

Guidance note on the implications of the Supreme Court *King Salmon* decision for planning practice and the interpretation of the New Zealand Coastal Policy Statement

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INTRODUCTION

1. The Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 ("**King Salmon**") represented a sea change in interpretation of the Resource Management Act 1991 ("**RMA**"). This guidance note:
 - (a) Summarises the *King Salmon* decision and the key principles emerging for planning practice and the interpretation of the New Zealand Coastal Policy Statement ("**NZCPS**"); and
 - (b) Identifies key principles emerging from subsequent application by the courts of *King Salmon*.

THE KING SALMON DECISION

2. King Salmon proposed to establish and operate nine additional salmon farms in the Marlborough Sounds and applied concurrently for the necessary plan changes and resource consents to be heard by a Board of Inquiry ("**Board**").
3. The Board found that the proposed Papatua salmon farm location (which would become the subject of the Supreme Court's decision) would have high to very high adverse effects on the outstanding natural character and outstanding natural landscape of that location. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to as required by section 67(3) RMA.
4. Despite that finding, the Board approved the Papatua plan change application because it found that the NZCPS contained objectives and policies that pull in different directions, and applying an overall broad judgment pursuant to Part 2 of the RMA, the Board considered that (overall) the proposal would be appropriate and achieved the RMA's purpose.
5. The Environmental Defence Society appealed the Board's decision to the Supreme Court. The Supreme Court granted the appeal and overturned the Board's decision. The Court's key findings are summarised below.

Scheme of the RMA

6. The RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to Part 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.¹

¹ *King Salmon* at paragraphs 31, 33, 34, 37, and 41

Section 5 RMA

7. Section 5 RMA it is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in section 5(2) are achieved. 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 part 2, ss 6, 7 and 8.²
8. Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of part 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 part 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 part 2 remains relevant. It does not follow from the statutory scheme that because part 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.³

Meaning of “avoid” and “inappropriate”

9. “Avoid” means “not allow” or “prevent the occurrence of”.⁴
10. What adverse effects are to be avoided and what is “inappropriate” should be assessed by reference to what is being “protected”.⁵

Meaning of “give effect to”

11. To “give effect to” simply means “implement”. It is a strong directive creating a firm obligation on those subject to it. The requirement to “give effect to” the NZCPS gives the Minister a measure of control over what local authorities do: the Minister sets objectives and policies in the NZCPS and relevant authorities are obliged to implement those objectives and policies in their plans and policy statements, developing methods and rules to give effect to them.⁶
12. 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

² *King Salmon* at paragraphs 24 and 25

³ *King Salmon* at paragraph 151

⁴ *King Salmon* at paragraphs 92-97

⁵ *King Salmon* at paragraph 101

⁶ *King Salmon* at paragraph 77

practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.⁷

Policies 13 and 15 are bottom lines

13. Policies 13(1)(a) and 15(a) of the NZCPS are directive in their nature and are essentially bottom lines that must be complied with in giving effect to the NZCPS.⁸ To apply the overall judgment to their implementation would:
- (a) be inconsistent with the process of issuing the NZCPS;⁹
 - (b) create uncertainty;¹⁰ and
 - (c) undermine the strategic region wide approach required under the NZCPS.¹¹
14. It may be acceptable to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to policies 13 and 15 of the NZCPS where their avoidance is not necessary (or relevant) to preserve the natural character of the coastal environment, or protect natural features and natural landscapes.¹²

Resorting to Part 2

15. In the context of giving effect to the NZCPS resort to Part 2 is not appropriate because Part 2 has been embodied by the NZCPS. The Supreme Court held that there are three exceptions where resort to Part 2 would be appropriate, namely:¹³
- (a) where there is a claim of invalidity;
 - (b) if the planning document does not cover the field; or
 - (c) the provisions are uncertain.

Conflicts in policy documents

16. Policies 13(a) and 15(a) NZCPS can be reconciled with policy 8(a) (Aquaculture), because policy 8(a) requires “provision for aquaculture

⁷ *King Salmon* at paragraphs 79 and 80

⁸ *King Salmon* at paragraph 132

⁹ *King Salmon* at paragraph 136

¹⁰ *King Salmon* at paragraph 137

¹¹ *King Salmon* at paragraph 139

¹² *King Salmon* at paragraphs 144-145

¹³ *King Salmon* at paragraph 88

activities in appropriate places in the coastal environment", not in all places.¹⁴

17. 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. 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.¹⁵

CASE LAW SINCE KING SALMON

18. *King Salmon* has subsequently been applied by the Court of appeal, High Court and Environment Court in a range of different factual circumstances. The key principles applicable to practice are summarised below.

Identification of Outstanding Natural Landscapes and Outstanding Natural Character

19. *King Salmon* has not changed the way in which outstandingness is to be determined. This assessment should still be undertaken based on objective criteria and on expert input - *Man O'War Station v Auckland Council* [2015] NZHC 767.
20. However, care needs to be taken in determining whether something is outstanding given the protection that *King Salmon* says should be provided in such cases - *Opoutere Ratepayers and Residents Assn v Waikato Regional Council* [2015] NZEnvC 105.

Are provisions unclear or in conflict?

21. It is important not to conclude too readily that provisions are in conflict where reconciliation can be achieved. Close scrutiny and analysis of provisions is necessary before it can be concluded that there is conflict - *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080.

Use of directive language

22. Where directive language is used then this should be followed. If there is any doubt about adverse effects when directive language is used then a decision to ensure no adverse effects must be made *Gallagher v Tasman District Council* [2014] NZEnvC 24.

Giving effect to higher order documents

23. Local authority planning documents (other than the NZCPS) cannot be presumed to embody Part 2 and higher order documents. As such, wherever

¹⁴ *King Salmon* at paragraphs 126 and 131

¹⁵ *King Salmon* at paragraphs 129 and 130

there is a statutory obligation to give effect to documents, those documents must be assessed - *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080.

Consideration of Part 2 for plan changes

24. Part 2 remains a relevant consideration when preparing plan documents, because those documents must be prepared “in accordance with Part 2”. However, Part 2 cannot be used to circumvent an obligation to give effect to higher order documents - *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764.

Consideration of Part 2 for resource consents

25. Part 2 remains a relevant consideration for resource consents and is not limited to the three exceptions defined by the Supreme Court in *King Salmon* (uncertainty, invalidity, or incomplete coverage). Part 2 may be considered as a check in appropriate cases where there is any doubt that the relevant planning documents may not properly embody Part 2. For instance, if a plan has not recognised and provided for a matter of national importance, then recourse to Part 2 would be appropriate.
26. However, an “overall broad judgement” approach under Part 2 cannot be used as a means to render ineffective district and regional plans. The emphasis from *King Salmon* on the importance of the words used in plans remains - *RJ Davidson v Marlborough District Council* [2018] NZCA 316.

Consideration of Part 2 for designations

27. Resort to Part 2 applies to notices of requirement - *New Zealand Transport Agency v Architectural Centre Incorporated* [2015] NZHC 1991. The findings of the Court of Appeal in *Davidson* are most likely also applicable to designations.

Consideration of tension between directive national policies

28. In relation to ports Policy 9 (Ports) NZCPS is more directive than Policies 6 (activities in the coastal environment), 7 (strategic planning) and 8 (Aquaculture), but not as directive as 11(a) (protection of indigenous biological diversity), 13(1)(a) (protecting natural character), and 15(a) (protecting natural features and landscapes).
29. Where Policies 9 and 11(a), 13(a), or 15(a) are engaged, this creates a tension that requires resolution at a policy level. Policy 7(1)(b)(ii) NZCPS provides a procedural route through which to resolve this tension by allowing matters to be resolved at the level of particular resource consents, notices of requirement and plan development processes - *Port of Otago Limited v Otago Regional Council* [2018] NZEnvC 183.

30. The procedural route in Policy 7(1)(b)(ii) may also be applicable to other situations where there is a tension between directive national policies.