be heard in the District Court by a Judge who is an Environment Judge. However, the Chief District Court Judge may direct that any of these proceedings may be heard by a District Court Judge who is not an Environment Court Judge.

Enforcement order

Clause 113 sets out the scope of an enforcement order. An order may only be made in relation to a contravention of the Bill, regulations, or a marine consent. It may—

- require a person to stop doing something or not to start doing something:
require a person to do something to ensure compliance with the Bill, regulations, or a consent or to avoid, remedy, or mitigate adverse effects that result from a breach of the Bill, regulations, or a consent;
• require a person to pay money to or reimburse another person for the actual and reasonable costs and expenses of taking reasonable measures to avoid, remedy, or mitigate the adverse effects resulting from the first person's failure to comply with another enforcement order, the Bill, regulations, or a marine consent;
• change or cancel a consent if the information the applicant for consent provided to the EPA contained inaccuracies relevant to the order that materially influenced the decision to grant the consent and the effects of the activity warrant different conditions or cancellation of the consent.

Clauses 114 to 116 deal with the making of an application for an enforcement order, service of notice of the application, and the right to be heard of the applicant for the order and the person against whom the order is sought. Only the EPA or an enforcement officer may apply for an order.

Clause 117 provides for the decision on an application for an enforcement order.

Clause 118 provides for the making of interim enforcement orders if the Judge considering an application for such an order considers there is an imminent risk of serious adverse effects resulting from a breach of the Bill, regulations, or a marine consent. The Judge may make an order without requiring service of the notice of application for the order and without holding a hearing.

Clause 119 provides for the person against whom an interim enforcement order is made to challenge the order.

Clause 120 requires the person against whom an enforcement order is made to comply with the order and to pay all costs of complying with the order. If the person does not comply and another person complies with the order, the second person may recover the costs from the first person.

Clause 121 allows the EPA, an enforcement officer, or the person against whom an enforcement order is made to apply to change or cancel an enforcement order.

Clause 122 provides that neither the EPA nor an enforcement officer may apply for an enforcement order in relation to actions of certain people under the Maritime Transport Act 1994 taken to deal with a hazardous ship, hazardous structure, or hazardous marine operation, or taken in response to an oil spill.

Clause 123 provides that sections 299 to 308 of the RMA apply to proceedings under the Bill in the Environment Court. These sections deal with appeals from decisions of the Environment Court to the High Court on questions of law, orders of the High Court, and further appeals to the Court of Appeal.

Offences and penalties

Clauses 124 and 125 specify offences and penalties for the offences. No offences attract a penalty of imprisonment. The maximum penalty for a breach of clause 15 or an enforcement order is $300,000 for a natural person and $600,000 for any other person. Continuing offences attract an additional maximum penalty of $10,000 per day or part of a day. Less serious offences attract a maximum penalty of $10,000 and $1,000 per day, and offences of obstruction or breach of a summons or order to give evidence are punishable by a maximum fine of $1,500. In addition to a monetary penalty, the court may make an enforcement order or an order requiring the EPA to review the relevant consent.

Clause 126 makes an offence in relation to clause 15 an offence of strict liability meaning that it is not necessary to prove that the defendant intended to commit the offence, and the defendant must prove the elements of the defence.

Clause 127 makes a person liable for an offence committed by another on the first person's behalf.

Clause 128 requires an information in relation to an offence to be laid by an enforcement officer within 6 months after the breach becomes known, or should have become known, to the officer. The period does not run if the defendant (being a natural person) is beyond the outer limits of the territorial sea.

Appointment and powers of enforcement officers

Clause 129 authorises the EPA to appoint enforcement officers.
Clause 130 requires enforcement officers to exercise their powers in accordance with their warrants of appointment and to keep the warrants and proof of identity with them and produce them if required. Clause 131 empowers an enforcement officer to require a person to give the officer information identifying the person if the officer believes the person is committing or has committed an offence. Clause 132 and the Schedule empower an enforcement officer to enter and inspect a place (other than a dwellinghouse or marae), vehicle, vessel, or structure for the purpose of checking compliance with the Bill, regulations, a consent, or an enforcement order. The inspection may be conducted in New Zealand territory, in the EEZ, or, in relation to a structure on the continental shelf, outside the EEZ. An enforcement officer may board and inspect a vessel in the waters beyond the EEZ but above the continental shelf but, if the vessel is a foreign vessel, the enforcement officer must first advise the Secretary of Foreign Affairs so that the Secretary may advise the flag State of the vessel.

Part 4
Miscellaneous, transitional provisions, and amendments to other Acts

Subpart 1—Miscellaneous

Protection of the Crown and others
Clause 133 provides that the Crown, the chief executive of the EPA, the EPA, and enforcement officers are not liable for any loss or damage caused or expense incurred as a result of a person lawfully carrying out functions and duties under the Bill.

Cost recovery
Clauses 134 to 138 require the EPA to recover its costs in performing its functions. Charges recovering the costs or a method for determining the charges may be prescribed by regulations. In determining the method and level of cost recovery, the Minister (who will recommend the making of the regulations) must have regard to the principles of equity, efficiency, justification, and transparency as those principles are expanded upon in clause 133.

Service of documents
Clauses 139 and 140 provide for the service of notices and other documents on persons. Service on a master of a ship who is a defendant in a prosecution may be achieved by personal delivery or registered letter to the ship's agent or served in accordance with section 24 of the Summary Proceedings Act 1957.

Incorporation by reference
Clauses 141 to 145 allow specified written material to be incorporated by reference into regulations. The material that may be specified is—
- standards, requirements, or recommended practices of international or national organisations;
- standards, requirements, or recommended practices of any country or jurisdiction;
- other material that the Minister considers is impractical or too large to include in or print as part of the regulations.

Protection of sensitive information
Clause 146 provides for the protection of information if necessary to avoid causing serious offence to tikanga Māori, disclosing the location of wāhi tapu, disclosing a trade secret, or causing unreasonable prejudice to the commercial position of the person who supplied the information.

Waivers and extension of time limits
Clause 147 allows the EPA to extend time periods or waive a failure to comply with a time period, or waive compliance with a requirement to provide information or a procedural requirement. Clause 149 provides that any extension of a time period may not exceed twice the maximum period specified unless the applicant requests or agrees to the extension. Before extending, or waiving compliance with, a time period, the EPA must take into account the interests of any person directly affected and of the community.
Subpart 2—Transitional provisions

Clauses 149 to 151 apply to activities being carried out when the Bill comes into force. An activity that becomes a discretionary activity may continue without a consent for 6 months longer and, if the person undertaking the activity applies for a marine consent during the 6 months, until the application is finally decided. An activity that becomes a prohibited activity may continue for a period prescribed in regulations.

Subpart 3—Amendments to other Acts

Clause 152 amends the Continental Shelf Act 1964 by repealing unused provisions that authorise the making of regulations—
- regulating the construction or use of structures on the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural resources;
- prohibiting the construction, placement, or use of structures on the continental shelf that could interfere with navigation;
- prescribing measures to be taken in safety zones around structures to protect the natural resources of the continental shelf and its waters from harmful agents;
- prescribing the notice to be given in relation to the construction and placement of structures;
- providing for the removal of structures that have been abandoned;
- prohibiting or restricting exploration and exploitation of natural resources if the exploration or exploitation could unjustifiably interfere with navigation, fishing, or conservation of living resources, or could interfere with national defence, research, or with submarine cables and pipelines.

TAB 2

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill – Regulatory Impact Statement
1. Background

The Exclusive Economic Zone and Extended Continental Shelf

This paper relates to both New Zealand’s Exclusive Economic Zone (EEZ) and extended continental shelf (ECS).

- The EEZ is the area of sea, seabed and subsoil from 12 to 200 nautical miles offshore (beginning at the edge of the territorial sea).
- The continental shelf is the seabed and the subsoil of a country’s submerged landmass. The extended continental shelf is where the continental shelf extends beyond the EEZ.

New Zealand’s EEZ and ECS are subject to international law, such as the United Nations Convention on the Law of the Seas (UNCLOS). UNCLOS grants New Zealand sovereign rights in the EEZ for the purposes of exploring and exploiting the living and non-living resources of the EEZ, as well as obligations relating to conserving and managing these resources. In the ECS these rights and obligations relate to the seabed and subsoil only.

Cabinet decisions

The previous Government proposed legislation to manage the environmental effects of activities currently unregulated in the EEZ and ECS. The proposal was agreed by Cabinet and drafting of the legislation commenced, but was not completed before the 2008 general election. The Bill was not introduced into Parliament.

The following decisions were made under the previous Government:

- In December 2006 Cabinet agreed to the development of a legislative option for an improved regulatory regime for environmental effects in the EEZ and ECS [CAB Min (06) 47/4B].
- In May 2007 Cabinet Economic Development Committee agreed to a consultation process involving the release of a discussion paper with proposals for EEZ and ECS legislation [CAB Min (07) 18/4]. Key stakeholders and iwi were consulted on the paper.
- In June 2008 Cabinet approved the policy for drafting of the EEZ and ECS legislation [CAS Min (08) 23/7]; further policy decisions were made in August 2008 [CAS Min (08) 30/3A].

The current proposal is to proceed with the previous Government’s proposed legislation, with some changes. The most notable changes proposed are:

- making the Environmental Protection Authority (EPA) responsible for decision-making and administration
- rebalancing the legislation to focus more strongly on the economic benefits of activities in the EEZ and ECS.

2. Status quo and problem definition

Status quo

Fishing and shipping are the predominant uses of the EEZ, however new activities will develop as technology advances and cost barriers diminish.

Regulatory regime

There is currently no overarching regime in place to assess and manage the environmental effects of activities carried out in the EEZ and ECS. Some controls have been imposed on a sector-by-sector basis in the EEZ, for example:

- Information about deep sea environments and resource opportunities in New Zealand’s EEZ and ECS is limited. This RIS relies on estimates of the likelihood of future activities in the EEZ and ECS, and the potential impacts of novel activities.
- There is uncertainty about the quantifiable benefits and costs of the options assessed in this RIS. Benefits of the proposals are largely environmental and reputational, and therefore difficult to compare to the monetary costs of implementation. Costs have been quantified as far as possible, but the actual costs will be highly dependent on the level of activity in the EEZ and ECS, which is uncertain.
- The total costs of the preferred option (for enabling legislation) are dependent on future decisions. Indicative costs per consent application have been estimated; however the likely number of applications is dependent on how activities are classified in subsequent regulations made under the legislation (ie, which activities will need consent). As noted above there is also uncertainty around the likely level of activity.
- Public consultation was undertaken in 2007 on options similar to those assessed in this RIS. There has been no consultation on the updated proposals, which have been updated to reflect the policies and priorities of the current Government. While the proposed changes are of medium impact, they are within the scope of the issues and feedback canvassed in previous consultation. However there are risks around the limited consultation that has taken place because stakeholders and the public have not had an opportunity to provide feedback on the details of the proposal.

Mark Sowden, Director Natural and Built Environment
The Fisheries Act 1996 provides for the management of fisheries, including the environmental impacts of fishing.

Marine pollution issues, such as discharges from ships and offshore installations, oil spills and dumping of waste such as dredged material, are covered by Marine Protection Rules under the Maritime Transport Act 1994.


Licences granted under the Continental Shelf Act 1994 can specify environmental obligations, although there is no guidance in this Act on how to do so.

Voluntary and non-enforceable guidelines exist for petroleum activities and seismic surveys.

Changes in uses of the EEZ and ECS

These controls have sufficed so far because they cover most of the activities occurring in the EEZ. However, as new technologies develop there is potential for changes in the use of the EEZ and ECS, and an increase in activities that are not currently regulated for their environmental effects.

Petroleum development is likely to be a growth area—a recent global petroleum survey ranked New Zealand the 18th most attractive jurisdiction out of the 133 jurisdictions surveyed. Under the current regulatory regime there are controls on discharges and spills from petroleum operations, but no mechanisms in place to assess the overall impacts of the operations from the outset. For example, the effects on specific locations of low-probability high-impact events such as oil spills are not formally considered under the status quo. There is also interest in gold placer deposits off the west coast of New Zealand, and seabed mineral resources including iron sands, precious metals and phosphates. Some mineral prospecting is already underway. Future activities, which are not regulated for their environmental effects, could include energy generation, aquaculture, carbon capture and storage, and biodiscovery.

Environmental pressure from these activities has been low in the past, due to a low level of activity in the EEZ and ECS.

Voluntary measures for environmental impact assessment

Some corrective processes in the EEZ have voluntarily undertaken environmental impact assessment measures, even though not required to do so by law. For example:

- In 2005 OMV, the Maari petroleum field developers, voluntarily prepared a comprehensive environmental impact assessment (EIA) in accordance with international best practice. However, there were no formal decision-making or governance arrangements in place for the government to assess the environmental impact assessment.

- In 2002, Neptune Resources was granted a licence under the Continental Shelf Act to prospect for minerals over several seamounts in the EEZ. There was no formal legislative process for consideration of the environmental effects of prospecting activities. The Continental Shelf Act enables the Minister of Energy to grant minerals licenses, but does not specify what, if any, environmental assessment is required on an application. The Ministry of Economic Development consulted with relevant departments to work out the best way forward. This was the most sensible process for good governance in the absence of any formal decision-making framework. The licence was granted approximately two years after application and included conditions agreed by government.

Problem definition

Current gaps

The current regulatory regime has significant gaps, including:

- assessing effects of activities (other than fishing) on seafloor habitats and biodiversity (e.g., the effects of seabed mining)
- assessing effects of activities (other than fishing) on biodiversity in the water column (e.g., effects of seismic surveys on marine life)
- assessing effects of new activities on existing interests (e.g., effects of a petroleum platform on fishing and shipping)
- managing the cumulative effects of all activities in the EEZ and ECS, as they are regulated under multiple regimes with variable ability to take other sorts of activities into account in decision-making.

These gaps are a problem for several reasons:

- There is potential for unregulated activities to cause environmental harm, impacting on marine life, habitats, and biodiversity. Due to the nature of the activities these effects could be severe—for example oil spills or destruction of significant benthic communities. Some examples of potential risks are set out below.

- There is a lack of certainty for industry on the regulatory processes that may affect their investment. There also is a reputational risk to companies wishing to undertake activities when they cannot demonstrate compliance with high environmental standards.

- There is no mechanism for ensuring public participation in decision-making around these activities. Due to the controversial nature of some of the activities—for example petroleum or iron sands exploration and extraction, New Zealanders are likely to want to contribute to the decision-making process.

- There is a reputational risk for New Zealand if we are perceived as not meeting our obligation to manage the EEZ and ECS under UNCLOS, or at the least aiming for high environmental standards. New Zealand is lagging behind other jurisdictions which have comprehensive environmental assessment processes in place for activities in their marine environments. The Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations, released by the Ministry of Economic Development in December 2010, noted that the four comparison countries discussed in the report (United Kingdom, Australia, Ireland, and Norway) had frameworks to assess environmental effects based on environmental impact assessments and public participation.

Examples of potential problems

Mining of hydrothermal vents

Two different companies have applied for or been granted licenses under the Continental Shelf Act to extract precious metal deposits from around seafloor hydrothermal vents in the Kermadec Arc. Hydrothermal vents are the submarine equivalent to geysers. They produce mineral resources such as seafloor massive sulphide deposits, and are home to unique ecosystems. Relative to the majority of the deep sea, the areas around submarine hydrothermal vents are biologically more productive, often hosting complex communities fuelled by the chemicals dissolved in the vent fluids. These rare and possibly unique biota also potentially have as-yet undiscovered high-value chemical compounds.

These ecosystems are reliant upon the continued existence of the hydrothermal vent field as the primary source of energy, which differs from most surface life which is based on solar
energy. Relatively little is known about the life forms that exist around hydrothermal vents, or their potential benefits to science. Under the status quo, with no formal mechanisms or guidance to assess the environmental impacts of a mining proposal, there is a risk that mining of seafloor massive sulphides may result in irreparable damage to these ecosystems.

**Seabed dredging**

Under the status quo a company may be granted a mining license under the Continental Shelf Act to extract seafloor mineral deposits. Any dredging operation would occupy the space for a considerable amount of time with dredging vessels. Mining could cause a significant amount of direct damage to the seafloor habitat and has the potential to create a large sediment plume, which may smother benthic habitats not directly being mined. There is no robust process under the Continental Shelf Act to assess and monitor these impacts, or to require changes to the activity should problems be found. There is also no consideration of the impact of dredging on existing benthic protected areas (BPA) (in which bottom trawling is banned) and areas of high value for fisheries.

**Location of petroleum drilling operation**

Another possible scenario is where Crown Minerals grants a petroleum prospecting permit in the Kermadec Arc. If a petroleum company proposed drilling of an exploration well close to the Kermadec Islands marine reserves, an oil spill from a rig would directly affect these marine reserves. Under the status quo the Continental Shelf Act does not require any consideration of the well’s location in relation to the environmental values protected in the Kermadecs. The rules of the marine reserves only prevent mining within their boundaries; there is no consideration of cross-boundary effects.

**Aquaculture development**

A final example is that of an aquaculture company which proposes a 500-hectare marine farm off Pegasus Bay in Christchurch. Half of the farm lies within the territorial sea and half in the EEZ. Within the territorial sea the applicant requires resource consent under the Resource Management Act. Over the EEZ boundary there is no legislative process to assess and consent the other half of the farm, which is built subject only to navigational and discharge controls under the Maritime Transport Act.

**Scale of risk**

Current indications suggest that New Zealand will not see a large number of new operations in the EEZ or ECS in the next ten years, as commercial and technical viability are barriers to developing resources. Indications from industry suggest that we can expect to see two oil and gas discoveries being fully exploited within the next ten years, as well as the development of up to three mining operations for seabed massive sulphides, phosphate nodules, and iron sands. Marine energy generation is likely to take longer to develop in the EEZ or ECS.

The development landscape is, however, changing quickly and there is the potential for activity levels to accelerate at relatively short notice. For example, proposals for ironsands and phosphate mining are relatively recent. The low projected level of activity in the EEZ and ECS means that there is not a high risk of environmental damage in the short term. To date, there have been no notable instances of the problems that are possible under the status quo. The key choice confronting government is the extent to which controls should be put in place now before the level of activity increases – and the limited consideration of other interests and increasing environmental risk becomes unacceptable.

There is a window of opportunity now to improve the environmental management regime before the need becomes more urgent. Delaying action until activity levels have increased carries a greater risk of environmental harm and would have a greater adverse impact on investment certainty.

**3. Objectives**

The objectives of the policy development are to ensure:

A. Processes are in place to assess and manage the adverse environmental effects of all activities in the EEZ and ECS, reducing the risk of environmental harm.

B. Greater certainty is provided to all parties, including industry and existing interests, on the process required to permit operations in the EEZ and ECS.

C. New Zealand acts within its rights and fulfills its obligations under relevant international law (such as UNCLOS).

D. The approach is cost-effective with the cost to government and users proportional to the problem being addressed.

**4. Regulatory impact analysis**

Four main approaches, each with many possible permutations, could be taken to address the problems. This RIS focuses only on the most feasible option relating to each of these broad approaches. For example, officials’ preferred option, to fill the gaps under the status quo, could be implemented in a number of different ways (creating new legislation, amending existing legislation, creating new regulations under existing legislation), but this RIS focuses on the option to create new legislation.

The four feasible options are:

1. **No legislative change – voluntary agreements and government guidance:** Government would work with industry to develop voluntary environmental operating procedures.

2. **Develop new legislation to fill the gaps in existing legislation in the EEZ and ECS:** New enabling legislation, which would use a rules and consents framework, would be developed to fill the existing legislative gaps in managing environmental effects in the EEZ and ECS; existing statutes governing the EEZ and ECS would remain in place.

3. **Extend the Resource Management Act (RMA) to the EEZ and ECS:** The RMA would be extended to cover the EEZ and ECS where it would coexist with other statutes such as the Fisheries Act.

4. **Develop an entirely new regime for managing all activities in the EEZ and ECS:** A single piece of legislation governing the environmental effects of all activities in the EEZ and ECS would be developed and existing statutes governing the EEZ and ECS would be reformed.
Option 1: No legislative change – voluntary agreements and government guidance

Under this option government would work with industries, not currently regulated for environmental effects, to develop further voluntary environmental operating procedures. For example, there are existing environmental best practice guidelines between government and some petroleum companies. Voluntary agreements would be based on international best practice.

Non-statutory guidance could also be developed for government departments on how to deal with activities in the EEZ or ECS.

Assessment against objectives

This option would be an improvement on the status quo, but would not effectively achieve the policy objectives.

<table>
<thead>
<tr>
<th>Objective</th>
<th>Meets objective</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A: Manage adverse environmental effects</td>
<td>✗</td>
<td>Depending on how this option was implemented, it may partially achieve this objective, however, it is considered that a non-enforceable approach would not adequately manage the adverse environmental effects of activities or reduce the risk of harm.</td>
</tr>
<tr>
<td>B: Provide greater certainty</td>
<td>✗</td>
<td>A voluntary approach would not give the requisite level of certainty that some industry stakeholders would like through legal consents for their activities. It would provide no certainty to existing interests on how their interests will be taken into account.</td>
</tr>
<tr>
<td>C: Meet international obligations</td>
<td>-</td>
<td>This would go some way to meeting New Zealand’s obligations under international law, though a voluntary approach may not be particularly robust.</td>
</tr>
<tr>
<td>D: Cost-effective</td>
<td>✓</td>
<td>This is a low cost approach relative to the size of the problem.</td>
</tr>
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</table>

Net benefits or costs

Given the low costs and low benefits, this option is likely to provide negligible benefits over the status quo.

Benefits

A voluntary approach has relatively low costs to government. It will create a clear framework for operators to assess effects in accordance with environmental best practice.

Costs

The costs to government will be relatively low.

Operators in the EEZ and ECS are likely to experience additional costs in complying with the guidelines. However, as voluntary guidelines would be aligned with international best practice, which many operators already follow, any additional costs would only be incurred by a small number of operators.

Risks

This option presents the risk of non-compliance by some operators. This may mean the system is not robust and not enforceable should problems arise. It also presents a reputational risk to government. However, these risks are present under the status quo.

Option 2: Develop new legislation to fill the gaps in existing legislation in the EEZ and ECS

This option would see the development of new legislation to fill the gaps within New Zealand’s UNCLOS obligations for managing environmental effects in the EEZ and ECS. Existing statutes, such as those governing fisheries and maritime transport, would remain in place in the EEZ.

As noted above, there are various alternative legislative mechanisms to achieve this option, ranging from new standalone legislation to substantial amendments to existing laws (for example the Continental Shelf or Maritime Transport Acts).

This is the option for new standalone legislation proposed in the associated Cabinet paper, and is the option preferred by officials. The Cabinet proposal is for gap-filling legislation. The associated Cabinet paper contains a high level of detail and provides a basis for drafting of legislation. As noted above, the current proposal is to proceed with the previous Government’s proposed legislation, with some changes.

Key elements of the proposal are summarised below:

- The proposal is for enabling legislation setting up a regulatory framework with the technical details set out in regulations. The details of the regulations would be determined through a separate process. Legislation would not take effect until the first set of regulations is passed.

- This option would establish a framework that is flexible to adapt to changing issues and technologies for operations in the EEZ and ECS. Activities in the EEZ and ECS will be regulated through a rules and consent framework. Regulations (rather than the primary legislation) will define effect thresholds for different categories of activity: permitted, discretionary and prohibited. Consents under this regime will be required for any discretionary activities. An applicant for consent would be required to prepare an impact assessment statement assessing the impact of a proposal on the environment and other interests. The required contents of an impact assessment statement will also be set through regulations.

- Low-impact activities will be permitted activities, and will not require consent if they comply with thresholds set in the regulations. Prohibited activities will not be allowed. The use of delegated legislation to classify activities, thresholds and standards is consistent with Legislation Advisory Committee (LAC) guidelines. However, this means that the overall costs cannot be determined at this stage as much depends on decisions made for the regulations (eg, the status of activities).

- The legislation would set up a general duty to avoid, remedy, or mitigate adverse environmental effects of activities in the EEZ and ECS, and require decision-makers to balance environmental and economic considerations. It would require consideration to be given to existing interests, environmental controls set through other statues, as well as setting up a process for public participation. It would establish information principles, for example requiring decision-makers to take into account the best available information.

- The particular details of this proposed approach to filling the gaps in the environmental management regime are based on key elements of international regimes and international best practice regarding environmental impact assessments. A summary of key elements of international regimes is included in Appendix 1.

One of the key changes since the 2008 proposal is the role of the EPA as decision-maker on consent applications. This change is likely to result in lower costs than the alternative of setting up a new function within the Ministry for the Environment (EEZ Commissioner).

This proposal also rebalances the previously proposed legislation to focus more strongly on the economic benefits of activities in the EEZ and ECS.
Assessment against objectives

This option would meet all policy objectives.

<table>
<thead>
<tr>
<th>Objective</th>
<th>Meets objective</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A: Manage adverse environmental effects</td>
<td>✓</td>
<td>By filling the legislative gaps relating to environmental effects in the EEZ and ECS, processes would be in place to assess and manage the adverse environmental effects of all activities in the EEZ, reducing the risk of environmental harm.</td>
</tr>
<tr>
<td>B: Provide greater certainty</td>
<td>✓</td>
<td>Filling the legislative gaps would give greater certainty to industry on the processes required to permit operations in the EEZ and ECS, meaning that operators would be able to demonstrate compliance. It would also provide certainty on the required process for other interests and the public.</td>
</tr>
<tr>
<td>C: Meet international obligations</td>
<td>✓</td>
<td>This option is consistent with UNCLOS.</td>
</tr>
<tr>
<td>D: Cost-effective</td>
<td>✓</td>
<td>The costs of this option are considered proportional to the size of the problem being addressed.</td>
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</table>

On balance, it is considered that the costs of this approach are warranted given the potential environmental risks associated with uncontrolled effects of development in the EEZ and ECS.

Net benefits or costs

This option would have net benefits relative to the status quo. The environmental benefits provided are expected to outweigh the costs associated with this option. As it is not possible to quantify the environmental benefits, it is not possible to determine the net benefits with any precision. However it can be asserted that this option would be an improvement on the status quo.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo. As this option would involve applying enforceable legislation to all activities, these benefits would be of a greater magnitude than those of option 1, and similar to those of options 3 and 4.

This option would also provide greater consistency with overseas approaches.

Costs

This option will incur only significant costs until regulations are made (aside from the costs involved in making the regulations). The total costs of this option will be dependent on the decisions made in the regulations; the regulations will impact on the number of consent applications and the costs of preparing and processing each of these. For example the regulations will determine which activities are classed as permitted, prohibited or restricted, the required contents of impact assessment statements accompanying applications. The regulations will be subject to a regulatory impact analysis.

As noted in the problem definition, there is also a high degree of uncertainty around the level of activity likely to occur in the EEZ and ECS. Despite these uncertainties, indicative costs per consents application have been estimated below. These estimates are based on recent information on costs of processing RMA resource consents and call-ins to the EPA, information from regional councils on the costs of processing resource consents for petroleum activities in the territorial sea, and a 2008 review of the Ministry for the Environment’s capability to take on functions under the then-proposed EEZ legislation.

Because there are greater synergies in the EPA carrying out these functions, the costs will be lower than those forecast for the Ministry for the Environment, and have been updated in this regulatory impact statement.

<table>
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<tr>
<th>Total potential costs to EPA</th>
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<tbody>
<tr>
<td>- Baseline costs (per annum): $250,000 (assuming up to 3 FTEs in EPA)</td>
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<tr>
<td>- Additional costs (per consent): up to a maximum of $470,000 non-cost recoverable, consisting of:</td>
<td></td>
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<tr>
<td>- Monitoring, information management, enforcement, legal expenses: up to $300,000.</td>
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<tr>
<td>- Appeals: up to $170,000.</td>
<td></td>
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<tr>
<td>- Consent process (cost recoverable): $40,000 - $500,000.</td>
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<table>
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<tr>
<th>Total potential costs to operator (per consent)</th>
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<tbody>
<tr>
<td>- $340,000 - $1,170,000, consisting of:</td>
<td></td>
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<tr>
<td>- Cost recovery of consent process: $40,000 - $500,000 (average cost projected $40,000 to $200,000).</td>
<td></td>
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<tr>
<td>- Preparation of application (for a large scale proposal): $300,000 - $500,000</td>
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<tr>
<td>- Appeals (assuming similar cost to EPA): up to $170,000 per appeal.</td>
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</tr>
<tr>
<td>- Costs associated with avoiding, remediating and mitigating adverse effects: not quantified, as it depends on the circumstances of the activities and the controls established by the EPA.</td>
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There is further detail on these potential costs below.

Baseline costs for the EPA

The EPA is likely to have a very uneven workload in relation to the proposed legislation – with a low forecast level of activity with potential long gaps (of years) between consents. Some kind of standing resource would still be required to liaise with industry, deal with lower-impact activities that don’t require consents, monitor compliance with the legislation and be prepared to deal quickly and efficiently with proposals.

The standing resource is estimated at up to three FTEs or approximately $250,000 per annum. There would be some synergies between this role and the EPA functions around consents called-in under the RMA, which potentially could reduce costs.

Aside from the baseline costs to the EPA, all other costs of this option are effectively user-pays as they are dependent on the occurrence of activity in the EEZ.

Consent processing costs

For comparison, regional council processing costs for a large offshore consent under the RMA could be expected to total approximately $100,000. The 2008 capability report estimated approx $270,000 per annum for two consents. Experience of call-ins to the EPA under the RMA reveals a wide range from approximately $4,000, and up to $500,000 for a high end, complicated and controversial proposal. Costs tend to scale to the number of consents required for a proposal and the degree of public interest and effects on other parties (for example the number of submissions to be processed and the length of hearings).

Due to the scale of the projects, it is not anticipated that an EEZ/ECS consent would attract the same costs as a high-end RMA call-in, and a likely range is therefore $40,000 to $200,000.
Cost to applicants of consultation and preparing application

The upper end cost to operators of preparing an impact assessment statement for a consent application for discretionary activities, and all associated processes, is likely to be between $300,000 and $500,000 depending on the scale of the activity. This is an indicative cost in relation to past experience with offshore petroleum platforms. Costs for lower impact activities such as seismic surveys would be much lower. It is hard to predict potential costs specifically around activities that have not yet been through an EIA process (e.g., seabed mining).

Marginal costs for some operators would be lower than the net figures above if they already voluntarily prepare EIAs.

Relative to the status quo, operators may also experience delays; however, the legislation will set statutory timeframes for decision-making.

Other costs

Other potential costs to the EPA include:

Monitoring, information, enforcement, legal expenses – up to $300,000 per year per consent (cost scales are considerably dependent on whether enforcement or court proceedings are required).

Appeals – approximately $170,000 per appeal.

Cost recovery

Cost recovery provisions are intended to operate in relation to the direct benefits to applicants of government expenditure – i.e., consent processing costs and monitoring costs. Costs to applicants would scale considerably according to the size/complexity and interest in the proposal. The EPA would not have power to recover costs for “business as usual” expenditure.

Risks

There is uncertainty on the nature of Maori rights and interests, and the application of the Treaty of Waitangi, in the EEZ or ECS. It is important that policy development creates mechanisms for engagement with Maori and recognition of the Treaty, and certainty for users on how these may affect their activities.

Under this option, the possibility that a consent may be declined does create a risk to operators that does not exist under the status quo (because there is no limited ability to stop an activity occurring).

Another risk under this option is that marine environmental regulation will remain poorly integrated across statutes with a discrepancy in the environmental controls in place. This risk can be mitigated through, as much as possible, coordinating implementation across statutes and agencies, although the underlying statutory issues will remain.

Option 3: Extend the Resource Management Act (RMA) to the EEZ and ECS

This option would see the RMA extended to cover the EEZ and ECS, and all associated processes, is likely to be between $300,000 and $500,000 depending on the scale of the activity. This is an indicative cost in relation to past experience with offshore petroleum platforms. Costs for lower impact activities such as seismic surveys would be much lower. It is hard to predict potential costs specifically around activities that have not yet been through an EIA process (e.g., seabed mining).

Marginal costs for some operators would be lower than the net figures above if they already voluntarily prepare EIAs.

Relative to the status quo, operators may also experience delays; however, the legislation will set statutory timeframes for decision-making.

Other costs

Other potential costs to the EPA include:

Monitoring, information, enforcement, legal expenses – up to $300,000 per year per consent (cost scales are considerably dependent on whether enforcement or court proceedings are required).

Appeals – approximately $170,000 per appeal.

Cost recovery

Cost recovery provisions are intended to operate in relation to the direct benefits to applicants of government expenditure – i.e., consent processing costs and monitoring costs. Costs to applicants would scale considerably according to the size/complexity and interest in the proposal. The EPA would not have power to recover costs for “business as usual” expenditure.

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Under this option, the possibility that a consent may be declined does create a risk to operators that does not exist under the status quo (because there is no limited ability to stop an activity occurring).

Another risk under this option is that marine environmental regulation will remain poorly integrated across statutes with a discrepancy in the environmental controls in place. This risk can be mitigated through, as much as possible, coordinating implementation across statutes and agencies, although the underlying statutory issues will remain.
Net benefits or costs

Like option 2, this option would have net benefits relative to the status quo. The environmental benefits provided are expected to out-weight the costs associated with this option; however these benefits cannot be quantified.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo.

It would have the additional benefit of providing integration across the boundary of the EEZ and the territorial sea.

Costs

The costs of this option, for example to the EPA and operators, are likely to be very similar to those of option 2. There is potential for additional costs under this option associated with appeals, as the RMA is characterised by high process and appeal costs and allows appeals on merits of decisions, in addition to points of law.

Option 4: Develop an entirely new regime for managing all activities in the EEZ and ECS

Under this option, existing statutes would be reformed to develop a single piece of legislation governing the environmental effects of all activities in the EEZ and ECS. In particular it would require changes to the fisheries and maritime transport legislation.

Assessment against objectives

This option would meet three policy objectives.

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<tr>
<th>Objective</th>
<th>Meets objective</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A: Manage adverse environmental effects</td>
<td>✓</td>
<td>The use of one overarching statute to cover the environmental effects of all activities in the EEZ and ECS would ensure processes are in place to assess and manage the adverse environmental effects of all activities in the EEZ and ECS, reducing the risk of environmental harm.</td>
</tr>
<tr>
<td>B: Provide greater certainty</td>
<td>✓</td>
<td>Certainty on process requirements would be provided to operators and interests in the EEZ.</td>
</tr>
<tr>
<td>C: Meet international obligations</td>
<td>✓</td>
<td>This option would be consistent with New Zealand’s rights and obligations under UNCLOS.</td>
</tr>
<tr>
<td>D: Cost-effective</td>
<td>X</td>
<td>The costs of this option would be disproportionate to the problem being addressed.</td>
</tr>
</tbody>
</table>

This approach would not be cost effective, as the costs would be disproportionate to the problems being addressed. The scale of this approach significantly out-weighs the problem to be addressed as it would impact on the (significantly larger) fishing industry.

Net benefits or costs

There is a high degree of uncertainty associated with the costs of this option, which means it is uncertain whether this option would have a net benefit, and if so, the magnitude of this benefit. What is certain is that the costs of this option would be higher than the costs of options 2 and 3 - and therefore the net benefit over the status quo, if any, would be smaller.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo. As this option would involve applying enforceable legislation to all activities, these benefits would be of a greater magnitude than those of option 1.

This would also provide the benefit of a consistent regulatory framework across the EEZ and ECS.

Costs

Reforming existing statutes and institutions to fit under one new regime would be costly and potentially time consuming. This option may be unable to be implemented fully without a significant increase in expenditure for marine planning, marine research and monitoring. It would also involve significant staff resources across a number of agencies and possibly the cost of independent expert advice. These high establishment costs would be unique to this option, as it would involve reforms to a number of statutes, therefore affecting a larger number of agencies (compared to options 2 and 3 for example).

As this option is not the preferred option, its costs have not been determined in detail. However, it is clear from preliminary analyses that the implementation costs of this option would be greater than those of options 2 and 3, whilst providing a similar level of benefit.
Compliance costs for operators also cannot be accurately estimated as they would depend on the design details of this option. However, all operators in the EEZ would experience compliance costs as follows.

- Operators of currently uncontrolled activities do not face any compliance costs under the status quo. Under this option, compliance costs to these operators would be similar to the costs of options 2 and 3.
- Operators subject to controls under the status quo, for example the fishing and shipping industries, would also face costs under this option. The costs to individual operators could be within a roughly similar range to those of options 2 and 3; however there may be additional costs associated with adjusting from current controls to the new regime. Additionally, the number of operators affected would be significantly greater given the size of these industries.

Risks
There are significant risks in reforming existing statutes when the problem is not with activities that are currently regulated, but activities that are not. Reforming existing statutes would not necessarily enhance the ability to deal with existing uses and/or associated problems; it may just shift the current institutional responsibilities. The option could detract focus from the key issue which is the lack of controls on some activities.

There is also a risk that this option would take a long time to implement. This could create unnecessarily short-term uncertainty for the fishing and shipping industries, and an interim regime may be necessary while this regime is developed.

5. Consultation
Public consultation was undertaken in 2007. The discussion document Improving Regulation of Environmental Effects in New Zealand's Exclusive Economic Zone was released for public submissions and workshops were held with key stakeholder groups. A Summary of Submissions was prepared following the consultation and is available on the Ministry for the Environment's website.

The discussion document proposed establishing new legislation to fill key gaps in the environmental regulation of New Zealand's EEZ and ECS, and promoted a consistent approach to environmental management across different statutes. The focus of the proposal was on the effects of activities not covered by existing statutes. The discussion document identified two broad options to address the policy issues. These options correlate to options 2 and 4 in this RIS.

Stakeholder groups who submitted on the discussion document included: fishing, petroleum, minerals, submarine cables/telecommunications, science/academic/research, environmental non-governmental organisations, local government, iwi, and individuals.

The proposals for EEZ legislation were generally well supported. Some key messages from consultation were:

- Environmental groups in general would prefer a more comprehensive review of marine environmental statutes (including fisheries legislation), but support any improvements to the management of marine environmental effects.
- Industry groups in general supported the legislation so long as any new controls are proportional to the issues and do not create an undue regulatory burden.

Following this public consultation on broad options, in 2008 Cabinet agreed the policy for drafting of legislation. While there was no further public consultation on the specific details of the proposed legislation, the decisions made by Cabinet were since released publicly. There is currently wide awareness among stakeholders of the details of the 2008 decisions.

There has been no further consultation on the updated proposals presented in the current Cabinet paper. Since the 2007 consultations there has been an increasing consensus amongst boh-industry and environmental groups that there is a need for this legislation. Since the 2007 consultations, the proposal has changed to reflect the policy of the current government. The main change has been the proposal that the EPA carry out decision-making under the legislation rather than an EEZ Commissioner within the Ministry for the Environment. Submissions on the recent Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations, commissioned by the Minister of Energy and Resources in June 2010, make it apparent that submitters are in favour of the EPA carrying out decision-making under the proposed legislation. While the proposed changes are of medium impact, they are within the scope of the issues and feedback canvassed in previous consultation.

The following agencies have been consulted on the development of the Cabinet paper and this RIS: Department of Conservation, Ministry of Fisheries, Ministry of Transport, Maritime New Zealand, Ministry of Economic Development, Te Puni Kōkiri, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Agriculture and Forestry, State Services Commission, Treasury, Ministry of Defence, Department of Internal Affairs, New Zealand Customs Service, Land Information New Zealand, Ministry for Culture and Heritage, Ministry of Research, Science and Technology. The Department of Prime Minister and Cabinet has been informed of the proposals.

6. Conclusions and recommendations
Option 1, a voluntary approach, has the lowest costs but limited benefits, and does not meet the policy objectives. Therefore option 1 is not being advanced.
Option 2, to develop new legislation to fill the gaps in existing legislation in the EEZ and ECS, meets all policy objectives and is officials' preferred option. It would put processes in place to assess and manage the adverse environmental effects of all activities in the EEZ, reducing the risk of environmental harm, and providing greater certainty to industry on the process required to permit operations in the EEZ and ECS. The approach is considered cost-effective with the cost to government and users proportional to the problem being addressed. It is also consistent with New Zealand’s rights and obligations under international law. While the level of activity in the EEZ and ECS in the short term is likely to be low, the types of activities that may occur carry high environmental risks. This approach will manage these risks.

Option 3, to extend the RMA into the EEZ and ECS, is inconsistent with New Zealand’s rights and obligations under UNCLOS. Major changes to the RMA would be required to make it compatible with international law and applicable to the EEZ. It is simpler and more efficient to write legislation tailor-made for the EEZ than to amend the RMA to fill.

Option 4, to develop an entirely new regime for managing all activities in the EEZ and ECS, would cost considerably more to government and industry compared with options 2 and 3, while providing a similar level of benefit. The higher costs associated with this option would be incurred through reforming existing statutes, rather than simply addressing the regulatory gaps. Reforming existing statutes (which regulate activities that are not part of the problem) would also create higher risks as it would be a greater level of intervention than is necessary to address the problem.

Option 2 is the preferred option outlined in the associated Cabinet paper. It is considered the only option that meets all of the policy objectives, and the implementation costs are warranted given the potential environmental risks associated with uncontrolled effects of development in the EEZ and ECS. Compared to options 3 and 4, this option would have lower costs to government and industry, while providing approximately the same level of benefit.

7. Implementation

The operational detail of the legislation will be set out in delegated legislation through regulations. This is considered an appropriate vehicle to guide implementation, because regulations will be easier to develop and change than primary legislation.

It is proposed that the legislation come into force through Order in Council when the first complete set of regulations have been developed under the legislation, otherwise there will be a period with no regulations against which to assess activities.

There will be a gap between passage of the legislation and “Day 1” for implementation of the new regime – during which the regulations will be developed. During this time the Ministry for the Environment and EPA will need to work together to develop appropriate capacity and business processes for implementation of the legislation.

There may be opportunities to delegate or contract functions from the EPA to other agencies or organisations if the functions would be more efficiently or effectively performed elsewhere. This may be a particular issue in the early years of the legislation if the workload is highly variable due to a low level of activity in the EEZ and ECS.

8. Monitoring, evaluation and review

As the responsible policy agency, the Ministry for the Environment will provide advice to government on the effectiveness of the regime. Key issues to be addressed under a monitoring, review and evaluation framework include:

- the extent to which the legislation can effectively be coordinated with other management statutes
- feedback of information into review of the policy statement and regulations to ensure they evolve over time as information improves
- evaluation of how the EPA and other management agencies can work efficiently together to reduce costs to government and compliance costs.

- improving information on the EEZ and ECS environment and potential resources
- improving information on the effects of new activities (eg, seabed mining)
- evaluation of compliance costs and the “user-friendliness” of the legislation
### Appendix 1: EEZ petroleum and seabed mining – International comparison of management

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<th>Country</th>
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<th>Public process</th>
<th>Cost recovery</th>
<th>Type of permission (eg, consent, licence)</th>
<th>Obligation to avoid, remedy, or mitigate adverse effects (or similar)</th>
<th>Protection for other interests</th>
<th>Precautionary approach</th>
<th>Overarching environmental assessment legislation or sector specific</th>
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<td><strong>Australia</strong></td>
<td>Yes: Where a project is deemed to be a &quot;controlled action&quot; with significant impacts on a national environmental matter, including commonwealth waters 3-200nm.</td>
<td>Yes: Public consulted in initial referral to determine if action is controlled in an EA; there is at least one period of public consultation.</td>
<td>No: Although the potential to recover costs was considered in the 2006 an independent statutory review of the legislation.</td>
<td>Approval.</td>
<td>Approval is conditional and can require protection, repair or mitigation of damage as well as establishing management and monitoring requirements, audit requirements, or acceptable outcomes.</td>
<td>No: Undue adverse effects test, action must not have significant impact on commonwealth marine environment (ecosystem approach may include fisheries).</td>
<td>Yes: Under s391 of the EPBC Act; precautionary principle is mandatory consideration for some decisions. s391 states &quot;the lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.&quot;</td>
<td>Overarching: The Environmental Protection and Biodiversity Conservation (EPBC) Act.</td>
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<td><strong>Canada</strong></td>
<td>Yes: Under the Canadian Environmental Assessment Act 1992 (CEAA).</td>
<td>Yes: Depending on the categorisation of the application. The decision-making body has discretion around whether consideration of projects which are not likely to have significant adverse effects are open for public participation.</td>
<td>No: Also some funding for participants.</td>
<td>Depends on the project. Decision-makers must complete an EA before doing anything that would permit a project to proceed. Certificate of completion once EA report finalised.</td>
<td>Yes: The decision-maker determines how adverse effects should be avoided or mitigated. But the decision-maker can approve projects which will have significant adverse effects if it believes they are justified in the circumstances.</td>
<td>No: Focus is on environmental effects. There is scope for public participation but it is unclear how decision-makers would balance interests.</td>
<td>Yes: Part of the purpose of the Act.</td>
<td>Overarching: The CEAA applies to all physical work or activities unless explicitly excluded under regulations.</td>
</tr>
<tr>
<td><strong>Norway</strong></td>
<td>Yes: Under the Pollution Control Act 1981.</td>
<td>Yes: Depending on categorisation of project.</td>
<td>Yes.</td>
<td>Yes: A permit is issued once the EIA has been completed.</td>
<td>Yes: The guidelines to application of the Act require avoidance of pollution and waste problems, and section 7 requires a project to avoid pollution. The decision-making body can apply conditions which prevent pollution, nuisance or damage.</td>
<td>Yes.</td>
<td>Not mentioned in the English summary of the Act.</td>
<td>Overarching: Pollution is widely defined. The legislation applies to all activities unless explicitly excluded, in all areas including the EEZ and continental shelf.</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td>Yes: Under series of regulations giving effect to EU directive on EIA, one for petroleum, another for seabed mining.</td>
<td>Yes: For petroleum the Department notifies application and public have 28 days to submit for seabed mining there is a 42-day public consultation process.</td>
<td>Yes: Cost recovery for marine licences but not for petroleum consents.</td>
<td>Consent.</td>
<td>For seabed mining it is up to an applicant to show in the environmental statement efforts to avoid, reduce and offset adverse effects. Decisions must take into account for petroleum Ministerial discretion as to what statement must show and what conditions apply.</td>
<td>No: However a high level of information is required in an environmental statement and any lack of knowledge must be identified. Further info can be requested if the info is not sufficient.</td>
<td>No: However, there are protections in other Acts which must take account of, eg, the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act prevent certain types of harm to species.</td>
<td>Sector specific regulations.</td>
</tr>
<tr>
<td><strong>United States</strong></td>
<td>Yes: In federal waters beyond 3sm, under the National Environmental Policy Act (NEPA). Three levels of activities with some not meeting threshold for EIS.</td>
<td>Yes: Scoping consultation for 45 days, draft EIS public consultation for 60 days. The final EIS is also published and 30 days allowed for comment.</td>
<td>No: Up to the federal department responsible. For Petroleum and other minerals there is no specifically cost recovery under NEPA.</td>
<td>There is no separate permission; an EIS is needed when applying for federal leases or production approval.</td>
<td>No obligation to act in a certain way. However the extent to which an effect can be avoided, remedied or mitigated must be considered and can be a condition of a lease or approval.</td>
<td>No: However, there are protections in other Acts which EIS must take account of, eg, the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act prevent certain types of harm to species.</td>
<td>No: However, a responsible department must take a &quot;hard look&quot; at all the effects including cumulative effects.</td>
<td>NEPA overarching.</td>
</tr>
</tbody>
</table>
TAB 3

Marine and Coastal Area (Takutai Moana) Act 2011 –
Part 3 Subpart 2
Marine and Coastal Area (Takutai Moana) Act 2011

Public Act 2011 No 3
Date of assent 31 March 2011
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Note
Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.
Note 4 at the end of this reprint provides a list of the amendments incorporated.
This Act is administered by the Ministry of Justice.
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Preamble

(1) In June 2003, the Court of Appeal held in Attorney-General v Ngāi Apa [2003] 3 NZLR 643 that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed. The Foreshore and Seabed Act 2004 (the 2004 Act) was enacted partly in response to the Court of Appeal’s decision:

(2) In its Report on the Crown’s Foreshore and Seabed Policy (Wai 1071), the Waitangi Tribunal found the policy undermining the 2004 Act in breach of the Treaty of Waitangi. The Tribunal raised questions as to whether the policy complied with the rule of law and the principles of fairness and non-discrimination against a particular group of people. Criticism was voiced against the discriminatory effect of the 2004 Act on whenau, hapu, and iwi by the United Nations.
(3) An applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish protected customary rights.

52 Scope and effect of protected customary rights

(1) A protected customary right may be exercised under a protected customary rights order or an agreement without a resource consent, despite any prohibition, restriction, or imposition that would otherwise apply in or under sections 12 to 17 of the Resource Management Act 1991.

(2) In exercising a protected customary right, a protected customary rights group is not liable for—
   (a) the payment of coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or
   (b) the payment of royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

(3) However, subsections (1) and (2) apply only if a protected customary right is exercised in accordance with—
   (a) tikanga; and
   (b) the requirements of this subpart; and
   (c) a protected customary rights order or an agreement that applies to the customary rights group; and
   (d) any controls imposed by the Minister of Conservation under section 57.

(4) A protected customary rights group may do any of the following:
   (a) delegate or transfer the rights conferred by a protected customary rights order or an agreement in accordance with tikanga;
   (b) derive a commercial benefit from exercising its protected customary rights, except in relation to the exercise of—
      (i) a non-commercial aquaculture activity; or
      (ii) a non-commercial fishery activity that is not a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1991;
protected customary rights area is lodged on or after the date that—
(a) a protected customary rights agreement comes into effect under section 96(1)(a); or
(b) a protected customary rights order is sealed in accordance with section 113.

(2) A consent authority must not grant a resource consent for an activity (including a controlled activity) to be carried out in a protected customary rights area if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a protected customary right, unless—
(a) the relevant protected customary rights group gives its written approval for the proposed activity; or
(b) the activity is one to which subsection (3) applies.

(3) The existence of a protected customary right does not limit or otherwise affect the grant of—
(a) a coastal permit under the Resource Management Act 1991 to permit existing aquaculture activities to continue to be carried out in a specified part of the common marine and coastal area,—
(i) regardless of when the application is lodged or whether there is any change in the species farmed or in the method of marine farming; and
(ii) provided that there is no increase in the area, or change to the location, of the coastal space occupied by the aquaculture activity for which the existing coastal permit was granted; or
(b) a resource consent under section 330A of the Resource Management Act 1991 for an emergency activity (within the meaning of section 63) undertaken in accordance with section 330 of that Act, as if the emergency activity were an emergency work to which section 330 applies; or
(c) a resource consent for an existing accommodated infrastructure (within the meaning of section 63) if any adverse effects of the proposed activity on the exercise of a protected customary right will be or are likely to be—
(i) the same or similar in character, intensity, and scale as those that existed before the application for the resource consent was lodged; or
(ii) if more than minor or temporary in nature; or
(d) a resource consent for a deemed accommodated activity (within the meaning of section 65(1)(b)(i)).

(4) In the case where a deemed accommodated activity within the meaning of section 65(1)(b)(i) applies, the consent authority must, when considering applications for a resource consent relating to that activity, have particular regard to the nature of the protected customary right.

(5) The provisions of Part 1 of Schedule 1 apply for the purposes of subsections (2) and (3).

Controls

56 Controls on exercise of protected customary rights

(1) If, at any time, the Minister of Conservation determines that the exercise of protected customary rights under a protected customary rights order or agreement has, or is likely to have, a significant adverse effect on the environment, the Minister may impose controls, including any terms, conditions, or restrictions that the Minister thinks fit, on the exercise of the rights.

(2) Any person may apply to the Minister of Conservation for controls to be imposed on the exercise of a protected customary right, stating the reasons for the application.

(3) If the Minister is satisfied that the application raises reasonable concerns that the exercise of a protected customary right has, or is likely to have, a significant adverse effect on the environment, the Minister must serve the notice, stating his or her intention to consider imposing controls, on—
(a) the protected customary rights group; and
(b) the local authorities that have statutory functions in the area where the protected customary right applies; and
(c) the person applying for controls to be imposed.

(4) If the Minister is not satisfied that an application under subsection (2) raises reasonable concerns that the exercise of a protected customary right has, or is likely to have, a significant
adverse effect on the environment, the Minister must advise the applicant accordingly, giving reasons for that decision.

(5) Part 2 of Schedule 1 applies to making a determination as to whether there is, or is likely to be, a significant adverse effect on the environment, for the purpose of imposing controls under this section.

57 Notification of controls

(1) The Minister of Conservation must notify in the Gazette any controls imposed under section 56.

(2) The notice must set out—
(a) the name and contact details of the relevant protected customary rights group; and
(b) a description of the extent of the protected customary rights area that is subject to the controls; and
(c) a description of the protected customary right that is subject to the controls; and
(d) a description of the controls, including any standards, terms, conditions, or restrictions, to be applied and the reasons for the controls; and
(e) the date on which the controls take effect (which must be as soon as is reasonably practicable after the date of the notice).

(3) The Minister of Conservation must, as soon as practicable after giving notice, provide a copy of the notice to—
(a) the protected customary rights group to which the notice applies; and
(b) the Minister of Māori Affairs; and
(c) the local authorities that have statutory functions in, or relating to, the protected customary rights area; and
(d) the chief executive.

(4) Controls take effect on the date stated in the Gazette notice.
TAB 4

*D R Sampson v Waikato Regional Council*
NZEnvC Auckland A178/2002, 2 September 2002
IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to section 120 of the Act

BETWEEN

DR SAMPSON & OTHERS

(RMA 741/99)

AND

WAIKATO REGIONAL COUNCIL

ASSET MANAGEMENT GROUP

(RMA 745/99)

Respondent

APPEARANCES

Mr N D Wright for Mr Sampson & others

Mr J M Milne for the respondent

Mr P M Lang for the applicant

DECISION

Introduction

This appeal is part of a continuing dispute between the Waikato Regional Council and a number of landowners who own land on the western bank of the Waikato River opposite Meremere. This land is generally referred to as the Mercer West properties. At the heart of the dispute is the appellants' request for the Council to construct a stopbank to reduce the flooding potential of the land, which lies within the flood plains of the Lower Waikato River.

The Lower Waikato/Waipa Control Scheme

[2] The Waikato River is New Zealand’s longest river (425km). It rises from its headwaters to the slopes of Mt Ruapehu and flows in a generally northern direction via Lake Taupo, to the sea at Port Waikato.

[3] The Lower Waikato River is that portion that extends from Ngarrawahia and its confluence with the Waipa River to the Waikato heads. Until it reaches Ngarrawahia the river is generally confined within a well-sized channel. The river then becomes wider and slower flowing and the floodplain is low and wide. In its natural state, the Lower Waikato floodplain was dominated by lakes and wetlands.

[4] Today much of this land has been drained and brought into agricultural production. Comprehensive management and drainage of the area followed the establishment of the Waikato Valley Authority in 1956. In the early 1960s a comprehensive river control scheme, designed to provide flood protection and drainage improvements within the floodplains of the Lower Waikato and Waipa Rivers, was developed.

[5] The flood scheme was commenced under a deed of arrangement signed by the former Waikato Valley Authority, the former constituent counties and drainage boards and the Crown. The function of the authority was to design the flood control scheme but it was the role of the constituent local authorities to undertake the construction works and rate their benefiting areas to fund the local share of the cost of the works. A major review of the scheme was undertaken in 1976 and 1977, at which time final decisions were made on those works to be included in the scheme and those to be deleted. The flood scheme primarily consists of stopbanks, pump stations, floodgates, and main river channel improvement works.
Physical components of the scheme

[5] Mr W M Mulholland, a registered engineer and manager of the Council's River and Drainage Technical Services Unit, described the scheme for us. Relevantly, for present purposes, the scheme comprises:

(i) stopbanks;
(ii) improvements to the main channel of the Waikato River, and
(iii) community works structures including floodgates and pump stations.

Stopbanks

[7] Stopbanks along parts of the Waikato River were constructed to prevent flooding of adjacent land, and at selected critical locations around the margins of the Whangamarino wetland, to enable adjacent land to be economically brought into production and to protect State Highway 1 and the Main Trunk Railway line from all but the most severe floods.

[8] Much of the land in the Mercer west area was originally earmarked for protection by the building of stopbanks but the plans carried the notation “dependent on local demand and further economic appraisal”. According to the evidence of Mr Sampson, it was subsequently deleted from the scheme in 1969. According to Mr Mulholland and the documents produced, the Mercer west area was deleted from the scheme for technical and possibly demand reasons. A memorandum dated September 1976 from Raglan County Council and produced by Mr Mulholland confirmed that the Mercer West area had been removed from the schedule.

Main channel works

[9] The scheme provides for river training works and channel improvements to increase the hydrological capacity of the channel. These include willow clearance, removal and future containment of shouldering, improvement of branch channel entrances, partial removal of islands, trimming of main and secondary channels, and improved alignment and widening of the river.

[10] More extensive channel training works, within the Mercer to Rangiriri reach, were included as part of the Tongariro offset works, with the object of offsetting the affect of the extra water diverted into the Waikato River from the Tongariro Power Development. Reliance was placed on sand abstraction to achieve the desired improvements from Meremere to Maioro Bay. The training works implemented between Maioro Bay and Rangariri, consisted of groynes construction to narrow the river in locations where it was wide, and trimming and removal of islands and obstructions where the channel was narrow to achieve desired channel widths.

Community works

[11] A feature of the Lower Waikato River catchment in its natural state was that large areas of flood storage were available in the form of lakes, swamps and flood plains. The effect of these storage areas was to significantly reduce peak flows in the river downstream of Huntly.

[12] The scheme provided for Lake Waikere and parts of the Whangamarino wetland to be retained for flood storage. To make the most effective use of this storage control, structures were constructed and diversions implemented. These included:

(i) The Rangiriri spillway - a low-level spillway at Rangiriri between the Waikato River and Lake Waikere to ensure the flows into Lake Waikere do not commence until flows in the Waikato River reach certain peak values. The spillway is designed to divert up to 15% of the design flow in the Waikato River in flood conditions.

(ii) The Te Onetea gate. The outlet from the Rangiriri Stream to the Waikato River is now blocked. The outlet from the Te Onetea Stream now passes beneath the Rangiriri spillway via a culvert, and flow through this culvert is controlled by a slide gate, the Te Onetea gate. Under normal conditions this gate is left open to allow the movement of eels and fish between the river and the lake. Because of the reduction in the level of Lake Waikere, direction of flow is normally from the river into the lake. In times of flood the gate is closed. This has the effect of causing the river level to rise.
(iii) The Waikere northern outlet gates provided a new outlet from Lake Waikere. Instead of discharging to the Waikato River at Rangiriri via the Te Onetea and Rangiriri Streams, the lake now discharges northwards and into the Whangamarino wetland via the Waikere northern outlet canal. Outflow from the lake into this canal is controlled by radial gates. This change enables the level of Lake Waikere to be lowered, thus creating more flood storage capacity, and improving drainage and flood control around the lake. Overflow from the lake to the Whangamarino wetland in times of flood is now prevented by a stopbank along the northern foreshore of the lake.

(iv) The Whangamarino gate. Backflow from the Waikato River at Mercer into the Wangamarino wetland is prevented by the Whangamarino control structure. This structure consists of twin radial gates situated on the Whangamarino River, immediately upstream of its confluence with the Waikato River. These gates normally remain fully open, but are closed during a flood, once backflow from the river to the wetland commences. The gates allow flood levels within the wetland to be held below those in the Waikato River. This allowed the design crest levels, for the scheme's various stopbanks protecting land around the edges of the Whangamarino wetland, to be lower than would otherwise have been the case. Reducing flood levels for these stopbanks was an important consideration, as the very poor foundation conditions upon which they were to be situated, limited the height to which they could be economically built. The effect of closing the gate is to cause the Waikato river level to rise.

The need for consents

[13] The various water takes, diversions and discharges associated with the control gates, were originally authorised by the Soil Conservation and Rivers Control Act and subsequently by section 21 of the Water and Soil Conservation Act 1967. Those authorisations were deemed to be water permits and discharge permits as appropriate, by virtue of section 386(1) of the Resource Management Act 1991. These transitional resource consents expired on 1 October 2001 by virtue of section 386(3). Accordingly applications for resource consents for water takes, diversions and discharges associated with the control gates were lodged before that date. The transitional provisions of the Resource Management Act, have enabled continued existence and operation of the scheme without consents.

[14] Relevantly, the applications for resource consents are in respect of:

(i) The Te Onetea control gate, which regulates flows between the Waikato River and the Te Onetea Stream which enters Lake Waikere;

(ii) The Lake Waikere control gate, which regulates flows between Lake Waikere and the Whangamarino wetland through the man-made Waikere canal; and

(iii) The Whangamarino control gate which regulates flows between the Waikato River and the Whangamarino River and wetland system.

[15] Resource consents, subject to conditions, were granted by the Waikato Regional Council subject to a number of conditions (RMA 745199). The Regional Council appealed seeking a change to some of the conditions. Agreement has been reached between the two sectors of the Regional Council. A memorandum from counsel and a draft consent order was filed at the commencement of the hearing. The draft consent order is attached as Appendix 1. Mr Sampson and others also appealed the Council's decision. They sought the decision to be either overturned and the consents refused, or alternatively, the imposition of a condition that the Council erect a stopbank adjacent to the Mercer west properties by way of mitigation. During the course of the hearing, that part of the relief which sought the refusal of the consent was abandoned. Accordingly, the only issue before us is whether a condition should be imposed, requiring the Regional Council to erect stopbanks adjacent to the Mercer west properties for mitigation purposes.

The appellants

[16] The appellants' case was spearheaded by Mr Sampson. He and his wife own a 70 hectare dairy farm, and lease another 50 hectares at Mercer west. Presently they milk 230 cows on their property, which is situated on the west bank of the Waikato River, upstream from Mercer, and approximately opposite, what was formerly, the Meremere Power Station.
Approximately half of the property is comprised of alluvial flats, which slope down and away from the river from a natural higher berm on the riverbank. The low point of the natural berm at "cross-section" 61.1 is RL 5.26 metres.

When the river level reaches RL 5.26 metres, water flows on to the property and floods the alluvial flats which are lower than RL 5.26 metres. Once flooded, natural drainage back to the river does not occur until the river level falls to around 3.7 metres.

When flooding occurs, drainage of the flats often takes around 4 to 5 weeks; long enough to kill the pasture. According to Mr Sampson their property flooded in July 1995, August 1996 and July 1998. He told us that he and his wife lost a total of $197,000 in the three floods, through the loss of production and costs. In addition, they are suffering significant ongoing losses due to the fact that they are operating their farm at far lower than optimum levels, in order to safeguard and/or mitigate against the potential impacts of flooding.

Mr Sampson explained to us in quite graphic terms the economic and social impacts that the flood damage has caused. Since the 1995 flood, five families have moved from the area. At times the financial and mental pressure becomes too much to bear he said.

It was the appellants' case that the existence and operation of the Te Onetio gate and the Whangamarino gate raised the flood levels at Mercer west by between 0.34 metres and 0.44 metres and that this represents a serious adverse effect. Hence the relief sought is for the Council to be required to undertake the construction of a stopbank.

We record here that consents for stopbanks have already been sought by the Council and were obtained in late 2000. The reason they have not been built, is because of a failure by the landowners at Mercer west and the Council to reach agreement as to how the costs are to be shared.

The "baseline"

The "baseline" has been authoritatively stated by the Court of Appeal in *Arrigato Investments Limited v Auckland Regional Council*:

...the permitted baseline...is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the section 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment. It is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought into account.

The question that has been raised by counsel in these proceedings is: what constitutes the existing environment? Mr Wright, for the appellants submitted that the existing environment includes the main channel works carried out as part of the scheme. They have had the effect of improving the hydraulics of the river. This in turn reduces the potential for flooding. While the main channel works are part of the scheme they are not, said Mr Wright, part of the application for resource consents. The resource consents relate only to the specified community structures. Accordingly, any adverse effect of those structures, must be measured against the existing environment which includes the main channel works.

The importance of Mr Wright's argument is highlighted by the uncontested facts in this case. It is accepted that the operation of the gates has the effect of increasing the river levels during flood conditions. This is because the operation of the gates reduces the ponding which would otherwise occur in Lake Waikere and the Whangamarino swamp and wetlands. The resulting effect is to increase the potential for the Mercer west land to flood. On the other hand, the main channel works improve the hydraulic capacity of the main channel, thus lowering the river level and reducing the potential for flooding. The Council maintain (although this is disputed) that the main channel works more than offset the rise in river level caused by the operation of the gates. There is thus a net benefit to the Mercer west land.

Mr Wright submitted that the main channel works, now form part of the environment and are not to be considered as mitigation for the future adverse effects of the activities, being sought by the application for resource consents. He said they cannot be considered to be the direct effects of exercising the resource consent, nor...
to be effects that would inevitably follow from the granting of consent. They are
effects which are independent of the activities authorised.

[27] Mr Lang submitted that while the main channel works may be part of the
existing environment, their positive effects should nevertheless be taken as a
mitigation measure adopted to mitigate the adverse effects arising from the operation
of the gates.

[28] In opening, Mr Lang submitted that the gates have always been operated as
part of an integrated scheme, designed so that the various scheme components
complement each other and work together to produce an overall benefit. The scheme
has already included, and continues to include, channel improvements and
maintenance works, to enable the river channel to accommodate the additional flows
caused by retention of water within the riverbanks. As a result of the combined
effects of the river channel works and the operation of the gates, water levels and
therefore flooding at Mercer west are reduced below those which would otherwise
occur if the scheme was not in place.

[29] In his closing, Mr Lang set out the basis for his opening submission. Generally, where the Court finds that the exercise of the consent will lead to adverse
effects on the environment, consideration must be given to methods of avoiding,
remediating or mitigating those effects, in order to comply with section 105. If
section 104(1)(a), which requires the Court to consider any adverse effects on the
environment, leads the Court to conclude that in this case, the proposed continuing
operation of the gates would lead to adverse effects, through increase in river water
levels, the Court is entitled to require appropriate and reasonable mitigation
measures.

[30] Mr Lang submitted, that where the effects of the activity have already been
mitigated by measures carried out in the past, with the intention of mitigating the
existing and future effects of the activity, and those mitigation measures are
continuing and are to be continued in the future, then the Court is entitled to
recognise that the mitigation already provided is intended to continue as mitigation
for future effects of the activity. This he said can be considered either under section
104(1)(a) or section 104(1)(i).

[31] Mr Lang further submitted, that the approach is particularly appropriate
where there is an ongoing commitment to monitoring to maintain the effectiveness of
those past works. He presented to the Court on behalf of the applicant, a proposed
additional condition that requires an ongoing commitment to monitoring. This is
attached as Appendix 2.

[32] We are conscious of the Court of Appeal’s obiter comment in Arrigato to the
effect that the identification of the relevant environment and relevant effects are
matters of fact to be assessed in each case, and not to be overlaid by refinements or
rules of law.

[33] We are also conscious of the distinction between land use consents, which
are granted in perpetuity, and water consents, which are granted for a defined term
and not necessarily renewed. In relation to the latter, the existing environment must
be determined as the environment that might exist if the existing activity, to which
the water consents relate, were discontinued.

[34] There is no suggestion, by any party, that in identifying the environment
there are any activities permitted as of right by a plan that should be taken into
account. For present purposes we find that the “existing environment” is the
Waikato River, its tributaries, streams, wetlands and the catchment configurations
that all contribute to the river’s hydrological and hydraulic components. This
includes the stopbanks and main channel works that have been completed under the
scheme. It does not include the community structures which are subject to the
consents under appeal.

[35] Mr Wright submitted that based on the evidence, we should also have regard
to likely changes to the existing environment over the 25-year term of the consent.
This would include such matters as aggregation of the riverbed. However, we find
that such changes as are likely can be accommodated for and met by the monitoring
condition (Appendix 2) which imposes standards, the breach of which, will trigger
appropriate mitigation action.
In considering effects on the existing environment, we agree with Mr Lang that we should balance any reduction in river level resulting from the main channel works against the rise in river level resulting from the operation of the gates during flood conditions. We so find because to do otherwise would:

(i) Arbitrarily and logically separate the various components of the scheme;

(ii) Separate the works out from part of the purpose they were intended to serve; the main channel works were carried out with the objective, in part, of mitigating the ongoing effects of other scheme components, including the operation of the gates and water management at the Whangamarino wetland.

(iii) Could result in over-mitigation of the effects caused by the operation of the gates.

**Factual issues**

Accordingly, the following factual issues need to be determined:

(i) The extent to which the operation of the gates (the activities requiring consent) affect river levels during flood conditions, and

(ii) The extent to which the main channel works cause reduction in river levels.

As to the first issue the parties appear to be in agreement that the consented activities are likely to have approximately the following effects on water levels at Mercer west:

(i) With the Whangamarino and Te Onetee gates closed, the proposed operation during flood events, the river level is 180mm higher than it would be with both gates open, in circumstances causing marginal flooding over the appellants’ land;

(ii) If the gates are closed the water level is between 240mm and 340mm higher than it would be if the Whangamarino gate was left open and the Te Onetee gate and culvert were not in place — ie the Te Onetee Stream was allowed to flow without any restriction by the culvert or the gate.

This leaves only the second issue. There appears to be no dispute about the degree of reduction in Waikato River water level as a result of channel works during the period 1960 – 1998. The river level has been reduced by about 1.5 metres at all flows. This was agreed to by expert evidence called by all parties, Mr J F Waugh for the Council and Mr M B Menzies for the appellants. It was particularly demonstrated by Mr Waugh’s figures 1-6 attached to his rebuttal evidence and which Mr Menzies accepted correctly plotted the updated data.3

The principal matter of difference is the extent of mitigation provided by the main channel works already undertaken and continued to be maintained. This primary factual issue requires a hydrological and hydraulic comparison between what exists now — ie the operation of the gates and main channel works — and the situation that would exist were those scheme components not presently in place. This can only be done by way of computer modelling.

**Computer modelling**

The hydrological and hydraulic functions of the Waikato River and catchment are complex. It is difficult to estimate precisely the hydrological response to different rain events. Many variables are involved. The preferred approach for obtaining estimates is to use numerical computer scenario models. Because of its complexity it is not surprising that a considerable part of the hearing time was devoted to this subject.

The modelling is intended to demonstrate the difference between the water levels that are produced in the Waikato River during flood events, with the river in its present state — ie with the scheme components in place (“post-scheme” situation) and the water levels that would be produced in the river if the scheme were not in place (“pre-scheme” situation).

To model the river levels under flood events without the scheme in place the model has been run with the river hydraulics as they were before the scheme was established. The present situation has been modelled on the basis of the existing...
river system with the scheme in place. The same hydrology was used in respect of each simulation.

Evidence of Dr Joynes

[44] The computer modelling was done by Dr S A Joynes, the Principal of Hydraulic Modelling Services Ltd. Dr Joynes has undertaken hydraulic modelling work for Environment Waikato over the past 3 years, the primary purpose of which was to determine the effect the operation of the Whangamarino control gate has on water levels in the Waikato River at Mercer West, during flood events. He contended that the model gave him the information necessary to compare the 'post-scheme' situation with the 'pre-scheme' situation.

[45] The model was set up to calculate flows and water levels from the Karapiro Dam to Port Waikato, as well as the lower reaches of the Waipa River down to Ngaruawahia. It was calibrated against measured flood events, to determine its accuracy, so that it then could be used to generate flows and water levels for designed 3-day rainfall events which are synthetically generated, based on the analysis of historical rainfall within the catchment. The model included all the main tributaries of the Waikato, including those of Lake Waikare and the Whangamarino wetland.

[46] An allowance for an additional 100m³/s was added to allow for diverted flow from the Tongariro Power Development (TPD). Dr Joynes noted, in his supplementary brief, that the TPD diversions are not the result of the control scheme, and would normally be excluded from the model. However, he recognised the importance that may be placed on the diversion and therefore included the allowance of 100m³/s. Dr Joynes factored the working model so that this level would never be exceeded, as the flood gates at the outlet of Lake Taupo are closed when the peak flow at Ngaruawahia reaches 850m³/s. There was later evidence given that this did not take into consideration the delay of the flood surge reaching downstream areas such as Mercer West.

[47] Two models were constructed: one for the pre-scheme period, and one for the post-scheme period, which included: the stopbanks, the community works, the main channel works, as well as other works associated with the scheme.

[48] As a result of discussions between Environment Waikato, and Mr Menzies, a hydrologist and the Principal of Water Resource Consulting Group, the model was upgraded from time to time such that the evidence presented was the result of the fourth refinement of the model, dated April 2002.

[49] The present model, according to Dr Joynes, is capable of predicting the peak flood levels at the two key points of Mercer and Ngaruawahia to within 215mm and 295mm respectively. He believes that to be an excellent level of accuracy and well within the 500mm free-board built into flood protection schemes.

[50] Dr Joynes and Mr Menzies together spent some time working on four real floods. These were the 1953 ('pre-scheme'), 1991, 1996 and 1998 (post-scheme) floods. These were said to have return periods of greater than 50, 8, 12 and greater than 50 years respectively. This was done to ensure that the model replicates real flood events. It also enabled the model to be calibrated to establish the hydrological and hydraulic parameters that could be applied to any rainfall event and ascertain its accuracy.

[51] Based on the calibrated model, a number of scenarios were analysed on various features of the scheme, and over a range of return periods, whether in relation to pre and post-scheme differences or on the impact of individual components of the scheme. These included:

(i) the post and pre-scheme flood level during the 1998 flood;
(ii) the post-scheme and pre-scheme comparison of low winter flows;
(iii) the post-scheme and pre-scheme comparison of river performance for designed storm events;
(iv) the post-scheme and pre-scheme comparison for flood duration during calibrated events;
(v) the post-scheme and pre-scheme comparison of flood level and duration impacts at cross section 61.1;
(vi) the water level profiles along the Meremere-Mercer reach.
The model's predictions were set out in graph form and explained by Dr Joynes. Dr Joynes made the following conclusions from the model's predictions:

(i) Gate open/gate closed comparison - from the graphs produced the impact of closing the Whangamarino and Te Črete gates on their own is to raise flood levels by about 220mm at cross section 61.1. This, said Dr Joynes, increases the flood risk from 20 years to 15 years. This takes no account of other changes in the channel;

(ii) Pre-scheme/post-scheme comparison - from the graphs produced the impact of the operation of the scheme has many benefits along the river for those it is meant to protect. At cross section 61.1 the reduction in flooding is in the range of 250mm to 500mm.

(iii) By interpretation of the results of the modeled scenarios Dr Joynes deduced that the risk of flooding at cross sections 61.1 has been reduced from 5 to 15 years.

(iv) Overall benefits of the scheme for Mercer West - there can be no doubt, according to Dr Joynes, that the closing of the Whangamarino and Te Črete gates raised an increase in flooding for the existing operation of the scheme. However, it is just as clear, in his opinion, that when the full scheme is considered there has been a net benefit to landowners in Mercer West. This he said quantifies as a flood level reduction of 500mm to 1000mm for major floods.

The relevance and importance of Dr Joynes' findings is that the raising of flood levels by about 220mm at cross section 61.6 is more than offset by the main channel works.

Appellants' criticism of the model

The robustness of the model is important. Mr Wright submitted that if "fundamental flaws" in the model and its analysis can be established, then the Council has not laid a proper foundation to establish that the main channel works do and will offset any adverse effects that arise from the operation of the community structures. The only feasible option, therefore, is to proceed to assess the application against the environment as it exists.

As Mr Wright pointed out, the cost of modelling is such, that the appellants did not have the financial resources to develop their own sophisticated model. They did as already referred to employ the services of Mr Menzies, an experienced engineer, specialising in water resources engineering. Mr Menzies is also a specialist in mathematical modelling of water resource systems. He carried out an extensive and thorough assessment of Dr Joynes' modelling and the results obtained therefrom.

The "fundamental flaws" to the model and Dr Joynes' analysis, alleged by the appellants, through cross-examination and evidence were:

(i) A failure to account for "relative error";

(ii) A variance between modelled pre-scheme and post-scheme water levels and actual events;

(iii) A failure to account for increased runoff arising from land development effects;

(iv) A failure to account for water level rises over the life of the consent;

(v) A failure to accurately reflect the influence of the Tongariro Power Development flows;

(vi) The use of 3 day rainfall event for modelling; and

(vii) The model predictions do not accord with anecdotal evidence.

We deal with each in turn.

(i) The alleged failure to account for relative error

Dr Joynes told us, that as a result of the model calibration, peak flood levels at Mercer could be predicted to within 215mm. This relates to an error percentage in terms of depth of 3.7%. It was his opinion, that in engineering terms, such a level of accuracy is excellent.
Mr Menzies concluded, that based on the information he received, the calibration of the model was as good as could reasonably be expected. He noted Dr Joynes' predicted accuracy. This, he said, is the accumulation of all the individual sources of error within the model, over the full range that it operates. This error is significant in respect of the frequency of flooding on the appellants' land, and represents a difference in water levels between a 10-year flood and a 15-year flood, a difference that could have significant economic consequences.

Mr Menzies then went on to highlight what he called "relative error", being the error applied to successive model runs exploring the same scenario. An error he claims was not factored by Dr Joynes. It is the difference in, say, two runs of a scenario where the hydraulic aspects are unchanged. This error will not be zero because of inherent uncertainties in the hydraulic conditions at different water levels. Mr Menzies estimated that this error is in the range of 50-100mm. In cross-examination he told us that this figure was essentially a judgement call based on his experience in similar situations where the error is divided between hydrological and hydraulic components.

In rebuttal evidence, Dr Joynes stated that he had done his own assessments and believes that the maximum "relative error" is between 25 and 50mm, being maximum in a major flood and lower in less severe flood conditions. Notwithstanding, Dr Joynes was entirely satisfied with the accuracy of the model and believed that the modelled comparison of the 'pre-scheme' and 'post scheme' Waikato River levels for various flood events are reliable.

(ii) Variance between modelled 'pre-scheme' and 'post-scheme' water levels and actual events

Mr Menzies also found fault in the modelling when comparing the pre-scheme and a "current" flood level in two, presumably similar, 50-year events. The variation between the two predictions was 550mm. Similarly, for two events representing an 8-year return period the difference was 500mm. Mr Menzies told us there should have been no difference in the levels found, and the findings suggested flaws in the model. The model's overall error was said to be not greater than 0.125m, yet there appears to be considerably larger errors in the modelling results of the 50 and 8 year events. This in turn, said Mr Menzies:

"Caists doubt on the accuracy of the model calibration, and correspondingly on the accuracy of the modelling results presented in Dr Joynes evidence."

In rebuttal, Dr Joynes stated that the apparent flaw was due to the fact that a real flood event was being compared with a statistical design event. Also, the 1998 flood (one of those modelled) was not specifically a 50-year event but somewhere between 50 and 100 years. Moreover, the characteristics of each event are different, for example, the lead in time for the 1998 flood was much longer than the 3-day storm used in the design of the scheme. In fact, the actual measured rainfalls in different parts of the catchment were used to replicate this 1998 event.

Mr Mulholland in his rebuttal evidence supported Dr Joynes. He explained that the events were very different in terms of rainfall duration, which inevitably produces different results when used to compare pre-scheme and post-scheme water levels. He attached to his evidence a series of graphs to explain his point. Mr Waugh, a highly qualified and very experienced hydrologist, also confirmed that in his view the comparisons should not have produced the same results in terms of "pre-scheme" and "post-scheme" comparison and that it would be incorrect to expect the same results.

(iii) Failure to account for increased runoff arising from "development effects"

Mr Menzies considered that a 5% nominal differential in the flow should have been allowed to allow for the increased discharge regime in the current over the "pre-scheme" situation. This figure he said was a "guestimate" to allow for effects such as:

(i) The Waipa River stopbanks;
(ii) Catchment urbanisation;
(iii) Recent planting of willow trees in the Meremere reach of the Waikato River.

As to the first, Dr Joynes acknowledged that he had not included in the model any allowance for Waipa River stopbanking that has been carried out around Otorohanga. This was omitted from the model because it has no measurable contribution to water levels in the Waikato River, due to the extremely small area protected by the stopbanks around Otorohanga Township and the remoteness from the river. This was also confirmed in Mr Mulholland's rebuttal evidence."
[66] As to the second, Dr Joynes, in his rebuttal evidence made calculations to establish the effects of urbanisation and concluded that any increase in runoff would be in the order of 0.3% or 4m$^3$/s. This he considered to be negligible. Further, he explained that the time taken for peak flows in urban areas is much quicker than for the larger rural catchments. Therefore, not only is the flow negligible, but it has passed through the system well before the main flood flows in the large rural catchments. Mr Waugh was of a like mind. In his rebuttal evidence he told us that urbanisation will have only a minute effect on today's hydrology since yesterday's and today's hydrology were essentially the same.

[67] As to the third, the appellants contend that the planting of some willow trees in the Waikato River have not been taken into account in the model. The willow planting was considered when the authorisation for Transit New Zealand works was considered and it was concluded that those planting would have no significant effects on river water levels.13 (iv) A failure to account for water level rises over the life of the consent

[68] Dr Joynes' modelling results were further criticised by Mr Menzies on the grounds they were based on data specifying riverbed levels. He believed that the results were seriously impaired by not taking into consideration the way in which river levels might change over the 35-year life of the consents. Indeed, he contended that the net effect of the scheme will quickly become negative as the natural situation process continues. [69] We were left in some doubt as to how this discrepancy might be taken into consideration at this time, as he contended that a full new survey of the river cross sections was required as well as long-term plotting of the river levels. He referred us to a graph, (an appendix to his brief of evidence), that appeared to show the effect that dredging had in lowering water levels in the Waikato River from 1980 to about 1993. However, the graph showed that since 1994 the trend has apparently reversed, indicative of renewed flow since the cessation of dredging. The effect of this situation said Mr Menzies has been to raise water levels by about 84mm between the period 1994 – 1998. He said, it seems logical to assume that this will have the effect of more frequent inundation of the appellants’ land. (v) A failure to accurately reflect the influence of the Tongariro Power Development flows

[70] Mr Waugh, in rebuttal, whilst agreeing that dredging has been discontinued at Mercer and Meremere, made the point that it continues downstream at Tuakau and Puni, where the removal of 300,000m$^3$/ year is allowed for the first 7 years of the consent (1997 - 2004) and a reducing amount thereafter. Removal of material in this location, he told us, will encourage sediment to move downstream, in effect readjusting the bed profile. This was not a concept agreed to by Mr Menzies who believed that dredging downstream would have a negligible effect in the areas of interest. [71] Mr Waugh did not accept the upturn in water level, as shown in Mr Menzies’ graph, as being anything other than a “mere blip in the data”. He said it might well reflect a sand bar moving into the section. Only ongoing monitoring will detect any significant long-term trend Mr Waugh told us. While we tend to agree with the evidence of Mr Waugh on this matter it is not necessary for us to resolve this particular disagreement. The possibility of future reduction in the mitigation works through riverbed reduction can be addressed by a review condition (Appendix 2) requiring that river water levels are regularly monitored, and providing a review opportunity when the results of monitoring indicate that the mitigation provided by channel improvement works may be eliminated.
management rules for the river are structured with the intention that TPD diversions do not contribute in any significant way to Waikato River floods above 650 m³/s at Ngaruawahia. The average TPD diversion flow is about 33 m³/s and 1998 flood data records indicate that even during that major flood event, the diversion to Lake Taupo averaged about 33 m³/s in the period immediately before the main flood and that diverted water was contained in the lake by using the lake outlet control gate. This said Mr Waugh demonstrates the way in which the diverted water and the water in Lake Taupo are managed to avoid TPD water having any significant effect on larger floods in the river.

(vi) Use of 3-day rainfall event as basis for modelling

[74] It was acknowledged by Mr Menzies that the usual "starting point" for determining the appropriate duration of design rainfall event is the "time of concentration" for the relevant catchment. There appears to be no dispute that the relevant time of concentration for the Waikato River catchment is around 3 days, which is the duration of rainfall event used in the modelling. The suggestion was made on behalf of the appellants that some further investigation could have been carried out to verify the choice of rainfall distribution and timing.

[75] Dr Joynes told us that the choice of a 3-day event is not only the usual approach, but is a conservative approach in the present case. It is the duration event that is most likely to cause the least benefit of the scheme at Mercer West. The 3-day rainfall event was the event used in the original design of the scheme (Scheme Design Report) and confirmed as the "time of concentration" of the catchment in the 1983 Scheme Evaluation Report.

[76] In our view there is no evidence before us to indicate that the use of the 3-day rainfall event as the basis of modelling comparisons is anything other than appropriate. There is the suggestion that there may, in theory, be some combination of rainfall distribution and timing not used by Dr Joynes that might produce even more conservative results. The lack of connection between that proposition and reality was made clear by Dr Joynes in the following exchange between he and Mr Wright:

Q. The basis upon which you have chosen not to explore in your model the impact of changing distribution and timing is that you believe an evenly distributed storm to be the likely one?
A. That's correct.

(vii) The model predictions do not accord with anecdotal evidence

[77] Another matter relied on by the appellants in challenging the reliability of the model is the fact that modelling predicted that flooding of the Mercer West land would occur with an average return period of 3 or 4 years prior to establishment of the scheme. Considerable reliance was placed on the recollection of Mr S Turnai of Ngati Naho who had occupied the area for over 100 years. He stated that between 1943 and 1962 a total of 5 floods occurred, as well as the recorded 1907 flood. On the basis of that "data set" it was suggested that the return period for flooding of the Mercer West land prior to establishment of the scheme was less frequent than 3 to 4-yearly. In fact, the flooding recollected by Mr Turnai indicated an average of 4-yearly flooding during the period 1943 to 1962. Further evidence based on the Ngaruawahia flood recorded from 1924 - 1964 indicated a return period of around 4 years, consistent with the modelled prediction.
Mr Sampson's evidence that his land flooded three times between July 1995 and July 1998, appears at first glance to belie the evidence of Dr Joynes when he calculated the reduction in the risk of flooding, as a consequence of the scheme, from 5 to 15 years. However, such statistical predictions are subject to the vagaries of nature and it is the difference in water level that in our view is the important factor in considering the question of effects.

Evaluation and determination

We are grateful to all of the witnesses, particularly the expert witnesses, who gave lengthy evidence and, who in the main, were subjected to lengthy cross-examination. The manner in which they presented their evidence assisted us in understanding and determining the complex hydrological and hydraulic matrix of the Lower Waikato River.

We are mindful of the expertise and experience of Mr Menzies. On some matters, his views were in direct conflict with those of Dr Joynes. To resolve those conflicts has not been easy. Dr Joynes impressed us as a careful and thorough witness. His modelling expertise is not only reflected in his qualifications and experience, but was also apparent from his evidence, both in evidence in chief and cross-examination. The evidence of Dr Joynes was supported by the evidence of Mr Mulholland and Mr Waugh – both very experienced experts.

At the end of the day we prefer the evidence of Dr Joynes, supported as it was by Mr Mulholland and Mr Waugh. We agree with Dr Joynes when he said:

I believe that the modelled comparison of the "pre-scheme" and "post-scheme" Waikato River levels for various flood events are reliable...

We accordingly accept his summary of the overall benefits of the scheme for Mercer West:

There can be no doubt that the closing of the Whangamarino and Te Onepopo gates causes increased flooding for the existing operation of the scheme. However, it is just as clear that when the full scheme is considered that there has been a net benefit to landowners in Mercer West. This quantifies as a flood level reduction of 500-1000mm for major floods.

The consequences of our finding is that the community works, for which the said consent is required, will have an adverse effect on the land of the appellants, but the positive effects of the main channel works will more than offset any adverse effects, such that there will be a nett benefit. The main channel works are part of the overall flood protection scheme. They were implemented for the purpose of reducing the overall potential for flooding of flood-prone land in the Lower Waikato – including the land of the appellants. They are accordingly a mitigation measure, designed to more than offset any adverse effects arising from the operation of the gates. As there is a nett benefit, there is no adverse effect caused by the operation of the gates to require mitigation.

Having so found, it would not be appropriate for us to impose a condition as sought. The power contained in section 108 is to grant consent "on any condition that the consent authority considers appropriate". This is a very wide power, but of course, any condition must nevertheless be reasonable: Housing New Zealand v Waitakere City Council [2001] NZRMA 202, applying Newbury District Council v Secretary of State for the Environment [1981] AC578, [1930] 1 ALL ER 731. To impose a condition, requiring an applicant to take measures beyond what is required to mitigate effects caused by an activity, would in our view be unreasonable.

We have considerable sympathy for the appellants, particularly Mr and Mrs Sampson, who valiantly farm their land while having to contend with the ravages of floods. It is clear from the evidence that a stopbank would lessen the potential for their land to flood. This is recognised by the Council. Hence, the Council has designed the structures, and sought and obtained the necessary resource consents. The parties cannot agree on their respective funding contributions. That is not a resource management matter. It is a policy decision for the Council. While it is not a matter for us, we would strongly urge the parties to endeavour to reach agreement on what is a manifestly important issue for Mr and Mrs Sampson.

The appeal is dismissed save for the imposition of a condition as set out in Appendix 2. Costs are reserved but it is our tentative view that costs should lie where they fall.
The appeal by the Council is allowed to the extent that the consent order (Appendix 1) is affirmed save for the addition of the condition set out in Appendix 2.

DATED at AUCKLAND this 2nd day of September 2002.

For the Court:

R. Gordon Whiting
Environment Judge

BEFORE THE ENVIRONMENT COURT

IN THE MATTER OF THE RESOURCE MANAGEMENT ACT 1991

AND

IN THE MATTER OF AN APPEALS UNDER SECTION 120 OF THE ACT

BETWEEN

WAIKATO REGIONAL COUNCIL
(Asset Management Group)

Appellant/Applicant

AND

WAIKATO REGIONAL COUNCIL
Respondent

AND

WAIKATO DISTRICT COUNCIL
Section 774 Party

CONSENT ORDER

The Court, having read the Notice of Appeal, the Respondent's Reply and the Consent Memorandum submitted to the Court, HEREBY MARES THE FOLLOWING ORDERS:

1 The terms and conditions of resource consents 101715, 101716, 101718, 101722, 101723, 101724, 101725, 101726, 101728 and 101729 granted by Waikato Regional Council to Waikato Regional Council (Asset Management Group) in respect of the Lower Waikato Waipa Control Scheme Community Gates

shall be amended by deleting all the terms and conditions of those consents and substituting the terms and conditions that are recorded in the consents attached to this Order.

In all other respects the appeal is disallowed.
There shall be no order as to costs.

Dated the 2 day of 2002

R G Whiting
Environment Judge

Resource consent (101715)

Consent type: Land use consent
Consent subtype: Channel works
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 2022

Activity authorised: Place and use a control gate and culvert on the bed of the Te Onetea Stream for water level control

Location: Te Onetea Stream
Map Reference: NZMS 260 S13:005-164

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement

Conditions:
1. This resource consent shall commence on (Date to be determined).
2. The activity authorised by this resource consent and the operation of the Te Onetea gate shall be carried out in general accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme - Lake Waikare System Structures Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The gate and box culvert shall be inspected as part of an inspection programme undertaken by the applicant, such inspections shall be no less than 3 monthly and specifically after any flood event in the Waikato River that requires the closure of the gate.
4. Inspections carried out under the provisions of condition 3 shall consider the state of the gate and culvert, abutting land erosion and debris collection. Any remedial works required shall be undertaken as soon as practicable and no less than one month from the date of the inspection.
5. Where the gate and/or culvert shows signs of instability or significant degradation a rehabilitation or repair programme shall be developed and implemented by the consent holder.

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holder within six months of the date of inspection, no instream works shall however, be undertaken during the period between October and March (peak juvenile fish migration period).

6. The consent holder shall maintain communications with Transit New Zealand, or any similar body established to maintain or upgrade State Highway I near this site to establish any plans for significant works to the Highway at the site of this culvert crossing.

7. Where communications in condition 6 determine that significant road works are planned for the site of the culvert the consent holder shall seek the inclusion of a culvert able to pass larger flows than the present facility and more suited to the need to provide Lake Waikare with clean flushing water from the river.

8. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128 (1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:

(i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or

(ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

9. The consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act.

Resource consent (101716)

Consent type: Water permit
Consent subtype: Dam
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 3201

Activity authorised: Dam water in Lake Waikare or the Waikato River for flood control purposes

Location: Te Onetea Stream
Map Reference: NZMS 260 S13:005-164

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement.

Conditions:

1. This resource consent shall commence on (date to be determined).

2. The damming of water authorised by this resource consent shall be carried out in general accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme - Lake Waikare System Structures Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.

3. The consent holder shall monitor the Waikato River, at the Te Onetea Stream mouth, and Lake Waikare water levels on a daily basis. Where the water level of the Waikato River at the Te Onetea mouth is below RL 7.00 metres Moturiki Datum and is;

(i) below the water Level of Lake Waikare, the Te Onetea Gate shall be closed,
(ii) above the water Level of Lake Waikare, the Te Onetea Gate shall be opened.

4. Where the monitoring of the Waikato River Level at the Te Onetea Stream mouth determines that the river level is at or above RL 7.00 metres Moturiki Datum, the Te Onetea Gate shall be closed until such time as the Waikato River Level at the Te Onetea Stream mouth falls below RL 7.00 metres.
5. Such adjustment or operation of the Te Oneta gate as is required to achieve the outcomes required by conditions 3 and 4 shall be carried out within the following times:
   (i) At any time when a computerised automatic gate is not in operation due to malfunction or programmed maintenance, within 12 hours of the relevant river level information being received by the Consent Holder,
   (ii) At all other times, within 2 hours of the relevant river level information being received by the Consent Holder.

6. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:
   (i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions, or
   (ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

7. The consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.

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**Resource consent (101718)**

**Consent type:** Discharge permit  
**Consent subtype:** Discharge to water  
**Applicant:** Waikato Regional Council (Hamilton Office)  
**PO Box 4010**  
**HAMILTON EAST 2032**  
**Activity authorised:** Discharge water from the Waikato River into the Te Oneta Stream  
**Location:** Te Oneta Stream  
**Map Reference:** NZMS 260 S13:005-164  
**Consent duration:** Granted for a period expiring on the 35th anniversary of the date of commencement.

**Conditions:**

1. This resource consent shall commence on (date to be determined).
2. The discharge of water authorised by this resource consent shall be carried out in general accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme -Lake Waikare System Structures Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The discharge of water from the Waikato River into the Te Oneta Stream, as authorised by this resource consent, shall not exceed a rate of 6 cubic metres per second at any time.
4. Within 3 months of the commencement of this consent the consent holder shall begin monitoring and recording the total volume of water discharged into Lake Waikare via the Te Oneta Gate on a daily basis. These records shall be made available to the Waikato Regional Council at all reasonable times and all records shall be forwarded to the Group Manager, Resource Use Group, Waikato Regional Council in August each year.
5. Any erosion control works which become necessary as a result of the exercise of this resource consent, shall be undertaken as directed by the Waikato Regional Council at the expense of the consent holder.

6. The consent holder shall monitor and record the suspended sediment concentration of the Te Onetea Stream on a monthly basis. Sampling shall be undertaken from the Te Onetea Stream at a site equidistant from the Te Onetea Gate and Lake Waikare and shall be undertaken only when the discharge authorised by this resource is being exercised.

7. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128 (1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:

(i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or

(ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

8. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.

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**Resource consent (101722)**

**Consent type:** Water permit  
**Consent subtype:** Surface water take  
**Applicant:** Waikato Regional Council (Hamilton Office)  
PO Box 4010  
HAMILTON EAST 2032  
**Activity authorised:** Take water from Lake Waikare for operation of a fish pass  
**Location:** Waikare Gate & Canal  
**Map Reference:** NZMS 260 S13:060-195  
**Consent duration:** Granted for a period expiring on the 35th anniversary of the date of commencement.

**Conditions:**

1. This resource consent shall commence on (date to be determined).
2. This resource consent shall lapse on the anniversary of 5 years after commencement, unless given effect to before this date.
3. The taking of water authorised by this resource consent shall be carried out in general accordance with the document entitled “Consents Application – Lake Waikare Flood Protection Scheme”, as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled “Lower Waikato/Waipa Flood Control Scheme – Lake Waikare System Structures Mitigation/Management Plan”, as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
4. The maximum abstraction rate from Lake Waikare shall not exceed 0.9 cubic metres per second at any time.
5. The taking of water authorised by this resource consent shall not be exercised at any time that the Level of Lake Waikare recorded at the Waikare Flood Control Gate is at or below the seasonal control level specified in condition 4 of resource consent number 101725.

under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:

(i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or

(ii) if necessary and appropriate, to require the holder of this resource consent to adopt the best practicable option to remove or reduce adverse effects on the surrounding environment due to the discharge of water from the fish pass, or

(ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

7. The consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with Section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under Section 360 of the Resource Management Act.

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**Resource consent (101723)**

**Consent type:** Discharge permit

**Consent subtype:** Discharge to water

**Applicant:** Waikato Regional Council (Hamilton Office)

PO Box 4010

HAMILTON EAST 2032

**Activity authorised:** Discharge water into Waikare Canal for fish pass operation

**Location:** Waikare Gate & Canal

**‘Map Reference:** NZMS 260 S13:060-195

**Consent duration:** Granted for a period expiring on the 35th anniversary of the date of commencement.

**Conditions:**

1. This resource consent shall commence on (date to be determined).

2. This resource consent shall lapse on the anniversary of 5 years after commencement, unless given effect to before this date.

3. The discharge of water authorised by this resource consent shall be carried out in general accordance with the document entitled “Consents Application – Lake Waikare Flood Protection Scheme”, as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled “Lower Waikato/Waipa Flood Control Scheme – Lake Waikare System ‘Structures Mitigation/Management Plan”, as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.

4. The maximum discharge rate from the fish pass shall not exceed 0.9 cubic metres per second at any time.

5. Any erosion control works that become necessary as a result of the exercise of this resource consent shall be undertaken as directed by the Waikato Regional Council.

6. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:
(i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or
(ii) if necessary and appropriate, to require the holder of this resource consent to adopt the best practicable option to remove or reduce adverse effects on the surrounding environment due to the discharge of water from the fish pass; or
(iii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

7. The consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with Section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under Section 360 of the Resource Management Act.

**Waikare Radial Gate**

**Resource consent (101724)**

**Consent type:** Land use consent  
**Consent subtype:** Channel works  
**Applicant:** Waikato Regional Council (Hamilton Office)  
PO Box 4010  
HAMILTON EAST 2032

**Activity authorised:** Place and use a radial sluice gate and associated structure on the beds of Lake Waikare and Waikare Canal for lake level control purposes.

**Location:** Waikare Gate & Canal  
**Map Reference:** NZMS 260 S13:060-195

**Consent duration:** Granted for a period expiring on the 35th anniversary of the date of commencement.

**Conditions:**

1. This resource consent shall commence on (date to be determined).
2. The activity authorised by this resource consent shall be carried out in general accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme -Lake Waikare System Structures Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The gate and box culvert shall be inspected as part of an inspection programme undertaken by the applicant, such inspections shall be no less than 3 monthly and specifically after any event in the Waikato River that requires the closure of the gate.
4. Inspections carried out under the provisions of condition 3 shall consider the state of the gate and culvert, abutting land erosion and debris collection. Any remedial works required shall be undertaken as soon as practicable and within no more than one month from the date of the inspection.

5. Where the gate and/or culvert shows signs of instability or significant degradation a rehabilitation or repair programme shall be developed and implemented by the consent holder within six months of the date of inspection, not including the period between October and March.

6. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, and August 2023, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:

(i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or

(ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

7. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 36 of the Resource Management Act.

Resource consent (101725)

Consent type: Water permit
Consent subtype: Dam
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 2032

Activity authorised: Dam water in Lake Waikare for lake level control & flood protection

Location: Waikare Gate & Canal
Map Reference: NZMS 260 S13:000-195

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement.

Conditions:

1. This resource consent shall commence on (date to be determined).

2. The damming of water authorised by this resource consent shall be carried out in general, accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme - Lake Waikare System Structures Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.

3. The consent holder shall monitor the Waikato River, Lake Waikare and Whangamarino River water levels on a daily basis. Water levels in Lake Waikare shall be measured at the existing lake level monitoring station.

4. Except as provided for in condition 10, the seasonal ranges within which the consent holder shall manage Lake Waikare are as set out below: (All numbers are in Metres RL to Moturiki Datum).
<table>
<thead>
<tr>
<th>Period</th>
<th>Target Water Level</th>
<th>Control Level</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st April To 30th September</td>
<td>5.500</td>
<td>5.400</td>
<td>5.600</td>
<td></td>
</tr>
<tr>
<td>1st October To 31st December</td>
<td>5.650</td>
<td>5.550</td>
<td>5.750</td>
<td></td>
</tr>
<tr>
<td>1st January To 31st March</td>
<td>5.600</td>
<td>5.500</td>
<td>5.700</td>
<td></td>
</tr>
</tbody>
</table>

5. Subject to condition 4 and except as provided for by condition 10, the consent holder shall operate the Waikare Gate according to the following requirements:

   From 1 April to 30 September where the Lake Waikare level at the Waikare Gate is:
   (i) between RL 5.50 and RL 5.60 and rising, the gate shall be opened sufficiently to ensure compliance with condition 4,
   (ii) between RL 5.50 and RL 5.40 and falling, the gate shall be closed.
   From 1 October to 31 December where the Lake Waikare level at the Waikare Gate is:
   (iii) between RL 5.65 and RL 5.75 and rising, the gate shall be opened sufficiently to ensure compliance with condition 4,
   (iv) between RL 5.65 and RL 5.55 and falling, the gate shall be closed.
   From 1 January to 31 March where the Lake Waikare water level at the Waikare Gate is:
   (v) between RL 5.60 and RL 5.70 and rising, the gate shall be opened sufficiently to ensure compliance with condition 4,
   (vi) between RL 5.60 and RL 5.50 and falling, the gate shall be closed.

6. Any adjustment or operation of the Waikare gate that is required by condition 5 shall be carried out within the following times:

   (i) At any time when a computerised automatic gate is not in operation due to malfunction or programmed maintenance, within 12 hours of the relevant river level information being received by the Consent Holder.
   (ii) At all other times, within 2 hours of the relevant river level information being received by the Consent Holder.

7. Where water level monitoring identifies that significant marginal flooding around Lake Waikare or the Waikare Canal could occur then the consent holder shall ensure that landowners/occupiers, as the case may be, are advised of the risk as soon as practicable. To this end, the consent holder shall develop and maintain a contact database of the likely affected landowners and occupiers. A log record of the contact made shall be kept where an event is expected that will result in significant marginal land flooding.

8. The maximum crest height of the Waikare gate shall be no greater than 8.31 metres RL Moturiki Datum.

9. The consent holder shall provide a spillway for the Waikare Gate of at least 70 metres wide and with a crest height of no greater than 7.37 metres RL Moturiki Datum.

10. Where the Whangamarino Gate is closed and the Waikato River is in flood or rising due to high water flows, then the Waikare Gate shall be closed and shall remain closed until such time as the Whangamarino Gate is re-opened at which time the control levels and operational requirements specified in conditions 4 and 5 shall apply in respect of the Waikare Gate.

11. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2016, August 2023, and August 2028, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:

   (i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or
   (ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

12. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.
Resource consent (101726)

Consent type: Water permit
Consent subtype: Surface water take
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 3202

Activity authorised: Take & divert water from Lake Waikare for lake level control

Location: Waikare Gate
Map Reference: NZMS 260 S13:060-195

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement.

Conditions:
1. This resource consent shall commence on (date to be determined).
2. The taking and diverting of water authorised by this resource consent shall be carried out in general accordance with the document entitled “Consents Application – Lake Waikare Flood Protection Scheme”, as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled “Lower Waikato/Waipa Flood Control Scheme – Lake Waikare System Structures Mitigation/Management Plan”, as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The taking of water from Lake Waikare as authorised by this resource consent, shall not exceed a rate of 53 cubic metres per second at any time.
4. Within 5 years of the commencement of this resource consent the consent holder shall have either carried out or funded a combination of permanent fencing or riparian planting of no less than 20 kilometres (cumulatively) of either:
   (i) The margin of Lake Waikare and the banks of the Matahuru Stream and tributary streams (in particular stream fencing and riparian planting should be carried out between the junction of Matahuru Rd and Hoult Rd and Lake Waikare).
   (ii) Where (i) can not be practically achieved due to circumstances beyond the control of the Consent Holder, the margins of Lakes, Whangape, Waahi, Kopuera, Rotongaro - Rotongaroiti and Ohinemai.
   To this end the consent holder shall provide an annual report in August each year to the Group Manager of the Waikato Regional Council’s Resource Use Group detailing progress made towards achieving the requirements of this condition.
5. The Waikato Regional Council may, in August 2003, August 2005, August 2006, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128 (1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions.
6. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.
Whangamarino Radial Gate

Resource consent (101728)

Consent type: Land use consent
Consent subtype: Channel works
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 2032

Activity authorised: Place and use a radial gate and associated structure on the Whangamarino River bed for water level control purposes

Location: Whangamarino Gate
Map Reference: NZMS 260 S12:932-322

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement.

Conditions:
1. This resource consent shall commence on (date to be determined).
2. The activity authorised by this resource consent shall be carried out in general accordance with the document entitled “Consents Application – Lake Waikare Flood Protection Scheme”, as lodged with the Waikato Regional Council on 22/9/1998 and the document entitled “Lower Waikato/Waipa Flood Control Scheme – Lake Waikare’ System Structures Mitigation/Management Plan”, as lodged with the Waikato Regional Council on 15/6/99 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The gate and box culvert shall be inspected as part of an inspection programme undertaken by the applicant, such inspections shall be no less than 3 monthly and specifically after any flood event in the Waikato River or the Whangamarino River that requires the closure of the

4. Inspections carried out under the provisions of condition 3 shall consider the state of the gate and culvert, abutting land erosion and debris collection. Any remedial works required shall be undertaken as soon as practicable and within no more than one month from the date of the inspection.
5. Where the gate and/or culvert shows signs of instability or significant degradation, a rehabilitation-or repair programme shall be developed and implemented by the consent holder within six months of the date of inspection, not including the period between October and March.
6. The Waikato Regional Council may, in August 2003, August 2005, August 2008, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:
   (i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or
   (ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.
7. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.
Resource consent (101729)

Consent type: Water permit
Consent subtype: Dam
Applicant: Waikato Regional Council (Hamilton Office)
PO Box 4010
HAMILTON EAST 2032

Activity authorised: Dam the Whangamarino River for flood control purposes
Location: Whangamarino Gate
Map Reference: NZMS 260 S12-932-322

Consent duration: Granted for a period expiring on the 35th anniversary of the date of commencement.

Conditions:
1. This resource consent shall commence on (date to be determined).
2. The damming of water authorised by this resource consent shall be carried out in general accordance with the document entitled "Consents Application - Lake Waikare Flood Protection Scheme", as lodged with the Waikato Regional Council on 22/11/1998 and the document entitled "Lower Waikato/Waipa Flood Control Scheme - Lake Waikare System Mitigation/Management Plan", as lodged with the Waikato Regional Council on 15/6/1999 or any subsequent update of this document, unless otherwise specified in the resource consent conditions below.
3. The consent holder shall monitor the Waikato River, Lake Waikare and Whangamarino River water levels on a daily basis. Where water levels in the Waikato River are above or falling, the Whangamarino Gate shall be closed in accordance with the Management Plan, within 12 hours of the relevant water level information being received by the Consent Holder.
4. Where the monitoring in condition 3 identifies that the level of the Waikato River is below the level of the Whangamarino River and rising, the Whangamarino Gate shall be opened in accordance with the Management Plan within 12 hours of the relevant water level information being received by the Consent Holder.
5. Where water level monitoring carried out in condition 3 identifies that significant marginal flooding around the Whangamarino Wetland could occur then the consent holder shall ensure that all potentially affected landowners and occupiers are advised of the risk as soon as practicable. To this end the consent holder shall develop and maintain a contact database of the likely affected parties. A record of the contact made shall be kept where an event is expected that will result in significant marginal land flooding.
6. The Waikato Regional Council may, in August 2003, August 2005, August 2007, August 2013, August 2018, August 2023, and August 2028, serve notice on the consent holder under section 128(1) of the Resource Management Act 1991, of its intention to review the conditions of this resource consent for the following purposes:
   (i) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or
   (ii) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.
7. The Consent holder shall pay to the Waikato Regional Council any administrative charge fixed in accordance with section 36 of the Resource Management Act 1991, or any charge prescribed in accordance with regulations made under section 360 of the Resource Management Act.
CONSENT ORDER

5A The consent holder shall, within 18 months after the date of commencement of this consent and at intervals not exceeding 18 months thereafter, measure the Waikato River Water Level at river cross section 61/1 when the Waikato River water flow is 350 cubic metres per second at Mercer Bridge.

In the event that river flow conditions do not enable the required measurement to be taken within any such 18 month period, the Group Manager of the Resource Use Group, Waikato Regional Council may extend, in writing, that time period to the next reasonably practicable opportunity.

5B Within one month of undertaking a measurement pursuant to condition 5A, the consent holder shall provide a written report of that measurement to the Waikato Regional Council.

5C Within 6 months after receiving any report under condition 5B which indicates that, since the date of commencement of this consent, the Waikato River Water Level at river cross section 61/1 has risen by 0.3 metres or more, the Waikato Regional Council may serve notice pursuant to section 128(1) of the Resource Management Act 1991 on the consent holder of its intention to review the conditions of this consent.

The purpose of such a review is to review the effectiveness of the conditions of this consent to avoid, remedy, or mitigate flooding effects on land at Mercer West and Meremere caused by the operation of the Whangamarino Control Gate and Te Onetee Control Gate.
Environmental Defence Society Inc v New Zealand King Salmon Company Ltd

[2014] NZSC 38

Supreme Court, (SC82/13) 19-22 November 2013: 17 April 2014

Elias CJ, McGrath, William Young, Glazebrook, Arnold JJ

Resource management — Consents — Considerations — Area of outstanding natural character and landscape — Board of Inquiry granted an application to rezone a coastal marine area to allow salmon farming as a discretionary activity — Appeal against a successful consent for salmon farming — Relationship between the New Zealand Coastal Policy Statement and the Resource Management Act 1991 — Whether granting consent would have significant adverse effects on an area of outstanding natural character and landscape — Whether Board had erred in law by incorrectly interpreting and misapplying the New Zealand Coastal Policy Statement — Whether decision-maker able to seek information on alternative locations for proposed activity — Resource Management Act 1991, ss 3, 5(2), 6(a), 6(b), 32, 58.

Words and Phrases — “Avoid”. Words and Phrases — “Give effect to”. Words and Phrases — “Inappropriate”.

The respondent, New Zealand King Salmon Company Ltd, applied to establish nine new salmon farms in the Marlborough Sounds. Under the District Council’s combined Regional, District and Coastal Plan (the Sounds Plan), the Coastal Marine Area was divided into two zones: Zone One where marine farming was prohibited and Zone Two where it was a discretionary activity. The respondent sought to rezone eight sites into a new zone, Zone Three, where farming of salmon would be a discretionary rather than prohibited activity. The respondent also sought consent for salmon farms in those eight sites. The respondent also sought consent for a ninth location, White Horse Rock, which was located in Zone Two.

The applications were referred to a Board of Inquiry. The Board granted plan changes in relation to four of the proposed sites. These changes allowed salmon farming to become a discretionary rather than prohibited activity in those locations. Consent for salmon farming was also granted in relation to these four sites. The other five locations were declined.

The appellant unsuccessfully appealed to the High Court in relation to one location, Papatau in Port Gore, on the basis that granting permission inadequately protected an area of outstanding natural character and outstanding natural landscape in the coastal environment. The appellant appealed to the Supreme Court. A separate Supreme Court appeal, brought by the second respondent, Sustain Our Sounds Inc, in relation to all four locations where consent was granted, was unsuccessful.

The issues on appeal in this proceeding were whether the Board: (i) had erred in law by incorrectly interpreting and misapplying policies 8, 13 and 15 of the New Zealand Coastal Policy Statement (the NZCPS) and therefore, whether the proposed plan change in relation to Papatau complied with s 67(3) of the Resource Management Act 1991 (the RMA), and: (ii) was obliged to consider alternative sites/methods when determining a private plan change that is located in an outstanding natural landscape or feature or outstanding natural character area within the coastal environment.

Held, (1) (per Elias CJ, McGrath, Glazebrook and Arnold JJ) 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. (paras 31, 33, 34, 37, 41)

(2) Section 55(2) of the RMA relevantly provides that, if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies 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. (para 125)

(3) The Board was required to “give effect to” the NZCPS in considering the respondent’s plan change applications. “Give effect to” simply means “implement”. It is a strong directive, creating a firm obligation on the part of those subject to it. 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 NZCPS 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. The caveat is that 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. (paras 77, 79, 80)

(4) The Board of Inquiry affirmed the primacy of s 5 of the RMA over the NZCPS, and the perceived need for the “overall judgment” approach 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. 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 considers the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS), before making a decision. 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. The Board ultimately determined the applications not by reference to the NZCPS, but by reference to pt 2 of the Act. It did so because it considered that the language of s 66(1)
of the RMA required that approach. The Supreme Court did not accept this was correct. (paras 83, 84)

(5) 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, however, several caveats to this. (paras 33, 85)

(6) 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. However, 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. (para 91)

(7) 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. However, the Board was obliged to deal with the application in terms of the NZCPS. The Supreme Court accepted EDS’s submission 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. Accordingly, 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. (paras 153, 154)

(8) In respect of the second question of law (consideration of alternatives), the Supreme Court made a preliminary point. It 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, it 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. Consideration of alternatives is permissible, but not mandatory. 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. 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”. 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. 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 commercial purpose, as here. (paras 157, 168, 169)

(9) Given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, this will not 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. (para 173)

(10) (per William Young) 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) of the RMA seems to leave open the possibility that a use or development might be appropriate, despite having adverse effects on areas of outstanding natural character. Whether a particular use is “appropriate” or, alternatively, “inappropriate” 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 follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. Those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5. It is implicit in this language that the identification of the areas in question is for regional councils, and that the identification of “the forms of ... use, and development” which are inappropriate is also for regional councils. (paras 179, 180, 187)

(11) 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. William Young J did 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, it was preferable to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept—informing 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 6(a) and (b) of the RMA being material to the interpretation and application of those policies. It is not difficult to construe these policies on the basis that 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. (paras 194, 196)

(12) 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
Papataua 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 and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed. (para 208)

Cases referred to
Brown v Dunedin City Council [2003] NZRMA 420 (HC)
Campbell v Southland District Council PT Decision Wellington W11494, 14 December 1994
Clevedon Cares Inc v Manukau City Council [2010] NZEnvC 211
Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council [2010] NZEnvC 403
Fosley Engineering Ltd v Wellington City Council PT Decision Wellington W1294, 16 March 1994
Green & McCahill Properties Ltd v Auckland Regional Council [1997] NZRMA 519 (HC)
Hodge v Christchurch City Council [1996] NZRMA 127 (PT)
Man O’ War Station Ltd v Auckland Council [2013] NZEnvC 233
Meridian Energy Ltd v Central Otago District Council [2011] 1 NZLR 482 (HC)
North Shore City Council v Auckland Regional Council [1996] 2 ELRNZ 305 (EnvC)
NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC)
Plastic and Leathergoods Co Ltd v Horowhenua District Council PT Decision Wellington W2694, 19 April 1994
Port Gore Marine Farms v Marlborough District Council [2012] NZEnvC 72
Shell Oil New Zealand Ltd v Auckland City Council PT Decision Wellington W89, 2 February 1994
Te Raranga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402

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 Plan1 (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, 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.4 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.5 The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.6

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.7 The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the applicant in SC84/13. Their appeals were dismissed by Dobson.8 EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.9 We are delivering contemporaneously a separate judgment in which we will outline our approach to a 149V and give our reasons for granting leave.10

1 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 New Zealand King Salmon Co Ltd [2013] NZHC 1992, [2013] NZRMA 371 (King Salmon (HC), above n 2, at [10]-[18].
2 Board of Inquiry, New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents, 22 February 2013 (King Salmon (Board)).
3 Environmental and Resource Management Law (looseleaf cd. LexisNexis) at [5.71] and following.
4 RMA, s 149V.
5 King Salmon (HC), above n 2.
6 Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2013] NZSC 101 (King Salmon (Leave)).
7 Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 41.
[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 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 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, national policy statements and New Zealand coastal policy statements.20 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.21 Policy statements of whatever type state objectives and policies,22 which must be given effect to in lower order planning documents.23 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,24 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”.25 Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement

12 Sustain Our Sounds Inc v 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).
14 King Salmon (Board), above n 6, at (1235)-(1236).
15 Environmental Defence Society Inc v New Zealand King Salmon Co Ltd, above n 11.
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).
23 Sections 45(1) and 58.
24 See further at [1235] and [1275]-[1276] below.
25 RMA, s 40(1).
26 Section 59.
may identify methods to implement policies, although not rules.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29} They may also contain methods other than rules.\textsuperscript{30}

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.\textsuperscript{31} There must be one district plan for each district.\textsuperscript{32} A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any) to implement the policies.\textsuperscript{33} It may also contain methods (not being rules) for implementing the policies.\textsuperscript{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.\textsuperscript{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).\textsuperscript{36} whereas regional and district plans operate above the line.\textsuperscript{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.\textsuperscript{38} Further, the Minister shares with regional councils responsibility for the coastal marine area in the various regions.\textsuperscript{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

\textsuperscript{27} Section 62(1).
\textsuperscript{28} Section 64(1).
\textsuperscript{29} Section 67(1).
\textsuperscript{30} Section 67(2)(b).
\textsuperscript{31} Sections 73-770.
\textsuperscript{32} Section 73(1).
\textsuperscript{33} Section 73(1).
\textsuperscript{34} Section 73(2)(b).
\textsuperscript{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].
\textsuperscript{36} RMA, ss 63(2) and 64(1).
\textsuperscript{37} Section 73(1) and the definition of "district" in s 2.
\textsuperscript{38} Section 28.
\textsuperscript{39} Section 30(1)(d).
Section 5(2) defines "sustainable management" as follows:

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.

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. Second, the word "environment" is defined, also broadly, to include:

(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". Accordingly, aesthetic considerations constitute an element of the environment.

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 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". 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. 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 intergenerational and environmental 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 subparas (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 and cultural well-being as well as health and safety. The use of the word “protection” links particularly to subpara (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 subparas (a) and (b). As we see it, the use of the word “while” before subparas (a), (b) and (c) means that those para 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 subpara (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 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)-(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 exercising 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 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, wahi tapu, and other taonga” and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga. 52

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49 RMA, ss 7(b) and (aa).
50 Section 7(b).
51 Section 7(c).
52 Environmental Defence Society v New Zealand King Salmon Company
[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 or development (that is, s 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 envisions 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. 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 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 against some other standard. This is also an issue to which we will return.54

[30] As we have said, the RMA envisions 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 Statement55 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 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 and the Sounds Plan.56

53 Emphasis added.
54 See [40] below.
55 See [98(1)(b)] below.
56 Marlborough District Council Marlborough Regional Policy Statement (Marlborough District Council, Blenheim, 1995).
57 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
58 See Section 140 below.
59 Section 67(3)(b).

[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 47-52 or something similar, albeit less formal.60 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" 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:

[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 105.59

[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 at which it was expressing its final view:

59 Section 75(3)(b).
60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new version by s 70 of the Resource Management Act Amendment Act 2013.
61 Section 46A.
62 NZCPS, above n 13, at s.
63 King Salmon (Board), above n 6. Emphasis in original, citations omitted.
[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 nature 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.

[57] 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 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 s 5(2)(a), (b) and (c) 69 may be considered cumulative safeguards which ensure (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 3 is not about achieving a balance between benefits occurring from an activity and its adverse effects. If (The 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 NZ Rail Ltd v Marlborough District Council, in the context of the appeal relating to a number of resource consents for the development of a port at 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

Grieg 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 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 [RMA].

In the end I believe the term 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, as the expense of everything except where... is necessary or essential to deprive it from that which 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 NZ 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

64 King Salmon (Board), above n 6, at (1227).
65 At (1180); adopting the language of Ms Sarah Dawsow, a planning consultant for King Salmon. This paragraph of the Board’s determination, along with others, is quoted at (1181) below.
66 At (1180).
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 65.
71 NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).
72 At 85.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 NZ Rail Ltd, above n 71, at 85.
76 At 85-86.
We have considered in the light of those remarks [in NZ 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 to attain fully, 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 [NZ 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.78 The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]."79 Particular policies in the NZCPS may be irreconcilable in the context of a particular case.80 No individual objective or policy from the NZCPS should be interpreted as imposing a veto.81 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.82

[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 Papawau would have 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 "avoids" 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

78 North Shore City Council v Auckland Regional Council, above n 77, at 547 (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 H Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 580.
80 EDS v North Shore City Council v Auckland Regional Council, above n 46, at [41]-[43].
81 At [258].
82 At [258].
83 At [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 New Zealand Gazette 1363.
85 In contrast, s 26(2) of the RMA provides that a regional policy statement must state "the method (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a)-(c) and 73(1)(a)-(d) 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 43AA defines regional rule as being 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 5.
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

(I) 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”, in this, 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); and
(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

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 Maori; 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(1)(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(c) 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 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.

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.
89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
[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.

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 its 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:

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.

92 Italics in original.
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 policies95 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 Papatau 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:
  - are inappropriate; and
  - 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, marine objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

[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 23 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.

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).
97 Sounds Plan, above n 1, at [1.0].
98 As [9.2.2].

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.
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. The Council described the purpose of this as follows:

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 on both 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.

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 and contains maps that identify the areas of outstanding landscape value, which are more modestly given the size of the region. It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

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.

**Requirement to “give effect to” the NZCPS**

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 in accordance with its functions under s 30, the provisions of pt 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.

As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement — an evalulation 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 regional and district plans. 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, resulted in a strengthening of the regional council’s obligation.

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,

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.

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. The existence of such mechanisms underscores the strength of the “give effect to” direction.

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 roles to give effect to them. To that extent, the authorities fill in the details in their particular localities.

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.

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,

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 at a whole is generally given effect to.

99 At Appendix 2.
100 At [2.1.6]. Italics in original.
101 At ch 5 and Appendix 1.
102 At r 3.4.
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.
105 See [31] above.
Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "give effect to" does not mean that every policy be met. It is not a simple check-box exercise. Requiring that every single policy be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.

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.

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.

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.

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).

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 "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.

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.

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.

(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.

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.

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 pt 2 of 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.

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.

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.
environment by stating objectives and policies which apply those principles to that environment; the NZCPS translates the general principles to more specific or focused 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, remediying 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 maritime 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 remediying 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, remediying, 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, remediying 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 did not mean “prohibit”... expressing its agreement with the view of the Court in Wairau River Canal Partnership v Auckland Regional Council. The Court accepted that policy 15 should not be interpreted as imposing a blanket 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 well-being.

[95] In the Wairau 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 Wairau 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”. 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 ...”

[96] We express no view on the merits of the Court’s analysis in the Wairau 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, remediying, 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, “[to] preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities”. It is also consistent with objective 6’s recognition that protection of the values of the coastal environment does not preclude use and development “in appropriate places and forms, and within appropriate limits”. The “does not
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 outstanding natural character. The italicised words indicate the meaning to be given to “inappropriate” in the context of policy 13.

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 biophysical 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 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 issues. 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 in fact afford absolute protection. Rather, they require a materially higher level of justification for relinquating 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

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

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.

[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 to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were said 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 contents 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”.

122 RMA, s 38(5).
124 At 19, 428.
125 At 22, 431.
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 s 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 appropriate. The Court said:

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 ungrounded 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:

A well-meaning 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 (ss 68) or district plans (ss 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 is 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 need not fall within the special statutory definition directly binding on individual citizens. Mainsely 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(j));
(d) The implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

126 At 23, 433.
127 At 23, 433.
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.

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.

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.

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.

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 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.

Interpreting the NZCPS

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 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.

Moreover, when other provisions in the NZCPS are considered, it is apparent that some of 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”, “have (particular) regard to”, “consider”, “recognise”, “promote” or “encourage”: use expressions such as “as far as practicable”, “where practicable”, “where practicable and reasonable”, “towards” or taking “all practicable steps” or to there being “no practicable alternative methods”.

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 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 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 developments 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 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 remediating 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 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.

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140 King Salmon (Board), above n 6, at [1240]; and King Salmon (HC), above n 2, at [151].
141 See [16] above.
142 Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).
(b) Second, Papatau 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 CMZI 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 NZCPS 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 CMZI 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.

143 Although the farms were in a CMZI 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 [53] above.
147 NZ Rail Ltd, above n 71, at 86.
148 At 86.
[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) (“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 NZ Rail, Greg 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 in its own but is accessory to the principle purpose.

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 primary 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 primary to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primary 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 Greg J in NZ 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 provision 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

149 At 85.
150 At 86.
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.

[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, previously, we set out the relevant portions of it for ease of reference:

151 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, previously, we set out the relevant portions of it for ease of reference:

152 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:

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:

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 found, the present case should properly have been treated as an exception to that 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,

151 King Salmon (Leave), above n 10, at [1].
152 At [1].

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—

(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 had 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 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:

[160] 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*, 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 7(2)c 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.

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:

> It seems to us that whether alternatives should be considered depends firstly on whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the 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. The Judge adopted the approach taken by the full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council.* 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. The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.

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 considered consideration of an alternative 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 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 circumstances of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

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 alternatives 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.

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.

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 might 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 must be considered is whether the activity requires consideration of alternative sites 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) request 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 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 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 ss 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 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 the activity 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 must be obliged to test that claim, 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 RMA as it did not give effect to policies 13(1)(a), 15(a) and 18 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.

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

163 Brown v Dunedin City Council, above n 155, at [160].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).
165 King Salmon (HC), above n 2, at [171].
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 RMA. 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:

(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 as 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 RMA

[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 167) 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.

166 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).

167 At [171] of the majority’s reasons.

168 At [165]-[173] of the majority’s reasons.


171 At [116] of the majority’s reasons.
[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 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

(a) 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:

Agriculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural wellbeing 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

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 is taken directly from ss 6(a) and (b) and also s 5 of what is appropriate development. By way of illustration, I consider that policy 13 should be construed as if it provided:

13. Preservation of natural character

(i) To preserve the natural character of the coastal environment and to protect it from inappropriate... use, and development;

(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;...

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.

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, then it 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.

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, and the context provided by policy 8. Against this background, I think it is wrong to construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

I think it is useful to consider the consequences of the majority’s approach, which I see as overbroad.

“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.

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 require some navigation aids and it would impose severe regulations 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 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.

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 minimus 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).

172 At [98]–[105] of the majority’s reasons.

173 Compare the discussion and cases cited in [92]–[97] of the majority’s reasons.

174 The NZCPS, above n 166, at 8 records that “[d]efinitions contained in the Act are not repeated in the Glossary.”

175 At [144] of the majority’s reasons.
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, 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.

My conclusion as to the first issue

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.

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.

176 See above at [195].
Housing New Zealand Limited v Waitakere City Council
[2001] NZRMA 202 (CA)
Housing New Zealand Ltd v Waitakere City Council

203 Court of Appeal [2001]

Court of Appeal
14 December 2000
Richardson P, Blanchard and Tipping JJ

Financial contributions — Leave to appeal on point of law — Whether issues raised are of general or public importance — Local Government Act 1974, ss 285, Resource Management Act 1991, ss 120, 308, 311, 407; Summary Proceedings Act 1957, s 144

The appellant, Housing New Zealand Ltd ("HNZ"), had two properties (in New Lynn and Te Atatu), both of which were held as single parcels of land, but had multiple housing units on them. HNZ sought to subdivide these properties, to provide separate legal titles for the individual units. The first respondent, Waitakere City Council ("WCC") imposed conditions on the subdivision consents requiring, inter alia, payment of reserves contributions.

HNZ appealed against the contribution conditions imposed on both its consents. It claimed that WCC could not require contributions in respect of its properties, as they were already fully developed, and granting the subdivision consent would therefore have no practical effect on the demand for reserves within the district. WCC also brought declaratory proceedings in the Environment Court, seeking clarification of its ability to impose reserves contributions on a subdivision application, even when the proposed subdivision would not place any additional demand upon the reserves of the district. It further held that even though the subdivisions would not themselves result in additional use of public reserves, it was fair and reasonable that the subdivider be required to pay a contribution towards the cost of providing public reserves to meet past shortfalls.

HNZ appealed to the High Court, which dismissed the appeal, and upheld the judgments of the Environment Court in all respects. In doing so, the High Court appeared to cast doubt over the continued applicability of the well known Newbury case to the provisions of the Resource Management Act 1991 ("the RMA"). An application to the High Court for leave for HNZ to appeal to the Court of Appeal was refused by Fisher J on 19 October 2000, on the grounds that there was no readily identifiable question of law, and the only potential question of law had been well traversed. HNZ therefore made the present application for special leave to appeal the High Court's decision to the Court of Appeal.

Held (refusing to grant leave to appeal):

(1) HNZ's appeal arguably raised a question of law which, by reason of its general or public importance ought to (or could) be submitted to the Court of Appeal for its decision (being the nature and applicability of the basic principles and policies of the RMA), as required by s 144 of the Summary Proceedings Act 1957 (see para [15]).

(2) However, this was not an issue the Court of Appeal was prepared to consider in the context of the present case, as it had not been raised before the Environment Court or High Court, and the Court of Appeal did not therefore have the benefits of the lower Courts' views on the issue (see para [15]).

(3) The Newbury test remains of general application, and New Zealand Courts should continue to apply it in relation to the provisions of the RMA (see para [18]).

(4) The fact that the High Court had not taken guidance from the Newbury case in deciding HNZ's appeal was not a matter of public or general importance, because when the High Court's observations regarding Newbury were read in the setting of its judgment as a whole, and with particular reference to the transitional provisions of the RMA, there was no danger that the Court would be interpreted as indicating that Newbury is no longer to be followed in resource management cases (see para [19]).

Observations

(1) Had HNZ chosen to present its case in the Environment Court so as to generate discussion of the principles and policies of the RMA, the Court may well have been disposed to grant leave to appeal (see para [18]).

(2) The Environment Court, in a passage not criticised by the High Court, did in fact deal with the common law requirements upon the Council in terms which were clearly drawn from Newbury (see para [18]).

Cases referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223; [1947] 2 AllER 680 (CA)
Newbury District Council v Secretary of State for the Environment [1980] 2 WLR 379; [1980] 1 AllER 731 (HL)

Summary Proceedings Act 1957

Application for leave to appeal to the Court of Appeal pursuant to s 144

P J Radich and L J Rossiter for appellant
D A Kirkpatrick for first respondent
J W Maassen for second respondent

203 Court of Appeal [2001]

203 Court of Appeal [2001]

NZRMA Housing NZ v Waitakere CC

203 Court of Appeal [2001]
The applicant, Housing New Zealand Ltd, seeks leave to appeal from a judgment of the High Court dismissing an appeal from certain judgments of the Environment Court. Leave to appeal to this Court was refused by Fisher J on 19 October 2000.

The first decision of the Environment Court concerned an application for declarations under s 311 of the Resource Management Act 1991 about the powers of the Waitakere City Council to impose various conditions on consents to subdivisions of land. The other two decisions of the Environment Court related to appeals under s 120 of the Resource Management Act 1991 in respect of conditions imposed on the applicant by the Waitakere City Council in relation to a subdivision consent concerning properties in New Lynn and Te Atatu. Both cases were heard together, with a judgment being delivered in each case, and then a further supplementary judgment which has no bearing on the issues now sought to be appealed.

The two properties in New Lynn and Te Atatu were held as single parcels of land, but had multiple housing units developed on them. The applicant sought to subdivide the land to provide separate legal titles for the individual units. The Waitakere City Council imposed conditions on the subdivisions requiring, inter alia, payment of reserves contributions under transitional provisions in the Resource Management Act. No further development was proposed in relation to either site. The Palmerston North City Council appeared, and its contentions in support of the Waitakere City Council’s application for declarations in the Environment Court, because it takes a similar position on reserves contributions. (Although certain other conditions were in issue before the Environment Court, we are not now concerned with them.)

The essential issue between the parties arises from the fact that the properties to be subdivided have already been developed. The applicant asserted that in those circumstances the act of subdivision does not have any effect on the reserves of the district, and therefore any payment in lieu of provision of public reserves is not justified. The Councils contended that a reserves contribution is payable irrespective of whether or not the subdivision actually places additional demand on reserves.

The case concerns s 407(1) of the Resource Management Act, which states:

407. Subdivision consent conditions — (1) Where an application for a subdivision consent is made in respect of land for which there is no district plan, or where the district plan does not include relevant provisions of the kind contemplated by section 108(2)(a) or 2001(1)(a), the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under sections 283, 285, 286, 291, 321A, or 322, as the case may be, of the Local Government Act 1974 if those sections had not been repealed by this Act.

The relevant provision under the sections of the Local Government Act which are preserved by s 407 is s 285, which related to reserves contributions in the case of residential subdivisions. That section provided:

285. Reserves contributions in case of residential subdivisions — (1) Where the council is of the opinion that all or any of the allotments shown on a scheme plan submitted for its approval are intended to be used solely or principally for residential purposes, the council may require that provision shall be made to the satisfaction of the council for public reserves under the Reserves Act 1977 within the land on the scheme plan amounting to not more than 130 square metres for each allotment on the scheme plan which in the opinion of the council will be used for such purposes.

(2) Subject to subsections (3) and (4) of this section, where the council is satisfied that the subdivision is adequately served by reserves or it is impracticable to provide such reserves, or where the area of the proposed reserves is less than 1,000 square metres —

(a) The council may, in lieu thereof, make it a condition of approval of the scheme plan that the owner shall pay to the council, within such time as it may specify, an amount of money specified by the council;

(b) The council and the owner may agree that instead of making such a payment, the owner shall set aside within the subdivision an area of land to be vested in the council;

(c) The council and the owner may agree that a combination of the provisions of subsection (1) of this section and of paragraphs (a) and (b) of this subsection, or of any of those provisions, shall apply.

(3) The value of the total contribution that the owner may be required to make under subsection (2) of this section (whether in money or land or both) shall not exceed 7.5 percent of the total value of the allotments shown on the scheme plan in respect of conditions imposed on the applicant.

(4) Where the subdividing owner undertakes, pursuant to a requirement of the council, earthworks, tree planting, or other work on the land to be set aside as reserves under this section (not being work done for ensuring the stability of the land or necessary land drainage), and the work is done to the satisfaction of the council, the value of that work shall be taken into account in assessing the area to be set aside under subsection (1) of this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).

(5) Where the subdividing owner makes provision for the setting aside within the land on the scheme plan of open space for the use only of persons to live within that land, the council may take into account the whole or part of the area thus set aside as reserves under this section in assessing the area to be set aside as reserves under this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).

(6) The area of land to be set aside as reserves, or work to be done, or the sum to be paid by the owner to the council, under this section shall be ascertained taking into account only the additional areas to which the number of allotments comprised in the land before the subdivision that could have been used for residential purposes.

In its judgment dated 9 February 2000, the Environment Court granted the Waitakere City Council's application for declarations, holding that there were no words in s 407 suggesting that the preserved Local Government Act provisions are a guide only and saying that the power conferred by s 407 is not fettered by the other provisions of the Resource Management Act or Local Government Act. The Environment Court held...
that where a proposed subdivision would not place any additional demand upon network infrastructure or upon reserves in the neighbourhood, a territorial authority may nevertheless lawfully impose conditions of subdivision consent requiring payment of a reserves contribution. The Court further held that the common law requirements for the exercise of power to impose planning conditions do not prevail where they are inconsistent with express statutory powers to impose conditions. The parties had agreed that the absence of any effects in terms of any additional demand upon reserves is a relevant factor in the exercise of a consent authority's discretion as to the quantum of any contribution, but is not a matter going to the power to require any contribution. The Court concluded that the Waitakere City Council's imposition of conditions requiring reserves contributions on the applicant on its consent to the proposed subdivision was lawful.

In a further decision dated 28 February 2000, the Environment Court considered the merits of the particular conditions imposed by the Waitakere City Council. The Court held that there was no general exemption for subdivisions of an existing development, and that the fact that Housing New Zealand provides housing for low-income families is not relevant to the exercise of the discretion to impose reserves contribution requirements. It concluded that, even though the subdivision would not itself result in additional use of public reserves, it was fair and reasonable that the subdividers be required to pay a contribution towards the cost of providing public reserves to meet past shortfalls. Housing New Zealand appealed to the High Court. In a judgment delivered by Glazebrook J on 17 July 2000, a Full Court, consisting of Fisher and Glazebrook JJ, dismissed the appeal. The Court held that the Environment Court had not applied a wrong legal test in deciding that the contribution could be imposed. The Court considered that there does not need to be additional demand created by the subdivision for there to be the legal power to impose a reserves contribution. It expressed the opinion that the test of whether the contribution was "so unreasonable that no reasonable planning authority could have imposed it" was perhaps not appropriate, except as a "final check", because it provided no real guidance, but concluded that it was not the only basis of the decision and therefore did not invalidate the Environment Court's findings. The Court concluded that the Environment Court had not made an error of law in assessing whether or not the contributions should have been made in respect of the New Lynn and Te Atatu properties, and in assessing the level of those contributions.

Leave to appeal to this Court was refused by Fisher J on 19 October 2000. The Judge accepted that the subject could fairly be described as a matter of general or public importance, as it affects many territorial authorities and many Housing New Zealand parcels of land. However, Fisher J found that there was no readily identifiable question of law, and the only potential question of law had been well traversed.

Leave to appeal to this Court is governed by s 308 of the Resource Management Act which provides that s 144 of the Summary Proceedings Act 1957 applies in respect of a decision of the High Court on appeal from the Environment Court. Section 144 in turn provides that the applicant may apply to this Court for special leave to appeal in the event that leave to appeal is refused by the High Court. But the appeal must raise a question of law which, "by reason of its general or public importance or for any other reason," ought to be submitted to this Court for its decision.

It is apparent that the argument which counsel for the applicant, Mr Radich, who did not appear in the Environment Court or upon the substantive hearing in the High Court, now would wish to present to this Court in a significant respect put differently from the argument on Housing New Zealand's behalf below. Counsel also recognised that it was facing the problem that leave is being sought in relation to a question of law concerning a transitional provision. Acknowledging this, Mr Radich emphasised that it might be 18 months or even longer before transitional plans are replaced throughout the country by new district plans which will, almost certainly, have self-contained provisions taking the place of s 285. It has been necessary to preserve s 285 only because schemes drawn up under the predecessor of the Resource Management Act do not have such provisions. Counsel said that large sums of money are at stake in the meantime for his client if it continues to pursue its policy of obtaining separate titles to its units.

There are two arguments sought to be advanced. The first is that s 285 is not to be read in isolation and applied as it would have been when the Town and Country Planning Act 1977 was in force. Now it must be applied in the context of the Resource Management Act whose policies and principles, it is said, require the decision-maker to concentrate upon the effects of the particular resource consent which is being sought - here, subdivision - which are "on paper only", involving no change or prospective change to the physical environment and no effects upon existing Council reserves.

Secondly, it is submitted that the High Court erred in law in declining to receive guidance from the well-known decision of the House of Lords in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA). A second appeal on a transitional provision will not usually give rise to a question of law of general or public importance. Here, in one respect, it can arguably be said to do so but, unfortunately, because of the way the matter has been argued below, this Court is being asked to consider embarking upon a potentially major review of the basic principles and policies of the Resource Management Act, which the applicant's argument before us would require, without the very substantial benefit of having the views of the specialist body, the Environment Court, expressed upon them in the context of this case, and without also having the advantage of a first review of the matter on that basis by the High Court.
Court. The concentration in the Environment Court appears to have been upon the circumstances of the particular case, rather than being directed to any more general questions. The High Court recorded that the view expressed for the appellant in that Court was "that there was the jurisdiction to impose a contribution but that the contribution should not be imposed in such circumstances [which is the way it is now put] or alternatively that it should always be imposed at 0 per cent." The latter formulation appears to have been predominant.

If the applicant had chosen to present its case in the Environment Court so as to generate discussion of the principles and policies of the Resource Management Act, a course seemingly still open to it in relation to a future subdivision where the issue emerges, we might well have been disposed to grant leave. But in the present circumstances we regard embarking upon that question as inappropriate, particularly when it would arise on the application of a provision which will fairly soon cease to have practical effect.

As to the High Court's treatment of Newbury, we think that the applicant may be giving too much importance to what appears to us to be a remark which was no doubt influenced by the case as it was argued before the Full Court and which was directed to the particular statutory provision. The High Court commented that Newbury was a case dealing with different legislation in a different jurisdiction, and with general rather than specific legislation. It said that conceivably Newbury had been over-used in this context, although the Court proceeded to refer to the third part of the Newbury test in a later portion of the judgment.

We take the view that the Newbury test remains of general application and that New Zealand Courts should continue to apply it in relation to the provisions of the Resource Management Act. We note that the Environment Court, in a passage not criticised by the High Court, did in fact deal with the common law requirements upon the Council in terms which clearly were drawn from Newbury. It said that it found that the acquisition and improvement of public reserves is a resource management purpose and asked itself whether the purpose related to the activity authorised by the consent, that is, the subdivision, and whether the condition for a reserve contribution was so unreasonable that a reasonable consent authority could not have imposed it.

When the High Court's observation is read in the setting of its judgment as a whole and with particular reference to the transitional provision we see no danger that the Court will be interpreted as indicating that Newbury is not to be followed in resource management cases. Hence the applicant's second point is not of public or general importance. It is also subsidiary to the first argument.

The application for leave to appeal is declined with costs of $2500 to each of the respondents together with their reasonable disbursements, including travel and accommodation costs, to be fixed if necessary by the Registrar.

2 Housing New Zealand Ltd v Waitakere City Council [2001] NZRMA 77, para [15].
Lyttleton Port Company Ltd v Canterbury Regional Council
NZEnvC Christchurch C8/2001, 26 January 2001
IN THE MATTER of the Resource Management Act 1991
AND
IN THE MATTER of an appeal under section 120 and section 121 of the Act
BETWEEN
LYTTELTON PORT COMPANY LIMITED (RMA 146/99)
Applicant
AND
THE CANTERBURY REGIONAL COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge J A Smith
Mrs N J Johnson

HEARING at CHRISTCHURCH on 9-13 and 16 days of October 2000

APPEARANCES
Mr S R Maling and Ms A C Dewar for the applicant
Ms M Perpick for the Canterbury Regional Council
Mr T Young for the Lyttelton Residents and Ratepayers Guild
Mr I Graham and Mr S Shrigley for the Inner Harbour Moorings Association
Mr Illingworth and Mr V McClmont for Lyttelton Harbour Residents Association Incorporated
Mr S Hemsley in person

INTRODUCTION

These appeals are from the decisions of an independent Commissioner for the Canterbury Regional Council ("The Regional Council") relating to an area in the Port of Lyttelton known as the Inner Harbour Moorings area ("the Moorings area"). The applicant, the Lyttelton Port Company Limited, ("the Port Company"), sought to:

(a) remove all of the existing piles in the Moorings area. This application was granted subject to conditions including condition 2 which is the subject of appeal. That reads:

2. No moorings which are occupied as at the date of this decision, shall be removed until application CRC 990039, and any appeals have been determined or withdrawn.

(b) occupy the Moorings area to the exclusion of all other persons not expressly allowed to occupy the area. This application was declined by the Commissioner.

The application CRC 990039 is an application by Inner Harbour Moorings Association ("the Moorings Association") which has not yet been processed by the Regional Council, apparently at the request of the Moorings Association.

BACKGROUND

The Port of Lyttelton has been established for some 150 years and has been in continuous use for both recreational and commercial vessels during that time. Over that period it has undergone significant improvements by way of reclamations to provide flat land around the harbour areas together with breakwaters, jetties, wharves and other facilities to provide a well protected environment for shipping. This area is known as the inner harbour and shall be referred to as such throughout the
decision. In more recent years development has also occurred on the outside of the inner harbour (which shall be referred to as the outer harbour) to provide further extensive areas for containers and other cargo, together with coal. This area includes wharves, known as Cashin Quay, and is protected by a further breakwater protruding into the Lyttelton harbour. West of the inner harbour entrance is a large area of reclamation known as Naval Point Reclamation. There are jetties on the inner harbour side of this reclamation but not on the outer harbour side. Further to the west again is an area known as Magazine Bay which has a berthing area for small vessels. That area was originally protected by a floating tyre breakwater which was removed in more recent years.

[3] Recently there have been attempts to construct a larger marina at Magazine Bay ("the Marina") involving construction of floating jetties and floating breakwaters. This relied on floating concrete structures anchored by wires and substantial weights to the seabed. The High Court decision Canterbury Regional Council -v- Lyttelton Marina Ltd et al, and Lyttelton Marina Ltd and Magazine Bay Berth Holders Association Incorporated and Others, contains a detailed description relating to the marina and notes that construction began between 1981 and 1985.

[4] At the commencement of the hearing the Marina development was well underway with approximately 75% of the marina completed. On Thursday 12 October 2000 during the course of this hearing the area was hit by a particularly severe storm and the Marina was substantially destroyed, with significant loss of vessels moored at the jetties.

[5] When the hearing commenced there were no recreational vessels in the Moorings area by virtue of a decision by the Port Company to exclude all such vessels. There was one vessel which was anchored within the Moorings area, belonging to one of the submitters Mr V McClimont, and several vessels belonging to the Port Company which were still moored to the piles. At the commencement of this hearing no piles had been removed but wire rope encircled most piles restricting vessels from entering the area.

[6] It is against a background of ongoing concern by recreational vessel owners as to the safety of the Marina and the exclusion of recreational vessels from the Moorings area that this appeal was heard.

The history of the appeal

[7] In 1998 the appellant sought consents to remove the piles from the Moorings area and to obtain occupation of this area to the exclusion of other parties. As already noted, the application for removal of the piles was granted subject to one condition preventing the removal of the piles until an application by the Moorings Association to occupy and place piles in the Moorings area had been finally disposed of. The Court is told that that application has still not been considered by The Regional Council at the request of the Moorings Association.

[8] The Port Company’s application to occupy, which was declined by the Commissioner, has been the subject of further requests for information by some of the submitters. A copy of a confidential supplementary paper circulated to the Board of the Port Company in December 1998 was the subject of orders for confidentiality by the Court dated 30 June 2000.

[9] The matter had previously been listed for call but could not be reached as part of the list. At the commencement of this hearing all [submitter parties] made application for adjournment of the matter. After considering the various submissions of the parties the Court by oral decision declined the application for adjournment.

[10] As already noted, part-way through the hearing of this matter the Christchurch and Banks Peninsula areas were struck by a particularly severe southerly storm. With the consent of all parties the Court took the opportunity of viewing Magazine Bay and the Port during these extreme weather conditions. It was subsequently
conceded by the Port Company that there had been a failure of the Marina. A significant number of vessels were sunk or damaged with failure of the floating jetties in the Marina and the floating concrete breakwaters. In light of the concession by the Port Company it was unnecessary to recall any of the witnesses. Evidence given by a witness for the submitters, Mr McClimont, was not rebutted relating to the Marina. In light of the concession by counsel it is also unnecessary for the Court to consider in any detail, evidence produced by the Port Company supporting the ongoing safety or availability of the Marina for recreational vessels.

**Issues on appeal**

(a) **Scope of conditions on pile removal**

[11] Having regard to the significant developments at the Marina it is important that we focus on the issues before the Environment Court in this appeal. Consent has been granted for the removal of the Moorings area piles ("the piles") and the only issue relating to that consent before this Court on appeal is the condition limiting the timing of the removal until after the application by the Moorings Association has been determined or dealt with. In such circumstances the Court cannot impose a condition that would nullify the grant of consent and this point was conceded by all parties. It was also accepted by all parties that we have jurisdiction to consider as part of the conditions, limitation on the number of piles to be removed. That is, to the maximum number that were unoccupied at the time of the Commissioner's decision. The Court could also impose another form of limitation upon removal, either as to time or number of piles that might be removed.

[12] In deciding the appropriateness of the conditions it will be necessary to consider the status of the piles under the transitional provisions of the Resource Management Act 1991 (the Act or RMA).

(b) **Occupation of the Moorings area**

[13] The more substantial issue before the Court was the aspect of the appeal relating to the occupation of the Moorings area for the future. The Port Company argued that because it owned the pile moorings what it sought was only an extension of its already existing rights of occupation. This requires some determination as to the extent of the occupation rights already enjoyed in the Moorings area and those enjoyed throughout the balance of the Port Company area. We are also required to examine in detail the concept of occupation as set out in section 12 of the RMA and its inter-relationship with other sections in the Act, particularly section 122(5). This involves:

(a) the issue of "exclusion" as this term is used in section 12;

(b) the question of whether occupation is reasonably necessary for another activity;

(c) consideration of the manoeuvring and mooring of commercial vessels and guaranteed access to the adjacent No. 7 wharf and nearby land as compared with other identified reasons for occupation including transactional costs, defending its position from alternative claims and economic efficiency;

(d) the scope of occupation as intended under section 12 in relation to areas of the coastal marine area that are on or over harbour bed vested in the Crown;

(e) the scope of potential development options in relation to a necessity for occupation at the present time.

[14] It is the Court's intention to deal with the pile issue first and consider issues relating to the exclusive occupation sought in the balance of the decision.

**Removal of the piles**

[15] The piles themselves have been in consistent use for a considerable period of time dating from around the 1920's. Prior to that time the area was used for either swing moorings or anchoring. The piles themselves devolved to the control of the Lytton Harbour Board and both the harbour bed in the Moorings area and the piles...
themselves were owned by the Harbour Board at the time of the Local Government re-organisation in 1989. Although the Moorings area was originally transferred to the Banks Peninsula District Council, this was purchased by the Port Company for some $462,000 in 1995. In the meantime however, the harbour bed in the Moorings area was transferred to the Crown. Accordingly, to determine the scope of any consent that was transferred to the Port Company the Court must determine the consents that were in force at the time of transfer.

Deemed consent for the Moorings area

[16] Section 384 provides that any existing permissions are to become coastal permits. Section 384(1) provides relevantly:

1) Every ...

(b) Licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950, Order in Council made under section 175 of that Act, and every approval granted under section 178(1)(b) or (2) of that Act (or the corresponding provisions of any former enactment); and

(c) ...

in respect of any area in the coastal marine area, being a permission, licence, permit, or authority in force immediately before the date of commencement of this Act, shall be deemed to be a coastal permit granted under this Act on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act) by the appropriate consent authority; and the provisions of this Act shall apply accordingly.

The relevant date set out in section 384A(1) to determine the right to occupy the coastal marine area adjacent to a port is September 30, 1991. In respect of other permissions not covered by section 384A these appear to become coastal permits on the date of commencement of the Act namely 1 October 1991 by virtue of section 384(1).

Section 425 of the Act also provides:

3) Except as provided in section 384(1) –

(a) Every licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950, and

(b) Every Order in Council made under section 175 of that Act; and

(c) Every approval granted under section 178(1)(b) or (2) of that Act shall, notwithstanding the amendment of that Act by this Act, continue in force after the date of commencement of this Act on the same conditions and with the same effect as if that Act had not been so amended.

Scope of deemed consent

[17] The Moorings area was not included in the occupation area under section 384A as the plan produced to the Court clearly shows.

[18] In respect of the Moorings area, the issue then arises as to whether or not the deemed resource consent in this case arises by virtue of the Harbours Act section 156 provision or section 178. In Canterbury Regional Council v Lyttelton Marina Ltd the Court concluded that the Marina was established under section 178. The Court drew a distinction between a licence or permit under section 156 which was subject, under section 155, to a 14 year time limit and one authorised under section 173 and requiring Ministerial approval under section 178(1)(b).

[1999 NZRMA 330 at page 337]
[19] We can see no proper distinction between the Marina established by the Harbour Board and the piles except the date of establishment. We adopt the reasoning of the Court in *Canterbury Regional Council v Lyttelton Marina Ltd* and hold that the continuing existence of the piles was authorised pursuant to sections 173 and 178 of the Act. Section 178 of the Harbours Act 1950 as amended and inserted by section 41 of the 1977 Harbours Amendment Act reads:

178. RESTRICTION ON WORKS AFFECTING HARBOURS OR NAVIGATION UNDER STATUTORY POWERS.

(1) Except where this Act or any other Act otherwise specially provides, the following provisions shall have effect with respect to harbour works, pipelines, cables, or any other structure of any kind undertaken or constructed by any Board or any local authority or other body or person (hereinafter called the constructing authority) on, in, over, through, or across tidal lands or a tidal water, or the bed of the sea, or the bed or bottom of any harbour, navigable lake, or navigable river, by virtue of this or any other Act, namely:

(a) ...

(b) If it appears to the Minister that the proposed work will not unduly interfere with or adversely affect the interest of the public (whether by being or tending to be to the injury of navigation or otherwise), he may approve the deposited plan, with or without such modification, addition, or condition as he may reasonably require, and subject or not to any restriction or condition necessary for the preservation of any public right:

(c) The work shall not be made, constructed, altered, or extended without the like approval but any such approval shall not confer on the constructing authority any right to construct, alter, or extend any work which independently thereof it would not have had:

(d) ...

(e) ...

[(2) The Minister of Conservation shall not give an approval under paragraph (b) of subsection (1) of this section except with the approval of the Minister of Transport; the Minister of Transport shall not give an approval under that paragraph or this subsection unless satisfied that the proposed work concerned will not unduly interfere with or restrict any public right of navigation; and the Minister of Conservation shall not give an approval under that paragraph unless satisfied that the work will not unduly interfere with or adversely affect the interest of the public].

Section 384(1)(b) of the (Resource Management) Act has already been quoted at para 16 of this decision.

Sub-section (2) of section 384 also states relevantly:

Notwithstanding section 12, a person who is the holder of-

(a) ...

(b) A licence, permit, or approval referred to in subsection 1(b); or

(c) ...

(d) ...

shall not thereby be authorised to carry out any activity referred to in section 12, except where that person also holds every other permission, licence, permit, or approval referred to in subsection (1)(a) or subsection (1)(b) that,
immediately before the date of commencement of this Act, he or she was legally required to hold in order to carry out the activity.

Subsection (3) reads:

Notwithstanding subsection (2), every coastal permit deemed to be granted by subsection (1) shall be deemed to include a condition enabling the holder of the permit, at any time until the proposed regional coastal plan is notified, to apply to the relevant regional council under section 127(1) to change the permit for the purpose of including, as conditions of that permit, matters that could have been included in a permission referred to in subsection (1)(a) or a licence, permit or approval referred to in subsection (1)(b) or a licence, permit, or authority referred to in subsection (1)(c), and of enabling the permit to authorise the activity.

Applying the provisions of the statutes, the continued existence of the piles is permitted. Section 178(c) of the Harbours Act is incorporated as a condition of the deemed coastal permit by virtue of section 384(1) of the RMA which uses the words...

...on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act)...

The removal of the piles is not included within the powers under section 178(c) and accordingly by virtue of section 384(2) of the RMA the Port Company is obliged to have regard to the restrictions of section 12 of the RMA which states relevantly:

(1) No person may, in the coastal marine area...

(a)...

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or

unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.

We conclude that maintenance is permitted in terms of the deemed resource consent and also the replacement of a broken or faulty pile as these are not precluded by the wording of section 12(1)(b) of the RMA. We find that the deemed resource consent under section 384 included the continued existence of the piles and the ability to maintain those piles.

Section 178(2) of the Harbours Act is of some importance. Under that provision, approval is required by the Minister of Transport and the Minister of Conservation. The rights of public navigation and the interests of the public are required to be considered. The deemed resource consent must be deemed to be subject to these implied restrictions.

In summary, section 178(c) of the Harbours Act would include conditions of the deemed consent allowing the existence and maintenance but not alteration or extension of the piles. The restriction imposed under section 12(1)(b) of the RMA would therefore be subject to the deemed consent to place, erect (and maintain) those piles. However, the deemed consent could not include rights to reconstruct, alter, extend, remove or demolish those piles as those rights are not provided for under section 178 of the Harbours Act.

Does the deemed resource consent include a right to occupy the area around the piles?

A deemed consent for the use of the area around the piles for mooring can only exist if resource consent for the use of the piles for mooring a vessel is required. In Canterbury Regional Council v Lyttelton Marina Ltd the Court noted:
We think that the clear sense of section 384 is that a licence or permit granted under section 156 becomes a deemed coastal (sic) only if, and to the extent that, a coastal permit is required in respect of the activities licensed or permitted.

And later, at page 350:

... The right which the berth holders have is to tie up to the marina and use its facilities. We do not see this as involving (or as ever having involved) any occupation of the "coastal space" which requires any separate permit or licence.

[25] In light of that decision we must conclude that although there is a deemed consent for the existence and maintenance of the piles by virtue of section 178 there is no corresponding deemed coastal permit in respect of the use of those piles. As a matter of contract the Port Company is able to licence the use of the piles as the piles are the property of the Port Company. But it has no right of occupation which exists outside that in terms of the RMA. In practical terms therefore the effect of the High Court decision Canterbury Regional Council v Lyttelton Marina Ltd on this case is that the deemed coastal permit relates only to the existence of the piles themselves and the use of those piles is a matter controlled by licence from the owner of the piles. This approach is consistent with that adopted by the Environment Court in the Auckland Regional Council case where Judge Treadwell states at page 7 of that decision:

I am of the opinion that a permit authorising the jetty structure and without other express provisions only allows exclusive occupancy of the space occupied by the physical form of the structure and does not confer other rights concerning the air space above, over or below the structure or the area of water below the structure. Thus in the absence of prohibition by a permit consent condition members of the public whether on foot, swimming or diving may continue use (sic) the air space, the land and water unless prohibited by a condition in terms of section 122(5).

[26] Whether the occupation of the area around that pile is reasonably necessary for the use of the pile itself is a question that will be considered later in the context of this decision as it relates to occupation. We conclude that the deemed coastal permit relating to the piles cannot include wider powers of occupation than are necessary for the existence and maintenance of the piles.

The condition as to timing of pile removal

[27] On this analysis of the existing position we have reached the inescapable conclusion that it is not possible to impose conditions reserving rights of occupation until others have their application heard before the Court. The Commissioner having granted approval for the removal of the piles can not properly impose conditions restricting the timing of that.

[28] Because of our conclusion, that the permit does not give a power to reconstruct the piles, the deemed permit would be at an end when all piles were removed. It can not be assumed by the Court that having obtained consent for the removal of the piles the Port Company will necessarily exercise that consent or remove all the piles. Deemed consents would only continue for any piles not removed.

[29] Accordingly existing condition 2 of the consent should be deleted.

Deemed permit under section 384

[30] As already determined only the piles themselves have a resource consent to occupy the area (that is the seabed, the water column and the air space). Vessels in the area do not require resource consents to moor to the piles. Applying the Canterbury Regional Council decision vessels in the area do not require a resource...
consent to moor to the piles. The Canterbury Regional Council decision related to a Marina where some vessels were berthed permanently. Furthermore, in the Auckland Regional Council application for declaration the Environment Court considered the impact of section 122(5) (as it related to the occupancy of jetties). The Court considered that section 122(5) provides that no coastal permit shall be regarded as conferring occupancy to the exclusion of all or any class of persons unless the permit expressly provides otherwise.

In our view section 122(5) is directly applicable in the current situation. There is no express restriction on the consent and the issue turns upon whether such a restriction is reasonably necessary to achieve the purpose of the coastal permit.

The Port Company having applied to remove the piles is unable to argue that occupation of the area around them is reasonably necessary "for the purposes of the coastal permit". Accordingly we conclude that the deemed coastal permit does not confer other rights in the circumstances where the piles are to be removed.

The Section 384A permit as a basis for exclusive occupation of Moorings area

In our view the application for exclusive occupation is not an extension of existing rights but a new application. The essence of the Port Company’s case here was that it sought occupation of the Moorings area on the same basis as it occupied the balance of the port area. Mr D G Viles, the managing director of the Port Company, gave evidence on its behalf. He said at para 61 of his evidence:

"This application to occupy under the same terms and conditions as the surrounding section 384A [sic] permit is to protect the commercial investment and all surrounding areas, and to exclude the very real possibility of conflicting rights being granted to some other parties whilst at the same time improving access to existing infrastructures such as the dry dock and No. 7 wharf."

On this basis it seems fundamental to the position of the Port Company that the occupancy they hold under section 384A gives exclusive occupation of the area. In Ports of Auckland v Auckland Regional Council Judge Sheppard considered the background to section 384A and its application. He noted:

"On the question whether the Port Company’s rights to occupy space in the coastal marine area to the exclusion of others, both parties submitted that the Port Company’s rights to occupy are exclusive only to the extent required to enable Port Company to manage and operate its port-related commercial undertaking. It seems to me that the true difference between them on this point is not the extent to which the Port Company’s rights of occupation are exclusive, but rather, which of them has the authority to decide whether occupation by another is compatible or not. I consider that that is an independent question, the answer to which does not assist to resolve the principal issue."

And at page 15 the Court concluded:

"... I do not need to attempt the questions about whether the Port Company’s rights in the areas defined by the coastal permit are exclusive, and if not, whether the Port Company or the Regional Council has authority to permit occupation of parts of the defined areas by others."

Some guidance in respect of the extent of the rights under section 384A can be obtained from Port Otago Ltd v Hall. In the Court of Appeal decision Blanchard J noted:

"It follows that we do not read section 384A as an indirect method of creating or preserving existing use rights for an extended period."

The Court then noted:

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3 There is a line of cases including Hauraki District Council v Moulton 2 NZED 373 where degree of annexation determined occupancy. Decision A109/2000 Judge Treadwell.


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The coastal permit does not authorize any activity or activities at all, other than to the extent that occupation is itself an activity. The permit, as the Full Court elsewhere accepts, is a permit for [Port Otago Ltd] to occupy the area specified in it. That right of occupation is conferred for the purpose of allowing the port company to manage and operate the port-related commercial undertaking it acquired under the Port Companies Act 1988, and it is limited to that purpose. The company does not have a right to occupy the area for any other purpose. But the port-related commercial undertaking is not authorized by the coastal permit as such; that undertaking is the purpose of the grant of the right of occupation and not itself part of the grant. [35] We have concluded that the section 384A permit does not in itself give rights of exclusive occupation to the Port Company. Nor does it prevent any other application for occupation except to the extent that there is a conflict.

We are supported in that conclusion by reference to section 122(5). Section 122 on its face applies to all coastal permits including those under section 384A. Section 122(5) states relevantly:

(5) Except to the extent—

(a) That the coastal permit expressly provides otherwise; and

(b) That is reasonably necessary to achieve the purpose of the coastal permit,

no coastal permit shall be regarded as—

(c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or

[36] The requirements of section 122(5)(a) and (b) are cumulative. The section 384A coastal permit granted to the Port Company does not exclude any classes of persons. Section 384A(10) expressly recognizes potential for competing claims for occupation. Although this clause appears to apply only to the transitional phase, it is consistent with section 122(5) and the potential limits to rights of occupation.

[37] In light of section 122(5) and quotations from the Court of Appeal decision in Port Otago Ltd v Hall it cannot be said that the occupation granted under section 384A to the Port Company is for all purposes and to the exclusion of all other persons. The occupation itself is limited to that required for the purpose associated with the operation and management of the port’s undertaking. There is a lack of any express words limiting the persons who may enter into the area. We conclude that there is no general power to exclude classes of persons under the section 384A permit except for limited times and for limited reasons relating to the operational requirements of the port itself. The limits of those powers would of course vary within the port area and may very well be significantly greater on the jetties, wharves and piers than they might be in other portions of the harbour which are only required for navigational purposes from time to time. The Port Company itself did not propose that it restrict the right of persons to pass and re-pass through the areas of the port. We heard that vessels could stop for example to refuel at the fuelling jetty and anchor in certain areas temporarily.

[38] Accordingly we must conclude that the rights under s384A are not exclusive rights of occupation but give power to exclude identified classes of persons for limited periods and for reasons related to the operational requirements of the port.

The current status of the Moorings area

[39] We have concluded that neither the deemed coastal permit applying to the Moorings area, or the section 384A rights the Port Company have, give a right to
exclusive occupation for all purposes. Therefore, we must consider whether the use and occupation of those areas by the Port Company precludes competing applications for occupation within the area. This is one of the issues that the Court in *Ports of Auckland* determined it was not required to decide on that occasion. In this case, however, the Port Company’s application for occupation seems to be predicated on an understanding that if it obtains an occupation consent this will preclude other parties from seeking occupation in the Moorings area. Mr Viles said in his evidence, paragraphs 94 and 95:

94. *This application is to occupy the coastal marine area under the same terms and conditions as the surrounding 384A coastal permit. If the application is granted this will give us security of tenure for the current operations of the port and for the planning of the development of this part of the port whilst excluding conflicting rights being granted to another party.*

95. *An occupation consent will also provide significant assurance that further more detailed investigation work for the necessary resource consents would not be wasted. Occupation would protect a strategic position for development when circumstances are right and avoid legal costs in defending that position.*

[40] Mr P T Donnelly, consultant economist to the applicant, went even further in para 12.4 of his evidence when he said:

*I am convinced that s.7(b) and the enabling provisions of s.5(2) will be promoted by their exclusive occupation of the [moorings] area. My analysis leads me to the conclusion that occupation of the [moorings] area is necessary for the efficient operation of the port, and that granting consent will forswear avoid unnecessary transaction and other opportunity costs being inflicted on society.*

[41] Notwithstanding this evidence counsel for the applicant accepted in closing that it was not possible to preclude further applications for occupation of the area. Section 122(5) specifically indicates that no coastal permit shall be regarded as conferring on the holder the same rights in relation to the use and occupation of the Moorings area against other persons as if they were a tenant or licensee of the land. It was not even contended that the current section 384A permit goes that far. It being conceded that the seabed in this area is vested in the Crown, it must be said that there is always potential for conflicting applications for occupation. This potential for competing applications is supported by reference to section 122(5) which requires any occupation to:

(a) expressly state the persons excluded; and

(b) be reasonably necessary.

[42] In respect of the current situation therefore, the Moorings area is subject to a deemed resource consent for the existence and maintenance of the piles. The limits of that occupation are subject to a reading of section 122(5)(a) and (b). We repeat the conjunctive word between the two provisions is “and”. This is a cumulative requirement that there not only be an express provision in the coastal permit but also that the provision is reasonably necessary to achieve the purpose of the coastal permit. This means that the current deemed coastal permit cannot exclude other persons from the area as there is no express provision within it.

*The application for occupation*

[43] Against the background of the status of the general port area and the Moorings area we must now consider the current application for occupation. The application must be considered under section 12 of the Act, particularly subsection (2) which states relevantly:

*No person may, in relation to land of the Crown in the Coastal Marine area ...*
(a) Occupy any part of the coastal marine area; or

(b) ... unless expressly allowed to do so by ... a resource consent.

The word "occupy" takes its definition from section 12(4) and is defined as follows:

(a) 'Occupy' means the activity of occupying any part of the coastal marine area —

(i) Where that occupation is reasonably necessary for another activity; and

(ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and

(iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense; and

and 'occupation' has a corresponding meaning:

[44] By virtue of the definition of occupation the following elements can be derived from section 12(4)(a):

(1) That the occupation is reasonably necessary for another activity; and

(2) That it excludes all or any class of persons not expressly allowed to occupy that area; and

(3) It is for a period of time or in a way that would require a lease or licence to occupy unless there is a rule or resource consent.

These requirements are cumulative and are derived rather than direct. They comprise the definition of the activity for which resource consent is sought under section 12(2)(a).

The Proposed Regional Coastal Plan

[45] Under the Proposed Regional Coastal Environment Plan (Proposed Coastal Plan) this application is a non-complying activity. The Proposed Coastal Plan is currently at a somewhat complicated stage in its development. Although originally notified in 1994 changes known as Variations 1 to 9, have been introduced to Chapters 7 and 8. No hearings have been held in respect of the variations to date. In respect of the base plan itself, Council have considered and notified decisions on submissions. References have yet to be determined. The relevant variations are not yet as advanced as the proposed plan and therefore have not yet merged under Clause 16B to the First Schedule. Clause 16B however states relevantly:

From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.

The meaning of these provisions is unclear but must involve a modification of any provisions in the proposed plan affected by the variation. In this case the variation does not change the status of the application as non-complying but other criteria of the proposed coastal plan which have been altered by the variation must be regarded with some circumspection.

[46] Mr A M Purves, consultant planner for the Port Company, gave evidence relating to the proposed coastal plan (with variations) including:

(a) That the port is recognised as having both regional and local strategic significance. It is noted as requiring relatively exclusive use of the coastal marine area at and adjacent to the port facilities and is in
accordance with policy 8.8(e) recognising that port infrastructure including hard standing areas, wharves, cranes, buildings and other structures may be further developed in response to commercial opportunities.

(b) Recognising that the port needs to have its own controls over access to the port operational area and that provision for public access to or use of such areas is not necessarily appropriate.

(c) Policy 8.5(a) also recognises the following:

(i) To give priority to maintaining safe anchorage of vessels; and

(ii) The need to avoid impeding navigational channels and access to wharves, slipways and jetties;

(iii) Avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available;

(iv) Having regard to existing commercial use of the area and any adverse effects on that activity.

The case for exclusive occupation

[47] We now consider the evidence given and submissions relating to the application. Evidence for the Port Company given by Mr Viles and Mr Donnelly made it clear that they primarily saw the advantage of obtaining occupation as excluding other parties from seeking to occupy the same area. However, both Mr Viles and Captain W T Oliver for the Port Company also made it clear that there were operational advantages in having exclusive occupation of the area. These turned largely upon the ability for greater manoeuvring, particularly with tugs and vessels off No. 7 wharf and into the dry dock area. Captain Oliver in particular made mention of several occasions when tugs had been compromised to some extent by the piles in the Moorings area, and particularly their fear of damaging or swamping moored vessels if mid or full thrust was used. Captain F R Keer-Keer for the Regional Council on the other hand believed that the ports’ pilots were well used to operating within confined spaces and that the manoeuvrability of vessels off both No. 7 wharf and the dry dock was not compromised by the existing piles. However, his view was that if the piles were removed then this would be more convenient for navigation.

[48] We conclude from the evidence that larger vessels would not be able to utilise the Moorings area in any event because of the water depth of 4.5 metres. Tugs are operable on the edges of the Moorings area but would be in marginal operating conditions once half-way into the Moorings area itself. The only immediate use of the Moorings area itself suggested by witnesses for the Port Company was transitory in the sense of potential utilisation by tugs manoeuvring vessels through the area.

[49] For the applicant the prospect of the Moorings Association obtaining occupation and constructing further moorings was of particular concern. They also cited difficulties with uncontrolled occupation of the area creating potential difficulties for operation of the access to No. 7 wharf and the dry dock.

[50] Counsel for the Regional Council quoted from the decision of Hauraki District Council v Moulton11 and the High Court decision in Canterbury Regional Council v Lyttelton Marina Ltd12 as authority for the proposition that people exercising their public right of navigation are not “occupying” the coastal marine area even when they leave a vessel in one place temporarily. The Regional Council position was that exclusive occupation would not prevent the navigational rights that seemed to be the concern of the Port Company.

[51] Evidence for the submitters related in part to the public amenity value of the area and that it constituted part of the coastal marine area. They pointed to the fact that it had traditionally been used by recreational vessels. They pointed to the lack of alternative places for the mooring of vessels in Lyttelton Harbour. They also pointed to the significant noise and impacts on the residential properties nearby of the use of the area for commercial vessels or land based activities. The submitters,
particularly Mr McCliment and Mr T Young, raised concerns relating to the installation by the Port Company of wiring between piles to prevent vessels entering the Moorings area. They pointed to this de facto attempt at exclusive occupation as providing a risk to vessels which had resulted in a hazard warning being issued by the Harbourmaster.

[52] The Port Company provided a significant amount of evidence about potential development of the area. All this potential development was at this stage speculative, including estimates of costs. There were no potential impact assessments. We have concluded that we can put little, if any, weight on potential uses of the area which do not constitute part of the application for occupation before this Court.

[53] Most, but not all, of the potential uses of the site would require resource consents. It was accepted by the applicant that the proposals were not sufficiently advanced to give the type of detail necessary to perform the scrutiny required in terms of the RMA. We do not believe we can put the potential developments any higher than that the Port Company believed there are uses to which the Moorings area could be put at some time in the future.

[54] From the time of the Commissioner's decision in early 1999 these proposals have not advanced. At the Court hearing no firm proposal or commitment was made by the Port Company as to any development in the Moorings area. One particular possible use, that of unloading and storing imported vehicles, appears to be a use that would not require significant modification in the area. It could be undertaken without utilising the Moorings area and may use No. 7 wharf for unloading and nearby open land areas for storage. Other uses, including potential construction of new breastwork for mooring commercial vessels and reclamation in the area would involve significant works by the Port Company at significant cost. Use by larger vessels in the area would require a significant increase in depth involving the removal of the underwater rock shelf in the Moorings area.

[55] At the time when some formal proposal is made in respect of the Moorings area, the evidence may then support the Port Company's contention that occupation should be granted and the extent to which that should exclude any class or classes of person. At the present time however the proposals are hypothetical possibilities and cannot provide a basis for assessment of effects or evidence to support the application.

In our view these hypothetical potential future uses of the site cannot form a basis for obtaining exclusive occupation at the current time.

Reasonably necessary

[56] The evidence for the applicant, in respect of whether or not the occupation of the area is reasonably necessary, related to:

(a) retaining options for future development;

(b) maintaining efficiency and avoidance of transactional costs in defending the occupation sought by other parties;

(c) operational use of the port particularly of No. 7 wharf and the dry dock.

[57] It was argued that as the port's infrastructure is of strategic importance the occupation has a status as reasonably necessary. The Regional Council disagreed and submitted that there was no evidence before the Court that established that the occupation of the Moorings area (as opposed to the removal of the piles) was reasonably necessary for the operation of the port. The submitters' evidence, particularly that of Mr Young and Mr McCliment, made it clear that the area was not suitable for larger vessels. They also pointed to the risk to smaller vessels of not being able to have a portion of Lyttelton Harbour for safe mooring in serious storm events. Mr McCliment in particular pointed to the sinking of several vessels at the Marina on 12 and 13 October 2000. Some of these vessels were previously in the Moorings area until required to vacate by the Port Company.
[58] All counsel adopted the definition as set out in Environment Defence Society Inc v Mangonui County Council\(^4\) where Cooke P said “necessary” is:

... a fairly strong word falling between expedient or desirable on the one hand and essential on the other.

[59] The issue of difference between the parties appears to turn on whether matters such as efficiency and strategic importance equate to reasonably necessary. For the Regional Council and for the submitters it was said that questions of strategic importance or efficiency equate to something in the order of desirable or expedient.

[60] In our view there is no evidence before this Court that would establish that the occupation of the Moorings area is essential for the operation of the port. If the Port Company had finalised an option for development of the Moorings area and associated land, then there may be compelling evidence to support such a proposition. We are of the view that once the piles are removed any inconvenience with manoeuvring vessels from No. 7 wharf and the dry dock will be avoided, and therefore we are unable to see any real advantage to the Port Company in obtaining occupation of the Moorings area from an operational point of view. It may be desirable for the Port Company to have full control over this area. However, the general powers of the Harbourmaster to control navigation and mooring would be sufficient. Accordingly we cannot find that there is anything necessary about occupation of the area from an operational perspective. We see occupation as no more than desirable. Nor do we accept that such occupation is currently of strategic importance or that strategic importance equates to reasonably necessary.

[61] We must assess where this application fits between desirable and essential. We have concluded that the evidence before the Court falls short of establishing that the occupation of the area is reasonably necessary. We base that decision on the following factors:

1. The port has operated for in excess of 100 years without significant conflict between the Moorings area and the balance of the port;

2. Although we accept that there have been changes in the size of vessels operating at the port, there is no immediate proposal before this Court for the use of the Moorings area for berthing ships;

3. The Moorings area is still subject to navigation and use by other vessels, including recreational vessels and fishing vessels;

4. There may be other areas of the port available for development or redevelopment.

Exclusion of parties under section 12

[62] In the alternative we consider that there is no basis for establishing the exclusion of any class or classes of persons under section 12. We consider that a resource consent for occupation must expressly state whether a class or classes of persons are to be excluded. Although it is unclear from the definition we are of the view that it must be established that it is reasonably necessary that parties be excluded from the coastal marine area. A reasoning for this view is based upon section 122(5) that provides that:

(a) the permit must expressly provide exclusion of persons from the area otherwise no exclusion occurs; and

(b) such exclusion must be reasonably necessary to achieve the purpose of the coastal permit; and

(c) the permit shall not be regarded as authority to occupy the coastal marine area which is land of the Crown as if the holder were a tenant or licensee unless the permit expressly says so and it is reasonably necessary.

Not only must any resource consent specifically state the class or classes of persons to be excluded, but it must be reasonably necessary for the purpose of the coastal permit. On those grounds we are unable to find any proper basis upon which persons could be excluded from the area.
It was suggested that giving the Port Company occupation would avoid competing claims for occupation. This was close to a submission that the Court should be involved in allocating or licensing the resource. Any competing application for occupation would need to be considered on a case by case basis. We indicate that the clear direction of section 122(5) is to ensure that the coastal marine area vested in the Crown remains open to the widest range of persons possible.

Non-Complying Activity

In addition to the other conclusions we have reached we also have concerns about the application meeting the tests under section 105(2A). We have insufficient evidence before us to form a view as to the extent of effects from the activity. Until there is a particular proposal before us we must assume that one of the major effects will be the lack of a harbour mooring for recreational vessels. In light of the loss of vessels at the Marina we cannot say that effect is minor.

We also note the objectives and policies of the Proposed Coastal Plan, particularly 8.5(a)(i) and (iii) relating to priority for safe anchorage for vessels and avoiding displacing recreational use of an area. We are not convinced that exclusive occupation of the Moorings area (by itself) meets the objectives and policies of the plan. We acknowledge the many references to the port as regionally and strategically important. However, to date there is no proposal before us to demonstrate that the occupation of the Moorings area furthers those objectives. The application does not seek occupation for a port activity but rather for potential future use. Accordingly we conclude that the application as currently framed is contrary to the objectives and policies of the plan, particularly those cited above.

On the evidence before us we have concluded the appellant has not satisfied the provisions of section 105(2A).

Conclusion

For the reasons given we are of the view that no compelling reasons have been advanced by the Port Company to restrict the range of persons having access to the Moorings area or that there is any particular use which the Port Company has for the area which would found the basis for such an application. The Port Company still holds a deemed resource consent for the existence and maintenance of the piles and it may wish to continue licensing those for mooring purposes.

In the alternative there appears to be opportunities for all the parties to attempt to reach a consensus as to the most appropriate use for the Moorings area in the future. Having regard to the onus to establish any exclusive occupation as reasonably necessary, some element of public utility would seem to be contemplated in terms of the Statute. There is a potential adverse effect on the local community of excluding all recreational vessels from the harbour. There is merit in the various stakeholders including The Regional Council considering and developing a consultative/consensus approach to resolution of this matter. Alternatively The Regional Council may wish to consider promulgating particular rules for the Moorings area as is contemplated in the Act.

For the reasons given we uphold the decision of the Commissioner for The Regional Council in declining the application for consent as it relates to the occupation of the Moorings area. The appeal on this aspect of the Commissioner’s decision is disallowed.

In respect of the application for the removal of the piles we confirm the decision of the Commissioner subject to the deletion of the existing condition 2.

Costs are reserved. Any party wishing to seek costs must file applications within 15 working days (as defined in the Act). Any reply is to be filed 10 working days thereafter. Final reply (if any) to be filed 5 working days thereafter.

DATED at CHRISTCHURCH this 2 30th day of January 2001.
New Zealand Airline Pilots' Association Inc v Attorney-General
[1997] 3 NZLR 269 (CA)
New Zealand Air Line Pilots' Association Inc v Attorney-General

5

Court of Appeal Wellington
16, 17 April; 16 June 1997
Richardson P, Henry, Thomas, Keith and Blanchard JJ


On 9 June 1995 an Ansett de Havilland DHC-8 twin-engine aircraft crashed into a hillside about 16 km east of Palmerston North airport. Three passengers and one crew member died in the crash and 14 others were seriously injured. This appeal dealt with two sets of proceedings. In the first set of proceedings the police sought to obtain the Cockpit Voice Recorder (CVR) by search warrant and the transcript taken from the recorder. They also sought the Digital Flight Data Recorder (DFDR). In the second set of proceedings the Transport Accident Investigation Commission (TAIC) proposed to use the transcript in its accident report including extracts in an appendix. In both sets of proceedings the plaintiff challenged the rights of both the police and TAIC to use the material from the CVR and at first instance the Court found that a judicial officer had the power to issue a search warrant directed to the CVR, transcripts and DFDR but could not exercise it without regard to both a particular annex to the Chicago Convention on International Civil Aviation 1944 and to public interest immunity. The Court also found that TAIC acted within the powers conferred on it by the Transport Accident Investigation Act 1990 without breaching the relevant part of the annex. The plaintiff, the New Zealand Air Line Pilots' Association Inc (ALPA) and the Attorney-General appealed and in the TAIC proceedings the plaintiff appealed and the Attorney-General intervened. The main issue was whether the powers of a District Court Judge to issue a search warrant under s 198 of the Summary Proceedings Act 1957 and the Transport Accident Investigation Commission (TAIC) to prepare a report under its Act were limited by the provisions of para 5.12 of annex 13 to the Chicago Convention on International Civil Aviation based on either public interest immunity in the first set of proceedings or the statutory powers of the TAIC in the second.

Held: 1. The Convention on International Aviation 1944 (the Chicago Convention), to which New Zealand is a party, is a whole does not form part of the law of New Zealand. The giving of full effect to the provisions of the convention and its annexes was required in some cases and not in others, and, if national legal effect is needed, the effect might be given more or less directly (see p 285 line 42).

2. Annex 13 to the Chicago Convention which deals with air accident investigation is not part of New Zealand law. That conclusion did not mean that New Zealand was in breach of its obligations under para 5.12 of the annex (relating to the non-disclosure, except in certain circumstances, of records obtained for the investigation of an air accident or incident) (see p 288 line 35).

3. In so far as its wording allows, legislation should be read in a way which was consistent with New Zealand's international obligations (see p 289 line 15).

Rajan v Minister of Immigration [1996] 3 NZLR 543 (CA) applied.

4. Once the condition in s 198(1) of the Summary Proceedings Act 1957 had been satisfied, the power to issue a search warrant was not qualified in any way. The section did not state factors or purposes which must or might be considered in the exercise of the power. It was a summary power, exercised without notice to those whose premises or property were the subject of the application. Notice would very often defeat the purpose of the search. There was no authority involving s 198 where a notice procedure was required or had even been proposed. Such a procedure would be contrary to the very purpose of the power to grant a search warrant. Paragraph 5.12 did not place any limit on the power to issue a search warrant. Nor was a judicial officer considering an application for a search warrant required to give notice to interested parties before deciding whether to issue the warrant (see p 290 line 32, p 291 line 17, p 291 line 31, p 292 line 11).

5. The power to issue a search warrant was not limited by public interest immunity because in so far as the public interest immunity argument "coalesced" with the para 5.12 argument it required content rather than class analysis of the particular information extracted from the recording and of the prejudice that was likely to be caused by the information being made available for legal proceedings; the Transport Accident Investigation Act itself rejected any general class claim for all information retrievable from CVRs; and thirdly, the Court in developing the law of public interest immunity over the last 35 years had increasingly emphasised the need to examine closely the issues and ambit of the particular case in order to decide if there was good reason to uphold the objection to release (see p 292 line 25 – p 293 line 18).

Gross v Boda [1995] 1 NZLR 569 (CA) at pp 573 and 574 and Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 (CA) at pp 430 and 438 referred to.

6. On 9 June 1995 an Ansett de Havilland DHC-8 twin-engine aircraft crashed into a hillside about 16 km east of Palmerston North airport. Three passengers and one crew member died in the crash and 14 others were seriously injured. This appeal dealt with two sets of proceedings. In the first set of proceedings the police sought to obtain the Cockpit Voice Recorder (CVR) by search warrant and the transcript taken from the recorder. They also sought the Digital Flight Data Recorder (DFDR). In the second set of proceedings the Transport Accident Investigation Commission (TAIC) proposed to use the transcript in its accident report including extracts in an appendix. In both sets of proceedings the plaintiff challenged the rights of both the police and TAIC to use the material from the CVR and at first instance the Court found that a judicial officer had the power to issue a search warrant directed to the CVR, transcripts and DFDR but could not exercise it without regard to both a particular annex to the Chicago Convention on International Civil Aviation 1944 and to public interest immunity. The Court also found that TAIC acted within the powers conferred on it by the Transport Accident Investigation Act 1990 without breaching the relevant part of the annex. The plaintiff, the New Zealand Air Line Pilots' Association Inc (ALPA) and the Attorney-General appealed and in the TAIC proceedings the plaintiff appealed and the Attorney-General intervened. The main issue was whether the powers of a District Court Judge to issue a search warrant under s 198 of the Summary Proceedings Act 1957 and the Transport Accident Investigation Commission (TAIC) to prepare a report under its Act were limited by the provisions of para 5.12 of annex 13 to the Chicago Convention on International Civil Aviation based on either public interest immunity in the first set of proceedings or the statutory powers of the TAIC in the second.

Held: 1. The Convention on International Aviation 1944 (the Chicago Convention), to which New Zealand is a party, is a whole does not form part of the law of New Zealand. The giving of full effect to the provisions of the convention and its annexes was required in some cases and not in others, and, if national legal effect is needed, the effect might be given more or less directly (see p 285 line 42).

2. Annex 13 to the Chicago Convention which deals with air accident investigation is not part of New Zealand law. That conclusion did not mean that New Zealand was in breach of its obligations under para 5.12 of the annex (relating to the non-disclosure, except in certain circumstances, of records obtained for the investigation of an air accident or incident) (see p 288 line 35).

3. In so far as its wording allows, legislation should be read in a way which was consistent with New Zealand's international obligations (see p 289 line 15).

Rajan v Minister of Immigration [1996] 3 NZLR 543 (CA) applied.

4. Once the condition in s 198(1) of the Summary Proceedings Act 1957 had been satisfied, the power to issue a search warrant was not qualified in any way. The section did not state factors or purposes which must or might be considered in the exercise of the power. It was a summary power, exercised without notice to those whose premises or property were the subject of the application. Notice would very often defeat the purpose of the search. There was no authority involving s 198 where a notice procedure was required or had even been proposed. Such a procedure would be contrary to the very purpose of the power to grant a search warrant. Paragraph 5.12 did not place any limit on the power to issue a search warrant. Nor was a judicial officer considering an application for a search warrant required to give notice to interested parties before deciding whether to issue the warrant (see p 290 line 32, p 291 line 17, p 291 line 31, p 292 line 11).

Television New Zealand Ltd v Attorney-General [1995] 2 NZLR 641 (CA) at p 648 referred to.

5. The power to issue a search warrant was not limited by public interest immunity because in so far as the public interest immunity argument "coalesced" with the para 5.12 argument it required content rather than class analysis of the particular information extracted from the recording and of the prejudice that was likely to be caused by the information being made available for legal proceedings; the Transport Accident Investigation Act itself rejected any general class claim for all information retrievable from CVRs; and thirdly, the Court in developing the law of public interest immunity over the last 35 years had increasingly emphasised the need to examine closely the issues and ambit of the particular case in order to decide if there was good reason to uphold the objection to release (see p 292 line 25 – p 293 line 18).

Brightwell v Accident Compensation Corporation [1985] 1 NZLR 132 (CA) at p 139 applied.
6 A report on an investigation aimed at preventing further accidents, determining the causes of an accident, and prepared by a qualified and experienced body drawing on particular expert advice including that of assessors would include a statement of relevant facts as an integral part of the determination of the facts. For TAIC to publish its report including the information in terms of its statutory function was not to "disclose" it. It was simply to carry out its statutory role. The inclusion in the appendix of extracts from the transcript came within the power of TAIC under the Act (see p 299 line 17 – p 299 line 37).

ALPA's appeal dismissed; Attorney-General's cross-appeal on behalf of police allowed; ALPA's appeal in the commission proceedings dismissed.

Observation: It is important for TAIC reports to be published early (see p 299 line 14).

Other cases mentioned in judgment


Fletcher Timber Ltd v Attorney-General [1984] 1 NZLR 290 (CA).
Inland Revenue (Commissioner of) v JFP Energy Inc [1990] 3 NZLR 536 (CA).


Whale Watch Kaikoura Ltd v Transport Accident Investigation Commission (Court of Appeal, Wellington, CA S797, 12 May 1997).

25 Appeal

The appellant appealed in two sets of proceedings dealt with by a single judgment of the High Court that the police were entitled to obtain by search warrant a Cockpit Voice Recorder and the transcript and the Transport Accident Investigation Commission was able to include extracts of the transcript in its report and that it was acting within its powers.

Hugh Rennie QC and Patrick Dymond for the appellant.
Solicitor-General John McGrath QC, John Pike and Natalie Baird for the respondents.

John Wild QC for the Transport Accident Investigation Commission.

Paul Davison QC for Ansett New Zealand Ltd (given leave to withdraw).

The judgment of the Court was delivered by
KEITH J.

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For the reasons given, we agree that TAIC has acted within the powers conferred on it by the Transport Accident Investigation Commission Act 1990 and without any breach of the relevant part of the annex - assuming it to be binding on TAIC.

Accordingly this appeal also fails.

In this Court the burden of the argument was carried by counsel for ALPA, the Attorney-General and TAIC. The other parties, the pilots in the High Court and Ansett in this Court, indicated that they abided the decisions to be given, although Ansett filed a memorandum in this Court.

**The main issue**

In broad terms, ALPA contends that the powers of a District Court Judge to issue a search warrant under s 198 of the Summary Proceedings Act 1957 and of TAIC to prepare and publish a report under the Transport Accident Investigation Commission Act 1990 are limited by the provisions of a paragraph of annex 13, titled “Aircraft Accident and Incident Investigation” (8th ed, July 1994), to the Chicago Convention on International Civil Aviation. Its claims are also based on public interest immunity in the first set of proceedings and on the statutory powers of TAIC in the second.

**The Chicago Convention and rulemaking under it**

We begin with the central international text, the Convention on International Civil Aviation 1944 (commonly known as the Chicago Convention) to which New Zealand became an original party in April 1947. It accordingly became an original member of the International Civil Aviation Organisation (ICAO) constituted under the convention (see 15 UN Treaty Series 295 and AJHR 1945 A9).

The preamble to the treaty recites that the state parties have agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner. One of the ways in which safety and order in the air are to be promoted is through the adoption by the institutions of ICAO and the state members of international standards and procedures, a matter regulated by ch VI of the convention and especially by art 37:

> “Adoption of international standards and procedures

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organisation shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircraft;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log Books;

(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accidents; and

such and other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.” (Emphasis added.)

The convention identified the areas in which standards and practices are to be adopted and establishes the institutions and procedures for their adoption – the “principles and arrangements” of the preamble. Those two matters provide an important part of the context in which annex 13 falls to be considered.

**Areas of rule making: the binding force of the rules**

Several articles of the convention indicate that different exercises of the power under art 37 will have different binding force. Such differences are probably to be expected given the diversity of the matters covered by the convention. Article 12, regulating the central and critical matter of “Rules of the Air”, provides an immediate contrast both within itself and with art 37:

> (1) “Over the high seas, the rules [relating to the flight and manoeuvring of aircraft] . . . shall be those established under this Convention.”

(Emphasis added.)

> (2) “Each contracting State undertakes to keep its own regulations [in respect of the rules of the air for aircraft flying and manoeuvring within its territory and aircraft carrying its nationality mark] in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention.”

(Emphasis added.)

The rules for flight over the high seas, adopted under art 37, are to apply without change; no government discretion is contemplated. By contrast the rules of the air applicable to other flights will require further action by the contracting states which have some limited flexibility in giving effect to the standards established under the convention. That flexibility is, however, more limited than that provided for in the general terms of art 37.

When the convention moves from rules governing flight (ch II) to measures facilitating air navigation (ch IV) – or from the air to the land – a more relaxed position on the extent of contracting states’ obligations is adopted. Thus, art 23, concerned with customs and immigration procedures, begins:

> “Each contracting State undertakes, so far as it may find practicable, to establish customs and immigration procedures and practices affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention.”

(Emphasis added.)

Article 26 – “Investigation of accidents” – the article at the centre of this case – also adopts a lesser standard of obligation than those found in art 12 and indeed that stated in the general provisions of art 37:

> “In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organisation. The State in which the aircraft is
registered shall be given the opportunity to appoint observers to be present
at the inquiry and the State holding the inquiry shall communicate the
report and findings in the matter to that State."

The particular lawmaking provisions are to be read not only with art 37.
the general empowering provision with its flexibility of obligation, but also
with art 38. As its heading indicates, that provision permits departures from
international standards and procedures:

"Any State which finds it impracticable to comply in all respects with
any such international standard or procedure, or to bring its own
regulations or practices into full accord with any international standard or
procedure after amendment of the latter, or which deems it necessary to
adopt regulations or practices differing in any particular respect from those
established by an international standard, shall give immediate notification
to the International Civil Aviation Organisation of the differences between
its own practice and that established by the international standard. In the
case of amendments to international standards, any State which does not
make the appropriate amendments to its own regulations or practices shall
give notice to the Council within 60 days of the adoption of the
amendment to the international standard, or indicate the action which it
proposes to take. In any such case, the Council shall make immediate
notification to all other States of the difference which exists between one or
more features of an international standard and the corresponding national
practice of that State."

We now move from that selection of convention articles, about the areas in
which standards are to be adopted and their binding character, to the articles
establishing the procedure for their adoption.

The procedures for rule making

The making of the annexes is in the hands of two expert bodies set up
under the convention, the ICAO Council and the contracting states both as a
group and individually. The Air Navigation Commission, consisting of 19
members with suitable qualifications and experience in the science and practice
of aeronautics and chosen by the council, proposes annexes concerning air
navigation (arts 56 and 57). The Air Transport Committee, appointed from
representatives of members of the council and responsible to it, proposes
annexes relating to the facilitation of international air transport; as well it
advises the council on economic matters (art 54(d)). These two bodies are
assisted in their work in the preparation of annexes by subcommittees and
conferences attended by government representatives. For instance the Air
Navigation Commission has been helped in the preparation of successive
versions of annex 13 by Accident Investigation (and Prevention) Divisional
Meetings which representatives of many contracting states have attended.

Proposals go from the Air Navigation Commission and the Air Transport
Committee (which give contracting states the opportunity to comment on their
drafts) to the council which has the power, by a vote of two-thirds of its
members, to adopt annexes and amendments to them (see arts 50 and 54).

That lawmaking power of the council is however subject to a veto of member
states, since under art 90(a):

"Any... Annex or any amendment of an Annex shall become effective
within three months after its submission to the contracting States or at the
end of such longer period of time as the Council may prescribe, unless in
the meantime a majority of the contracting States register their disapproval
with the Council."

A thorough scholarly study based on the convention provisions and on the
first 20 years of practice relating to ICAO technical legislation came to this
conclusion about the obligatory character of the standards which result:

"With some exceptions to be discussed below, the Contracting States
have no legal obligation to implement or to comply with the provisions of
a duly promulgated Annex or amendment thereto, unless they find it
practicable to do so. This conclusion is supported both by the language of the
Convention as well as by the practice of the Organization." (Thomas
Buergenthal, Law-Making in the International Civil Aviation
Organization (1969) p 76. See similarly Edward Yemin, Legislative Powers

The "most important" of the exceptions to which judge Buergenthal refers is
that laid down in art 12, concerning the rules of the air over the high seas. He
also includes arts 33 and 34 concerning the recognition of certificates and
licences and the format of log books, pp 80 – 88.

Annex 13, aircraft accident and incident investigation

Annex 13, as it has evolved, is to be seen in the context of the "principles
and arrangements", reviewed in the two preceding sections of this judgment,
for developing the safety and order of international civil aviation. We begin
with two features of the substantive statement of principle in art 26 of the
convention. The first is that it is limited to accidents (and does not include
incidents) to an aircraft of one state occurring in the territory of another. It was
not until 1994, in the edition of the annex in issue in this case, that the
annex was extended to include national accidents (and incidents) and accordingly
to cover the current matter. The second relevant feature of the article concerns the
extent of the obligation applying to that limited group of accidents:

"... a State in which an accident... occurs... will institute any inquiry
into the circumstances of the accident, in accordance, in so far as its laws
permit, with the procedure which may be recommended by the
International Civil Aviation Organization:...". (Emphasis added.)

That obligation is not as rigid as some obligations imposed by articles which
have already been mentioned in this judgment, notably art 12. The flexible
character of the obligations arising under annex 13 also appears from its
historical evolution, the balance within it between standards (not actually
mentioned in art 26) and recommendations, and the wording of the annex itself.
Some of this flexibility reflects another matter which appears in its text and
which is central to the police proceedings – the fact that accident investigations
may well proceed in parallel with inquiries which can lead to legal proceedings
including criminal prosecutions.

So far as annex 13 is concerned we begin with the text of the crucial
provision in its 8th edition, as adopted in 1994:

"Disclosure of records
5.12 The State conducting the investigation of an accident or incident,
where it occurred, shall not make the following records available for
purposes other than accident or incident investigation, unless the
appropriate authority for the administration of justice in that
State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

a) all statements taken from persons by the investigation authorities in the course of their investigation;

b) all communications between persons having been involved in the operation of the aircraft;

c) medical or private information regarding persons involved in the accident or incident;

d) cockpit voice recordings and transcripts from such recordings; and

e) opinions expressed in the analysis of information, including flight recorder information.

These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed.” (The submissions in this case emphasised the lengthy first sentence, including the list. The next two sentences are principally relevant to the commission proceedings considered in the last part of this judgment.)

A note to the provision elaborates reasons for the protection:

“Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative, and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigative process and seriously affect flight safety.”

While para 5.12 expressly covers CVRs, DFDRs are not within that provision’s protective scope. They do however fall within the scope of other provisions of ch 5 on investigation. Those provisions make express reference to “flight recorders” — defined comprehensively as “any type of recorder installed in the aircraft for the purpose of complementing accident/incident investigation” — a definition which includes DFDRs. So paras 5.7 and 5.8 provide:

“Flight recorders — Accidents and serious incidents

5.7 Effective use shall be made of flight recorders in the investigation of an accident or a serious incident wherever it occurred. The State conducting the investigation shall arrange for the readout of the flight recorders.

5.7.1 Recommendation. — In the event that the State conducting the investigation of an accident or a serious incident does not have adequate facilities to read out the flight recorders, it should use the facilities made available to it by other States, giving consideration to the following:

a) the capabilities of the readout facility;

b) the timeliness of the readout; and

c) the location of the readout facility.

Flight recorders — Incidents

5.8 Effective use shall be made of flight recorders in the investigation of an incident wherever it occurred.”

The annex expressly contemplates parallel proceedings. Two provisions emphasise both the purpose and the independent character of the investigation. Chapter 3 begins with a statement of the “Objective of the Investigation”:

“3.1 The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.” (Emphasis added.)

Moreover,

“5.4 The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct. The investigation shall include the gathering, recording and analysis of all available relevant information; if possible the determination of the causes, and the completion or recommendation. When possible the scene of the accident shall be visited, the wreckage examined and statements taken from witnesses.” (Emphasis added.)

But that is immediately followed by a recommendation which acknowledges that there may well be proceedings additional to the accident investigation:

“5.10 The State conducting the investigation shall recognise the need for co-ordination between the investigator-in-charge and the judicial authorities. Particular attention shall be given to evidence which requires prompt recording and analysis for the investigation to be successful, such as the examination and identification of victims and readouts of flight recorder recordings.

Note 2. — Possible conflicts between investigating and judicial authorities regarding the custody of flight recorders and their recordings may be resolved by an official of the judicial authority carrying the recordings to the place of readout, thus maintaining custody.”

Even if a criminal inquiry has not been launched, the accident investigator might in effect cause that to happen:

“5.11 If, in the course of an investigation it becomes known, or it is suspected, that an act of unlawful interference was involved, the investigator-in-charge shall immediately initiate action to ensure that the aviation security authorities of the State(s) concerned are so informed.”

On their face these provisions contemplate — consistently of course with arts 37 and 38 and, in the extent that it is relevant, art 26 — that contracting States will exercise some freedom in deciding how far to give effect to the standards included in the annex. That understanding is supported by the following passage in the foreword to the annex:
“Use of the text of the Annex in national regulations. The Council, on 13 April 1948, adopted a resolution inviting the attention of Contracting States to the desirability of using in their own national regulations, as far as is practicable, the precise language of those ICAO Standards that are of a regulatory character and also of indicating departures from the Standards, including any additional national regulations that were important for the safety or regularity of air navigation. However, the Standards and Recommended Practices of Annex 13 while of general applicability will, in many cases, require amplification in order to enable a complete national code to be formulated.” (Emphasis added.)

The extent of state freedom in deciding how and how far to implement the Annex and especially para 5.12 also appears from the national legislation that has been brought to our attention and from related notifications of difference under art 38 of the Convention. In Austria, Denmark, Finland, Iceland, the Netherlands, Norway, Sweden and Switzerland, the law does not prevent the use of CVRs in judicial proceedings (although in Denmark a Court Order would be needed and, it is said, has never been sought). Similarly, American legislation provides that parts of a cockpit voice recording not made public by the National Transportation Safety Board may be obtained by discovery if the Court decides that that is necessary to enable a party to receive a fair trial. Any such discovery is limited to the trial, 49 USC Section 1154.

By contrast the Australian and Canadian legislation is protective of the recordings, but even there the protection is limited. In both countries the protection does not extend to civil proceedings for damages (although under the Australian legislation a Court Order is needed) and the prohibition on the use in criminal cases in Australia is limited to proceedings against crew members—and not for instance against air traffic controllers, the operator of the aircraft or the manufacturer. Air Navigation Act 1920 ss 19HE, 19HF and 19HH (Aus), Transport Accident Investigation and Safety Board Act 1989 s 28 (Can).

Very recent United Kingdom legislation takes a more central position. The records referred to in para 5.12 of the Annex are to be released only: (1) for accident or incident investigation; or (2) if the High Court or Court of Session is:

… satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any further accident or incident investigation undertaken in the United Kingdom.” (Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996, reg 18(4); the provisions are without prejudice to public interest immunity, reg 18(6).

The substantial conformity of the wording of that proposal with that of para 5.12 highlights the fact that none of the other states mentioned have expressly adopted that test. Indeed the major power in international civil aviation, the United States, expressly rebutted it when notifying its departure from para 5.12:

“The standard for determining access to this information does not consider the adverse domestic or international effects on investigations that might result from such access.” (Supplement to Annex 13 . . . (8th ed, 28 December 1995), United States.)

New Zealand has also notified a difference from the paragraph. The notification appears to have been first given in 1982:

“No absolute guarantee can be given that the records listed in 5.12 will not be disclosed. All practical steps will be taken, however, to minimize the extent and occurrence of such disclosures.” (Supplement to Annex 13, (6th ed . . . 5 February 1982), New Zealand.)

The parties were agreed that this notice has been in effect at the relevant times. When the notice was first given, the Bill which was to become the Official Information Act 1982 was before Parliament. We mention later the New Zealand legislation relating to the investigation of air accidents in force at that and other times.

The notifications given in the 1980s had been forestalled when in 1979 the Accident Prevention and Investigation Divisional Meeting, notwithstanding the difficulties which existed in those countries which had freedom of information legislation, successfully proposed the raising of para 5.12 from a recommendation to a standard (Report Doc 9280, AIG (1979) 7–1 to 7–3). The extent of the notifications of difference led to the following comment that the attitude of non-compliance indicated by 20 states made the adoption of the text of para 5.12 as a standard in the sixth edition in 1981 “a kind of Pyrrhic victory”, Werner Guldemann, “Some Legal Aspects of Aircraft Accident Investigations” (1990) 15 Annals of Air and Space Law pp 99, 100.

Annex 13: a conclusion on its binding force in international law

The relevant texts and their history lead us to the conclusion that annex 13 and in particular para 5.12 (especially its first sentence) do not impose on contracting states an absolute rule of full binding force. Specifically, states have considerable flexibility in determining the extent of the protection of the information covered by the paragraph. A major reason for that flexibility is that different countries can and do strike different balances between the competing public interests in protecting the information and allowing access to it. Among those who may have a proper interest in access are criminal law enforcement agencies, licensing and regulatory bodies, private litigants and the public. It follows – as indeed the paragraph quoted earlier from the foreword to the present edition of annex 13 acknowledges – that amplifying national legislation will probably be required to enable a complete national code. The annex cannot stand alone. Even if para 5.12 is to be given substantial effect, as in the United Kingdom, the regulations made there show that legislation is highly desirable, if not essential, to identify the body or person who is “the appropriate authority for the administration of justice” with the power to order disclosure. The United Kingdom rules also add to the ICAO text the crucial balancing consideration of “the interests of justice in the judicial proceedings or circumstances in question”.

The conclusions just reached are critical for the question whether para 5.12 is part of the law of New Zealand. Like the parties, we first consider the wider question whether the Chicago Convention is part of the law of New Zealand.

Is the Chicago Convention part of the law of New Zealand?

As Lord Atkin said for the Privy Council in Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326 at p 347, it is well established that while the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic
law, requires legislative action. The stipulations of a treaty duty ratified by the Executive do not, by virtue of the treaty alone, have the force of law.

We accordingly turn to the relevant legislation—principally the Civil Aviation Acts of 1948 and 1964 (each repealed by the successor Act) and 1990 but also the Radiocommunications Act 1989, the Diplomatic Immunities and Privileges Act 1959, the Civil Aviation Rules made since 1990, and the repealed Air Navigation Act 1931, the International Air Services Licensing Act 1947 and Civil Aviation Regulations 1953 (SR 1953/108).

While the 1948 Act was the first New Zealand statute to refer in any general way to the Chicago Convention, it repealed the statute designed to help implement in New Zealand law the earlier general treaty on civil aviation, the Paris Convention of 1919. That was a convention for determining by a common agreement certain uniform rules with respect to international air navigation (11 League of Nations Treaty Series 173). It is convenient to consider that earlier statute, the Air Navigation Act 1931, because of its approach to the Paris Convention and because the first New Zealand aviation accident investigation regulations were made under it. We consider those particular regulations under the next heading.

The title to the 1931 Act says that it is an Act "to enable" to be given to the Paris Convention. Consistently with that purpose the Governor-General in Council was given power under s 3 to "make such regulations as appear to him necessary for carrying out the Convention and for giving effect thereto, or to any of the provisions thereof, or to any amendment made, whether before or after the passing of this Act, under article thirty-four of the Convention." (Those amendments were the forerunners of the annexes made under the 1944 convention.) Under s 4 the regulation-making power authorised the extension of any or all of the provisions of the convention to internal flying. The special provisions which could be made in regulations, according to s 6, might also give greater precision to the powers conferred by the convention—by identifying those who were to exercise powers or the manner and conditions of the issue, renewal, cancellation . . . of licences and certificates required by the convention. Fees could also be prescribed for such licences and certificates. Section 10 provides separately for the making of regulations about investigations. The significant point about these provisions in the 1931 Act is that they do not themselves give effect to the convention as a whole or indeed even a single provision of it. Rather, as the title accurately states, it is an Act "to enable" to be given to the convention and, as its operative provisions say, to a selection of its provisions and not necessarily all.

The 1948 Act is to the same substantive effect—it authorises the making of such regulations as appear to the Governor-General in Council to be necessary for carrying out the 1944 convention, any annex to it and any amendment to the convention or an annex. The title no longer recognises the limited enabling effect of the Act: it is now said to be an Act "to give effect to" the Chicago Convention (which is defined to include annexes and future amendments to them). Like statements made in the parliamentary debates on the 1948 Bill, that title is however an overstatement as appears from the very limited terms of the Act, from a cursory comparison of the Act with the convention along with its annexes, from other legislation enacted to give effect to the convention and from some of the regulations made under the Act.

We now turn to some of those regulations. Between 1948 and 1952 the regulations made under the 1948 Act were amendments to the 1933 Air Navigation Regulations originally made under the 1931 Act. Some were expressly designed to give effect to the Chicago Convention and the annexes. So Amendment 15 made in 1950 (SR 1950/27) adopted "new provisions agreed to by members of the International Civil Aviation Organization in respect of the registration" and marking of aircraft, and Amendment 18 (SR 1950/27), made later that year, substituted a new definition of "Convention" which referred to the 1944 convention rather than that of 1919. That definition included standards and recommended practices adopted under art 37. The 1933 regulations along with the many amendments to them were revoked in 1953 by the Civil Aviation Regulations 1953 (SR 1953/108). They set out in considerable detail—but with the support as well of tertiary legislation—rules governing civil aviation. The original 271 regulations were organised into 15 Parts and extended over 120 pages. The explanatory note said that: ". . . the law is brought up to date by the introduction of the most recent technical standards and procedures recommended by the International Civil Aviation Organization, . . . " (SR 1953/108).

As from 1990 many of the regulations were revoked and replaced by rules made under the 1990 Act. Those which remained in force until 31 March 1997, when remaining provisions of the 1953 regulations were finally revoked, included several which specifically indicated their ICAO origins. Thus reg 29 required foreign aircraft flying in New Zealand to comply with the requirements of the convention (including the annexes) concerning nationality, certificates of airworthiness, flight crew, and documents. The provision for the carriage of dangerous goods in reg 31 referred to the relevant annex "for the time being approved" by the Council of ICAO. And notably reg 21A "Flight over high seas", gave direct effect to art 12 of the convention (discussed earlier in this judgment) and the annex made under it, including the provisions which referred to the 1944 convention rather than the earlier one. Those amendments were the forerunners of the annexes made under the 1944 convention. The 1990 Act is to the same substantive effect as that in the 1948 Act. It authorises the making of such regulations as appear to the Governor-General to be necessary or expedient for carrying out the convention, any annex or amendment to the convention or annex (s 29(1)(a)). Again, as in 1931 and 1948, a separate provision authorises regulations for the investigation of accidents (s 19). Unlike the earlier statutes the title to the Act makes no reference to the convention. Once again the Act is a brief one. Subordinate legislation would continue to be the major legislative means of
regulating civil aviation. As we have already seen it was the 1953 Civil Aviation Regulations, along with many amendments made before and after 1964, that continued in effect until 1 April 1997. (We come to the accident investigation regulations under the next heading.)

5 The 1990 Act, like its 1951, 1948 and 1964 predecessors, provides for the selective implementation by other agencies of provisions of the convention and annexes. We find that at the outset of the Act. According to para (b) of the long title, the new statute is an Act:

(b) To ensure that New Zealand’s obligations under international aviation agreements are implemented.

That statement is to be contrasted with the (erroneous) claim in the 1948 Act that it was an Act "to give effect to [the] Convention". Two reasons for its relative reticence are to be seen in the scope of the reference to international texts and in the fact that two other Acts were passed at about the same time to give effect to aspects of the convention. To elaborate on the first, the reference now is to ensuring compliance with international aviation requirements — and not simply the 1944 convention. That too is an overstatement. A quick look at the statute book in 1990 would identify the Aviation Crimes Act 1972 (giving effect to three aviation conventions about criminal jurisdiction, hijacking and sabotage) and the Carriage by Air Act 1967 (giving effect to the Warsaw Convention of 1929 and various amendments to it — an Act which was itself twice amended in 1990), as well as the Privileges and Immunities Order in Council under s 100(1).

Notable among those authorising provisions is s 28, the second general provision, which gives the Minister power to make rules for:

(a) The implementation of New Zealand’s obligations under the Convention:

(b) Any matter related or reasonably incidental to . . .

(iii) The Minister’s functions under section 14 . . .

(The rule-making power does not include the power to create offences for breach. That can only be done by regulations made by the Governor-General in Council under s 100(1).)

As noted already, such rules are now being made, replacing the 1953 regulations made under the 1948, 1964 and 1990 Acts. The convention is not only the positive basis for conferring the rule-making power. It also constrains the power, since under s 33(1), the third general reference, the rules and any emergency rules made by the Director of Civil Aviation must not be inconsistent with:

(a) The standards of ICAO relating to aviation safety and security, to the extent adopted by New Zealand;
(b) New Zealand’s international obligations relating to aviation safety and security.

That constraint on the rule-making power also includes, but in an appropriately more limited manner, ICAO’s recommended practices. The Minister and Director must have regard to, and give such weight as they consider appropriate, to those recommended practices (among other matters) (s 33(2)(a)). If any further indication were required that the Act calls for positive action to incorporate the relevant international texts into New Zealand law, the fourth general provision in the Act, s 36(1)(a), gives that indication by allowing the Minister or Director to incorporate, simply by reference, standards, requirements or recommended practices of international aviation organisations.

In summary, the Chicago Convention, together with its annexes, like many other major multilateral treaties, is implemented by the state parties to it and has effect in their law in a variety of ways:

(a) Basic provisions about sovereignty over airspace, which incorporate principles of customary international law, are reflected in fundamental
constitutorial arrangements and leave the state parties free to exercise the authority recognised by international law.

(b) Some provisions are implemented in the exercise of prerogative or other non-statutory administrative powers, such as: participating in meetings and elections; providing information; participating in joint operating organisations; and meeting budgetary obligations — although, as that last example shows, Parliament might well have to appropriate funds to support those activities.

(c) At the other extreme, some provisions may be directly incorporated by statute into national law with their actual text providing the content of the law. The primary relevant instances are the rules of the air provided for in art 12 and annex 2. In New Zealand the Carriage by Air Act similarly provides that the terms of the Warsaw Convention of 1929 and amendments have the force of law.

(d) In other cases, the substance of the treaty provisions but not their precise words may appear more or less clearly in legislation. For instance a 1996 amendment to the Civil Aviation Act (s.55A) relating to flights without authority or for an improper purpose gives effect to an amendment (art 3BIS) to the Chicago Convention. The Aviation Crimes Act is a second example. A third, to be considered later in the judgment, is the Transport Accident Investigation Commission Act 1990.

(e) Other articles and annexes provide the basis for the conferral and exercise of delegated power and may also constrain the exercise of the power — as with the regulation and rule-making powers in the Acts of 1931, 1948, 1964 and 1990. Several provisions of the 1944 convention expressly contemplate or require the making of national laws. They are not always written in such a way as to be capable of direct application in national law; to use an expression to be found in some constitutional systems, the provisions are not self-executing.

(f) The rules and regulations made under the powers referred to in (e) above sometimes give direct effect to the treaty text (c) above) or may be less direct (d) above). An instance of the former was the regulation giving effect to the rules of the air and of the latter is the Order in Council relating to the status and privileges and immunities of ICAO.

The broad point is that some of the provisions of the convention and annexes are appropriate in their subject-matter and drafting for direct application in the law of New Zealand, others require detailed national legislation, while still others do not call for national legislation at all. See generally, Law Commission, "A New Zealand Guide to International Law and its Sources" (NZLC R34 1996) ch 2.

We now turn to the more specific question whether annex 13 and in particular para 5.12 are part of New Zealand law.
contracting State, or where the location of the accident cannot be established definitely as being in the territory of a contracting State, it shall be the responsibility of the Chief Inspector or an Inspector nominated by him to conduct an investigation as if the accident had occurred within the territorial limits of New Zealand.

(3) Where an accident to a New Zealand aircraft occurs in the territory of a contracting State, and that contracting State conducts an investigation or inquiry, the Chief Inspector shall, on request by the appropriate authority of that State, furnish that authority with all the relevant information within his possession.

The 4th to 7th editions of the annex were in force from 1976 until 1990 when the above regulations were revoked by the Civil Aviation Act 1990 when the Transport Accident Investigation Commission Act 1990 was enacted. As noted earlier, the sixth edition of 1981 had upgraded para 5.12 from a recommendation to a standard and if reg 23 is read as referring to the edition of the annex current at the relevant time it would have been effective to apply para 5.12 as a standard from 1981. The application would however have been limited in at least two significant ways: it applied only to accidents to foreign aircraft, and it was subject to New Zealand's rather vaguely stated notice of difference.

That limited application was the high-water mark in terms of the explicit acceptance in New Zealand law of the annex and in particular of para 5.12. It was removed from the law at the very point that the two statutes invoked in this case as adopting the annex and in particular para 5.12 came into force. Before we turn to the relevant provisions of the two Acts we should also note that the 1978 investigation regulations, like those of 1933 and 1953, required that the local police be notified of any accident causing injury or third-party property damage, and also contemplated that the police were likely to be involved in their own investigations of the crash, at the site and elsewhere. We have already seen that annex 13 recognises such parallel processes.

The only relevant provision in the Civil Aviation Act requires the Civil Aviation Authority to advise TAlC of an accident involving an aircraft (including of course foreign aircraft); or (since 1996) a serious incident in accordance with the provisions of the convention (which in the context can mean only the annex since art 26 is limited to accidents). As is to be expected it is in the Transport Accident Investigation Commission Act that the principal references to investigations are found:

The statement of purpose of TAlC in s 4 of the Act carries forward the distinction drawn in the 1953 and 1978 regulations, conformably with annex 13, and in particular para 3.1 quoted earlier, between investigation and fault finding:

4. Purpose of Commission - The principal purpose of the Commission shall be to determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribe blame to any person.

That provision plainly leaves open the possibility that other agencies may be undertaking inquiries concerned with blame. Other provisions more directly recognise that possibility: s 8(b)(i), (f); ss 9, 10 and 14(6).

TAlC is obliged by s 13 to investigate certain accidents. First in the list are aviation accidents involving a foreign aircraft, required by the convention (defined as including the annexes) to be investigated. The convention requirements about participation are met by s 14(2) which requires TAlC to permit the participation or representation of foreign organisations in the investigation as is provided for in the convention. It is s 14(3) and (4) which address the matters dealt with by the first sentence of para 5.12. (The second

and third sentences of the paragraph are to be related to s 8 of the Act considered in the last part of this judgment concerning the commission proceedings.) Subsections (3) and (4) provide:

(3) Except with the consent of the Commission, which consent shall not be unreasonably withheld no other person (including the Civil Aviation Authority, the Land Transport Authority, and the Maritime Safety Authority) shall -

(a) Participate in any investigation being undertaken by the Commission;

(b) Undertake any independent investigation at the site of any accident or incident being investigated by the Commission;

(c) Examine or cause to be examined any material removed from the site of any accident or incident being investigated by the Commission.

(4) Where the Commission refuses consent under subsection (3) of this section, it shall give the applicant a statement in writing of the reasons for its refusal.

We do not have to consider whether s 14(3) overrides relevant police powers, including the power to obtain a search warrant, or such cases as Bonner v Karamea Shipping Co Ltd [1973] 2 NZLR 374, since in the present situation its effect is now spent: it protects information only while TAlC is undertaking its investigation and that process is now complete. That is one difference between the legislation and para 5.12 which is generally understood to continue to protect the listed information after the end of the investigation. A second difference is that the provision does not expressly require a consideration of the adverse impacts set out in para 5.12. And, thirdly, TAlC rather than “the appropriate authority for the administration of justice” that makes the decision to release the information. The American, Australian and United Kingdom legislation indicates that the “justice authority” is likely to be a Court and not an investigating body.

In the face of those differences between the most immediately relevant statute and the paragraph we cannot see how it can possibly be said that Parliament has made annex 13, and in particular the first sentence of para 5.12, part of the law of New Zealand. It has simply failed to manifest such a purpose.

The clearest for the lawmakers got was between 1978 and 1990 but in the latter year, and before the annex applied to domestic accidents, they revoked the requirement that the annex – subject to any difference – be complied with. This conclusion again does not mean that New Zealand is in breach of its obligations in respect of para 5.12. We recall the earlier discussion of the limited nature of those obligations and the scope of the notice of difference which New Zealand has filed indicating that the records listed in para 5.12 might be disclosed.

It is convenient to answer at this point an ALPA argument that the filing of that difference in that form confirms that the paragraph is in force under New Zealand law. One part of the answer is provided by the purpose and scope of the power to file a difference under art 38: it assumes that the national law in issue does not give full effect to the annex in question. At least 20 countries have at one stage or other taken that position since para 5.12 has become a standard.

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The second part of the answer is that the review of the New Zealand legislation shows that the first sentence of para 5.12 of the 1994 edition of the annex has not become part of New Zealand law. That is not however the end of the matter since, although not part of the law of New Zealand, the annex and in particular para 5.12 might place a limiting gloss on, or state a consideration relevant to, the exercise of the power of a judicial officer to issue a search warrant under s 198 of the Summary Proceedings Act 1957. Pannckhurst J so held, while denying that the annex was part of the law of New Zealand. He also ruled that it would be appropriate for any application for a search warrant in this case to be heard by a District Court Judge and on notice to TAIC and ALPA. We now turn to those matters and to the related argument that public interest immunity also places limits on the exercise of the power to issue a search warrant.

Is the power to issue search warrants limited by para 5.12?

We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations, eg Rajan v Minister of Immigration [1996] 3 NZLR 543 at p 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So this Court in interpreting guardianship legislation enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction has said that it is incumbent on it to construe the Act in a manner that will as far as possible give effect to that purpose, Gross v Bodi [1995] 1 NZLR 569 at pp 573 and 5/4. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the Employment Court as not overriding the customary international law of sovereign immunity. In the absence of such an approach almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 at pp 430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. A related instance appears in the references to good faith compliance with obligations in the Charter of the United Nations and the Vienna Convention on the Law of Treaties in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 at p 682; see also Commissioner of Inland Revenue v JFP Energy Inc [1990] 3 NZLR 536 at p 540.

The application of the presumption depends on both the international text and the related national statute. We consider them in turn. So far as para 5.12 is concerned, we note:

- its very limited binding force both in general and (because of the New Zealand statement of difference) in this particular situation,
- its relative unimportance (compared say with the rules of the air adopted in terms of art 12 of the Chicago Convention or with a fundamental human rights treaty),
- its indeterminate character in that it anticipates competing demands in national legal systems of confidentiality and access for law enforcement purposes,
- the recognition in annex 13 that police and related investigations may be running in parallel with the investigation regulated by the annex and related national legislation.

To establish a clear limit on power (as in the Picard case) or state one or more particular relevant factors to be weighed in the exercise of statutory power (as contended in the Rajan case). Rather it contemplates the setting up of a process for decision, with competing considerations stated or implied within it, which as we shall see would cover much of the ground of the power to issue search warrants conferred by s 198 of the Summary Proceedings Act 1957. To give effect to it would be more than a simple glossing of the statutory power or the stating of considerations relevant to the exercise of the power.

We now turn to that statutory power. Section 198 reads in part as follows:

198. Search warrants – (1) Any District Court Judge or Justice, or any Registrar (not being a constable), who, on an application in writing made on oath, is satisfied that there is reasonable ground for believing that there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place –

(a) Any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed;

(b) Any thing which there is reasonable ground to believe will be used for the purpose of committing any such offence –

(c) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

(5) Every search warrant shall authorise any constable to seize any thing referred to in subsection (1) of this section.

(6) In any case where it seems proper to him to do so, the District Court Judge, Justice, or Registrar may issue a search warrant on an application made on oath orally, but in that event he shall make a note in writing of the grounds of the application.

On its face this provision has two characteristics which raise immediate questions about the ruling made by Pannckhurst J:

(1) Once the condition in subs (1) is satisfied, the power to issue the warrant is not qualified in any way. The judicial officer “may” issue the warrant. It does not state factors or purposes which must or may be considered in the exercise of that power.

(2) It is a summary power, exercised without notice to those whose premises or property are the subject of the application. The power to grant the warrant is exercised without notice being given. Notice would very often defeat the purpose of the search (although there could be no suggestion of that here).

The safeguards against the arbitrary exercise of that power, notwithstanding the lack of a notice requirement and the absence of expressly controlling criteria (once the condition is satisfied), include:

- the decision – an independent judicial officer has the power to issue the warrant;
- the matter to be proved and the method of proof – as set out in subs (1); see also subs (6); and
- review after the issue (and execution) of the warrant, including:

A variation on the third and fourth points is that the paragraph does not establish a clear limit on power (as in the Picard case) or state one or more particular relevant factors to be weighed in the exercise of statutory power (as contended in the Rajan case). Rather it contemplates the setting up of a process for decision, with competing considerations stated or implied within it, which as we shall see would cover much of the ground of the power to issue search warrants conferred by s 198 of the Summary Proceedings Act 1957. To give effect to it would be more than a simple glossing of the statutory power or the stating of considerations relevant to the exercise of the power.
should be specific to the particular case. Such an examination cannot be sensibly undertaken at the stage of the issue of a search warrant. To adopt the language of the law of public interest immunity, making the decision at that early stage would require the use of a class approach – all CVR transcripts are protected – when a content approach is called for. That is to say, to the extent that the process of determination provided for in para 5.12 might be seen as relevant to the obtaining and adducing of information and evidence for the purpose of legal proceedings, it must be undertaken in the context of the particular proceeding by reference to the competing protective and justice considerations.

We accordingly conclude that para 5.12 does not place any limit on the power to issue a search warrant. Nor is the judicial officer considering an application for a search warrant obliged to give notice to interested parties before deciding whether to issue the warrant.

The possible relevance of para 5.12 to any decision about the admissibility of evidence drawn from the CVR before or at any trial is not before us. We make two comments about such a decision. The first is that that possible relevance is not excluded by anything that is said in this judgment about the status of para 5.12 in New Zealand law. The second is that the extent of the quotations from, and the other uses of, the transcript in the particular report prepared for publication by TAIC – the matter considered in the last part of this judgment – would no doubt weigh heavily in any such decision about admissibility.

Is the power to issue search warrants limited by public interest immunity?

As indicated, Panckhurst J answered that question in the affirmative at pp 19 – 20:

“To the extent that the decision to grant a search warrant application is discretionary, there is scope for the judicial officer involved to consider public interest immunity. In that regard I do not see s 5.12 of annex 13 and public interest immunity as separate issues. They coalesce because the claim to immunity is in large part based upon New Zealand’s assumed obligations under the Convention.”

Our two reasons for rejecting that conclusion have been foreshadowed under the preceding heading: a public interest immunity assessment is not contemplated by s 198 in terms either of substance or of process. The substantive reason divides into three. The first has already been discussed. In so far as the public interest immunity argument “coalesces” with the para 5.12 argument it requires content rather than class analysis of the particular information extracted from the recording and of the prejudice that is likely to be caused by the information being made available for the legal proceedings. More than that, the assessment must have regard, on the other side of the balance, to the concrete value of the information for the particular proceedings.

Secondly, the Transport Accident Investigation Act itself rejects any general class claim for all information retrievable from CVRs. That is plain from the terms of s 14 which protects such information only for a limited period and, more importantly, requires particular reasoned decisions within that period to disclose or withhold particular information gathered in the course of the investigation.

Thirdly, this Court in developing the law of public interest immunity over the last 33 years has increasingly emphasised the need to examine closely the
issues and ambience of the particular case in order to decide if there is good reason to uphold the objection to release. Brightwell v Accident Compensation Corporation [1985] 1 NZLR 132 at p 139. Parliament has manifested a similar reluctance to recognise a class approach in the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, as has the House of Lords in R v Chief Constable of West Midlands Police, ex parte Wiley [1995] 1 AC 274. The New Zealand legislation requires particular protection from the 1982 Act; see also Fletch Timber Ltd v Attorney-General [1984] 1 NZLR 290 in which case, as in Brightwell, the Court drew on the policy of the 1982 Act. Lord Woolf in the principal speech in the Wiley case required clear and compelling evidence of the need for any new class based claim (p 305). Enough has been said in respect of annex 13 and the New Zealand legislation to indicate that such evidence is simply not available in respect of the information recorded on CVRs.

The process reason for rejecting a public interest gloss on s 198 is again essentially that of appropriateness and timing discussed under its previous heading. The judicial officer, considering an application for a search warrant, is not in a position which permits the proper assessment of the competing interests in protecting the information and in facilitating a particular legal investigation and proceeding. Again, if the assessment of those matters is to be made, the appropriate time is immediately before or in the course of trial.

The police proceedings: conclusion

It follows that ALPA’s appeal fails and that the Attorney-General’s cross-appeal on behalf of the police succeeds.

There will be a declaration that s 14 of the Transport Accident Investigation Commission Act 1990, annex 13 to the Convention on International Civil Aviation and public interest immunity provisions need not be considered in the exercise of the power to issue a search warrant under s 198 of the Summary Proceedings Act 1957 in respect of the Cockpit Voice Recorder and the Digital Flight Data Recorder fitted to the DHC-8 aircraft registration ZK-NEY also known as Ansett Flight 703, material from the two recorders and transcripts of them. We have included the DFDR within the declaration although there was no real dispute about its availability; it is not covered by para 5.12 since it does not record what the aircrew and others involved in the operation of the aircraft are saying.

The commission proceedings: its power to issue reports

ALPA, by way of an application for judicial review, sought an order setting aside the decision of TAIC dated 8 July 1996 to annex an edited transcript of the CVR to the report on the accident which it was proposing to publish. It also sought various related declarations including:

- a declaration that TAIC’s decision to publish a report including a transcript of the CVR is outside its statutory powers;
- a declaration that TAIC erred in law in its view that the direct perinence of the CVR transcript to the analysis of the accident was a sufficient reason to permit the transcript to be appended to the report; and
- a declaration that in reaching its decision TAIC failed to take into account relevant considerations, namely:
  (1) the need to be satisfied under the convention that the disclosure of the transcript outweighs the adverse domestic and international impact such disclosures may have on that or any future investigations; and
  (2) the need to minimise the extent and occurrence of the intended disclosure.

In essence, the grounds argued before us in support of that relief were:

(1) that the inclusion of the transcript of the CVR as an appendix to the report was outside the powers of TAIC under the Act; and
(2) that TAIC had misdirected itself in law or failed to have regard to relevant considerations in terms of para 5.12.

(Claims of breach of privacy which had been raised by ALPA during the High Court hearing were, we were told in the course of the hearing, now being pursued by the two pilots under the Privacy Act 1993.)

These submissions must be considered in the context of the facts relating to the preparation of the report and especially the proposed inclusion of extracts from the transcript of the CVR in an appendix to the report. TAIC prepared a full transcript. A representative of ALPA was present at the opening of the CVR and the playing back of the record. He was given a copy and he has played it to the pilots involved. While there is apparently some dispute about the accuracy of the transcript, some corrections have been made to it, according to the Chief Inspector of Accidents, Mr Ron Chippindale. Extracts from the transcript as well as summaries of parts of it are included in the body of the report itself and other extracts in an appendix. ALPA does not challenge the first use, but it does challenge the second. The appendix includes about 50 per cent of the total recording (22 pp out of 43) or approximately 20 minutes (error on the side of more rather than less) of the 33 minutes covered by the tape. According to Mr Chippindale, non-pertinent sections and communications of a personal nature were excluded. The report in draft was submitted to the pilots in accordance with s 14(5) of the TAIC Act for their response. A central issue in that process of the preparation of the report was the inclusion of the appendix with the extensive extracts from the CVR.

That issue was the subject of a TAIC hearing on 26 June 1996 at which ALPA was represented. In a letter of 8 July the Chief Commissioner advised ALPA of its unanimous decision that the edited transcript would be annexed to the report. He continued:

"Factors, not necessarily exhaustive, which influenced this outcome included the following:

(i) To attach such an appendix does not set a precedent either within ICAO or in New Zealand. of 184 contracting States to the ICAO Convention it is understood the principal States which have reservations about utilising transcripts in this way are Australia and Canada.

(ii) It is the clear view of the inspectors who participated in this investigation that the completeness and quality of the report would be compromised if the abbreviated transcript containing relevant extracts from the CVR were not to be attached."
Having regard to criticism directed by the crew at the performance of the air traffic control officer it is believed that is important from her perspective to have the exchanges with that officer produced in the edited transcript.

It is believed to be an important ingredient of the human performance information and analysis which formed a significant aspect of the investigation and which occupies a considerable section of the report that what the expert described as 'attentional slips, memory lapses and mistakes' should be accompanied by the timings related to the report extracts to facilitate an understanding of their significance.

It is believed that the edited and abbreviated transcript does provide significant evidence in a chronological and cohesive form which cannot be achieved by quoting extracts in the body of the report itself.

Finally, taking into account these considerations and the arguments fully and capably presented against the inclusion of the edited transcript, the Commission believes that this is a case which falls fairly within clause [5.12] of annex 13 of the ICAO Convention in that this CVR transcript is believed to be directly pertinent to the analysis of the accident and accordingly qualifies to be included as an appendix to the report."

The Chief Commissioner concluded his letter by indicating that the likely date of release of the report was 26 July 1996.

Mr Chippindale, in [his second] affidavit, expanded on those reasons. The transcript, he said, enabled the extracts in the body of the report to be put into context in four important areas which he then discussed in some detail. He concluded with this summary at pp 13 – 14:

"These four phases show the increasing number of events in the available time scale. In summary, the first phase shows the air crew conducting routine pre-approach procedures in an unhurried and competent manner. The second phase demonstrates the crew's time and attention being absorbed in discussion of the . . . [Air Traffic Control Officer's] instructions. The third phase occurred during the instrument approach when the routine of intercepting the desired approach path with appropriate engine power adjustments and altitude monitoring was interrupted by the need to respond to a system malfunction [relating to the landing gear]. The fourth and final phase, cumulative upon the third, was the berthed audio warning from the . . . [Ground Proximity Warning System]."

The affidavits disclose professional disagreement about TAlC's proposed use of the extracts from the transcript. Our task of course is to determine the lawfulness of the action and not its desirability. None the less the evidence helps provide the general context in which we are to address those legal issues.

There is no essential disagreement about the value of the installation of recorders, a value plainly recognised in ch 5 of annex 13. So Mr S G Iovian, an Air New Zealand pilot and air safety investigator for ALPA, referred to CVRs as a valuable aid to aviation accident investigations. It is reasonable, he said, that TAlC use the information or the CVR to help it in formulating its findings and recommendations. Somewhat similarly, Mr Chippindale expressed his concern that there was, at present in New Zealand, no legal obligation on carriers to equip their aircraft with recorders. That was not satisfactory, he said,
prevented in the future. Because this is a report in a CFIT accident it will be studied by researchers into accident prevention, airline operators, flight training organisations and pilots generally who will want to learn from the report on such subjects as human factors, crew resource management and standard operating procedures.

12.2 The report is a very comprehensive one and I have come to the strong view that the Cockpit Voice Recorder transcript in Appendix C forms an integral part of that report. When the report is studied in conjunction with the time frames depicted in the Cockpit Voice Recorder transcript and on the Flight Data Recorder read-out, a full picture develops of:

• The human factors involved.
• The crew resource management as it happened.
• The position and velocity of the aircraft at any particular time.

12.3 Presented in this form, the report will provide a most valuable document for crew training and crew refresher training in airlines, and also for the organisations and individuals I mentioned in paragraph 12.1 above.

12.4 If the Cockpit Voice Recorder Transcript contained in Appendix C is removed from the report, it becomes more difficult to tie together the sequence of events and the interaction of the three factors I have set out as bullet points in para 12.2 above.

12.5 I believe that, if Appendix C is removed from the report significant value would be lost in terms of the opportunity to study and learn from the human factors and crew resource management involved in the accident.”

This evidence provides, among other things, a valuable indication of the way in which a report prepared in the manner proposed can achieve the vital purpose of TAIC: to determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future (s 4).

Mr Julian provides a contrasting view [at pp 3 - 4 of his first affidavit]:

“10. I can confirm that disclosure of the transcript is likely to seriously affect future accident investigations, being the outcome referred to in the Note to para 5.12.

11. This is for the reason that pilots may disconnect CVR’s rather than risk that they may be used against them in disciplinary or criminal proceedings. I understand that some overseas pilots have already indicated that they would disconnect the CVR when flying within New Zealand airspace if a transcript of the CVR is disclosed in this case. If this happens, a valuable aid to aviation accident investigations may be lost. NZALPA accepts that it is reasonable that the information on the CVR be used by TAIC to assist it in formulating its findings and recommendation in respect of its investigation. However, I do not believe that there is any necessity to annex the alleged edited transcript of the CVR to the report.

12. Furthermore, a CVR is, of its very nature, likely to present a distorted idea of what occurred in the cockpit before the accident. Cockpit operation, particularly in the landing phase with equipment malfunction, is a combination of physical actions, signs and signals between pilots, possibly some spoken communication, and reference to check lists and manuals. Only the spoken content of this operation may be included in the sounds recorded on the CVR. Even the spoken content is likely to consist of cross-talk and interrupted discussion, and to be conducted against various background noises. In this particular instance, the accuracy of the transcript has never been accepted by the crew.”

It is not of course for us to resolve the policy issue: about what the law ought to be on the disclosure of the recordings, Parliament has addressed that in a limited way and has considered whether it should address it further. Rather our task is to determine whether the proposed inclusion of the CVR extracts in the appendix to the report is lawful.

ALPA did not argue that extracts from the transcript could not be used as appropriate in the body of the report. The objection was to the separate extracts being included in the form proposed in an appendix. As counsel put it in argument:

“There has never been any issue that extracts from the recorder can and should address it further. Rather our task is to determine whether the proposed inclusion of the CVR extracts in the appendix to the report is lawful.

ALPA did not argue that extracts from the transcript could not be used as appropriate in the body of the report. The objection was to the separate extracts being included in the form proposed in an appendix. As counsel put it in argument:

“Here has never been any issue that extracts from the recorder can and indeed should be used, in context and properly analysed, in the body of the report. These are ‘findings’ [s 8(2)(c) of the TAIC Act] which TAIC has the statutory power to make. There is no interrelationship or cross reference in the report between its content and Appendix C. Appendix C is a gratuitous additional publication.”

Whether information is included in the body of a report or an annex to it cannot by itself be decisive. Paragraph 3.12 indeed makes that point when it provides the following test for the use in the investigation reports of the records it lists and protects:

“These records should be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed.” (Emphasis added.)

In an appendix to the report there is a suggested format for an accident report. That format provides for appendices which “include, as appropriate, any other pertinent information considered necessary for the understanding of the report”.

We return to ALPA’s argument before us which, to repeat, turned first on the extent of the powers conferred by the TAIC Act and second on the limits which it said arose from para 5.12. In its statement of defence TAIC accepted that the proposed inclusion of the appendix was the exercise of a statutory power of decision within the scope of the Judicature Amendment Act 1972. We were informed from the Bar that in other litigation TAIC has challenged that position.

Section 8(2)(c) of the Act authorises TAIC:

(c) To prepare and publish findings and recommendations (if any) in respect of any such investigation.

The contention was that the proposed appendix was not “a finding”. That function is to be read in the context of the function of “making such inquiries as it considers appropriate in order to ascertain the cause or causes of accidents or incidents” and its principal function of investigating accidents or incidents.
(s 8(2)(a) and (1)). Those functions are to be used in pursuit of the principal purpose of TAIC which, it will be recalled, is:

... to determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future. ...

These provisions can be read in the context of the sentences quoted above from para 5.12: a report which records an inquiry into an accident or incident and ascertains its causes will draw on “pertinent” and “relevant” information and only on that information. There is no legislative provision which stands in the way of that use of those sentences. Nor does the notice of difference under art 38 of the convention. Similarly helpful is para 6.11 of the annex:

“6.11 In the interest of accident prevention, the State conducting the investigation of an accident shall publish the Final Report as soon as possible.”

This Court recently emphasised the importance of the early publication of TAIC reports in Whale Watch Kaikoura Ltd v Transport Accident Investigation Commission (Court of Appeal, Wellington, CA 87/97, 12 May 1997).

A report on an investigation aimed at preventing further accidents, determining the causes of an accident, and prepared by a qualified and experienced body drawing on particular expert advice including that of assessors will include a statement of relevant facts as an integral part of the determination of the facts. As the ICAO annex and the experience of other investigation bodies indicate, in some cases a sensible way of presenting part of the facts will be to use an appendix. TAIC’s letter setting out the reasons for including the appendix, Mr Chippindale’s affidavit expanding on those reasons and the opinion of Mr T A Middleton given from an independent position demonstrate that including the proposed appendix is properly part of the process of reporting on the findings of TAIC in this case. An elaboration of the relevant facts is often a critical part of the reasoning process. eg Official Information Act 1982, s 23(1)(a). That elaboration can be important for informing and educating others so that future accidents can be avoided.

ALPA’s argument under this head is in part based on the alleged “disclosure” of the information from the transcript. But for TAIC to publish its report including the information in terms of its statutory function is not to “disclose” it. It is simply to carry out its statutory role.

Accordingly, we have no difficulty in holding that the inclusion in the appendix of extracts from the transcript comes within the powers of TAIC under the Act.

The grounds of review relating to para 5.12 proceed on the basis that it is the protection and disclosure provision in the lengthy first sentence of the paragraph that is in issue. But, as we have already said, the relevant part of the paragraph is contained in the next two sentences about the inclusion of relevant and pertinent material in the report including its appendices. Where TAIC reports, it is “reporting” publicly in exercise of its principal function; it is not “disclosing” to someone else for some other purpose. It is no part of the function of reporting to interpret or apply the first sentence about protection and disclosure. Rather it is by contrast acting within the area covered by the next two sentences of para 5.12, as it said in its letter giving its reasons for including the appendix:

“... this is a case which falls fairly within clause [5.12] ... in that this CVR transcript is believed to be directly pertinent to the analysis of the accident and accordingly qualifies to be included as an appendix to the report.”

In any event, as appears from an early part of this judgment, that first sentence of the paragraph is not part of the law of New Zealand. As well, TAIC is not a “judicial authority” with the role of making the assessment which that sentence contemplates.

The commission proceedings: conclusion

Accordingly we conclude that the application for judicial review of TAIC’s inclusion of the appendix including the extract from the transcript of the CVR must fail. ALPA’s appeal in the commission proceedings is dismissed.

Costs

Counsel may file memoranda on costs if they consider it appropriate. We note that in the High Court costs were reserved to enable counsel to file memoranda.

Appeal dismissed.

Solicitors for the appellant: Bartlett Thompson & Partners (Wellington).

Solicitors for the respondents: Crown Law Office (Wellington).

Solicitors for the Transport Investigation Commission: Morrison Kent (Wellington).

Solicitors for Ansett New Zealand Ltd: Barrie Hopkins (Auckland).

Solicitors for G N Sotheran: Izard Weston (Wellington).

 Reported by: Gordon Paine, Barrister
TAB 9

*Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd*

Consent for salmon farming was also granted in those four sites. The other five locations were declined.

The appellant unsuccessfully appealed to the High Court on the basis that there was inadequate information on water quality issues before the Board to enable it to grant the applications for plan changes. The appellant subsequently appealed to the Supreme Court. A separate Supreme Court appeal, brought by the second respondent, Environmental Defence Society, was successful in relation to one site, leaving only three sites remaining in this appeal.

The issues on appeal in this proceeding were: (i) whether an adaptive management approach was available; (ii) whether the plan changes were improperly predicated on the consent conditions; and (iii) whether the parameters of the adaptive management regime should have been contained in the plan rather than through consent conditions.

Held, (1) Policy 3 of the New Zealand Coastal Policy Statement requires a precautionary approach to managing activities in the coastal environment when the effects of those activities are uncertain, but potentially significantly adverse. The issue is when an adaptive management approach can legitimately be considered a part of a precautionary approach. This involves the consideration of what must be present before an adaptive management approach can 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. (paras 100, 124)

(2) 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. Whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors, including the extent of the environmental risk, the importance of the activity, the degree of uncertainty, and the extent to which an adaptive management approach will sufficiently diminish the risk and uncertainty. (paras 125, 129)

(3) The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach. In this case, the gravity of risk of realised (ecological disaster) was grave. The vital part of the test deals with the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty. Normally, one would expect there to be sufficient baseline information before any adaptive management approach could be embarked on. In this case, while a change in trophic state would be grave, the experts agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was of the view that the consent conditions provided effective monitoring of adverse effects and that appropriate thresholds were set. It was open to the Board to consider that the adaptive management regime it had approved in the plan and consent conditions was consistent with a proper precautionary approach. (paras 129, 133, 135, 136, 140)

(4) The influence of the consent conditions on the Board’s decision on the plan change was evident. The modifications to the consent conditions were discussed by the Board after it had made findings on the contested effects and before the consideration of the plan changes. It was quite clear that the Board would not have granted the plan change request in the absence of the detailed consent conditions. It is the consent conditions that address the uncertainties that the Board had identified and
contain the adaptive management regime which is an essential component of the Board's decision. (paras 143, 144)

(5) The issue then is whether it was improper for the Board to take into account the consent conditions when deciding on a plan change to make salmon farming a discretionary activity in Zone Three. If a relevant authority considering a plan change could not conceive of a consent being granted for an activity, no matter what conditions, then the activity could not be designated as a discretionary activity. If, however, an activity could have significant adverse effects but these could be eliminated by a simple consent condition, then it would be irrational to require a planning authority to ignore the fact that such a condition could be imposed. All that occurred is that the Board considered the actual conditions that would ultimately be imposed, rather than hypothetical conditions. This is legitimate given that the hearing, and the subsequent decision, covered both plan changes and consent conditions. The Board considered the plan changes and consents separately, and was well aware of the different roles and statutory provisions when considering water quality issues. It also took a proper regional approach to the issue of water quality. (paras 145, 146)

(6) There could be dangers when a planning authority had regard to anticipated consent conditions where the consents are for only one activity, while the plan change covers a variety of activities. A planning authority must have regard to the full range of activities that a proposed plan change could subsequently permit. In this case, both the plan changes and the consent conditions related only to salmon farming. (para 147)

(7) Under s 87A(4) of the Resource Management Act 1991, if a resource consent is granted for discretionary activity, the activity must comply with requirements, conditions, and permissions, if any of the Act, regulations, plan or proposed plan. However, the law does not require in all circumstances comprehensive assessment criteria setting out when resource consent may be granted for discretionary activities. If, however, a consent for a particular activity would only be granted on certain conditions, it would be good practice (and may in some circumstances be a requirement) that this be made clear in the plan, either as standards or as assessment online. In this case, the Court accepted the respondent's submission that no future consent for Zone Three could be granted without properly providing for the maintenance of water quality. (paras 151, 153, 155)

(8) The Board was entitled to consider that the adaptive management regime, reflected in both the plan and the consent conditions, was consistent with a proper precautionary approach. The plan changes were not improperly predicated on the consent conditions and there was no need for the plan to contain more than it did on water quality. The appeal was dismissed. (paras 158, 159)

Cases referred to

Biomarine Ltd v Auckland Regional Council EnvC Auckland A14/07, 13 February 2007

Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage) 2003 FCA 197, [2003] 4 FC 672

Clifford Bay Marine Farms Ltd v Marlborough District Council EnvC Christchurch C131/03, 22 September 2003


Crest Energy Kaipara Ltd v Northland Regional Council EnvC Auckland A132/09, 22 December 2009

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Sustain Our Sounds v New Zealand King Salmon Company

Direct-Generals of Conservation v Marlborough District Council [2004] 3 NZLR 127 (HC)

Director-General of Conservation v Marlborough District Council EnvC Christchurch C11/04, 17 August 2004

Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597


Environment East Gippsland Inc v VicForests [2010] VSC 335


Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2013] NZSC 101

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38

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

Geotherm Group Ltd v Waikato Regional Council EnvC Auckland A14/06, 22 December 2009

Golden Bay Marine Farmers v Tasman District Council EnvC Wellington W19/03, 27 March 2003

Golden Bay Marine Farmers v Tasman District Council EnvC Wellington W89/04, 3 December 2004

Lower Waikato River Management Society Inc v Canterbury Regional Council EnvC Christchurch C86/09, 21 September 2009

Minister of Conservation v Tasman District Court HC Nelson CIV-2003-485-1072, 12 December 2003

New Zealand King Salmon Co Ltd v Marlborough District Council [2011] NZEnvC 346


Pembina Institute for Appropriate Development v Canada (Attorney General) 2008 FC 302


Appeal

This was an unsuccessful appeal from a Board of Inquiry decision to modify a district plan and grant consent for salmon farming.

M S R Palmer and K R M Littlejohns for appellant

D A Nolan, J D K Gardner-Hopkins, D J Minihinck and A S Butler for the first respondent

D A Kirkpatrick, R B Enright and N M de Wit for second respondents

C R Gwyn and E M Jamieson for fourth respondents

P T Beverley and D G Allen for Board of Inquiry Cur adv vult
The judgment of the Court was delivered by

GLAZEBROOK J

Introduction

[1] New Zealand King Salmon applied to establish nine new salmon farms in the Marlborough Sounds. Under the Marlborough District Council’s combined Regional, District and Coastal Plan (the Sounds Plan), the Coastal Marine Area in the Marlborough Sounds is divided into two zones: Coastal Marine Zone 1 where marine farms are prohibited and Coastal Marine Zone 2 where marine farming is usually a discretionary activity. With regard to eight of the sites, the application asked for a plan change so that those sites would be re-zoned to a new zone, Coastal Marine Zone 3, where the farming of salmon would be a discretionary (rather than prohibited) activity. Resource consents for the salmon farms at those eight sites were also sought. In addition, there was a separate resource consent application for the White Horse Rock site, which was situated in Zone 2.

[2] King Salmon’s requested sites for spot zoning changes were in three different areas of the Sounds. Four were in Waitata Reach in Pelorus Sound: Waitata, Kaitira, Taipiti and Richmond. The White Horse Rock site was also in Waitata Reach. King Salmon requested its largest site, referred to as Papatau, in Port Gore in the outer Sounds. In Queen Charlotte Sound, the requested sites were at Kaitapaha and Ruamoko. The final site was on the western shores of the Tory Channel, at Ngamahau.

[3] The applications for the plan changes and the consents were referred by the Minister of Conservation to a Board of Inquiry chaired by retired Environment Court Judge Whiting on 13 November 2011 and were heard and considered at the same time. The Board granted plan changes in relation to four of the proposed sites (Papatau, Ngamahau, Waitata and Richmond). This meant that salmon farming became a discretionary rather than prohibited activity at those sites. Resource consents were also granted for those four sites, subject to detailed conditions of consent that were designed to monitor and address adverse effects under an adaptive management approach. The application for consent for the White Horse Rock site was declined.

2 For further details, see Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2013] NZHIC 192, [2013] NZRMA 311 (King Salmon (HC)) at [21].
3 The Minister of Conservation deals with proposals of national significance relating to the coastal marine area, the Minister of the Environment with other proposals of national significance: see Resource Management Act 1991, s 148.
4 Pursuant to ss 147(1)(a) and 147(2) of the RMA. The Minister considered the proposals to be of “national significance”.
5 This is allowed through an application under the RMA, s 165ZN. This section, and the other sections subsection 4 of pt 7A of the RMA were introduced by the Resource Management Amendment Act (No 2) 2011. The purpose of those changes was to streamline planning and consent processes in relation to, among other things, aquaculture activities. For a full description of the background to this legislation, see Derek Nolan (ed) Environmental and Resource Management Law (looseleaf ed, LexisNexis, 2005) at [5.71] and following.
6 Board of Inquiry New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents, 21 February 2013 (King Salmon (Board)).
7 At [1341]. A map showing the location of the sites that were approved and those that were not is set out in King Salmon (HC), above n 2, at Appendix A.

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[4] Sustain Our Sounds Inc (SOS) appealed to the High Court against the Board’s decision on all four sites, primarily on issues relating to water quality. That appeal, and an appeal by the Environmental Defence Society (EDS) in relation to the Papatua and Waitata sites only, was dismissed by Dobson J on 8 August 2013. Both SOS and EDS were granted leave to appeal to this Court against Dobson J’s decision and the appeals were heard together. In a judgment on the EDS appeal, released at the same time as this judgment, the EDS appeal with regard to the Papatau site in Port Gore has been allowed. In practical terms, this means that the SOS appeal now relates to the three remaining sites.

[5] As indicated, SOS challenges the Board’s decision with regard to all four sites. This is on the basis that there was inadequate information on water quality issues before the Board to enable it to grant the applications for plan changes at all and particularly at the maximum feed levels. Although there had been modelling of the effects on water quality at the maximum initial feed levels, there had been none at the maximum feed levels. (The application envisaged a process whereby feed levels could be raised over time up to a ceiling maximum feed level.) Even at the initial feed levels, however, it is submitted that there was insufficient baseline information to rely on the modelling of the maximum initial feed levels, without rectifying the information deficit. In addition, SOS submits that the Board was wrongly influenced by the adaptive management measures contained in the resource consents in deciding to make the plan changes and that, even if an adaptive management approach was available, the parameters of that approach should have been in the plan and not the resource consents.

[6] The SOS submissions therefore raise three broad issues:

(a) Whether the adaptive management approach that the Board took was available;
(b) Whether the Board’s decision on the plan changes was wrongly predicated on the consent conditions; and
(c) If an adaptive management approach was available, whether that should have been contained in the plan as against the consents.

[7] In order to put these issues and the SOS submissions in context, we first explain the water quality issue in more detail and then set out the statutory framework applicable to this appeal, including the relevant provisions of the New Zealand Coastal Policy Statement, the Marlborough Regional Policy Statement and the Sounds Plan. After this, we give more detail on the plan change approved by the Board, outline the

8 An appeal from a Board of Inquiry to the High Court is available as of right, but only on a question of law: RMA, s 149V.
9 King Salmon (HC), above n 2.
10 Section 149V(8) of the RMA gives the ability for a party to apply to the Supreme Court for leave to bring an appeal on a question of law against a determination of the High Court. In terms of s 149V(7), if the Supreme Court refuses to give leave, but considers that an appeal against the High Court determination is necessary, it may remit the proposed appeal to the Court of Appeal. If remitted to the Court of Appeal, in terms of s 149V(8), that decision cannot be appealed to the Supreme Court.
11 Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2013] NZSC 101. We have contemporaneously issued a separate judgment Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 41 setting out our reasons for granting leave. That judgment also deals with the submissions made by the Board, which have not been considered.
12 Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, (2014) 17 ELRNZ 442. In this Court, only the Papatau site was challenged by EDS.
13 Although this Court’s judgment in the EDS appeal renders the SOS appeal unnecessary, we still include discussion on that site in this judgment as the Board’s comments on that site are relevant to its approach to water quality issues.
evidence before and the findings of the Board on water quality and summarise the Board’s approach to the plan change. We then summarise the decision on the consent applications, set out the conditions of consent for the four sites that were approved and discuss the modifications made in the course of the hearing to the consent conditions as originally proposed by King Salmon.

The water quality issue

[8] The trophic state of bodies of water is indicative of their biological productivity (that is, water quality). The quantities of particular nutrients in water, including nitrogen, are the primary determinants of a body of water’s trophic state. The five trophic states are microtrophic (least productive), oligotrophic, mesotrophic, eutrophic and hypertrophic. 14 Typical water column characteristics for the different trophic states, as measured by total nitrogen, total phosphorus, water clarity and chlorophyll-a, were set out by the Board in its decision. 15

[9] The classifications of trophic level are broad and there had been discussion among the expert witnesses as to the proper classification of the Sounds as a whole. 16 The concentrations of nitrogen in the Sounds are currently at the oligotrophic end of the spectrum, while chlorophyll-a levels are within the levels indicative of a mesotrophic state. It appears, too, that there may be seasonal variations in trophic levels, due to natural fluctuations in nutrient inputs and flushing. 17

[10] It was accepted by the Board that a change from the current trophic state of the Sounds from an oligotrophic/mesotrophic to an eutrophic state “would represent an ecological disaster with significant implications for recreation and tourism, natural character, cultural values and other primary production operators within the Sounds”. 18

[11] The issue with the proposed salmon farms is that the feed given to salmon introduces a new nutrient source to the water, mostly through fish waste. The salmon process fish pellets and excrete ammonia/nitrogen and faeces into the receiving waters. 19 The concentration of nutrients is higher in close proximity to salmon farms but there is also a cumulative effect from all farms in the Sounds. Increased nutrient concentration can lead to enhanced growth of phytoplankton and, potentially, an increase in harmful algal blooms. 20

[12] The main concern with regard to the Sounds and the proposed salmon farms is nitrogen level increases. 21 In this regard, salmon farming is not the sole source of nitrogen. Nitrogen additions also occur naturally from ocean exchange and from land runoff from farming and forestry. 22 By contrast, nitrogen is removed through mussel farming. 23 The estimated sources and sinks of nitrogen are set out by the Board for the three regions where the plan changes were sought. 24

[13] The Board considered that the salmon farms “could very well become the dominant source of ‘new’ nitrogen into the Sounds”. 25 It said that the “oceanic exchange of nitrogen can be regarded as part of the natural background” and considered that the inputs from rivers are “almost certainly significantly elevated due to farming and forestry operations” but are mitigated to a large extent by the mussel farms which remove nutrients. 26

The statutory framework

[14] We have discussed the statutory framework and the hierarchy of instruments in the principal judgment under the EDS appeal. We do not repeat that analysis here but merely summarise the relevant sections of the RMA.

[15] Under ss 67(3)(b) and (c), a regional plan must give effect to any New Zealand coastal policy statement and any regional policy statement. Under ss 66(1), a regional council, when changing any regional plan, must do so in accordance with its functions under ss 30, the provisions of pt 2, any direction given under ss 25A(1), its duties under ss 32 and any regulations. It must also have regard, among other things, to the Crown’s interests in the coastal marine area. 27

[16] In addition to the matters required under ss 66 and 67, s 32, as it was at the relevant time, 28 sets out the framework for evaluations required to be carried out for changes to regional plans. The evaluation framework, according to the heading of the section, is to ensure the consideration of alternatives, benefits and costs by the relevant decision-maker. Under s 32(3), the evaluation must consider the extent to which the objectives of the proposals are the most appropriate way to achieve the purpose of the RMA and whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives. The evaluation must also take into account the benefits and costs of policies, rules or other methods and 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. 29

[17] Section 87A sets out various classes of activities. For the purposes of this appeal, the relevant classifications are discretionary activities and prohibited activities. Discretionary activities require resource consent. 30 A consent authority may decline the consent or grant the consent with or without conditions. 31 The activity “must comply with the requirements, conditions, and permissions, if any, specified in the

14 Lake Ecosystem Restoration New Zealand “Trophic State”<www.lernz.co.nz>. The Trophic Level Index is the recommended index for trophic level assessments by the Ministry for the Environment and has been adopted for the New Zealand Lakes Water Quality Monitoring Programmes. The scale referred to by the Board in its decision contained only four trophic states (oligotrophic to hypertrophic); King Salmon (Board), above n 6, at [361].
15 King Salmon (Board), above n 6, at [361].
16 At [427].
17 At [562].
18 At [456].
19 At [1311].
20 At [353]. The danger of increased algal blooms is that some algal species can cause mass mortalities of marine flora and fauna, contaminate shellfish and kill fish in sea cages. Degraded coastal water quality can promote the development and persistence of such blooms; see [413].
21 At [375].
22 At [378].
23 At [377] and (378).
24 At [377].
25 At [384].
26 At [384].
27 The Board, under s 149P(6)(c) of the RMA, in exercising its functions to change any regional plan must act as if it were a regional council.
28 Section 66(2)(b).
29 Section 32 was replaced on 3 December 2013 by s 70 of the Resource Management Amendment Act 2013.
30 RMA, s 32(4)(a).
31 Section 32(4)(b).
32 Section 87A(6).
33 Section 87A(6)(c).
Sustain Our Sounds
Salmon Company

The New Zealand Coastal Policy Statement

[20] Objective 1 of the Coastal Policy Statement is to “safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems” by, among other things, “maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition”.

[21] Objective 6 relates to enabling “people and communities to provide for their social, economic and cultural wellbeing and their health and safety, through subdvision, use, and development”, recognising, among other things, 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”.

[22] Turning now to the policies of particular relevance to this appeal, Policy 3 requires the adoption of “a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse”. In particular, a precautionary approach must be adopted to the use and management of coastal resources vulnerable to climate change.

[23] Policy 8 recognises “the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities”. Regional policy statements and regional plans are required to provide for aquaculture in appropriate places, recognising that relevant considerations may include the need for high water quality for those activities. Policy 8 also requires that the social and economic benefits, both national and regional where assessments exist, of aquaculture are taken into account. It also requires ensuring that development in the coastal environment does not make water quality unfit for aquaculture in areas that are approved for that purpose.

[24] Policy 12 relates to the control of activities that could have adverse effects on the environment through the release or spread of harmful aquatic organisms. Policy 21 relates to the enhancement of water quality. This requires priority to be given to the enhancement of water quality where it has deteriorated to the extent that “it is having a significant adverse effect on ecosystems, natural habitats or water-based recreational activities or where it is restricting existing uses”.

[25] The management of the discharge of contaminants into water is required under Policy 23. Particular regard must be had to the sensitivity of the receiving environment, the risks if the concentration of contaminants is exceeded and the capacity of the receiving environment to assimilate the contaminants.

The Marlborough Regional Policy Statement

[26] The Marlborough Regional Policy Statement, after a discussion of the statutory framework, sets out a number of principles. These are stated to be “an attitude of the Council rather than an achievable target with supporting policies and methods”. One of the principles is to “[i]ncorporate into resource management policy and plans the concepts within Agenda 21 relevant to the sustainable management of natural and physical resources”. The Regional Policy Statement also provides that, where there is insufficient information about actual or potential adverse effects, “a precautionary approach to the use and development of resources” will be taken “to ensure there are no adverse effects on the environment”.

[27] The Regional Policy Statement then identifies five regionally significant issues for Marlborough. Three of particular relevance to this appeal are the protection of water ecosystems, enabling community well-being and control of waste.

[28] Part 5 of the Regional Policy Statement deals with the protection of water ecosystems. The issue is identified as being that the “function of the marine ecosystem is disrupted by effects from land and water based activities”. It is recognised that small local effects of contamination and disruption can aggregate to have significant effects on the functioning of the ecosystem and that discharges, including from marine farming, can “cause disturbance to the natural marine ecosystem”.

[29] In order to deal with that issue, the Regional Policy Statement sets an objective of maintaining water quality in the coastal marine area at a level which provides for the sustainable management of the marine ecosystem. A number of policies are then
set out to achieve this objective. Of particular relevance to this appeal is the policy to
“avoid, remedy or mitigate the reduction of coastal water quality by contaminants
arising from activities occurring within the coastal marine area”. In terms of
methods, the incorporation of “controls to avoid, remedy or mitigate the effects of
water from water based activities [including marine farming], on marine ecosystems”
is required in resource management plans.

[30] The Regional Policy Statement also provides that discharge controls are required
“to reduce the discharge of contaminants into coastal water and allow for the
safe consumption of plants and fish from the water.” In addition, research into the
cumulative effects of water based activities on water quality must be supported.
This applies in particular to marine farming.

Reference particular needs to be made to the cumulative or long term effects of water
based activities on water quality, especially marine farming. Little is known about the
cumulative or long term effects of marine farming on existing natural stocks and
ecosystems.

[31] Part 7 of the Regional Policy Statement deals with community wellbeing and
includes policies and objectives relating to the subdivision, use and development of
the coastal environment in a sustainable way. It is recognised that the coastal marine
area is “used for a wide variety of purposes to meet the commercial, economic, social
and recreational needs of the people who use the area” and that these purposes include marine farming. The aim is to provide for the continued use and development of these resources but sustainably manage those resources to minimise adverse effects, conflicts between users and ensure efficient and beneficial use.” It is recognised that “appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.”

[32] Resource management plans are required to identify criteria to indicate where
subdivision, use and development will be appropriate. Criteria to indicate where
subdivision, use and development is inappropriate may include issues relating to water
quality. Allocation of space for aquaculture in the coastal marine area “will be based
on marine habitat sustainability, habitat protection, landscape protection, navigation
and safety, and compatibility with other adjoining activities.” It is acknowledged that
there is little information to assess the effects of aquaculture on the sustainability of
the marine habitat and that it could be many years before meaningful research is
completed. This means that, in the interim, allocation of space for aquaculture will be
undertaken in a precautionary manner. Applicants must therefore provide “a detailed
assessment of the effects of their proposal”.

55 At [5.3.5].
56 At [5.3.6(d)].
57 At [5.3.8].
58 At [5.3.6(c)].
59 At 7.2.10(d).
60 At 7.2.10(d).
61 At 7.2.1.
62 At 7.2.7.
63 At 7.2.9(c).
64 At 7.2.10(d).
65 At 7.2.10(d).
66 Sounds Plan, above n I, vol 1 at [1.8].
67 At [9.2.1] (Objective 1, Policy 1.1(1)).
68 At [9.2.2].
69 There were grand-parenting rules for marine farms that were already in existence when Zone 2 was set up.
70 At 9.3.
71 At 9.3.
72 At 9.3.
73 Sounds Plan, above n 1, vol 2 at [35.4].
involving the coastal marine area. These include taking into account any relevant objectives, policies and rules of the plan and the Coastal Policy Statement. The criteria also include taking into account the significant environmental features (including ensuring that any proposal does not compromise the integrity of any terrestrial or marine ecosystem) and taking into account the protection of natural and physical resources so that any proposal maintains the future use potential of any renewable resource and does not reduce water quality beyond a reasonable zone of mixing.

[39] In terms of standards for marine farms in Zone 2, no part of any farm can be located closer than 50 m to the mean low water mark and no part of any farm can be located further than 200 m from the mean low water mark. In terms of assessment criteria applying to marine farms, the "effect on the marine ecology of feed proposed to be added to the environment, including the type and amount of feed and an assessment of its effect on the environment" must be provided, as well as likely effects on water quality and ecology. Permits may be granted for a period of up to 20 years only.

Plan change approved by the Board

[40] The plan change, as approved by the Board, added a third zone, where marine farms and marine farming would be discretionary activities to the extent they complied with the standards specified. These include limiting the farming to king salmon from roe sources in New Zealand. There are standards on cage size, height and boundaries and also standards relating to feed barges, lighting and noise. Most relevantly for our purposes, the maximum initial annual discharge of fish feed within each site is set together with annual maximum increases in the annual tonnage of fish feed discharge up to a total maximum annual discharge of fish feed. For example, for the Waitata site, the maximum initial annual discharge of fish feed within the site is 3000 tonnes. The maximum annual increase is 1000 tonnes up to a maximum annual discharge ceiling of 6600 tonnes. There is provision in the rules that "[t]he annual feed discharge may exceed the relevant maximum feed discharges by up to 15%; provided that over any continuous 3 year period, the average annual feed discharge does not exceed the relevant maximum feed discharges." Specific assessment criteria are also set, covering a range of matters, including effects on marine mammals and seabirds. The assessment criterion that is specifically related to discharges to coastal water provides:

Evidence and findings on water quality

[42] The Board heard from a number of experts on water quality. These experts cautioned and produced a joint statement dated 27 August 2012. Following caucusing, the experts agreed that the unavailability of baseline data had introduced uncertainty to the interpretation of modelling results and that baseline surveys would need to begin as soon as possible after the issuing of any consent. The Board agreed that there was a paucity of data presented on the existing water quality of the Marlborough Sounds. The trend of increasing nutrient additions from the land and the lack of robust research as to the impact of existing land-based activities added to the Board’s concerns about the characterisation of the existing environment.

[43] An expert for King Salmon (Mr Knight) had presented three models relating to water quality in his evidence before the Board: a mass balance model, a flushed agential model and a spatially explicit model, the SELFE model. These models had been modified following a peer review process initiated by the Board and it was the revised models that were considered by the Board.

[44] The Board concluded that the first two models are a useful first check on the impact of the proposed salmon farms on the Sounds as a whole. They provide an overview of the various sources and sinks of nitrogen and put the input from the farms into the context of the natural background variability, the nitrogen inputs from the land and the removal of nitrogen by mussel farming. These models demonstrate that the introduced nitrogen is a significant addition to the Sounds' ecosystem but unlikely to cause a major shift or perturbation in the function of the ecosystem as a whole. The extensive mussel farming in Pelorus Sound acts as a buffer to further nutrient additions.

[45] As to the third model, the Board noted that improvements made during the review process had led the experts to agree that the “results are satisfactory except in the very short term (less than two to four weeks) and at a detailed scale of impact..."
(minor embayments). The experts were also agreed that "the [total nitrogen] increments will be conservative (that is overestimated) for the scenarios modelled". This is because the model ignores the removal of nitrogen by biological and physical processes.97

[46] The Board expressed concern, however, that the scenarios modelled did not include the maximum feed discharge set out in the proposed conditions. The Board said:98

The scenarios modelled are for the "maximum initial feed discharge" in the proposed conditions of consent. While these levels are increased by 50% to demonstrate the impact of summer loadings Mr Knight has not modelled the "maximum feed discharge" also set out in the proposed conditions. He explained that these levels may never be reached and the intention was to take an adaptive management approach. We are somewhat astounded and cannot understand why these maximum discharges were not modelled to give the truly worst case scenario for nutrient additions and the potential effects at both local and Sounds wide scale. Such modelling would not have precluded an adaptive management approach.

[47] The Board said that the lack of spatial modelling of the maximum feed discharges made it "extremely difficult to come to a finding on the nature or magnitude of the effects of this discharge".99 The Board, however, said that it was satisfied that the SELFIE model "is an adequate tool to determine the potential impacts of the salmon farms on water quality."100

[48] It had been suggested in evidence that a full food web model should have been produced.101 The Board agreed that a more sophisticated biogeochemical model would have assisted with the prediction of effects, particularly related to potential biological changes. However, it accepted evidence that such modelling would not necessarily provide any more certainty when attempting to quantify those effects. It said that such a model would be a major research project of considerable assistance in the overall management of the Sounds and the sources and sinks for nutrients. However, it did not consider such a model to be "the sole responsibility of King Salmon or any other individual stakeholder".102

[49] The Board then went on to discuss the possible effects on water quality of the proposed salmon farms, beginning with the possibility of harmful algal blooms, the cumulative impact and potential for eutrophication and the issue of mitigation, before coming to its overall conclusion on the water column.

Harmful algal blooms

[50] As to the potential for harmful algal blooms, it had been explained in evidence before the Board that blooms (a high biomass) of plankton in coastal waters are a natural and essential ecosystem process. However, some algal species can cause mass mortalities in the marine environment.103 Such harmful algal blooms are usually natural events, although degraded coastal water quality can promote the development and persistence of blooms.104

[51] The Board, while recognising that the development of harmful algal blooms is not easily predictable, accepted that the salmon farms "are unlikely to materially affect the frequency, duration or extent of such blooms".105 There is the potential for localised changes in some bays but the availability of nutrients from the farms was but one driver. The Board agreed that ongoing monitoring, including of potentially affected bays, is necessary.106

Cumulative effects

[52] Turning to cumulative effects, the experts were agreed (with the exception of Dr Henderson) that, at a Sounds-wide scale, there is unlikely to be a change in the water column from oligotrophic/mesotrophic to eutrophic from the establishment of the salmon farms. The experts were also agreed that changes may occur at a smaller scale and the greatest potential for adverse effects, such as harmful algal blooms, exists in side embayments close to the farms and off the main channels.107 The Board accepted the majority opinion on the point but did not rule out the possibility of more subtle ecosystem changes in response to the increased nutrients from the farms.108

[53] Dr Henderson, an independent expert, considered that the intense production systems of the proposed salmon farms would lead to further eutrophication of the Sounds that might be difficult to reverse.109 Dr Gillespie, an expert called by King Salmon, "expected the rapidly flushed environment of the Sounds to ensure easy reversibility and a rapid return to the trophic condition pre-development following the closure of the salmon farms".110 The Board did not make any explicit finding on this conflict of evidence but, given its rejection of Dr Henderson’s concerns on the issue of the dangers of trophic change, may have done so implicitly.

[54] The Board accepted that Mr Knight "has quite correctly modelled the cumulative effects of the existing farms, this proposal and other consented salmon farms."111 However, the Board noted that little information had been presented on the trends in nitrogen from the land. The possibility of more subtle and long term effects due to climate change were also noted, although there was not enough information to predict whether this would be positive or negative with respect to nutrient inputs.112 The Board also noted that the conclusions of the experts are based on the present day conditions of the Sounds. It said that:113

Increases in riverine inputs and/or conversions of shellfish to finfish farms would further add to the nitrogen load and have to be factored into the consideration of cumulative effects. That is the baseline is shifting and there is an important question around the assimilative capacity of the Sounds as a whole, given the likely trend of increasing nutrient loads from both land and sea based activities.

Mitigation

[55] There were a number of matters put forward as mitigation. These included possible improvements in feed, farm management and fish breeding to reduce the nitrogen emission rates. Dr Broekhuizen, an expert appointed by the Board, agreed that such improvements were plausible.114 The Board did not make an explicit finding on those matters. The Board did, however, reject the notion that the location of the
farms in high flushing environments was a form of "natural mitigation". It said that the "careful site selection is more correctly characterised as choosing a receiving environment where rapid mixing and dilution. The limit the intensity of the immediate effects on the water column and on the benthos [seabed])." 115

Overall conclusion on effects on the water column

[56] The overall conclusion of the Board as to the effects on the water column was, in agreement with the experts, that "the data and information on water quality, that had been presented" is not an "adequate description of the existing environment given the scale of the proposed increase in fish farming and consequent release of nutrients into the marine environment." 116 Some of the uncertainty was to be remedied by the conditions of consent related to baseline monitoring and some through monitoring already under way by the Marlborough District Council. However, the Board considered that there remained considerable uncertainty "as to the nature of the receiving environment, including the trends in other nutrient sources" and consequently in the ability of the Sounds to assimilate a significant increase in nutrients adequately. 117

[57] The Board accepted that the modelling of the nutrients introduced to the water column is conservative. However, the scenarios presented were generally for the initial feed rates for each farm and in some cases for the higher summer loadings. The Board noted that the applications for each salmon farm seek almost double this feed level and that the approach taken was in marked contrast to the modelling of effects on the benthos which were at the maximum feed levels. The Board commented again that this "astonishing gap in the prediction of effects on the environment cannot be explained away by emphasising that the modelling is conservative." Nor could it "be simply filled by invoking adaptive management". 118

[58] The Board went on to repeat its concerns as to the lack of modelling at the maximum feed levels, saying that this was a "fundamental failing in the assessment of effects on the environment that we would not expect to see in a project of this magnitude and importance." 119 This meant that the Board could only consider granting consent for "these graduated increases in feed discharge levels with any increases based on a more robust monitoring and adaptive management regime than that presented in the proposed conditions." 120

Board's approach to the plan change

[59] The Board began its discussion of the plan change by saying that pt 2 of the RMA is "the framework against which we must exercise our decision-making." 121 The Board then outlined the statutory provisions and instruments applicable to its consideration of the plan change and addressed a number of matters that it saw as being of particular relevance. One of these was the compliance with statutory directions in relation to planning instruments, including the Coastal Policy Statement. We have discussed the problems with the Board's analysis in this regard and the "overall broad judgment" approach the Board adopted 122 in the principal judgment on the EDS appeal and do not repeat that analysis here. The Board also discussed the definition of "most appropriate." 123 We are not to be taken as commenting on that discussion as it was not the focus of argument before us. The Board did say, however, that its findings on the many contested issues "is effectively an evaluation of the various costs and benefits." 124 It said that its conclusion on the contested issues forms the basis for the evaluation. 125

[60] The contested issues discussed included the economic costs and benefits, the salmon farms and their effects on the seabed, 126 water column, biosecurity, marine mammals, seabirds, natural character and navigation. In relation to the water column, the Board acknowledged "the uncertainty that exists with regards to the ability of the Sounds marine ecosystem to assimilate the nutrient loadings that would eventuate should all the zone locations be approved, thus creating the ability for consents to be considered and granted". 127 The Board said that this was particularly critical in the Pelorus Sound and the approval of only two of the four zone locations sought in the Waitaia Reach was "partly underpinned by our recognition of the (unsolved) uncertainty and risk that exists with regards to the water column effects should all the zonings be approved and consents granted". 128

[61] Overall, the Board considered that the additional policies and associated rules that were to be introduced into the plan "are efficient and effective in terms of the provision of space for salmon farming. They address this resource management issue and are most appropriate with respect to the settled objectives of the Sounds Plan." After this summary, the Board discussed the various matters in more detail. It said that it had to "apply our findings of fact to the balancing exercise we must now do." 129 If this is a reference back to the need to evaluate the various "costs and benefits" of the proposed plan changes, then this accords with s 32 of the RMA. 130

[62] The Board said that the effects have been described and evaluated at a site, region (or reach) and whole of Sounds scale. The Board, for convenience, however, in its report discussed the plan changes at the regional (or reach) scale, given the clustering of the proposed plan change sites within three distinct regions. 131

Port Gore

[63] With regard to the proposed Papatua site (Port Gore), the finding with regard to water quality was that there would be "localised increases in total nitrogen and, consequently, phytoplankton growth within Port Gore." 122 The Board considered, however, that the open nature of the site, being adjacent to Cook Strait, "reduces the potential for cumulative effects to arise over time". The Board also considered the likelihood of changes in the frequency or duration of algal blooms to be very low. 133
Waitata Reach

[64] With regard to the four sites proposed in the Waitata Reach area and water quality, the Board said that "[n]itrogen is considered to be the primary limiting nutrient for phytoplankton production in the Pelorus Sounds". Even with the extensive mussel farming removing nutrients from the water, intensive salmon farming would be a substantial net addition".134

[65] In the absence of a sophisticated biogeochemical or “food web” model for Pelorus Sound, the Board considered it difficult to be sure of the outcomes of the salmon farms for the wider ecosystem. It said that, while “some expansion of salmon farming seems able to be accommodated (as indicated by the ‘critical nutrient loading rate’135), the assimilative capacity for an expansion of this scale has not been demonstrated".136

[66] The “cumulative additions of nitrogen, increases in phytoplankton and consequential reduction in water clarity” were also potentially of significance for the King Shag foraging habitat. This merited a precautionary approach, given the threatened status and limited geographic range of the King Shag.137

[67] In its overall assessment with regard to this region, the Board said:138

After careful consideration of all the balancing factors, we conclude that the siting of four proposed farms in this Reach would not be appropriate. The assimilative capacity of the receiving waters and the potential cumulative effects on the foraging areas of the King Shag are uncertain. The cumulative effects of the Kaiitaa and Tappii farms on the natural character, landscape and seascape qualities of the entrance to the Sounds would be high. Further, Tappii lies in the path of a traditional waka route — a taonga to Ngati Koata. It would also be in the vicinity of recorded sites of significance to Maori.

[68] The Board considered that granting all the plan changes sought in this area “would not give effect to the statutory provisions in respect of natural character, landscape, Maori, or ecological matters. The overall cumulative effects would be high”.139 The Board accordingly granted the request with respect to Waitata and Richmond, but declined the request with respect to Kaiitaa and Tappii.140

Queen Charlotte Sounds and Tory Channel

[69] For the Queen Charlotte Sounds, there is no specific mention of water quality issues. The plan change request with regard to Kaiitaa Peninsula and Ruomoko was declined for other reasons.141 As to the Tory Channel site, Ngamahau, again there is no specific mention of water quality but, apart from effects on cultural values, ecological features and the effect on local residents, the effects of the farms at the site were considered to be less than minor.142 The Board approved that plan change.

Assessment approach

[70] After having outlined its decisions in relation to the three regions, the Board discussed its “Part II Assessment”. It said that it considered it had “struck the right balance ... between providing for the social and economic well-being of the community and achieving sustainable management of the natural and physical resources of the Sounds”.143 That statement is not the correct approach and King Salmon did not attempt to defend it. The purpose of the Act is set out in s 5 of the RMA as being to promote sustainable management of natural and physical resources. It would be contrary to this purpose to balance economic and social wellbeing against that purpose. In any event, the “overall judgment” approach, based on s 5, does not take proper account of the hierarchy of instruments, such as the Coastal Policy Statement and the Regional Policy Statement.144

[71] In this case, any “balancing” approach that led to water quality being compromised would be inconsistent with those instruments. Objective 1 of the Coastal Policy Statement requires, among other things, water quality to be maintained. Policy 21 relates also to water quality and the management of discharges is dealt with in Policy 23. Further, Policy 8, dealing with aquaculture, specifically recognises the reliance of aquaculture on proper water quality.145 Similar themes arise in the Regional Policy Statement, which recognises the importance of water quality being kept at a level that provides for sustainable management of the marine ecosystem and the importance of avoiding, remediating or mitigating adverse effects from the discharge of contaminants.

[72] Further, any compromise to water quality would be inconsistent with the Sounds Plan. The plan changes instituted by the Board left most of the Sounds Plan intact. One of the objectives of the Sounds Plan is to allow development, subject to avoiding, mitigating or remediating adverse effects on water quality. The importance of uncontaminated seawater and the maintenance of water quality is stressed in the Sounds Plan.146

[73] In King Salmon’s submission, however, the Board did not undertake any such balancing exercise in relation to the water column effects. The Board recognised that it had to be satisfied that the life supporting capacity of the water and its ecosystems are adequately safeguarded.147 King Salmon contends that the adaptive management approach adopted achieved that aim.

[74] We accept King Salmon’s submission that the Board did not in fact apply the incorrect balancing approach to the decision on water quality and that the Board, when discussing the adaptive management conditions, implicitly accepted that water quality would be adequately protected by those measures.148 The real issues in this appeal therefore are whether the Board was entitled to accept an adaptive management approach and the other two issues relating to the relationship between the plan and the consents that were identified at the beginning of this judgment.149 Before turning to those issues, we discuss the Board’s decision on the consents.

134 At [1245].
135 The definition of a critical nutrient loading rate was explained by the Board, at [385], as the “nutrient loading rate which cannot be exceeded without loss of ecosystem integrity”.
136 At [1245].
137 At [1246].
138 At [1252].
139 At [1253].
140 At [1254].
141 At [1255]-[1256].
142 At [1265]-[1267].
143 At [1275].
144 At [1279].
145 The approach of the Board to part II and the overall judgment approach is discussed in more detail in Environmental Defence Society Inc v New Zealand King Salmon Company Ltd, above n 12, particularly at [106]-[109].
146 See [23] above.
147 See [29] above. See Marlborough Regional Policy Statement, above n 47, at objective [5.3.2] and policy [5.3.3].
148 See [34] and [36] above.
149 King Salmon (Board), above n 6, at [1277(c)].
150 At [454]-[460].
The consents

[75] As noted above, the Board granted resource consents for the farms at the four sites that had been the subject of the plan changes. The consent conditions originally proposed by King Salmon underwent modification during the course of the hearing and the conditions that were imposed by the Board are intended to create an adaptive management regime. Objectives involving qualitative standards are set in the course of the hearing, along with a process for developing quantitative standards. The consents provide for monitoring in accordance with those standards and remedial action if required. This process is to be monitored by an independent expert peer review panel.

Modification of consent conditions in course of hearing

[76] In its initial application, King Salmon had suggested detailed conditions for an adaptive management approach. There were extensive modifications made over the course of the hearing to these conditions. The Board set out in detail the reasons for these changes. We do not summarise all of this discussion but do summarise the matters of principle discussed by the Board.[152]

[77] One of the most important additions, in response to the concerns expressed by submitters, was the introduction of a series of objectives, expressed in narrative form, designed to maintain the environmental quality of the Sounds.[153] Dr Gillespie explained that specific quantitative thresholds or management triggers were not recommended “at this stage” because of the wide natural variability in nutrient levels. After three years of monitoring, however, thresholds could be defined for specific indicators or for an integrated trophic index.[154]

[78] That approach had been considered by the experts during caucusing and numerous amendments to the water quality objectives were agreed. At the close of the hearing, King Salmon proposed the recasting of the objectives as “qualitative water quality standards” and at the same time “outlin[ed] the process for developing the quantitative standards and responses”.[155]

[79] The Board accepted that it was not able to make a decision on quantitative water standards at this stage. However, it said that the thresholds to be set through the water quality standards are simply a mechanism to achieve the agreed water quality objectives. It pointed out that “the peer review panel is tasked with reviewing the baseline information and the quantitative water quality standards which in turn are to be approved by the Council”.[156] It went on to say that the objectives “are robust and would ensure the quantitative water quality standards would be sufficiently constrained to be effective”. It noted that, in the end, there had been little dispute as to the setting of the objectives.[157]

[80] Dr Gillespie proposed that both qualitative and quantitative standards should continue to be used in a “holistic approach”. Any breach of a threshold would trigger more intensive monitoring to establish cause and effect and then decisions as to whether or not to cut back on production.[158] The Board agreed with Dr Gillespie’s holistic approach.[159] It said that it saw the qualitative standards as “objectives for an adaptive management approach to water quality (and the wider ecosystem)”. It noted that some of the objectives are able to be stated reasonably precisely “but others are broad and involve a measure of professional judgment.” The requirement for a peer review panel was therefore necessary and appropriate.[160]

[81] The Board was concerned that any shift in trophic state needs to be expressed in terms of an “increase” or “shift towards” rather than a full scale change in state. As noted above, the Board considered that a change from today’s oligotrophic/ mesotrophic conditions to a eutrophic state would represent an ecological disaster.[161] It said that preventing “such an extreme scenario is hardly an appropriate safeguard, something less must trigger action”. It went on to say that what represents a material or significant shift (with respect to magnitude, temporal and spatial extent) must be left to the judgement of the peer review panel in the light of all of the information from the monitoring programme. The Board approved a wording change to make it clear that “avoiding a significant movement along the scale is the objective.”[162] The Board also said that it favoured adding an integrated trophic index to the list of quantitative water quality standards, while recognising that it may be some time before such an index can be reliably “calibrated” for the Sounds. The Board believed the creation of an enrichment index for the locations would be a useful indicator for monitoring changes and provide a trigger for an adaptive management response.[163]

[82] The Board said that it must make the decision, based on the evidence presented, as to the levels of acceptable change. It said:[164]

While we are not able to make a decision as to the appropriate water quality standards the thresholds must relate to the agreed objectives as modified by this decision. And the conditions must clearly set out the process and timelines for setting these standards. We are satisfied that the proposed conditions provided by King Salmon in closing are adequate in this regard. The Peer Review Panel is tasked with reviewing the baseline information, the quantitative water quality standards, the management responses and the supporting monitoring programme.

[83] The Board had also been concerned that any breach of the water quality standards in the original proposals required, first, the gathering of further information and, if that indicated an issue, an “action plan” to be formed. The Board said that it did not entirely disagree with this approach but, if the standards are exceeded greatly, then this should result in more immediate action.[165] There were modifications made to the process originally proposed to ensure that this was the case.

Overall decisions on consents

[84] In its overall decision on the resource consent applications, the Board said that on balance the concurrent resource consent applications for Papatau, Waiata, Richmond and Ngamahau should be granted, subject to the Conditions of Consent. The Board said:[166]
While some adverse effects will arise, particularly in respect to the water quality, the seabed, Maori values, natural character and landscape, and amenity values: these effects can be adequately managed through the proposed conditions of consent. Any adverse effects need to be balanced with the need to provide for the economic and social well-being of the community. We reiterate, that providing for these four farms, this will strike the right balance.

[85] The terms of the consents were set at 35 years. At [1340]. The Board said that, in setting this term, it had taken into account the level of financial investment that the consent holder has made in achieving their resource consent and the ongoing costs. A 35-year term would enable the minimum necessary return on investment threshold to be achieved. By contrast, a 20-year term would significantly reduce the return by a factor of 25 per cent.

[86] The Board did express concern with a 35-year term in relation to the potential effect on the water quality, scientific uncertainty as to the ecosystem response and customary values of the Sounds environment. At [1337]. It said, however, that the adaptive management approach and a robust set of conditions applied to the issued consents “gives certainty to the near field operation of the farms”. At [1338]. However, the “far field and Sounds-wide effect of the farms in combination with yet to be fully understood natural variation and trends in sources of nutrients entering the Sounds from the ocean, land and other activities leave a higher degree of uncertainty beyond a 20 year period”. The Board considered, however, that this could be addressed, if necessary, by the Council through the review process.

[87] The Board then went on to consider and reject the White Horse Rock application because of adverse effects on recreational fishing, customary fishing, navigation, natural character and landscape. When considered cumulatively with the existing farms and the other consents, the adverse effects “would be sufficiently high to tip the balance against granting the application”. Consent conditions

[88] The consent conditions imposed a requirement for a “baseline plan” to be created by an independent person specifying how the monitoring and analysis is to be undertaken to establish baseline information. A peer review panel (the composition of which is approved by the Council) will review the plan and provide recommendations and a report to the consent holder. The “baseline plan” must be approved by the Council. Prior to any structures being placed on the farms, a “baseline report”, prepared by an independent person, containing the results from monitoring and analysis undertaken in accordance with the “baseline plan”, must be provided to the peer review panel for its review and assessment. The peer review panel is required to review the baseline report, including the recommended water quality standards and integrated trophic index, and make a recommendation to the Council for its approval. If the resulting “baseline report” is not approved by the Council, then the consent will lapse after three years from the date of the consent’s commencement. If the resulting “baseline report” is not approved by the Council, no structure(s) can be placed on the marine farms. Therefore, if the analysis and monitoring of the baseline information shows that the development of a marine farm would be inappropriate, the Council can effectively halt any further development of the marine farms by not approving the report.

[90] In addition to the baseline review before the farms are stocked, the Board set out numerous conditions for the ongoing monitoring of the farm to provide a detailed feedback-loop on the effects on the benthos and water quality. For example, in the Waiata Farm consent, the conditions of consent set an initial maximum feed level and maximum increases allowed per annum. Before any increase in the feed levels can be implemented, the farm must have operated at the current maximum level for at least three years, the results must indicate that the enrichment stages are not statistically significantly more than the enrichment stages from the previous year and that the marine farm complies with all the environmental quality standards set in the consent and does not exceed the relevant standards for each zone. These environmental quality standards include various chemical and ecological measurements.

[91] Any increase in the tonnage of feed must be recommended in the “annual report”, which is prepared by an independent person, providing details on the monitoring of results from the previous year, an analysis of those results and recommendations for changes to the monitoring and marine farm management actions for the following year. The peer review panel will review this report and make recommendations and then it must be submitted to the Council. Only upon the approval of the “annual report”, including the aspects as to an increase in the tonnage of feed, may there be an increase in feed levels.
[92] If and when the farms are stocked and monitoring detects that the enrichment stages are above those allowed under the environmental quality standards for the various zones, then, depending on the extent to which the enrichment stages exceed the environmental quality standards, the amount of feed must be reduced, or in more serious circumstances, stock must be removed from the farms until compliance is achieved. 187

[93] In essence, the above conditions require the gathering of baseline information for the assessment as to whether the marine farm can be built and stocked. If the marine farm is built and stocked, the conditions mandate extensive monitoring and provide remedial mechanisms if water quality is compromised.

The issues

[94] We now discuss the three issues identified at the beginning of the judgment:

(a) Whether an adaptive management approach was available;

(b) Whether the plan changes were improperly predicated on the consent conditions; and

(c) Whether the parameters of the adaptive management regime (if available) should have been contained in the plan rather than through consent conditions.

Adaptive management

[95] We propose to discuss the question of whether an adaptive management approach was available to the Board under the following headings: the parties’ submissions; the precautionary approach under the Coastal Policy Statement; the Board’s consideration of the precautionary approach and adaptive management; the guidance notes on the Coastal Policy Statement; international commentary; and caselaw on adaptive management from New Zealand, Australia and Canada. We then assess whether the requirements for an adaptive management approach were met in this case.

The parties’ submissions

[96] SOS submits that there was a threat of serious damage to water quality in the Sounds. Scientific uncertainty meant that the Board could not assess the effects of the proposal on water quality. It was thus contrary to its statutory function to approve the plan changes. 188 SOS relies on Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development 2007) NZCA 473, 2008) 1 NZLR 562, 2007) 3 ELR NZ 279 (Glazebrook, O’Regan and Arnold JJ) at [346(a)] and [36]. As an alternative, SOS submits that the Board’s decision was inconsistent with the only reasonable conclusion from the evidence. 190

[97] In particular, SOS submits that:

(a) There was insufficient baseline information available to the Board. This means that, even at minimum initial feed levels, the plan changes cannot be justified; and

(b) The Board had found that there was a “fundamental failing” in the modelling exercise in that there had been a failure to model the effects of the maximum feed discharge on water quality. As this was the case, the Board could not justify the plan changes allowing stocking over time to the maximum level.

[98] King Salmon submits that, under the RMA, discretionary activity status simply allows a person to apply for a resource consent. The change from prohibited to discretionary status for the salmon farms in Zone 3 therefore has no environmental effects in itself. As to the resource consents, it is submitted that the Board had sufficient information on all contested issues, including water quality, for consents to be granted up to the initial feed levels (and that is all that was to be allowed initially). The modelling for those initial feed discharge limits was accepted by the Board as having been undertaken on a conservative basis.

[99] In King Salmon’s submission, the Board applied a proper precautionary approach in that it declined four of the eight plan change sites, as well as consent for the White Horse Rock site. It also adopted a robust adaptive management regime with regard to the four sites that were approved so that no increases in feed levels could occur unless it was safe to do so. It is submitted that the SOS contentions amount to a submission that there must be perfect (or near perfect) scientific knowledge of all the potential and actual effects of an activity before it can be classified as other than prohibited. It is submitted that there is no statutory support for such a proposition.

Precautionary approach under the Coastal Policy Statement

[100] Policy 3 of the Coastal Policy Statement requires a precautionary approach to managing activities in the coastal environment when the effects of those activities are uncertain but potentially significantly adverse. 191

[101] The Board accepted that there was a lack of baseline information. 192 Further, while modelling of initial feed levels had been undertaken, there had been no modelling at the maximum feed levels. The Board also said that, if there were a change in trophic level of the Sounds resulting from nitrogen introduced into the coastal waters through the salmon farms, then this would be an ecological disaster. 193 This means that the requirements set out in Policy 3 for uncertainty and potentially significant adverse effects were met and a precautionary approach was required. 194

Board’s consideration of the precautionary approach and adaptive management

[102] Despite being required to give effect to the Coastal Policy Statement, the Board did not refer to Policy 3 when it specifically discussed the precautionary approach. 195 However, the Board did accept that it was required to take a precautionary approach, which it said is inherent in the structure of the RMA. 196

See [22] above. The Marlborough Regional Policy Statement, above n 47, also emphasises the need for the precautionary approach and the uncertainty as to the long term effects of marine farming: see [26] and [30] above.

192 King Salmon (Board), above n 6, at [461].

193 See [10] above.

194 Therefore, the approach taken by the High Court that it was open to the Board to assess the weight to be given to the precautionary approach was incorrect: see King Salmon (HC), above n 2, at [83].

195 King Salmon (Board), above n 6, at [173]-[182], although Policy 3 is referred to in a quote from one of the experts. However, the Board did refer to Policy 5 when outlining the contents of the Coastal Policy Statement: see [85], [283] and [975].

196 As [173]-[178], We are not to be taken as making any comment on that discussion or on whether the cases discussed correctly state the legal position.
[103] Turning to the adaptive management approach, the Board said that this arose, at least in part, from the precautionary approach. Under adaptive management, ongoing monitoring of the effects of an activity are required and the Board said that this “provides a pragmatic way forward, enabling development while securing the ongoing protection of the environment, in complex cases where there are ecological or technological uncertainties as to the effects of the proposal”.197

[104] The Board noted that in this case three adaptive management approaches were proposed by King Salmon:198

(a) Staged development — Sites are proposed to be developed in a staged manner, with expansion contingent on compliance with pre-defined seabed and environmental quality standards (EQS to be specified in the consent conditions) and on regular reviews of wide-scale water column and wider ecosystem monitoring result;

(b) Tiered approach to monitoring — Monitoring effort is proposed to increase if and when sites approach or exceed the EQS or in response to other identified environmental issues. Likewise, monitoring intensity may decrease with evidence of sustained compliance and stability;

(c) Ongoing adaptive management — The farms are proposed to be managed adaptively long-term, in response to environmental monitoring results. Any breaches of the consent condition standards will be addressed and management responses implemented to ensure the farm becomes compliant. Any other adverse effects identified through monitoring, including from the wide scale water column and wider ecosystem monitoring, can also be addressed by adaptive management approaches.

[105] The Board referred to a number of cases where the adaptive management technique had been applied in New Zealand.199 On the basis of those cases, the Board considered that, before endorsing an adaptive management approach in this case, it would have to be satisfied that:200

(a) There will be good baseline information about the receiving environment;

(b) The conditions provide for effective monitoring of adverse effects using appropriate indicators;

(c) Thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) Effects that might arise can be remedied before they become irreversible.

[106] The Board considered that it had appropriately applied the precautionary principle in some cases refusing consent and in others by the adoption of “the strong proposed adaptive management conditions of consent”.

Guidance notes on the Coastal Policy Statement

[107] The guidance note to Policy 3 of the Coastal Policy Statement prepared by the Department of Conservation deals with the precautionary approach and adaptive management.201 It is said that it will be a matter for local authorities to decide on a case-by-case basis whether the activity should be avoided until sufficient study has been done into its likely effects, or whether an activity is allowed, but subject to “complex and detailed conditions and a programme of specified testing and monitoring (as in adaptive management)”.202 It said that adaptive management recognises that:203

Knowledge about natural resource systems is uncertain and that some management actions are best conducted as experiments or “learning by doing”. A key issue in implementing an adaptive management approach is to ensure that conditions clearly specify the level of effect that is anticipated. If monitoring shows this threshold has been reached, then the condition (in the case of a resource consent) should provide for the activity to be adjusted.

[108] The commentary goes on to say that an adaptive management approach must provide for monitoring of issues of concern and will not be inappropriate where adaptive management cannot remedy the effects before they become irreversible.204

International commentary

[109] In 2007, the International Union for Conservation of Nature (IUCN)205 approved a set of guidelines on the application of the precautionary principle.206 These included a guideline on using an adaptive management approach, which it said should be used unless strict prohibitions are required.207 Any such approach should include the following core elements:208

(a) Monitoring of impacts of management or decisions based on agreed indicators;

(b) Promoting research, to reduce key uncertainties;

(c) Ensuring periodic evaluation of the outcomes of implementation, drawing of lessons and review and adjustment, as necessary, of the measures or decisions adopted; and

201 At [1278].


198 At [179].

199 At [54].

200 King Salmon (Board), above n 6, at [181].

201 At [1278].


203 At 7.

204 At 7-8.

205 At 8.

206 The IUCN is an international environmental organisation founded in 1948. The IUCN is comprised of more than 1,200 member organisations (government and non-governmental organisations), six commissions and a secretariat of over 1,000 people in more than 60 countries. IUCN's main aims are targeted at ensuring biodiversity conservation, the use of nature based solutions and related governance. See www.iucn.org.

207 International Union for Conservation of Nature "Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management" (as approved by the 67th meeting of the IUCN Council 14-16 May 2007) (IUCN Report).

208 Guideline 12 at 9-11. This was said in the context of the precautionary principle at international law. In that context, rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment. For example, in the IUCN Report, it is noted that "the leading criterion to which the various formulations of the Precautionary Principle is the recognition that lack of certainty regarding the threat of environmental harm should not be an excuse for not taking action to avert that threat"; at 1. For a discussion on the precautionary principle in international law, see also: Philippe Sands and Jacqueline Post Principles of International Environmental Law (3rd ed, Cambridge University Press, Cambridge, 2012); Nicolas de Sadeleer Environmental Principles: From Political Slogans to Legal Rules (Oxford University Press, Oxford, 2002); World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) Report of the Expert Group on the Precautionary Principle of the World Commission on the Ethics of Scientific Knowledge and Technology (UNESCO COMEST, March 2005); and 1992 Rio Declaration on Environment and Development A/Conf/151/26 (1992).

209 IUCN Report, above n 207, at guideline 12.
(d) Establishing an efficient and effective compliance system.

In its commentary on this guideline, the IUCN said that an adaptive management approach is:

particularly useful in the implementation of the Precautionary Principle as it does not necessarily require having a high level of certainty about the impact of management measures before taking action, but involves taking such measures in the face of uncertainty, as part of a rigorously planned and controlled trial, with careful monitoring and periodic review to provide feedback, allowing amendment of decisions in the light of such feedback and new information.

It is recognised that the precautionary principle may require prohibition of activities. This may be the case, for example, where urgent measures are needed to avert imminent potential threats, where the potential damage is likely to be irreversible and where particularly vulnerable species or ecosystems are concerned.

Where adaptive management is suitable, monitoring and regular review are required. In some cases, further information and research may lead to the precautionary measure no longer being needed. However, it could lead to the conclusion that the threat is more serious than expected and that more stringent measures are required.

New Zealand cases

As indicated by the Board, the concept of adaptive management has been discussed and implemented in a number of Environment Court decisions. We propose to discuss three of these. The first is Clifford Bay Marine Farms Ltd v Marlborough District Council, which involved the granting of resource consent for the proposed implementation of a large mussel farm in a "prime Hector's dolphin habitat", with uncertainty as to the effects of the farm on the dolphins.

The Environment Court granted resource consent for a small farm, following a two year intensive survey, research and monitoring program regarding Hector's dolphins, allowing a cautious adaptive management strategy.

The two options open to us are to decline consent, or to grant it in such a way that if any adverse effects on the use, Hector's dolphin make of the habitat arise, they are limited, and measures to reverse them speedily can be implemented. The probability of undetected adverse effects of significance occurring unrelated to, and unaccompanied by, other existing adverse effects are of sufficiently low probability that they should not lead us to decline the application altogether.

In Crest Energy Kaipara Ltd v Northland Regional Council, the Environment Court said that the concept of adaptive management had been developed through a number of decisions of the Court. The Court said that it should not put an applicant in a position of anticipating and researching all hypotheses before making an application. However, the applicant "must establish sufficient of a case to persuade the court to grant consent on the basis of allowing the adaptive management processes to be embarked upon".

The Court said that it is important in such plans for baseline knowledge to be collected on which management plans can build in "an on-going and cycling process". Plans should set reasonably certain and enforceable objectives, and a process for reviewing the adaptive management processes to be embarked upon is important. After that point, the process will often start again at the design and planning level.

In Lower Waitaki River Management Society Inc v Canterbury Regional Council the Environment Court said that the Court "always has to be careful to ensure that the objectives for the adaptive management are reasonably certain and enforceable".

In that particular case, the Court said that the management plans needed more detail.

Australian cases

The concept of adaptive management has also been discussed in a number of Australian decisions. In Telstra Corporation Ltd v Hornsby Shire Council, the New South Wales Land and Environment Court (Preston CJ) held that the type and level of precautionary measures required depends on the combined effect of the degree of seriousness and irreversibility of the environmental threat and the degree of uncertainty. The more significant and the more uncertain the threat, the greater the degree of precaution required.

The Judge also said that prudence would suggest that some margin for error should be retained. One means of ensuring this is through an adaptive management approach, whereby the development is expanded as the extent of uncertainty is reduced. The Judge said that an adaptive management approach might involve the core elements we set out at [109] above.

In Environment East Gippsland Inc v VicForests the plaintiff sought to restrain logging in an area of old growth forest, which was significant both ecologically and as a source of timber resources. One of the main contentions was that logging would breach the precautionary principle in respect of habitat preservation for endangered species. The Victorian Supreme Court said that the precautionary principle requires that where there is uncertainty in a decision about a significant environmental impact, there must be a margin of safety in the relevant decision-making process.

The Court held that the precautionary principle requires that where there is uncertainty in a decision about a significant environmental impact, there must be a margin of safety in the relevant decision-making process.
does not require avoidance of all risks.229 The degree of precaution will depend upon the combined effect of the seriousness of the threat and the degree of uncertainty.230 It also held that uncertainty may in some circumstances be adequately remedied by an adaptive management approach.231 The test set out by the Court was as follows:232

(a) Is there a real threat of serious or irreversible damage to the environment?
(b) Is it attended by a lack of full scientific certainty (in the sense of material uncertainty)?
(c) If yes to (a) and (b), has the defendant demonstrated the threat is negligible?
(d) Is the threat able to be addressed by adaptive management?
(e) Is the measure alleged to be required proportionate to the threat in issue? [120] It is significant that the Victorian Supreme Court considered that, before adaptive management could be considered, the threat had to be shown to be negligible, but this may not have been intended as a general statement of principle. It may have been a requirement arising out of the facts of the particular case and the seriousness of the risk of environmental harm.

[121] In Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council,233 a case involving a consent for a limestone quarry, Preston CJ made some further comments on adaptive management. He said that:234

Adaptive management is a concept which is frequently invoked but less often implemented in practice. Adaptive management is not a "suck it and see", trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained. The monitoring program has to be designed so that there is statistical confidence in the outcome. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty, but rather they establish a regime which would permit changes, within defined parameters, to the way the outcome is achieved.

Canadian cases

[122] Adaptive management has also been discussed in Canada. The case of Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage) involved the construction of a winter snow road through a national park.235 It was held by the Federal Court of Appeal that any environmental harm from the road was likely to be of limited significance because of the mitigation and adaptive management measures and the high degree of reversibility of the project.236 The Court had earlier said that adaptive management responds to the difficulty of predicting the environmental effects of a project and counters "the potentially paralysing effects of the precautionary principle on otherwise socially and economically useful projects".237

It was said that the precautionary principle states that a "project should not be undertaken if it may have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialise".238

[123] The case of Pembina Institute for Appropriate Development v Canada (Attorney General) involved an iron sands mine project in Alberta.239 Tremblay-Lamer J referred to Canadian Parks and said that adaptive management allows projects to proceed, despite uncertainty and potentially adverse environmental impacts, "based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exist".240

Was an adaptive management approach available in this case?

[124] The issue for the Court is when an adaptive management approach can legitimately be considered a part of a precautionary approach. This involves the consideration of the following: 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.

[125] 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" approach.232 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.

[126] The Board had before it modelling showing that water quality would not be compromised at the initial maximum feed levels for all nine locations. The Board accepted that the modelling of the nutrients introduced to the water column was conservative.242 The experts were agreed too that the results of the modelling were satisfactory except in the very short term and for minor bays.243 Although there was no modelling for the maximum feed levels, as King Salmon points out, there is no guarantee that these levels will actually be reached.245 Under the consent conditions, they will only be reached if water quality (and the seabed) will be protected.246

[127] Indeed, as also pointed out by King Salmon, the total maximum discharge levels that could ever be enabled under the approved plan changes were less than half of what was sought and were contained within three separate areas. Further, in the
Waipatia Reach, the combined maximum feed levels for the two farms that were approved (10,000 tonnes per annum) are less than the combined initial maximum feed levels (12,000 tonnes per annum) for the five farms that were proposed in the Waipatia Reach. Of course those levels are concentrated in two farms and this may mean that a linear calculation may not adequately capture the risk but it does, as King Salmon submits, illustrate the extent of the precautionary approach applied by the Board in the Waipatia Reach where it refused two of the plan changes and consent for the White Horse rock site, partly because of water quality concerns.

[128] The Board also accepted evidence that the incidence of harmful algal blooms was unlikely to be affected by the salmon farms, apart from localised changes in some bays. Further, the Board also accepted the evidence of the majority of the experts that a trophic shift in the Sounds was unlikely. While recognising the potential for less disastrous shifts, this was to be dealt with in the conditions.

[129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on a combination of factors:

(a) The extent of the environmental risk (including the gravity of the consequences if the risk is realised);
(b) The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
(c) The degree of uncertainty; and
(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

[130] In this case with regards to [129](a) above, the gravity of risk if realised (ecological disaster) was grave. The extent of the risk is difficult to assess because of the uncertainties as to the baseline information and the lack of modelling for maximum feed levels. However, on current information, the majority of the experts considered that a change in trophic level of the Sounds was unlikely. The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

[131] With regards to [129](b) above, the importance of marine farming is outlined at Policy 6 of the Coastal Policy Statement. It provides that aquaculture is important to the social, economic and cultural well-being of people and communities and thus requires that the social and economic benefits of aquaculture be taken into account in decision making. The Board was also satisfied that these particular projects were individually and collectively of economic benefit at the local, regional and to a lesser extent, the national level.

[132] With regards to [129](c), the uncertainty, particularly as to baseline and increased feed levels, was high. The modelling that had been done could be seen as having reduced the uncertainty somewhat, subject to the limits of modelling. As the Board noted, however, quoting Mr Knight, models "can never perfectly simulate what effects will transpire under real world conditions", or, quoting another witness, "all models are wrong, but some models are useful".

[133] The vital part of the test is contained within [129](d) above. This part of the test deals with the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty. We accept that, at least in this case, the factors identified by the Board are appropriate to assess this issue. For convenience, we repeat these here:

(a) There will be good baseline information about the receiving environment;
(b) The conditions provide for effective monitoring of adverse effects using appropriate indicators;
(c) Thresholds are set to trigger remedial action before the effects become overly damaging; and
(d) Effects that might arise can be remedied before they become irreversible.

[134] It is unfortunate that the Board did not return to discuss the factors it had identified explicitly. We must therefore assess the extent to which the findings of the Board as to the measures put in place meet those tests.

[135] Looking first at the question of baseline information under [133](a), normally one would expect there to be sufficient baseline information before any adaptive management approach could be embarked on (as against prohibition until any deficiency in baseline information is remedied). All the experts were agreed that there was a lack of baseline information with regard to water quality. That deficiency will, however, be remedied before the farms are stocked and no structure can be placed on the farms if the Council does not approve the baseline report.

[136] With regards to [133](b), the Board was of the view that the consent conditions provided effective monitoring of adverse effects and that appropriate thresholds were set. The environmental quality standards set were seen to by the experts with little debate as to the content. These standards are to be continued to be used.

246 Waipatia and Richmond. The initial feed levels (in tonnes per annum) for the Waipatia and Richmond farms are 3,000 and 1,500, respectively. The maximum increase in feed discharge (in tonnes per annum) for the Waipatia and Richmond farms is 1,000 and 300, respectively. The maximum feed discharge ceiling (in tonnes per annum) for the Waipatia and Richmond farms is 6,000 and 4,000, respectively.

247 Waipatia, Richmond, Kaitira, Tapiji and White Horse Rock. The maximum initial feed discharge levels (in tonnes per annum) for each of these farms proposed were 3,000, 1,500, 3,000, 3,000, and 1,500, respectively.

248 King Salmon (Board), above n 6, at [421].

249 At [431].

250 At [431] and [432]. See [88]-[93] above.

251 While we have summarised the discussion referring to adaptive management in New Zealand, Australian and Canadian case law and in commentaries, we are not to be taken as having endorsed the approach taken in those cases or commentaries, except to the extent specifically indicated in this section of the judgment at [124]-[134].

252 See [10] above.

253 See [52] above.

254 Sec [23] above.

255 King Salmon (Board), above n 6, at [263]-[268].

256 At [380].

257 See [105] above.

258 See [42] above.

259 See [89] above.


261 King Salmon (Board), above n 6, at [1277](b).
in a holistic approach with the quantitative standards that are to be developed.\textsuperscript{262} The qualitative standards provide an overarching framework. The baseline report and the ongoing monitoring reports are to be prepared by an independent person, monitored by the peer review panel and have to be approved by the Council.\textsuperscript{263}

[137] As to (133)(c), any significant shift in trophic state will lead to remedial action by either reducing the amount of feed, or in serious circumstances, removing fish from the farm until the trophic state improves.\textsuperscript{264} SOS expressed concern about the efficacy in practice of the monitoring and remedial measures but it is not an error of law for the Board to rely on the measures being properly implemented.

[138] As to (133)(d), although it did not explicitly make findings that the effects could be remedied before they became irreversible, this is implicit from its acceptance of the conditions as complying with a precautionary approach.\textsuperscript{265}

[139] The answer to the overall question from (129)(d) of whether risk and uncertainty will be diminished sufficiently for an adaptive management regime to be consistent with a precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach.

[140] In this case, while a change in trophic state would be grave, the experts were agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was thus entitled to consider that the four factors it had identified were met. In this case, given the uncertainty will largely be eliminated and the risk managed to the Board's satisfaction by the conditions imposed, it was open to the Board to consider that the adaptive management regime it had approved, in the plan and the consent conditions, was consistent with a proper precautionary approach.

Relationship between the plan change and consent applications

The parties' submissions

[141] In SOS's submission, while the plan changes and the consent applications could be heard together, they remain separate processes with a different focus (the planning role as against a quasi-judicial role for consent applications).\textsuperscript{266} The 2011 amendments to the RMA, which allowed the two to be heard together, were not intended to make a substantive change to the nature of the planning and consent processes or the relationship between them.\textsuperscript{267} SOS submits that the Board made its decision on the plan change and the consent applications as an integrated whole and that its plan change decision was improperly predicated on the consent conditions it intended to impose.

[142] In response to this submission, King Salmon's position is that the Board's decision was not predicated on the conditions it proposed to impose at the consenting stage. It says that the Board repeatedly reminded itself of the statutory direction in relation to the sequencing of the matters for decision before it.\textsuperscript{268} The Board followed the correct sequence by first considering the requested plan changes and then the five remaining resource consent applications.\textsuperscript{269} The Board noted, when considering the plan changes, that it did so "aware of" the conditions proposed\textsuperscript{270} but in King Salmon's submission, the decision was not "predicated on compliance with the proposed conditions of consent." Any event, the proposed conditions of consent cannot be an irrelevant factor for the Board to take into account.

Discussion

[143] We accept that the Board outlined its decision on the plan changes before its decision on the consent applications. We also accept that the Board was aware of the different statutory provisions that governed plan changes and consent applications. However, the influence of the consent conditions on the Board's decision on the plan change is evident from the structure of the report. The modifications to the consent conditions originally proposed by King Salmon were discussed by the Board after it had made findings on the contested effects and before the consideration of the plan changes.

[144] It is quite clear, too, that the Board would not have granted the plan change request in the absence of the detailed consent conditions. The Board referred on more than one occasion to the uncertainty relating to baseline levels and the fundamental failure to model maximum feed levels. The consent conditions require the gathering of baseline information, which had to be done before the farms were stocked. The consent conditions also require ongoing monitoring to ensure that, if water quality becomes at risk of being compromised, then appropriate remedial action can be taken. It is thus the consent conditions that address the uncertainties that the Board had identified and contain the adaptive management regime which is an essential component of the Board's decision.\textsuperscript{271}

[145] The issue then is whether it was improper for the Board to take into account the consent conditions when deciding on a plan change to make salmon farming a discretionary activity in Zone 3. We do not consider that it was. If a relevant authority considering a plan change request could not conceive of a consent being granted for an activity no matter what the conditions, then the activity could not be designated as a discretionary activity. If, however, the activity could have significant adverse effects but these effects could be eliminated by a simple consent condition, then it would be irrational to require a planning authority to ignore the fact that such a condition could be imposed. All that occurred in this case is that the Board considered the actual conditions that would ultimately be imposed, rather than hypothetical conditions. This is legitimate given that the hearing, and the subsequent decision, covered both plan changes and consent conditions.

[146] It is nevertheless important for the plan change process and the consents to be considered separately, with the different statutory provisions and the different roles of the decision maker firmly in mind: as a planning authority (for plan changes) and as a hearing authority with a quasi-judicial role (for consents). We consider that the

\textsuperscript{268} King Salmon (Board), above n 6, at [73(e)] and [101]-[102].

\textsuperscript{269} At [1156]-[1279].

\textsuperscript{270} At [1280]-[1342].

\textsuperscript{271} At [1277(b)].

\textsuperscript{272} The Board explicitly noted, at [1359], that it could only consider granting consent if there was a more robust monitoring and adaptive management regime than that presented in the proposed conditions by King Salmon.
Board in this case did consider the plan changes and the consents separately and was well aware of the different roles and statutory provisions when considering water quality issues. It also took a proper regional approach \(^{273}\) to the issue of water quality, considering the effect of the farms on water quality on a Sounds-wide basis. \(^{274}\)

\[147\] We recognise that there could be dangers when a planning authority has regard to anticipated consent conditions where the consents are for only one activity, while the plan change covers a variety of activities. A planning authority must have regard to the full range of activities that a proposed plan change could subsequently permit. In this case, however, both the plan changes and the consent conditions related only to salmon farming.

**What should have been contained in the plan?**

**The parties’ submissions**

\[148\] SOS submits that, if the Board could identify conditions that would enable salmon farming to continue consistently with the RMA, \(^{275}\) then these conditions should have been in the plan and specified in rules and standards. That would have given the community certainty about what is allowed to enable people to “order their lives under it with some assurance”. \(^{276}\) SOS acknowledges that there were assessment criteria in the plan but points out that these are guidelines only. Further, it points out that the Board could not even set water quality standards in the resource conditions as it lacked sufficient information to do so. Instead, it imposed a monitoring regime and means of setting water quality standards to be approved by the Council. This did not give proper assurance that the adaptive management regime, as envisaged by the Board, would be complied with. \(^{277}\)

\[149\] In addition, if the adaptive management regime had been specified as rules and standards in the plan, SOS says that any future resource consent application would almost certainly be notified and the community could have participated in decisions relating to resource consent applications in the future that would be made on the basis of the newly gathered monitoring information. Public participation is integral to the RMA.

\[150\] In response, King Salmon submits that the standards, assessment criteria and the existing provisions of the Sounds Plan, together with all of the relevant higher order planning documents (such as the Coastal Policy Statement), provide specific directions and guidance for conditions of consent to be imposed on any subsequent resource consent application. In its submission, no future consent could be granted without properly providing for the maintenance of water quality. Further, water quality objectives were set as conditions of consent. As to public participation, King Salmon submits that the public had had a proper opportunity to be heard during the Board process.

\[273\] See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 12, at [170].

\[274\] See *King Salmon (Board)*, above n 6, at [406] and [427].

\[275\] Of course, the primary submission of SOS is that no such conditions would adequately safeguard water quality, in light of the lack of information before the Board.


\[277\] SOS did not, however, pursue in this Court its earlier argument that the Board had improperly delegated its decision to the independent expert, the peer review panel and the Council. In *King Salmon (HC)*, above n 2, the High Court dealt with this submission at [114]-[128]. We make no comment on this issue.

\[151\] Under s 87A(4), if a resource consent is granted for a discretionary activity, the activity must comply with the requirements, conditions and permissions, if any, of the RMA, regulations, plan or proposed plan. It is common practice for regional plans to include assessment criteria for determining whether a discretionary activity should be granted a resource consent. If such criteria exist, the consent authority must give effect to them. However, the law does not require in all circumstances comprehensive assessment criteria setting out when resource consent may be granted for discretionary activities.

\[152\] As to the discharge of contaminant levels, s 15(1)(a) of the RMA allows for the discharge of contaminants into water as long as the discharge is expressly allowed by either a national environmental standard or other regulations, a rule in a regional plan, \(^{278}\) or a resource consent. Thus, in the current case, the discharge levels of fish feed could be set either in the regional plan or in the individual consents.

\[153\] If, however, a consent for a particular activity would only be granted on certain conditions, then it would certainly be good practice (and may in some circumstances be a requirement) that these be made clear in the plan, either as standards or as assessment criteria. Otherwise consent applications may not address relevant criteria and a future consent authority may risk making a decision on a basis that was not contemplated by the planning authority.

\[154\] The structure of the Sounds Plan is to have rules and standards but also to have assessment criteria relating to resource consent applications. Assessment criteria are designed to give guidance to those applying for consents as to the types of information and analysis that will be required of applicants. \(^{279}\) They also give the community information on how such consents will be assessed. Although the assessment criteria are not said to be binding, a reasonable consent authority would have to take them into account, to the extent that they were relevant.

\[155\] In this case, we accept King Salmon’s submission that no future consent for Zone 3 could be granted without properly providing for the maintenance of water quality. This is because of what is contained in the Coastal Policy Statement and the Regional Policy Statement on water quality, along with the general requirements of the Sounds Plan on that topic, as well as the specific standards and assessment criteria relating to Zone 5, \(^{280}\) including the requirement to assess the adverse effects of any discharge to coastal water, the provision for staged and monitored increases in feed discharge and the necessity for adaptive management approaches to the management of the seabed and water quality. \(^{281}\)

\[156\] As to the submission of SOS relating to the inability of the Board to set water quality standards, it is true that the Board could not set quantitative standards but it did set comprehensive qualitative ones in the consents. \(^{282}\)

\[278\] As well as a rule in a proposed regional plan for the same region (if there is one).

\[279\] See [33] above.

\[280\] See [40] and [41] above.

\[281\] See [41] above. The amended rule 35.4.2.10.3 set out in *King Salmon (Board)*, above n 6, at Appendix 3, also includes a requirement to assess the effects from seabed deposition and changes to water quality, ecological effects and environmental standards in which effects of discharges can be monitored and evaluated.

\[282\] The submissions of SOS contained a number of other complaints about the consent conditions (including the 35-year term of the consents) and also complaints relating to other matters such as the assessment of economic benefit. These matters did not explicitly come within the terms of the leave.
We accept that public participation is a key tenet of decision making under the RMA with many public participatory processes. As noted by Keith J in Westfield (New Zealand) Ltd v North Shore City Council, the purpose of these processes is to recognise and protect the particular rights of those who are affected and to enhance the quality of the decision making. With regard to the current case, the hearing before the Board was eight weeks long. The Board heard from 181 witnesses and 1221 submissions were received. Therefore, in this case, there was a significant amount of public participation in the process.

**Conclusion, result and costs**

The Board was entitled to consider that the adaptive management regime, reflected in both the plan and the consent conditions, was consistent with a proper precautionary approach. The plan changes were not improperly predicated on the consent conditions and there was no need for the plan to contain more than it did on water quality, the plan containing in particular a reference to an adaptive management regime and to controls for water quality.

The appeal with regard to the Waitata, Richmond and Ngamahau sites is dismissed.

If costs cannot be agreed, the parties have leave to file memoranda on or before 2 June 2014.

Appeal dismissed

Reported by Kara Hudson
West Coast Environmental Network Inc v West Coast Regional Council [2013] NZEnvC 253 (extracts)
BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 253

IN THE MATTER of 2 appeals under s 120 of the Resource Management Act 1991 (the Act)

BETWEEN

WEST COAST ENVIRONMENTAL NETWORK INC ("WCENT")
(ENV-2011-CHC-000095)

AND

ROYAL FOREST AND BIRD SOCIETY OF NEW ZEALAND INCORPORATED ("Forest & Bird")
(ENV-2011-CHC-000097)

Appellants

AND

WEST COAST REGIONAL COUNCIL
AND BULLER DISTRICT COUNCIL

Respondents

AND

BULLER COAL LIMITED ("BCL")

Applicant

Hearing: On the papers (the last of the written materials having been received from the parties on 2 September 2013, and Judgment of the Supreme Court concerning declarations about effects on climate change, received 19 September 2013).

Court: Environment Judge LJ Newhook
Commissioner WR Howie
Deputy Commissioner CM BJorn

Counsel: P Anderson and S Oepp for Appellants
H van der Wel and F Hughes for Respondent
J Appleyard and B Williams for BCL
T Sumner for himself (s274)

Date of Decision: 24 October 2013

FINAL SUBSTANTIVE DECISION OF THE ENVIRONMENT COURT,
AND DECISION ON APPLICATION BY FOREST & BIRD TO RECALL
SECOND INTERIM DECISION

A. Consent granted, subject to the detailed conditions attached.
B. Recall of Second Interim Decision refused.
C. Costs reserved.

REASONS FOR DECISION

Introduction

[1] On 27 March 2013 this Court issued an Interim Decision on appeals by the two appellants against a raft of consents granted by Buller District Council ("BDC") and West Coast Regional Council ("WCRC") to Buller Coal Limited ("BCL") to establish and operate an open cast coal mine at the southern end of the Denniston Plateau. The Court then indicated that it was likely to confirm the consents subject to BCL satisfying the Court as to the strength of certain conditions including some which were intended to give security to the environmental offsets it was proposing for some acknowledged adverse environmental effects the mine would generate. The Court invited the parties to work together on those proposed conditions.¹

[2] An important aspect of the first interim decision related to the ability of BCL to secure performance of a proffered condition over two large areas of land beyond the footprint of the mine, owned by the Crown.

[3] As recorded in our second interim decision,² Forest and Bird appealed to the High Court. The High Court in its decision largely upheld our first interim decision,³ but indicated that in one respect this Court had erred in apparently conflating two

¹ Decision [2013] NZEnvC 447
² Decision [2013] NZEnvC 178
³ [2013] NZHC 1324
tends in place, in its first interim decision, to “offset/mitigation.” The High Court nevertheless made no finding as to the materiality of that error.

[4] In our second interim decision we considered the findings of the High Court, reconsidered aspects of our first decision, expressly analysed certain actions to be required by conditions of consent so as to distinguish between mitigation and offsets, and made a finding at paragraph [19] that, “aplying strictly the distinction in terminology set out by the High Court, we find, as the High Court envisaged possible, that our interim judgment that with appropriate conditions consent can be achieved, is not materially affected.” [sic]

[5] In our second interim decision we proceeded to discuss and analyse two possible options for a condition being proposed in relation to a legal mechanism to protect an area to be called the Denniston Permanent Protection Area (“DPPA”) from open cast mining. We did this in circumstances where we reiterated that the protection being offered by BCL was against possible future open cast mining in lands (745ha) contiguous to its proposed Escarpment Mine, and where the stated purpose of the DPPA was to provide the best possible conditions for native ecosystems and native flora and fauna to flourish.

[6] As recorded in our first interim decision, we reiterated concern that the protection offered was only against open cast mining, and not against related or peripheral activities that could modify the area and compromise the ecosystems. Further, in both interim decisions we recorded a concern that we had no real evidence that the “best endeavours” offer essentially being put forward by BCL would result in adequate legal protection, given that it did not own the land proposed for such protection.

[7] In our second interim decision we set out the full text of proposed conditions 141 to 144 on this subject, and then discussed further evidence received from BCL about progress alleged to be occurring in negotiations that it was conducting with the Crown and other parties.

[8] We then recorded the following:

[36] We have put some effort into considering possible ways forward in this situation. For instance, as a first option, the Court could issue a further interim decision, and wait to see what further protection can be achieved for the DPPA before finalising consent. A second option might be to strengthen conditions to ensure that “best endeavours” would have been genuinely exhausted prior to the consent commencing, by requiring that fact to be certified by a party other than the consent holder. The two logical certifiers would be the two councils whose consents are in issue. If the latter course were to be pursued, one way in which certainty and finality could be achieved, might be to allow recourse to this Court, perhaps by way of declaring the mechanism of an application for declaratory judgment, if the Councils and BCL found themselves unable to agree. We tentatively favoured the second option for reasons recorded in the next paragraph concerning legislative processes. However, because of the unusual nature of such a step, the parties have leave to discuss this aspect further and provide prompt input, hopefully within 10 working days of the date of this decision.

[37] In recording this tentative preference we remind ourselves that our overall decision has been one to grant consents for mining. We take into account as well that neither legislative consenting process should be seen to control, let alone trump, the other. Also, that the parties that BCL is negotiating with are, after all, the keepers of the “conservation estate” (loosely described) on behalf of the New Zealand Government. We expressly record that we are not doubting that BCL or any of the other parties would be genuine in their endeavours, but we are aware of the conflicting demands of industry wishing to go about its business as quickly as possible, and the time which legislative processes can consume. We can at least hold that in such circumstances BCL would not be “issuing itself a certificate”, and we can expect the councils properly to oversee the operation of conditions of consent. (Adequate policing of conditions of consent was a matter on which we tested the councils before this last hearing when they exhibited reluctance to continue to participate through counsel in the later stages of the hearing process. They satisfactorily answered our concerns by preparing and lodging affidavits by their respective CEOs, explaining precisely how they would meet their obligations of monitoring and enforcement.)

[9] As can be seen, we expressed tentative preference for a strengthened “best endeavours” condition, and recorded our reasons.

[10] In our second interim decision we concluded by analysing competing submissions about the form of management plans that would be required to be prepared and certified pursuant to conditions of consent, and made a finding in favour of the stance taken by BCL. We then indicated that consent was likely to be forthcoming, and required certain modifications to be made to a significant number that were in draft form before us.

Judgment of the Supreme Court: Climate Change issue

[11] Since the time the present appeals were brought, there has been a series of hearings and judgments of various Courts concerning a preliminary issue raised by the parties. BCL applied to this Court for declarations that a consent authority could not have regard to the effects on climate change of discharges into air of greenhouse gases.
arising from the subsequent combustion of the coal extracted [whether within or beyond New Zealand territorial boundaries]. The appellants sought a declaration effectively the converse of that.

[12] Judge Newhook held in favour of the applications by BCL and dismissed the WCENT application.4

[13] The appellants' appeal to the High Court was dismissed5.

[14] Recognising that the parties had agreed to proceed meantime towards resolution of these appeals in the Environment Court, the Supreme Court granted leave for an appeal to be brought directly to itself against the High Court judgment.6

[15] The parties and this Court had expressly recognised that if the ultimate decision on the climate change point were to be resolved in favour of the appellants, hearings would need to resume in this Court to enable hearing of such evidence as would then be called on the subject, with the Court then bringing its findings thereon to bear in its ultimate overall decision on the Escarpment Mine proposal.

[16] The Judgment of the Supreme Court was received on 19 September 2013, the majority dismissing the appeal (Elias CJ dissenting).7 We have now therefore been able to proceed to finalise the substantive appeals absent the climate change issue.

Application by Forest & Bird for recall of second interim decision

[17] On 13 August Forest & Bird applied to this Court to recall the second interim decision, alleging that in its decision the High Court had held8 that it considered that it was open to the Environment Court to find as a matter of fact that [BCL] is likely to achieve resource consents for mining elsewhere in the DBEA [Denniston Biodiversity Enhancement Area], and indeed in the DPPA. In effect Forest & Bird alleges that there was a second error of law that we should have addressed in the further hearing that we held on 12 June 2013, which it alleged it addressed in submissions advanced on that date.

[18] Forest & Bird submitted that we have power to recall, citing s278 RMA, Rule 12.8.8 of the District Court Rules 2009 and Rule 11.9 of the High Court Rules, all of which had been considered in a decision of the Court Lai v Auckland Council.9

[19] We do not doubt that the power to recall exists, but there are several problems with what Forest & Bird is requesting on this occasion. First, at paragraph [94] the High Court simply recorded, in as we understand it, a rather generic fashion, that it is open to the Environment Court to make certain findings. Secondly, in paragraph [97] of that decision the High Court said, in we perceive, a rather tentative fashion, “While Forest & Bird may have identified an error of law ...” [underlining ours]. Thirdly, the High Court did not hold that the error (assuming for the moment contrary to finding above, that it had positively identified that there was an error), was material to leave for an appeal to be brought directly to itself against the High Court judgment. Fourthly, there was no direction expressed by the High Court that we reconsider this issue.

[20] In submissions in opposition to the application to recall, BCL discussed some of the above uncertainties, and pointed out that the appellant could have sought clarification from the High Court, but had not.

[21] The application is frankly rather difficult to follow, but we interpret it as in effect asking this Court to reconsider whether BCL is likely to be granted resource consents for mining elsewhere in the DBEA, then determine whether that would affect the weight we give to the benefits of the DBEA.

[22] We point out that in our first interim decision we said:

[23] That was our finding then, and remains so now. There is no basis on all the evidence that we have heard, to change our view.

[24] We consider that this issue is somewhat bound up with the separate decision of the High Court10 on appeal from a decision of this Court (Judge Newhook) concerning an issue about whether the effects of a proposed adjoining mine called Sullivan Mine
should form part of the "existing environment" for the purposes of consideration of the present proposal.

[25] That issue has now been the subject of three Higher Court decisions, the one just mentioned, the decision of the High Court refusing leave to appeal it to the Court of Appeal,11 and a decision of the Court of Appeal12 also refusing such leave.

[26] By analogy with our findings in paragraph [230] of the first interim decision, and the findings of fact that underpinned it (held by the Court of Appeal to be of importance on the issue, and incapable of being appealed as a matter of law), there is insufficient evidence in this case to determine whether any future mining activity should be considered to be part of the future environment. We did hear in evidence from Mr H Bohannan, the managing director of BCL, that the company has aspirations in this area, but aspirations do not equate to detailed applications being brought, and even less do they equate with consents being granted. That would all be far too speculative on the evidence before us. We can take the matter no further than as stated in paragraph [230] of our first interim decision.

[27] Finally, we acknowledge what we have perceived as a somewhat generic statement by the High Court in paragraph [94] of its decision [2013] NZHC 1346, that it is open to this Court to find as a matter of fact that a party might obtain resource consents elsewhere in the DBEA; however it is our finding that there can be no certainty that such consents would be granted, let alone implemented, and we are unable to find that future mining in the DBEA forms part of the future environment to be considered under s104(1) RMA. Accordingly, the uncertain prospect of possible future mining in the DBEA does not affect the weight that we have given to the benefits of the DBEA.

[28] For completeness we record that counsel for the respondents lodged a simple half-page memorandum supporting submissions made on behalf of BCL, without adding reasons.

[29] Forest & Bird has continued to oppose the imposition of a "best endeavours" condition, even with the certification tentatively recommended by us in our second interim decision. We cannot accept its submissions. In particular, it has picked up on our words in the second interim decision that "neither legislative consenting process should be seen to control, let alone trump, the other,"13 submitting that its own negotiating position in relation to achieving protection for the land under Schedule 4 of the Crown Minerals Act, would be weakened. We do not accept that to be the case, noting particularly that we have required any "best endeavours" condition to be strengthened by a requirement for certification, as to which we are entitled to have an expectation that the consent authorities will meet their obligations to give protection of the land the best possible chance of occurring. Next, Forest & Bird submit that the requirement that we signalled in our second interim decision that the protection be not just against open cast mining, but also against related activities including the placement of infrastructure (now agreed to by BCL), would be inadequate given the interests of others in the adjoining Sullivan Mine licence area, noting that Schedule 4 does not provide protection against infrastructure. In advancing this submission, Forest & Bird has chosen to overlook the two decision of the High Court, and the most recent decision of the Court of Appeal, concerning future prospects in relation to the Sullivan Mine based on our own previous findings of fact.

[30] Forest & Bird submits that "best endeavours with certification" is too uncertain to be enforceable, and refuses to accept that there would be any amount of certainty of protection short of special legislation. We have been provided with no sufficient reasoning to depart from the tentative findings in our second interim decision.

[31] Finally, Forest & Bird submitted again that a condition of this kind would be unlawful. We have been provided with no sufficient basis to resile from the findings that we made in paragraphs [46] and [47] of our second interim decision on the point.

[32] BCL has sought a minor amendment to the condition, such that the best endeavours obligation would not be tied to the commencement date of consent, but instead to the commencement of mining operations as that term is defined in the consents. BCL has drawn our attention to the fact that there is a considerable body of work to be undertaken over some months following the commencement of consent,

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11 Royal Forest & Bird Protection Society of N.Z Inc v Buller District Council [2013] NZCA 496, 19 October 2013
and prior to actual mining operations, and we see no reason why that work, including developing the several management plans, undertaking detailed design, and the conducting of pre-mining baseline surveys, shouldn't be allowed to proceed.

[33] BCL has now very largely accepted and drafted conditions addressing the matters that we commented on in our second interim decision. It seeks a minor modification to a condition that we considered important, about the status of the Environmental Manager in relation to organisation of mining operations. The exception that BCL seeks is that the recommendations of that manager, which are to be taken account of and given effect to in mine planning, be subject to obligations of the consent holder under the Health and Safety in Employment Act 1992 and associated legislation. That amendment is sensible, indeed in our view necessary.

[34] In connection with the DPPA, and in light of our requirement that the protection extend not only to open cast mining, but also to infrastructure and associated land disturbing activities, BCL seeks a small exception up to 5ha in area, to allow land disturbance effects associated with the route of the possible aerial conveyor that it is endeavouring to provide and obtain consents for in place of the pipeline. In light of evidence that we heard during the main hearing, and although tentative in the sense that consents have not been applied for, we consider the suggestion reasonable in the context of the significant (500ha minimum area) proposed for protection, and in order to gain the benefits of the alternative conveyance system that we heard about.

[35] As mentioned in our previous decisions, a lot of hard work has occurred amongst the parties directed to finalising what are now significant and strong conditions.

[36] The stage has been reached where conditions of consent have been prepared, in large measure at our direction, that give us confidence in holding that with the imposition of them, consent can now be granted. Consent is granted accordingly, subject to the conditions of consent attached to this decision.

[37] Costs remain reserved. Should any application be forthcoming, it is to be filed and served within twenty working days of the date of this decision.

SIGNED this 24th day of October 2013

For the Court

LJ Newhook
Acting Principal Environment Judge
Escarpment Mine Project
Consent Conditions

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Escarpment Mine Project

Consent Conditions

Decision No 1
West Coast Regional Council: Land Use Consent to mine coal and associated land disturbance activities associated with the Escarpment Mine

1. Resource Consent Number: RC10193/1
3. Term of consents: Twelve (12) years.
4. Date of lapsing of consent (if not given effect to): The consent lapsing period for these consents shall be ten (10) years from the commencement of the consent as provided in s.125 of the Resource Management Act 1991.
5. Purpose of consent: To enable mining and associated land use disturbance activities associated with the Escarpment Mine Project in accordance with the relevant conditions in Schedule A as set out below.
6. Land Use Consent RC10193/1 is subject to the following conditions, which are set out in detail in Schedule A:
   Conditions 1 - 25 (General and Bond);
   Conditions 26 - 30 (Mine Closure);
   Conditions 34 - 41 (Management Plans - General);
   Conditions 44 - 47 (Ecology and Heritage Management Plan);
   Conditions 68 - 89 (Mine and CPP Operations Management Plan);
   Conditions 90 - 103 (Social Impact Management Plan);
   Conditions 104 - 113 (Annual Work Plan);
   Conditions 114 - 117 (Baseline and Annual Monitoring Report);
   Conditions 118 - 121 (Recreational Values);
   Condition 128 (Cultural Protocols);
   Conditions 129 - 133 (Hazardous Substances);
   Conditions 134 - 135 (Transpower Infrastructure);
   Conditions 136 - 143 (Peer Review panel);
   Conditions 145 - 152 (Biodiversity Enhancement);

Consent Conditions
Conditions 153 - 155 (Biodiversity Enhancement Management Plan);
Condition 183 (Non Derogation);
Conditions 186 - 194 (Soil Conservation and Sediment Control);
Conditions 195 - 201 (Fauna);
Conditions 202 - 222 (Vegetation and Flora);
Conditions 223 - 224 (Finished Landforms);
Conditions 225 - 248 (Rehabilitation);
Conditions 249 - 252 (Mining Operations Water Management);
Conditions 269 - 277 (Overburden Classification and ELF Management);
Condition 278 (Natural hazards);
Conditions 279 - 283 (Historic Heritage); and
Consent Conditions

146. In establishing the DPRA, the Consent Holder may seek to exclude an area of up to 5 hectares from the final DPRA provided that the proposed DPRA continues to meet all the requirements of conditions 145a)i) and ii).

Advisory note: the purpose of condition 146 is to allow for the exclusion of a small area from the final protections afforded by the DPRA to allow for future activities that may be ancillary to mining. The best endeavours obligation under condition 149 will not apply to any area excluded under this condition 146.

Specific objectives and goal of the DPRA

147. The goal of the Denniston Biodiversity Enhancement Programme shall be to achieve and sustain improvements in key biodiversity attributes within the DPRA.

148. The objectives of the Denniston Biodiversity Enhancement Programme in the DPRA are to:

a) Offset the residual adverse effects on biodiversity values from the EMP;

b) To achieve statistically significant improvements in abundance and to ensure that those improvements are sustained for each of the following key measurable and representative biodiversity attributes:

i) Great Spotted Kiwi;

ii) P. patrickensis;

iii) South Island fernbird;

iv) Rifleman;

v) Forest gecko; and

vi) West Coast green gecko.

Legal protection of the DPRA and future applications

149. Prior to undertaking any Mining Operations under this consent, the Consent Holder shall:

a) In consultation with the Ministry of Business, Innovation and Employment – NZ Petroleum & Minerals and the Department of Conservation, use best endeavours to establish a legal mechanism to protect the DPRA from future open Cast Mining; and

b) Upon either:

i) the legal mechanism being established; or

ii) best endeavours discussions being exhausted,

the Consent Holder shall provide evidence to the Buller District Council and West Coast Regional Council, for the purposes of certification, of a satisfactory legal mechanism being established or best endeavours discussions being exhausted.

For the purposes of this condition, “Open Cast Mining” shall mean the removal or placement of overburden including soil and/or subsoil layers for the purpose of gaining access to minerals below the removed overburden for the extraction of those minerals and, without limiting the exception described in condition 146, the infrastructure or associated land disturbance activities that support it.

150. From the commencement date of these consents, the Consent Holder shall:

a) inform the relevant consent authority of the presence of the DBEA and DPRA as part of any new application for resource consents to undertake mining within the DBEA; and

b) make no application for Open Cast Mining (as that term is defined in condition 149) within the area covered by the DPRA.

Advisory note:

150 a) is proffered condition to require the Consent Holder to advise any future decision maker of the existence of the DBEA and DPRA when considering any new application for resource consents. It does not bind or fetter the discretion of a future decision maker in considering any future application for resource consent.

150 b) is a proffered condition intended to further protect the DPRA. It is in addition to the legal protection that is to be sought under condition 149.

Funding

DPRA and DBEA Funding

151. Prior to the commencement of this consent, the Consent Holder shall enter into an access arrangement or deed with the Department of Conservation for the purposes of...
Escarpment Mine Project

Consent Conditions

a) securing the obligations set out the Denniston Biodiversity Enhancement Management Plan prepared in accordance with condition 154; and

b) funding and managing the biodiversity enhancement activities that are required to be undertaken within the DPPA and DBEA for 50 years,

and which requires the Consent Holder to make the following payments to the Department of Conservation:

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<tr>
<td>On approval of first annual Work Programme (as that term is used under the Crown Minerals Act 1991)</td>
<td>$250,000 + GST</td>
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<td>$687,500 + GST</td>
</tr>
<tr>
<td>On the second anniversary of the first annual Work Programme</td>
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HBEA funding

152. Prior to the commencement of this consent, the Consent shall enter into an access arrangement or deed with the Department of Conservation for the purposes of:

a) securing the obligations set out the Heaphy Biodiversity Enhancement Management Plan prepared in accordance with condition 155; and

b) funding and managing the biodiversity enhancement activities that are required to be undertaken within the HBEA for 35 years,

and which requires the Consent Holder to make the following payments to the Department of Conservation:

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<td>On the first anniversary of the first annual Work Programme</td>
<td>$3,342,500 + GST</td>
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Denniston and Heaphy Biodiversity Enhancement Management Plans

153. A Denniston Biodiversity Enhancement Management Plan and a Heaphy Biodiversity Enhancement Management Plan as outlined in conditions 154 and 155 shall be prepared in consultation with the Department of Conservation.

154. The Denniston Biodiversity Enhancement Management Plan shall as a minimum:

a) demonstrate that the weed and animal pest control measures are coordinated with any other control measures carried out in adjacent areas;

b) identify weed and animal pests to be controlled and the areas over which they will be controlled;

c) quantify weed and animal pests targets to be achieved and the means of measuring the targets;

d) identify key invertebrate, plant and vertebrate species for outcome monitoring to be monitored;

e) incorporate an initial survey focusing on what pest irruptions are triggered by mastng events in the particular case of the Denniston Plateau forest habitats;

f) identify how outcome monitoring will be implemented and how the information will be used for adaptive management to ensure that the required biodiversity benefits are achieved;

1) outline a process for expert input into the design and implementation of the weed and animal pests control programme and subsequent monitoring, reporting and adaptive management to respond to the need for change;

h) incorporate control methods in relation to the target species and the available best practice methodology, taking into account the sensitivity of the receiving environment and the potential interests of the public that depend on the area for water supply; and,

i) provide for regular review and reporting on the achievements of the weed and animal pest control.

155. The Heaphy Biodiversity Enhancement Management Plan shall as a minimum:


Escarpment Mine Project

Consent Conditions

a) demonstrate that the weed and animal pest control measures are coordinated with any other control measures carried out in adjacent areas;

b) identify weed and animal pests to be controlled and the areas over which they will be controlled;

c) quantify weed and animal pest targets to be achieved and the means of measuring the targets;

d) identify key invertebrate, plant and vertebrate species for outcome monitoring to be monitored;

e) incorporate an initial survey focusing on what pest irruptions are triggered by masting events;

f) identify how outcome monitoring will be implemented and how the information will be used for adaptive management to ensure that the required biodiversity benefits are achieved;

g) outline a process for expert input into the design and implementation of the weed and animal pests control programme and subsequent monitoring, reporting and adaptive management to respond to the need for change;

h) incorporate control methods in relation to the target species and the available best practice methodology, taking into account the sensitivity of the receiving environment; and,

i) provide for regular review and reporting on the achievements of the weed and animal pest control and the implementation of adaptive management techniques over the 35 year duration of the term of the plan.

Whareatea Road

General

156. The activities shall proceed in accordance with the submitted application received by the West Coast Regional Council on 5 June 2012; the mitigation measures outlined in the Transportation Assessment dated 31 August 2012 prepared by Abley Transportation Consultants; and the relevant plans as detailed above and stamped as approved, except where the following conditions take precedence.

157. The up-graded road alignment shall be restricted to the formation detailed on the approved plans.

158. A suitably qualified ecologist should be on site to supervise vegetation clearance and to capture any rare or threatened fauna disturbed during this process.

159. The use of the road for the hauling of coal from the Escarpment Mine by truck shall be limited to a period of no more than three years from the date of completion of the proposed works set out in Condition 156.

Rehabilitation and Weed Control

160. All actual and reasonable costs incurred by this Council in monitoring, enforcement and administration of this consent shall be met by the Consent Holder.

Waterways

161. Any work within a waterway or stream shall be kept to a minimum.

162. During the exercise of this consent, sediment control measures shall be utilised to ensure the discharge of sediment into vegetation and waterways is minimised. Where straw bales are used, these shall be weed free.

Fauna

163. The Consent Holder shall avoid construction activities during the fernbird breeding season, being September to November inclusively. Where construction activity during this time period is unavoidable, the Consent Holder shall consider and implement measures to minimise disturbance to potential fernbird nesting areas.

Advice note: For the purposes of Condition 163, measures to minimise disturbance to fernbird nesting areas may include removing tall manuka later in the construction programme.

164. Any snakes incidentally encountered/discovered during the course of vegetation clearance and road construction shall be relocated a minimum of 50 m from the disturbance area.

165. Immediately prior to road construction, a targeted search for lizards in habitat 'hotspots' shall be conducted. The search shall include sections of the road corridor most likely to hold lizards and where lizards are easily found and captured. Any lizards captured shall be released a minimum of 100 m from disturbance areas.

Advice note: For the purposes of Condition 165, 'hotspots' include rock jumbles, scree and other areas where lizards are known to occur or areas where lizards may have been encountered in the past.

166. All machinery, tools and equipment shall be steam cleaned and weed free prior to being used for clearance and construction activities on the Whareatea Road.

167. All metal course for the up-graded road formation and any subsequent maintenance applications shall be taken from a weed free, non-acid generating source, preferably obtained from a location on the Denniston Plateau.

168. At the completion of construction activity, all disturbed areas shall be shaped to integrate with the surrounding contours, with particular care taken for any cuts greater than 1 m and the road verge. This shall include the placement of rock to assimilate disturbed areas into its immediate setting and maintain land form patterns.

169. Within 6 months of completion of construction activity, a vegetative cover shall be re-established on all exposed road margins comprising locally sourced manuka seedlings and/or hydro-seeding with a mix of indigenous grasses or brown top. Re-