

NZCPS 2010 Implementation guidance

Introductory note

Updated May 2018



[New Zealand Government](http://www.govt.nz)



Department of
Conservation
Te Papa Atawhai

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Purpose

This introductory note explains the guidance prepared by the Department of Conservation (DOC) to support implementation of the New Zealand Coastal Policy Statement 2010 (NZCPS). It also sets out overview guidance to be noted when working with the NZCPS and discusses the relationship between the NZCPS and other national policy statements prepared under the Resource Management Act 1991 (RMA).

An overview summary of the Supreme Court decision, *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 (the *King Salmon* decision), is provided as well as the findings in relation to how the NZCPS is to be read.

Explanation of the NZCPS guidance notes

DOC has prepared guidance notes as an online resource to support the implementation of the NZCPS. This includes guidance on each policy of the NZCPS.¹ It does not form part of the NZCPS. This guidance was prepared with support and input from local government. It is not legal advice.

The intended audience for this online resource is the agencies and practitioners that have responsibilities for coastal planning and management under the RMA. Local authorities have a key role to play in achieving the RMA's purpose in the coastal environment in New Zealand. This material has been developed primarily for local authorities but is likely to be of interest to anyone involved in coastal management and planning.

Guidance notes are provided on Policies 1-28 of the NZCPS. For each policy the notes identify the other NZCPS objectives and policies that should also be considered when giving effect to the individual policy. Links are provided where resources exist that aid implementation of the NZCPS. A number of technical, guidance and background reports are available on the DOC,² Ministry for the Environment,³ Quality Planning⁴ and NIWA⁵ websites, and can be referred to directly for additional technical guidance. The Board of Inquiry's report and recommendations to the Minister of Conservation on the proposed NZCPS 2008 is also a useful resource.⁶

¹ www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement/new-zealand-coastal-policy-statement-2010.

² www.doc.govt.nz.

³ www.mfe.govt.nz.

⁴ <http://qp.org.nz>.

⁵ www.niwa.co.nz.

⁶ www.doc.govt.nz/getting-involved/consultations/results/new-zealand-coastal-policy-statement/proposed-new-zealand-coastal-policy-statement-2008-board-of-inquiry-report-and-recommendations.

This guidance will be updated periodically as the RMA, policy, case law, practice and methodologies develop further. While this guidance may be amended in the future to reflect new case law, it should not be relied on for up-to-date summaries of relevant case law. The guidance note for each NZCPS policy is dated according to when it was last updated.

The place of the NZCPS in the RMA legislative framework

The RMA establishes a three-tier management system of national, regional and district planning documents. National direction (such as national policy statements and national environmental standards) is the responsibility of central government. A New Zealand coastal policy statement is the only mandatory national policy statement under the RMA.⁷ The purpose of an NZCPS is to state objectives and policies in order to achieve the purpose of the RMA (to promote the sustainable management of natural and physical resources) in relation to New Zealand's coastal environment.^{8, 9}

Regional policy statements and regional plans are the responsibility of regional councils and unitary authorities. There must be a regional policy statement and at least one regional coastal plan (approved by the Minister of Conservation) for each region.¹⁰

Territorial authorities (district and city councils) are responsible for preparing and administering district plans and there must be one district plan for each district.¹¹

Regional policy statements, regional plans, and district plans must give effect to the NZCPS.¹² The Supreme Court has determined that 'give effect to' means 'to implement'.¹³

The current NZCPS came into force on 3 December 2010 and replaces the New Zealand Coastal Policy Statement 1994 (NZCPS 1994).¹⁴

⁷ Section 57 RMA, although note that there can be more than one NZCPS.

⁸ The coastal environment is a greater area than the coastal marine area and will need to be identified for individual areas.

⁹ Section 56 RMA.

¹⁰ Sections 60 and 64 RMA.

¹¹ Section 73 RMA.

¹² Sections 62(3) (regional policy statements), 67(3) (regional plans) and 75(3) (district plans) RMA.

¹³ <https://www.courtsofnz.govt.nz/cases/environmental-defence-society-incorporated-v-the-new-zealand-king-salmon-company-limited-ors>, at paragraph 77.

¹⁴ www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement/archive/new-zealand-coastal-policy-statement-1994.

An emphasis on integrated and strategic planning

An important difference between the NZCPS 1994 and the current NZCPS is the greater emphasis on ‘upfront planning’. Policy 4: Integration¹⁵ and Policy 7: Strategic planning¹⁶ require that planning documents and decision-makers consider current and potential effects, including cumulative effects, across the land/water interface, irrespective of jurisdictional boundaries and responsibilities.

Giving effect to Policy 4 means councils and agencies co-ordinating their management of activities within the coastal environment and working collaboratively.

Having heard and considered submissions to the proposed NZCPS 2008, the Board of Inquiry noted that:

We see that many of the conflicts that are occurring in the coastal environment stem from a lack of forward thinking at a strategic and spatial level. Those conflicts are not just about the location and nature of coastal settlement, ... but also about a potential inability to provide activities important to the social, economic and cultural wellbeing of people and communities. The points made by those with an interest in aquaculture and renewable energy for example demonstrated a need to ensure that ad hoc development does not compromise the ability to locate and undertake these activities in the coastal environment.¹⁷

As well as proactively identifying where particular activities and forms of subdivision, use and development may be inappropriate, the strategic planning process required to give effect to Policy 7 also requires local authorities and others to identify coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects and to develop provisions in plans to manage those effects.

¹⁵ <http://www.doc.govt.nz/Documents/conservation/marine-and-coastal/coastal-management/guidance/policy-4.pdf>.

¹⁶ <http://www.doc.govt.nz/Documents/conservation/marine-and-coastal/coastal-management/guidance/policy-7.pdf>.

¹⁷ <http://www.doc.govt.nz/Documents/getting-involved/consultations/closed-consultations/nzcps/NZCPS-2008-board-of-inquiry-vol-1.pdf>, page 7.

General implementation guidance

How the NZCPS is to be read

While regional policy statements, regional plans (including regional coastal plans) and district plans are required to 'give effect to' (i.e. implement) the NZCPS, not all NZCPS objectives and policies will be relevant in all situations. As with all management of natural and physical resources, particular situations must be looked at in context. Individual policies should be considered together with the objectives and other policies in the NZCPS that address activities in or affecting the coastal environment. Decision-makers for plan reviews and plan changes will need to carefully consider these matters when considering what is required to promote sustainable management, and in accordance with the *King Salmon* decision give greater weight to those policies that are expressed in more directive language. The *King Salmon* decision is summarised later in this guidance note.

When dealing with a plan change or drafting regional policy statements, regional coastal plans or those parts of district plans relating to the terrestrial coastal environment, decision-makers must first identify those NZCPS objectives and policies that are relevant to the issue.¹⁸ It is then necessary to pay careful attention to the way in which the relevant NZCPS policies are expressed.¹⁹

The way in which the different policies in the NZCPS are expressed is deliberate and is important. Various policies give decision-makers more flexibility than others.²⁰ While decision-makers must ensure that effect is given to all relevant policies, those policies which include terms such as 'where practicable', 'consider', 'recognise', 'have regard to' and 'take into account' are less directive than policies which include terms such as 'have particular regard to', 'require', 'avoid' and 'do not allow'.

'Avoid' means 'not allow' or 'prevent the occurrence of'.²¹

The context in which words such as 'avoid', 'appropriate' and 'inappropriate' are used is important and requires the policy to be read as a whole and applied in relation to the facts of a situation. For instance, Policy 23(1)(d) requiring discharges to water to "avoid significant adverse effects on ecosystems and habitats after reasonable mixing" qualifies 'avoid' with both 'significant' and 'after reasonable mixing'.

Policy 8 requires regional planning documents to provide for "... aquaculture activities in appropriate places in the coastal environment ..." and sets out that the relevant considerations may include 'high water quality' and 'land-based facilities'. In this context 'appropriate' is referring to the technical suitability of areas for aquaculture.²² However, the context of 'appropriate' in Objective 6 is more open-

¹⁸ *King Salmon* decision, paragraph 129.

¹⁹ *ibid.*, paragraph 129.

²⁰ *ibid.*, paragraph 129.

²¹ *ibid.*, paragraph 96.

²² *ibid.*, paragraph 100.

ended (“... 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 the determination of what is appropriate requires not just a technical evaluation but also broader considerations, including environmental.²³

Objective 2 and various policies²⁴ refer to ‘preserve’ or ‘protect’ from ‘inappropriate’ subdivision, use and development. What is ‘inappropriate’ is to be assessed by reference to what it is that the objective or policy seeks to preserve or protect.²⁵ The relevant policies set out the matters decision-makers are to include in their assessment of what is to be preserved or protected.

Because the purpose of the NZCPS is to “... state objectives and policies in order to achieve the purpose of this [RMA] Act in relation to the coastal environment of New Zealand”,²⁶ the NZCPS thus “... gives substance to pt 2’s provisions [purpose and principles of the RMA] 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.”²⁷

Amending plans to give effect to the NZCPS

Section 55 of the RMA requires local authorities, if directed by a national policy statement, to amend regional policy statements (RPSs), proposed RPSs, plans, proposed plans, and variations to give effect to any provision in the national policy statement (NZCPS) that affects those documents. The RMA²⁸ and the NZCPS²⁹ require the necessary amendments to be made “as soon as practicable”.

All amendments necessary to give effect to the NZCPS must be made using the process in Schedule 1 of the RMA, except the amendments required by Policy 29, Restricted Coastal Activities.³⁰

The Minister of Conservation no longer requires any activity to be identified as a Restricted Coastal Activity (RCA) in a regional coastal plan. Policy 29 directs local authorities to amend planning documents to give effect to this policy as soon as practicable by deleting references to RCAs. Sections 55 and 57 of the RMA enable councils to make the changes without using the Schedule 1 RMA process.

What is “as soon as practicable” will depend on the particular facts of a situation. In order to give effect to Policy 4, Integration and Policy 7, Strategic planning and

²³ *ibid.*, paragraph 100.

²⁴ In particular, policies 7, 13, 15 and 17.

²⁵ *King Salmon* decision, paragraph 101.

²⁶ Section 56 RMA.

²⁷ *King Salmon* decision, paragraph 85.

²⁸ Section 55(2D)(a).

²⁹ ‘Application of this policy statement’, second bullet, page 7.

³⁰ www.doc.govt.nz/get-involved/have-your-say/all-consultations/2010/new-zealand-coastal-policy-statement/questions-and-answers.

thereby ensure proactive upfront planning, in many instances a full review of current regional coastal plans will be required. However, depending on the age and style of RPSs and district plans a change to an operative document may be all that is required.

Giving full effect to some policies, and particularly those that require detailed technical assessments may require significant work and time. Provided that the objectives of strategic and integrated upfront planning have been achieved, in some circumstances it may be possible to include a method in a notified planning document that the assessment and identification required to give effect to NZCPS policies will be undertaken at a specified time in the future. Those policies would then be given full effect by way of a subsequent variation or plan change.

As noted, planning documents have to give effect to the NZCPS. To ensure it is meeting its obligations, a local authority must assess all relevant RMA plans and RPSs. Where those plans and RPSs do not already give effect to the NZCPS, they must be amended. There is no discretion about giving effect to the NZCPS.

Application of the NZCPS to resource consent applications

Decision-makers on resource consent applications, notices of requirement, heritage orders and water conservation orders need ‘to have regard to’ the relevant provisions of the NZCPS (sections 104(1)(b)(iv); 171(1)(a)(ii); 191(1)(d); and 207(c) of the RMA).

‘Have regard to’ imposes an obligation on decision-makers to give attention and thought to the NZCPS. The consideration is still subject to Part 2 RMA, if that is needed in accordance with *King Salmon*.

The NZCPS will not determine whether or not an application is notified but may assist in identifying relevant effects to consider in a notification determination.

The High Court has considered whether the reasoning of the majority of the Supreme Court in the *King Salmon* decision in respect of plans applies to resource consent applications when considered under section 104 RMA. The Court found that “the reasoning in *King Salmon* does apply to s 104(1) because the relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.”³¹

This High Court decision has been appealed to the Court of Appeal.

³¹ *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 Judgment of Cull J, paragraph 76. <https://forms.justice.govt.nz/search/Documents/pdf/ido/e6/alfresco/service/api/node/content/workspace/SpacesStore/95f02442-fd96-4243-958b-c360aac63925/95f02442-fd96-4243-958b-c360aac63925.pdf>.

Roles and responsibilities

The majority of the NZCPS objectives and policies set expectations on local authorities to manage the coastal environment consistently with the functions of regional councils under section 30 and territorial authorities under section 31 of the RMA.

A number of the policies in the NZCPS provide specific direction about who is to do what. RPSs must give effect to the NZCPS and regional and district plans must give effect in their area to the RPS and the NZCPS. An integrated approach is promoted. Some policies of the NZCPS (such as Policies 1-7) are about processes, approaches and directions that are relevant to all those implementing the NZCPS.

Local authorities are directed in the NZCPS to work in a collaborative way with other agencies with responsibilities and interests in order to promote the sustainable management of the coastal environment. Such agencies include the Department of Conservation, the Ministry for Primary Industries, Heritage New Zealand and Maritime New Zealand. This approach also includes working with tangata whenua, communities and other stakeholders.³²

Relationship with other national policy statements

There are a number of documents, including other national policy statements (NPSs), relevant to the implementation of the NZCPS.

In implementing the NZCPS, the following NPSs, which are currently in force under the RMA, must be considered as they also apply in the coastal environment:

- The National Policy Statement on Electricity Transmission 2008 (NPSET)³³
- The National Policy Statement for Renewable Electricity Generation 2011 (NPSREG)³⁴
- The National Policy Statement for Freshwater Management 2014 (amended 2017) (NPSFM)³⁵
- The National Policy Statement on Urban Development Capacity 2016 (NPSUDC).³⁶

³² In particular Policy 4, Integration but also Objective 3 and Policy 2, The Treaty of Waitangi, tangata whenua, and Maori heritage and Policy 5, Land or waters managed or held under other Acts.

³³ www.mfe.govt.nz/sites/default/files/nps-electricity-transmission-mar08.pdf.

³⁴ www.mfe.govt.nz/publications/rma/nps-renewable-electricity-generation-2011.

³⁵ www.mfe.govt.nz/publications/fresh-water/national-policy-statement-freshwater-management-2014-amended-2017.

³⁶ www.mfe.govt.nz/publications/towns-and-cities/national-policy-statement-urban-development-capacity-2016.

Implementation guidance has been prepared for each of these NPSs and the links to this guidance are provided below:

- National Policy Statement on Electricity Transmission: Implementation guidance for local authorities³⁷
- National Policy Statement for Renewable Electricity Generation 2011: Implementation guide³⁸
- Guidance on implementing the National Policy Statement for Freshwater Management 2014³⁹
- Introductory guide to the National Policy Statement on Urban Development Capacity 2016.⁴⁰

There will be situations where more than one NPS is relevant. In these situations, all relevant NPSs will need to be given effect to.

The NPSFM applies to freshwater resources, including fresh water within the coastal environment. Therefore, some of the objectives and policies of the NZCPS apply to the same waterbodies and subject matter as the NPSFM and both will need to be considered and given effect to.

In light of *King Salmon*, when considering the NZCPS and an NPS (and arguably an RPS, and a regional or district plan), decision-makers should not refer to Part 2 of the RMA or undertake a ‘balancing’ interpretation unless the national policy statement does not ‘cover the field’ in relation to the issues being addressed, or the wording is uncertain or conflicting.

Other relevant legislation

Coastal management to the outer limit of the territorial sea is guided principally, although not solely, by the RMA. When implementing the NZCPS other laws are often relevant in relation to matters such as statutory management priorities, agency responsibilities and implementation methods. The guidance notes identify related legislation where relevant to a particular policy.

For the coastal environment of the Hauraki Gulf/Tīkapa Moana, the Hauraki Gulf Marine Park Act 2000 requires that sections 7 and 8 of that Act must be treated as an NZCPS issued under the RMA. Section 10(2) of the Hauraki Gulf Marine Park Act states that if there is a conflict between sections 7 and 8 of that Act and the provisions of any NZCPS, the NZCPS prevails.

³⁷ www.mfe.govt.nz/publications/rma/nps-electricity-transmission-implementation-guidance-jan2010/index.html.

³⁸ www.mfe.govt.nz/publications/rma/nps-renewable-electricity-generation-guide-2011.

³⁹ www.mfe.govt.nz/fresh-water/technical-guidance-and-guidelines/implementing-national-policy-statement-freshwater.

⁴⁰ www.mfe.govt.nz/sites/default/files/media/Towns%20and%20cities/introductory-guide-on-the-nps-udc-nov-2016.pdf.

Decisions under the Marine and Coastal Area (Takutai Moana) Act 2011 will also need to be considered, as required under the RMA. The Exclusive Economic Zone (EEZ) comprises those areas of the sea, seabed, and subsoil that are between 12 to 200 nautical miles from the coast of New Zealand (including the coast of all islands). This area is managed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.⁴¹ This Act assists with the sustainable management of natural resources in the EEZ and continental shelf. It does this by allowing for the regulation of certain activities that were previously unregulated in the EEZ and on the continental shelf.

The NZCPS and Māori

The NZCPS has a number of provisions relating to Māori and their relationship with the coastal environment, including Objective 3 and Policies 2, 17 and 23. Policy 2 provides some direction and examples on how and when to incorporate Māori involvement into the coastal planning and decision-making process. Those policies may also be given effect through a Mana Whakahono a Rohe (iwi participation arrangement) introduced to the RMA under the Resource Legislation Amendment Act 2017.⁴²

⁴¹ www.legislation.govt.nz/act/public/2012/0072/latest/DLM3955428.html.

⁴² Mana Whakahono a Rohe means an iwi participation arrangement entered into.

Overview summary – the King Salmon decision and NZCPS⁴³

The majority decision of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (the *King Salmon* decision) makes important findings with respect to the weight to be accorded to NZCPS objectives and policies when considering plans and plan changes intended to give effect to the NZCPS as well as the meaning to be accorded to certain RMA words and phrases. For a summary of the factual context to this decision see Part 2I of the *Review of the effect of the NZCPS 2010 on RMA decision-making*, report to the Minister of Conservation, June 2017.⁴⁴

The key findings of the majority of the Supreme Court in relation to the interpretation of the NZCPS and decision-making to give effect to it were:

Wording of relevant NZCPS provisions:

- “... 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.”⁴⁵
- The NZCPS is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional policy statements and plans, and the methods and rules to implement those objectives and policies must be determined by the councils. “But the fact that the RMA and 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.”⁴⁶
- ‘Avoid’ (as used in section 5(2)(c) RMA and in the relevant provisions of the NZCPS) has its ordinary meaning of ‘not allow’ or ‘prevent the occurrence of’.⁴⁷
- ‘Appropriate’ means different things in different parts of the NZCPS and is heavily affected by context:
 - Policy 8: Aquaculture – “... the context suggests that ‘appropriate’ is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense.”

⁴³ The *King Salmon* decision was in respect of changes to an operative regional coastal plan and is relevant to reviews of plans where the requirement is to ‘give effect to’ the NZCPS (section 67). It is not yet settled case law whether the *King Salmon* decision applies to decisions made in respect of resource consent applications under section 104(1) RMA, where the statutory requirement is ‘have regard to’ the NZCPS.

⁴⁴ www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement.

⁴⁵ *King Salmon* decision, paragraph 116.

⁴⁶ *ibid.*, paragraph 91.

⁴⁷ *ibid.*, paragraph 96.

- “By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development ‘in appropriate places and forms, and within appropriate limits’, the context suggests that ‘appropriate’ is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.”⁴⁸
- “... ‘inappropriateness’ should be assessed by reference to what it is that is sought to be protected.”⁴⁹ It is not an indication that an overall broad judgement should be applied.
- The language of the relevant policies in the NZCPS is significant and is “... expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. ... These differences matter.”⁵⁰
- “When dealing with a plan change application, the decision-maker must first identify those policies which 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.”⁵¹
- There is no tension between Policies 8, 13 and 15.

The Role of Part 2 RMA:

- If there is an apparent conflict between particular NZCPS policies, then a careful analysis should first be undertaken of the way in which the policies are expressed and only if the conflict remains should the analysis be informed by section 5. “As we have said, s. 5 should not be treated as the primary operative decision-making provision.”⁵²
- “... 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.”⁵³

⁴⁸ *ibid.*, paragraph 100.

⁴⁹ *ibid.*, paragraphs 100 and 101.

⁵⁰ *ibid.*, paragraph 127.

⁵¹ *ibid.*, paragraph 129.

⁵² *ibid.*, paragraph 130.

⁵³ *ibid.*, paragraph 90.

- Because the purpose of the NZCPS is to “state policies in order to achieve the RMA’s purpose in relation to New Zealand coastal environment”,⁵⁴ the NZCPS thus “gives substance to pt 2’s provisions [purpose and principles of the RMA] in relation to the coastal environment”.⁵⁵
- “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 ... [Part 2] when determining a plan change.”⁵⁶

Acknowledgements

DOC would like to thank the local government planning and consent staff from regional and district councils and the external coastal management specialists who provided advice and feedback in the preparation of the implementation guidance.

Disclaimer

This guidance, including the guidance on policies of the NZCPS, is intended as general guidance on implementing the NZCPS. It has been written primarily for local government practitioners. This guidance does not substitute for professional advice where and when that is needed. It should not be taken as providing legal advice or the Crown's legal position. This guidance is not official government policy.

Feedback

Please send any feedback on the NZCPS implementation guidance to:
nzcps@doc.govt.nz.

⁵⁴ Section 56 RMA.

⁵⁵ <https://www.courtsofnz.govt.nz/cases/environmental-defence-society-incorporated-v-the-new-zealand-king-salmon-company-limited-ors>, at paragraph 85.

⁵⁶ *ibid.*, paragraph 85.