Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd

Supreme Court of New Zealand SC82/2013; [2014] NZSC 38
19, 20, 21, 22 November 2013; 17 April 2014
Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Resource management – New Zealand Coastal Policy Statement – Interpretation – Apparently conflicting policies – Whether balancing approach appropriate – Duty of planning authorities to give effect to NZCPS – Interpretation of NZCPS – "Inappropriate" – NZCPS, policies 8, 13, 15 – Resource Management Act 1991, ss 55, 58.

Resource management – Resource consents – Whether and when requirement to consider alternative sites – Observations. – Resource Management Act 1991, s 32.

King Salmon applied for changes to the Marlborough Sounds Resource Management Plan to change salmon farming from a prohibited activity to a discretionary activity in eight locations and at the same time applied for resource consents to undertake salmon farming at those locations and one other for a term of 35 years. The Minister of Conservation decided that the application involved matters of national importance and should be decided by a Board of Inquiry. The Board considered the New Zealand Coastal Policy Statement and also Part 2 of the Resource Management Act 1991. Policy 8 of the NZCPS was intended to enable aquaculture subject to conditions while policies 13 and 15 required decision makers to avoid adverse effects of activities on the natural character of areas of outstanding natural character, outstanding natural features and outstanding natural landscapes in the coastal environment. The Board considered that these policies conflicted and that it was required to balance their requirements and make an overall judgment. It found that there would be adverse effects on areas of outstanding natural attributes but nonetheless decided to grant the applications for plan changes in respect of four sites and to grant the resource consents for those four sites, subject to conditions. The Environmental Defence Society and others appealed unsuccessfully to the High Court, arguing that the Board had wrongly taken an "overall judgment" approach to balancing the requirements of different policies. EDS and SOS then appealed to the Supreme Court under s 149V of the Resource Management Act.

Held: 1 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) Section 5(2) of the Resource Management Act 1991 was to be read as an integrated whole. The word "while" did not indicate that the section addressed two different sets of interests but had its ordinary meaning of "at the same time as". The word

"avoiding" in s 5(2)(c) had its ordinary meaning of "not allowing" or "preventing the occurrence of" (see [24], [62], [96]).

2 (unanimously) Although a policy in the New Zealand Coastal Policy Statement did not come within the definition of a "rule" in the RMA, it could have the effect of what in ordinary speech would be a rule and prohibit particular activities in certain localities (see [10], [116], [182]).

3 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) The NZCPS gave substance to the principles in Part 2 of the RMA in relation to New Zealand's coastal environment by translating the general principles to more specific or focused objectives and policies. Therefore in principle, when considering a plan change in relation to the coastal environmental, a regional council was necessarily acting in accordance with Part 2 by giving effect to the NZCPS. No party had challenged the validity of the NZCPS or any part of it and there was no uncertainty in the meaning of the relevant policies of the NZCPS which required reference to Part 2 (see [85], [88], [90]).

4 (William Young J dissenting) The word "inappropriate" in the NZCPS emerged from the way particular objectives and policies were expressed and related to the natural character and other attributes that were to be preserved or protected and also emphasised that the NZCPS required a strategic, region-wide approach (see [102], [105]; compare [193], [194]).

5 (William Young J dissenting) Planning authorities were required to "give effect to" the New Zealand Coastal Policy Statement. "Giving effect to" meant "implement" and was a strong directive creating a firm obligation on the part of planning authorities. The NZCPS did not simply identify a range of potentially relevant policies to be given effect as policy makers considered appropriate on an overall judgment in the particular circumstances. Although Part 2 of the RMA did not give primacy to preservation or protection over other interests, this did not mean that the NZCPS could not do so in particular circumstances. There was no conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policy 8 provided for salmon farming in appropriate areas but salmon farming could not occur in breach of policies 13(1)(a) and 15(a) which directed authorities to avoid significant adverse effects on particular limited areas of the coastal region – areas of outstanding natural character, outstanding natural features or outstanding natural landscapes. The use of the word "avoid" in these policies was a strong direction, meaning they are not merely relevant considerations to factor into a broad overall judgment. It followed that given the Board's findings that the Papatua site engaged policies 13(1)(a) and 15(a), the plan change should not have been granted in respect of that site. The overall judgment approach was inconsistent with the process by which an NZCPS was issued, would create uncertainty and had the potential to undermine the strategic, region-wide approach that the NZCPS required planning authorities to take (see [77], [124], [125], [127], [129], [130], [132], [135], [137], [139], [146], [147], [152], [153]).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC) discussed.

Result: Appeal allowed/dismissed.

Observations: (per totam curiam) If consideration of alternatives is permissible, there must be something about the circumstances of particular cases that make it so. Those circumstances may make consideration of alternatives not simply permissible but necessary. In the case of an application relating to the applicant's own land, the RMA does not require consideration of alternative sites as a matter of course but there may be instances where such consideration is required and there may be instances where the decision maker must consider the possibility of alternative sites. The question of alternative possible sites may have greater relevance in cases where application is made to use part of the public domain for a commercial purpose. Whether consideration of alternative sites may be necessary will be determined by the nature and circumstances of the particular application (see [166], [167], [168], [169], [170], [176]).

Brown v Dunedin City Council [2003] NZRMA 420 (HC) discussed.

Other cases mentioned in judgment

Auckland Regional Council v North Shore City Council [1995] 3 NZLR 18 (CA).

Brown v Dunedin City Council [2003] NZRMA 420 (HC).

Campbell v Southland District Council W114/94, 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.

Foxley Engineering Ltd v Wellington City Council W12/94, 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).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).

North Shore City Council v Auckland Regional Council (1996) 2 ELRNZ 305 (EnvC).

Plastic and Leathergoods Co Ltd v Horowhenua District Council W26/94, 19 April 1994.

Shell Oil New Zealand Ltd v Auckland City Council W8/94, 2 February 1994.

Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402.

Wairoa River Canal Partnership v Auckland Regional Council [2010] 16 ELRNZ 152 (EnvC).

Appeal

These were appeals (SC82/2013) by the Environmental Defence Society Inc under s 149V of the Resource Management Act 1991 from the judgment of Dobson J, [2013] NZHC 1992, dismissing an appeal from a Board of Inquiry set up under s 142(2)(a) of the RMA, supported by Sustain Our Sounds Inc, second respondent, and opposed by New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries,

fourth respondents and (SC84/2013) by Sustain Our Sounds Inc from the same judgment, supported by the Environmental Defence Society Inc, second respondent, and opposed by The New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries, fourth respondents, leave to appeal having been granted by the Supreme Court [2013] NZSC 101, the approved questions on appeal being (SC82/2013):

(a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:

(i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.

(ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal Policy Statement under s 67(3)(b) of the Act in coming to a balanced judgment or assessment in the round in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary; and

(SC84/2013): was the conclusion of the Board of Inquiry that the key environmental effects of the plan change in issue would be adequately managed by the maximum feed discharge levels set in the plan and the consent conditions it proposed to impose in granting the resource consent to King Salmon one made in accordance with the Act and open to it?

DA Kirkpatrick, *RB Enright* and *NM de Wit* for EDS.

DA Nolan, *JDK Gardner-Hopkins*, *AS Butler* and *DJ Minhinnick* for the King Salmon Co.

MSR Palmer and *KRM Littlejohn* for Sustain Our Sounds Inc.

CR Gwyn and *EM Jamieson* for Minister of Conservation and Director-General of Ministry for Primary Industries.

SF Quinn for Marlborough District Council.

PT Beverley and *DG Allen* for the Board of Inquiry.

Palmer for SOS: This case demonstrates the importance of the Resource Management Act 1991. Resources and the uses to which they are put are mediated by the RMA through the principle of sustainable management. Consent authorities often pay lip service to this principle by listing all relevant considerations and then coming to an overall conclusion – a "broad judgment" approach which means that the weight assigned to different considerations cannot be appealed. This approach has not previously been taken to plan changes. Mr Upton said in the third reading debate on the Bill that the concept of sustainable management provided a "physical bottom line" which should not be compromised ((4 July 1991) 516 NZPD 3019) either by plan changes or consents. This is one of the rare cases when we come up against the bottom line. SOS is not challenging Parliament's attempts to streamline and simplify the RMA. The challenge is to the particular decision of the Board which did not have before it the information about the key environmental effects it required. This Court can provide guidance to the courts below and to the increasing numbers of boards of inquiry as to decision making.

SOS is not opposed to salmon farming in general. King Salmon applied for a plan change carving out eight areas from the zone where salmon fishing is a prohibited activity and making it a discretionary activity in those areas. Concurrently it applied for consents (as well as consent for another farm where it was already zoned as discretionary) and the Board of Inquiry agreed to the request for four of them. The Board was set up because the Minister was concerned about water quality, among other factors. Open-cage salmon farming introduces nitrogen and other pollutants from salmon feed and faeces. The ability of the water to deal with this depends on the complex interaction of factors such as water flow, temperature, and pre-existing nutrient levels natural and unnatural, including run off from fertilisers on land. Excessive nitrogen causes eutrophication where dissolved nutrients reduce oxygen levels and increases algal blooms which reduce sunlight. The process is potentially reversible over time but once a certain point is reached, return to a pristine state becomes impractical. It is not just the levels that matter but the degree of change from the pre-existing natural state. The feed discharge from the nine farms applied for would be equivalent to the raw effluent discharge from 400,000 people (BoI report, at [379]). So we need to know the current state of the environment and need good information (not perfect information) as to the effect of an increase in nutrients given the maximum feed quantities allowed by the consent. SOS considers the conditions on both the plan change and the consent inadequate. The applicants had modelled only on the initial stages and not on the maxima.

The Board (Appendix 3) does not amend the objectives of the plan. The Board says that there can be an increase in salmon farming where the effects can be mitigated. The additional rules required would be effected by plan change. Marine farms are discretionary activities within Zone 3 provided that they comply with the standards set out. These relate to water quality: maximum discharges and maximum increases per year. King Salmon proposed that farming for different species would be a prohibited activity but the Board amended this to non-complying.

Water appears in the long Title of the RMA. Section 5 sets out the purpose of the RMA as to promote sustainable development of natural and physical resources, which are all defined terms. Purpose is important in interpreting provisions in an Act (*Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767). Sustainable development is defined in s 5(2) as including the needs of future generations and safeguarding the life-supporting capacity of water and ecosystems, avoiding, remedying or mitigating any adverse environmental effects. If the use of water is not sustainable and life-supporting capacity not supported, the plan change cannot go ahead. Section 6 expands on sustainable management and refers to the preservation of the natural character of the coastal environment, its protection from inappropriate use and the protection of any significant habitat of indigenous fauna. The Rt Hon Simon Upton MP, said that s 5(2) was not a mere manifesto ("Purpose and Principle in the Resource Management Act" (1995) 3 Wai L Rev 17). The trade off on sustainability was made by Parliament. The Act marked a shift in focus from planning activities to regulating effects, so it is necessary to know what the effects will be. Part 3 in general allows activities unless they are controlled, prohibited etc. In respect of the coast, s 12 lists things that one cannot do unless they are expressly allowed by a rule in a coastal plan; s 14 does the same re water and s 15 for discharges. So water is treated differently from land. The coastal and marine areas are the responsibility of the Minister of Conservation under the RMA, not the Minister for the Environment but the use of space in coastal and marine areas is the responsibility of regional authorities as is the use of water. Functions are expressed in light of the purpose. "Integrated management" is a reference to the Bruntland Report from where "sustainable management" also derives. Section 32 requires cost-benefit analysis and s 32(4)(b) in respect of plan changes must include the risks of acting and of not acting if there is insufficient information. The precautionary principle is implicit in the section and implicit in the definition of sustainable management. The Board was not cautious in the face of uncertainty. Part 5 of the RMA sets out the hierarchy of standards and policies and the hierarchy of documents which provide the framework for consents (see ss 63, 65(6), 66 and 84). There has to be a coastal policy statement under s 57 and the CPS refers to sustainability. Each document in the hierarchy must give effect to the document in the hierarchy above. Policies relate to how objectives are to be achieved. The precautionary approach, in Policy 3, underpins all the policies but the Board does not consider uncertainty as to effects. Policy 23 on discharge of contaminants required particular sensitivity to the receiving environments (see also s 108(8) of the RMA), but the Board said it did not have evidence as to the nature of the receiving environment. Regional policy statements are also directed to the integrated management of resources. The Marlborough Regional Policy Statement refers to Agenda 21 and affirms commitment to controlling degradation of the marine environment (chapters 5 and 7). Part 5.3.6 of the RPS refers to problems of limited information. The approach of the statement is to move along the path to sustainable development. Where insufficient information is available, plans will take a precautionary approach (7.2.11). Coastal water quality is to be

maintained at a level which will support the eco-system. Methods of achieving policies include controls in plans to avoid, remedy or mitigate the effects of discharges. The Board did not do this.

King Salmon argues that a discretionary activity has to go through all resource consent steps so it does not matter whether it is potentially harmful. This is not correct. Status as a discretionary activity indicates how an activity is to be thought about when considering applications for resource consent. Discretionary status indicates that the activity may well be desirable provided that conditions are complied with, or may not be. So the result of the application could go either way. A coastal permit is a type of resource consent (s 105). The Board of Inquiry acts as a consent authority (s 149) and a consent authority has a quasi-judicial role (*Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562). On the application for a plan change, the Board must act as if it were a regional council (s 149). Concurrent applications for plan changes and resource consents are dealt with by s 149P(8), (9) and (10). The Board had to determine matters relating to the plan change and only then consider the resource consent application in the light of the amended plan. A plan cannot depend upon a resource consent but at [12.76] the Board purports to apply Part 2 of the Act to plan changes and says that where there are identified adverse effects that overcame the benefits, consent would be refused and where adverse effects could be mitigated, conditions would be imposed on consents. In other words, the amendment to the plan depended upon the conditions in the consents. This is contrary to the scheme and purpose of the Act.

The bulk of the Board's report relates to contested effects. As to water quality and the effect of waste feed and faeces, the Board considered that it had enough information when one added the year of monitoring which would be one of the conditions of the resource consent. The then Minister of Conservation considered that this was insufficient information and submitted that a precautionary approach was warranted, especially as to effects on water quality. There was expert evidence as to the tropic state of the Sounds overall and of individual Sounds. The Board concurred with the experts on the paucity of information on the current state of the Sounds (at [372]). The Board was unable to assess the effect of farm run-off. It refers to sustainable feed levels, but it is not clear whether it is referring to the sustainability of the farming or of the water. The Board was surprised that there had been no modelling of the effect of maximum feed levels, whether locally or overall (at [430]–[435]). So the Board identified numerous problems but then went straight on to consider what conditions should be imposed on the resource consent and failed to consider whether the consents should be granted at all. The conditions imposed are complex. There are 84 conditions ranging from feed conditions up to the maximum to increases in discharges to be allowed if the monitoring shows that they are not harmful. So the conditions on the consents were being used to set standards which should have been in the amended plan.

Granting the plan change on the basis of the maximum feed discharge limits about which the Board itself said it had insufficient information and of the proposed consent conditions to gather that essential information would not adequately manage the environmental effects on water quality. Accordingly, the Board did not fulfil the function for which the Minister established it and its

decision was inconsistent with the principle of sustainable management, with the emphasis on water quality in the RMA and planning regime and the precautionary approach. If these consents were dropped or cancelled, we would still have salmon farming as a discretionary activity in the plan but without the controls on it which the Board considered essential. The plan change creates a zone specifically for salmon farming so we need to know what the effects will be. The words "have regard to" must be interpreted against the purpose of the Act. If after having regard to a matter, it is decided that the proposal is not compatible with sustainable management, consent cannot be granted. If the Board can identify conditions necessary for salmon farming these should be in the plan which the public can make submissions on. Granting the plan change on this basis was inconsistent with *Edwards v Bairstow* [1956] AC 14, [1955] 3 All ER 48 (HL). The Board should have re-appraised matters when it realised it did not have enough information (as in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153). The decision of the Board should be set aside. [Reference also made in printed case to: *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA); *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *Minister of Conservation v Kapiti Coast District Council* [1994] NZRMA 385 (PT); *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC); *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA); *Re Canterbury Regional Council* [1995] NZRMA 110 (PT); *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 (PT); *Unison Networks Ltd v Hawke's Bay Wind Farm* [2007] NZRMA 340 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149; *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475 (HC).]

Kirkpatrick for EDS: Question 1 turns on the interpretation of certain key words and phrases: "give effect to" in s 67(3)(d) of the RMA; "avoid" in Policies 13(a) and 15(a) of the NZCPS; "preserve" and "protect" in Policy 13(1) and "protect" in Policy 15; and "appropriate" in Policy 8. The central point for EDS is that Policies 8, 13, and 15 do not contradict or pull against each other; all three policies may be reconciled on the basis that "appropriateness" in Policy 8 is to be determined in accordance with, among other things, the guidance on areas of natural character and natural landscapes in Policies 13 and 15. That approach is not affected by the other policies of the NZCPS in the circumstances of this case; it is consistent with the objectives of the NZCPS (especially objectives 2 and 6); and is in accordance with Part 2 of the RMA. Part 2 has to be read with other matters such as the NZCPS. Hence the Board erred in saying that the NZCPS contained objectives and policies that pulled in different directions and that therefore a judgment had to be made as to whether the instrument as a whole is generally given effect to. Part 2 does not create extra grounds for refusing restricted discretionary activity (see *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC), Randerson J at [40]–[47]). One applies the relevant detail, rather than resolving tensions on the basis of Part 2. Giving effect to the NZCPS will achieve the objectives of the Act. King Salmon submits that this is to read up the NZCPS; we say that King

Salmon is reading down s 67(3)(b). The purpose of the RMA given in s 5 is a complex statement encompassing the enabling of community well-being while avoiding, remedying or mitigating adverse effects of activities on the environment (see *Judges' Bay Residents Association v Auckland Regional Council* A72/98, 24 June 1998, especially Part 11 of the judgment). Promoting sustainable development is a single objective, no one aim overrides the others.

The RMA relies on the hierarchy of documents to achieve its objectives; the rungs between the Act and the Rules (which are deemed Regulations) are important. In this case, it is a requirement to give effect to the NZCPS. It is not necessary to return to the Act to resolve every tension, only to the relevant rung in the hierarchy. It is routinely argued in the Environment Court that some of the policies in the NZCPS are in conflict but we still have to examine the policies in detail. If the policies are not relevant to the current decision, it does not matter that they conflict. No issues arise as to waste water and so how Policies 8, 13, and 15 apply to waste water is irrelevant. There is no doctrine of precedent in consideration of resource consents (*Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA)) and any arguments about what might happen in other cases is answered by s 6 of the Interpretation Act 1999, that statutes are applied to circumstances as they arise.

The RMA also has a hierarchy of words and phrases relating to how decision makers must deal with various consideration of which "give effect to" is the most directory. "Avoid" and "prohibit" are words of ordinary meaning. "Avoid" is not a step short of "prohibit" as suggested by *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. "Avoid" is something one does oneself, "prohibit" is what authorities do to other people. Hence "avoid" is appropriate to policies and "prohibit" to rules. "Avoid" means to stop something from happening. Policies 13(a) and 15(a) say "avoid" which does not allow taking other matters into account; that would be mitigation, not avoidance. They thus provide non-negotiable baselines. Prohibition is not provided in Part 2 of the RMA but is provided for elsewhere in the Act. Prohibited activity status should only be used when the activity will not be contemplated in that place under any circumstances (*Coromandel Watchdog*). "Veto" means a power to reject a proposal. It hardly ever appears in legislation but does appear in RMA case-law starting with *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA). It is not appropriate here; this is a provision preventing something from happening. The NZCPS does not have direct regulatory effect (*Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 22–23) but it must be given effect to and the Environment Court can order amendment of a plan to give effect to the NZCPS. It determines what goes into plans and the plans contain rules. But the NZCPS cannot be used to prosecute a party for breach.

An applicant for a resource consent is not required to go right round New Zealand looking for alternative sites. We are not seeking a veto but merely that the change for Port Gore be declined. Policy 8 refers to "avoid, remedy or mitigate" unlike Policy 11 which only refers to "avoid" but it applies only where a species is threatened or at risk. Policies 13 and 15 call for mapping but an area can be found to be an outstanding natural landscape without being mapped as such. If the area is found to be an ONL or significant habitat it will be covered by Policies 13 and 15. Policy 16 on natural surf breaks

refers to "avoiding" other activities in the water. A developer has to enable access and use which is not onerous. Under Policy 25 it is increases in risk which are to be avoided, not existing risk from existing activity. Development in ONLs is not forbidden as long as adverse effects from development are avoided (*North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC)).

Enright, following: The Board at [124] found that it had no jurisdiction to consider alternative sites for the purposes of plan changes, referring to *Brown v Dunedin City Council* [2003] NZRMA 420 (HC) but at [127] it quotes *Brown* [16] but misses out an important qualifier in the penultimate sentence. The Board also said at [125] that there was no burden on the applicant for resource consent to consider alternatives but this does not apply to plan changes. In *Brown* it was not appropriate to require the applicant to consider sites over which he had no control but *Brown* did acknowledge that there may be cases where looking at alternatives would be required. In *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) it was said that alternatives should be examined but not too far afield but the ratio of *Meridian* is confined to s 7(b) which does not apply here. Whether there is a requirement to examine alternatives depends on the context including what is being protected. The question is how important is the site and why. The High Court in *Meridian* considered that the Environment Court had overstepped the mark: see *Meridian* (HC) at [92]. Dobson J at [171] said that it was not mandatory to consider alternatives but in this case there are no proprietary rights until consent is granted and so it is appropriate to look for other sites. We seek a decision that it is mandatory in the case of plan changes. Other sites were considered but not in the context of the plan changes. In *TV3 Network Services Ltd v Waikato District Council* [1998] NZLR 360, [1997] NZRMA 539 (HC), Hammond J said that if s 6 applies then alternative sites are a relevant consideration. On s 32 and plan changes, see *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 45 at [68], [84] and [103], *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21] and *Coromandel Watchdog* at [16]). [Reference also made in printed case to: *Green and McCahill Properties Ltd v Auckland Regional Council* HC Auckland HC 4/97, 18 August 1997; *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC)); *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331.]

Gardner-Hopkins for King Salmon: King Salmon has been farming salmon in the Marlborough Sounds since the 1980s. It was a pioneer but has learned a great deal since then. King Salmon was part of the process by which zones were allocated by consent in 1999. At that time King Salmon did not need to reserve any areas for future use and accepted the zone boundaries. It began looking for new sites from 2007 and has reviewed some 500 mussel farm sites but found them unsuitable for salmon farming. It is well known that until 2011, the aquaculture regime hindered the development of aquaculture. The 2011 amendments removed legislative obstacles. In particular, the concurrent application for plan change and resource consent encourages applications for plan changes without creating the risk that someone else will apply for resource consent.

The Board was primarily concerned with sustainable development (see the Board at [75]–[81], [1227] and [1276]–[1278]). The SOS argument fundamentally misconceives the statutory scheme as to the role of regional plans and discretionary resource consents. The plan change itself has no environmental effects. All it does is enable applications for discretionary activity resource consent for salmon farming at four specific locations. For a discretionary activity there is no presumption that consent will be granted. The Act does not require that plans include conditions for resource consents and certainly not the detailed conditions demanded by SOS. For discretionary activities, all relevant matters have to be considered when consent applications are considered. The Board had more than sufficient information to approve the plan change and there was full public participation in the process, including discussions between the parties which led to the conditions. In fact, the amended plan contained more specific standards and assessment criteria than the existing plan. The Board applied the precautionary approach in the plan changes: in declining five of the nine proposed sites; in setting standards for initial feed levels and subsequent increases; and then in the resource consents by imposing robust adaptive management conditions. The approval of the plan change was not predicated on the specific consents; the Board was "aware" of them and SOS does not contest that they were a relevant consideration.

The NZCPS Objective 6 recognises that some uses and developments can only be in the coastal area, this includes salmon farming and Policy 6(2) recognises that appropriate locations have to be found. Policy 8 requires regional policy statements and regional coastal plans to provide for aquaculture in appropriate places, recognising the need for high water quality including ensuring that the water is fit for aquaculture. The Regional Policy Statement states at [3.6] the limitations that we may never fully understand some ecosystems and effects of decisions and the absence of complete information is not necessarily an excuse for avoiding resource management decisions. Discretionary status is precautionary in that consent requires compliance with the purposes of the Act. Under Policy 7.2.10(d) of the Regional Policy Statement, applications for aquaculture consents are considered in the light of adjoining activities, navigation and other factors. Hence it is necessary to prohibit in some areas. The Board clearly had regard to all these matters in its decisions (see [283] and [284] of the Board decision). The Sounds Plan sets out policies, objectives and methods which enable applicants to understand how any application will be assessed. The plan emphasises the importance of assessment criteria and standards which will protect water quality and so on, so discretionary status is sufficient to ensure that the objectives of the Act are met. Chapter 9 "Coastal marine" recognises the importance of marine farming to the regional economy and community. Some Sounds communities have been revitalised by aquaculture. Research is continuing into farming new species which might then require further plan changes. Where there may be adverse effects, rigid controls can be imposed by conditions on the consent. Conditions could be called standards. The scheme of the Plan is that for some discretionary activities there are assessment criteria; for others there are standards. This Plan meets the requirements. Discretionary activities have previously been declined on sustainability grounds. The proposed plan changes go further. Once adaptive management requirements have been imposed on early consents they might not

be required for later consents and so should not be imposed. If the standards were not met under the amended Plan, a discretionary activity would become a non-complying activity. The 14 assessment criteria include assessment of any adverse effects on water and water quality and cumulative effects on habitat. The potential threats to Hector's Dolphin and the King Shag are dealt with. These criteria are more specific than those already in the plan; they are mandatory considerations and a guide to applicants as to the material that must be provided in an application. The consents include specific conditions about the amount of nitrogen in feed, limits on feed discharges, restrictions on when feed limits could be increased, and conditions on benthic effects. Maximum feed levels were not modelled as it was expected that benthic effects would be the limiting factor. Standards were set for the water column: no increase in phytoplankton bloom; no increase in algal bloom; no reduction in oxygen levels; no increase in nutrient levels; and a power to review the consents. The cumulative effects on the water column would be substantially reduced by the fact that five of the nine consents were refused. It is permissible to leave standard setting until later provided that the objectives are clear and achievable. What should be in the plan and what should be in the consents was extensively discussed before the Board. SOS wanted more conditions in the plan change rather than in the consents; the Council wanted the plan not to be cluttered with too much detail. "Assessment criteria" are not mentioned in the RMA but could be considered as parts of rules under s 67(1)(b) or as an "other method for implementing policy" under s 67(2)(b). There is no bright line test to determine the status of activities, the RMA leaves the choice as to activity status to the planning authorities. There was therefore no error of law. The Board was a planning authority and had discretion which it exercised after careful consideration of the relevant matters (see contested effects at pp 94–336: s 32 analysis is at [1224] and water column effects at [1212]). Its discretionary decision cannot be said to be so unreasonable that no reasonable planning authority could have taken it. The Board then considered site-specific issues relating to the plan change, including nitrogen and cumulative effects, ecological integrity and the ability of Port Gore to be serviced separately. This is why only four of the sites were approved for plan changes.

The Board then considered the resource consent applications and grants resource consent for the four plan change sites. Water quality issues were extensively considered, see [405], [411], [412], [421], [456], [458] and [460]. In the contested effects section of its report, the Board was still dealing with the nine applications. Its decision was precautionary: approval only for four sites. There is no need for philosophical debate about how to reconcile the limbs of s 5(2). The Board was aware of the need to "avoid, remedy or mitigate". It did refer to the "balance between" the two limbs but this was a mischaracterisation of its own decision making. At [439], the Board said that consent for increases was conditional on more information and adaptive management. This does not mean that the plan changes depended on the consent conditions, they were referring to the future. The Board was aware of the specific consent conditions, which was appropriate. The Board considered the precautionary approach at [173]–[182] and recognised "adaptive management" as part of the precautionary approach, a way of giving effect to the precautionary approach.

The Board recognised the reduction in adverse effects and benefits from only granting four consents rather than nine. The SOS complaint boils down to saying that this was not precautionary enough. This was a matter of weight, not law.

Nolan, following: The NZCPS and s 67(3)(b) must be interpreted in the light of the purpose of the NZCPS which is to state policies aimed at achieving the purpose of the RMA. The individual policies in the NZCPS are not ends in themselves. There can be tensions between them. Some policies, for example 13 and 15, give more direction than others, but they are not standards or vetos. Section 67(3) requires that effect be given to the NZCPS as a whole, not that every policy has to be achieved individually (*Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [257]–[258]; *Man O' War Station* at [41]–[43]). Documents are interpreted as a whole and policy documents have to be approached with care as they are not drafted with the same precision as legislation (*Beach Road Preservation Society Inc v Whangarei District Council* HC Whangarei CP27/00, 1 November 2000). Nor can any single matter in ss 6 (such as ONLs), 7 and 8 trump s 5 (*New Zealand Rail Ltd*). It would undermine the purpose of the RMA to allow some considerations to trump all other factors. The Board considered all the relevant considerations and applied the correct law and was entitled to reach the conclusions that it did. Policy 15, if read in the manner sought by EDS, would prevent any development that had any adverse effect. "Effect" is widely defined in the RMA, s 3. But the introductions to policies 13 and 15 refer to "appropriate". On EDS's argument, navigation beacons currently in ONLs on the Cook Strait would not have been permitted. Likewise, Policy 11a refers to "any adverse effects"; if this were interpreted in the manner sought by EDS one would never get to social and economic benefits. Several policies in the NZCPS use the word "avoid", so on EDS' argument no development would be possible, even if the adverse effects could be remedied or mitigated.

The NZCPS can direct regional councils to put matters into regional plans (s 55(2)), but these could only be objectives and policies. Provisions of the NZCPS can be put into rule form but are not rules themselves (s 43(a)). A wide range of interests such as recreational boating and fishing (Policy 6) and windfarms (*National Policy Statement on Renewable Energy Generation*) have to be taken into account. Places suitable for salmon farming are places with few inhabitants or holiday homes and with good water flow. It is part of the role of the decision maker to determine what will give effect to the NZCPS and Part 2 of the RMA. Status as an ONL is to be considered in making a decision, but does not require any particular process. The Board discusses all these matters, especially at pp 183–184. The weight to be given to them was a matter for the Board and is not apt for reconsideration on appeal. Matters emerging from Policies 6 and 8 are not determinative but are factors to be considered (Dobson J at [110]). The Board of Inquiry on the current NZCPS referred to giving more weight to the protection of landscape and to providing further guidance: indicates that the policies were not intended to be standards and rules. The Board in the present case had regard to the NZCPS as a whole, focused on effects, assessed those effects and considered the adverse effects along with the enablement of economic and social wellbeing (see [1184], [1185], [1240], [1241] and [1243]). The Board also placed weight on

biosecurity. Currently, New Zealand salmon farms are free from infectious diseases. The Papatua site was seen as safe as it is not connected to the other areas (see [1242]). The Board also considered that the adverse effects on landscape and natural character were less at Papatua than at Kaitira. The answer to the first part of Q 1(a)(i) is "no"; even if the Court answers it "yes", the answers to the remaining parts of Q 1(a) are "yes" and "yes".

As to alternatives, a decision maker may consider alternative sites but there is no mandatory requirement in s 32 to consider alternative sites for a specific plan change (*Brown*). There are express requirements elsewhere in the RMA (for example, ss 168A(3) and 171(1)(b). The title to s 32 refers to alternatives but the text of the section does not and certainly not to alternative sites. Parliament has amended s 32 regularly but has not included a mandatory requirement to consider alternative sites. For a site-specific plan change, s 32 requires consideration of whether the policies and rules proposed for that site are the most appropriate to achieve the purposes of the RMA. Earlier references to alternatives in s 32 were removed. A planning authority would not have evidence before it of all the effects of the activity at an alternative site. Section 105(1)(c) refers to alternative methods of discharge. *McGuire* referred to a notice of requirement not to a plan change. King Salmon produced evidence as to why the existing plan provisions did not adequately provide for salmon farming (see Board at [1204]). No other party gave evidence of any alternative biosecure site. In any case, the Board did consider alternatives. King Salmon's application contained detailed descriptions of alternatives and the analysis by the Board included consideration of alternatives (see Board at [136]–[158]). [Reference also made in printed case to: *Auckland City Council v John Woolley Trust*; *Brown v Dunedin City Council*; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363; *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211; *Director-General of Conservation v Marlborough District Council* EnvC Christchurch C113/2004, 17 August 2004; *Dye v Auckland Regional Council*; *Gisborne District Council v Eldamos Investments Ltd* HC Gisborne CIV-2005-485-1241, 26 October 2005; *Graeme v Bay of Plenty Regional Council* [2013] NZEnvC 173; *Man O'War Station Ltd v Auckland Council*; *McGuire v Hastings District Council*; *Meridian Energy Ltd v Central Otago DC*; *Moturoa Island Ltd v Northland Regional Council* [2013] NZEnvC 227; *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZRMA 293 (HC); *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 (PT); *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA).]

Gwyn for the Ministry: The Ministry appears only in respect of Q 1(a). The purpose of the 2010 amendments was to encourage aquaculture and reduce costs, delays and uncertainty. The NZCPS does not state policies which have the effects of rules and there is no need to read up the NZCPS as other tools are available, for example ss 25A, 25B and 360A. There are no national priorities stated in the NZCPS and it is well established that the preservation of the natural character of the coastline is subordinate to the primary purpose of promoting sustainable development (NZ Rail). Policies in this context may be inflexible (*Auckland Regional Council v North Shore City Council* [1995] 3

NZLR 18 (CA) at 20–21) but the current NZCPS is not intended to state inflexible policies. The wording of Policies 13 and 15 indicates that they are not intended as rules or absolute directions to planning authorities. There are not only tensions between policies within the NZCPS but also between the NZCPS and other documents, for example, the policy statements on electricity, on renewable energy and on freshwater. Windfarms for example may have significant adverse effects on the landscape but must be put where a source of energy is available. Many of the policies are written in the imperative voice, there is no indication that some sentences are more important than others. "Avoid" is a step short of prohibition, see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] NZEnvC 309 at [15]–[16] and *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZRMA 143 at [178]–[179]. "Appropriate" must be defined with regard to Policies 8, 13 and 15. [Reference also made in written submissions to: *Auckland City Council v John Woolley Trust*; *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC); *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA); *Crest Energy Kaipara Ltd v Northland Regional Council* (2011) NZRMA 420; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *McGuire v Hastings District Council*; *Man o' War Station Ltd v Auckland Regional Council*; *Meridian Energy Ltd v Central Otago District Council* HC Dunedin CIV-2009-412-980, 16 August 2009; *New Zealand Rail Ltd*; *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council* HC Wellington, 25 June 2001 AP6/01; *Ngati Ruahine v Bay of Plenty Regional Council* (2012) 17 ELRNZ 68 (HC); *Rational Transport Society Inc v New Zealand Transport Agency* HC Wellington CIV-2011-485-2259, 15 December 2011; *S & M Property Holdings Ltd v Wellington City Council* HC Wellington CP257/01, 7 August 2002; *Tait v Hurunui District Council* EnvC Christchurch C106/2008, 29 September 2008; *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Watercare Services Ltd v Minhinnick; Whistler v Rodney District Council* EnvC Auckland A228/02, 19 November 2002.]

Palmer, replying: SOS accepts that the Board thought that the initial limits were sustainable in terms of its own assessment of what that meant. But it has become clear that there are issues over the interpretation of s 5. The Board's overall assessment approach did not accord with the correct approach under s 5. The plan change limits were not sustainable in the sense required by a proper interpretation of s 5. Even the initial discharge limits decision did not accord with proper process under s 5. The Board makes frequent references to competing principles, balancing factors, and the balance between the limbs of s 5(2). It adopted an overall balancing approach which is also regularly applied in the Environment Court.

The Board thought that the maximum limits were not sustainable and was not using a proper definition of sustainable. The Board changed the plan to classify salmon farming as a discretionary activity at four sites despite "a paucity of data" (at [373], [406], [407] and [461]) and when the only constraints were an unconstrained annual increase to the proposed maximum discharge levels that it had expressed concern about. The Board should have taken a proper precautionary approach and retained the prohibited status until

the information deficiencies were remedied (*Coromandel Watchdog* at [45]). Adaptive management is not "prudent avoidance" and is not precautionary in these circumstances and not consistent with what the Board was set up to do: s 149P(1)(a). The Board's evaluation of contested effects for both the plan change and the resource consent applications led it to conflate two different decision-making processes. A fair reading of the report shows that the plan change was predicated on the conditions in the consents ([1185], [1209], [1277(b) and (c)] and [1278]). The assessments of the resource consent applications do not mention the mandatory relevant consideration of "assessment conditions" it put into the amended plan. Given the Board's findings, it should not have classified salmon farming as a discretionary activity at the maximum feed discharge levels. That is what it did do and so its decision in relation to the four approved sites should be set aside.

Kirkpatrick, replying: Aids to navigation are provided for under the Maritime Transport Act 1994, not in the Regional Plan. A lighthouse may not be adverse to the landscape, for example, at Cape Reinga. "Appropriate" in policy 8 does not mean appropriate for salmon farming; policies 13 and 15 help identify what was appropriate in policy 8. As to alternatives, see *Coromandel Watchdog* at [16]. If *Brown* is not treated as a rule, s 32 analysis should give submitters the opportunity to discuss alternatives. Plan changes do have environmental effects. The change from prohibited status to discretionary status is enabling and so the planning authority must consider the effects of enabling change. As to mootness, the issue of alternatives under Q 1(b) is important and it would be beneficial to have guidance.

Cur adv vult

Reasons

	Para no
Elias CJ, McGrath, Glazebrook and Arnold JJ	[1]
William Young J	[175]

The reasons of Elias CJ, McGrath, Glazebrook and Arnold JJ were given by **ARNOLD J.**

Table of contents

	Para no
Introduction	[1]
The RMA: a (very) brief overview	[8]
Questions for decision	[17]
First question: proper approach	[18]
Statutory background – Part 2 of the RMA	[21]
New Zealand Coastal Policy Statement	[31]
(i) General observations	[31]
(ii) Objectives and policies in the NZCPS	[45]
Regional policy statement	[64]
Regional and district plans	[69]

Table of contents

	Para no
Requirement to "give effect to" the NZCPS	[75]
Meaning of "avoid"	[92]
Meaning of "inappropriate"	[98]
Was the Board correct to utilise the "overall judgment" approach?	[106]
(i) The NZCPS: policies and rules	[112]
(ii) Section 58 and other statutory indicators	[117]
(iii) Interpreting the NZCPS	[126]
Conclusion on first question	[150]
Second question: consideration of alternatives	[155]
Decision	[174]

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

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

---

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

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

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

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

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

to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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

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

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three-year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with 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 Part 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that

---

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents,* 22 February 2013 [*King Salmon* (Board)]. At [1341].
7 At [1341].
8 RMA, s 149V.
9 *King Salmon* (HC), above n 2.
10 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].
11 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 41.
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) [NZCPS].
14 *King Salmon* (Board), above n 6, at [1235]–[1236].

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 washe 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 Part 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

---

15 *Environmental Defence Society Inc v The 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.

rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA, being defined to mean "a district rule or a regional rule".[18]

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

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

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

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

---

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

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

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

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

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

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

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities,

---

33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and Part 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).
40 See s 87A.

discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

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

(a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:

(i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.

(ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

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

We will focus initially on question (a).

First question: proper approach

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

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

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a

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

> relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> ...
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.
>
> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

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

Statutory background – Part 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical

resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

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

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

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

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

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

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

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is 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]–[97] below, in the sequence "avoiding, remedying, or mitigating" in subpara (c),

---

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

43 RMA, s 3.

44 Section 2.

45 Section 2.

"avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition. The definition is sometimes viewed as having two distinct parts linked by the word "while".[47] That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in 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 paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in 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

---

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

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

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 Part 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 s 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 excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):
   (i) kaitiakitanga and the ethic of stewardship;[49]
   (ii) the efficient use and development of physical and natural resources;[50] and
   (iii) the maintenance and enhancement of the quality of the environment.[51]

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

---

48 Resource Management Bill 1989 (224-1), explanatory note at i.
49 RMA, s 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

[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, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, s 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of s 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

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

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

(b) Second, a protection against "inappropriate" development is not

---

52 Emphasis added.
53 See [40] below.

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 or against some other standard. This is also an issue to which we will return.[54]

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

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

(a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.

...

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

---

54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).
60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.
61 Section 46A.

inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with Part 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 Part 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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

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

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As

---

62 NZCPS, above n 13, at 5.
63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> 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 Part 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 Part 2 was justified in the circumstances.

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

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

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

---

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

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

66 At [1180].

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

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

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

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

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

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

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

---

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

> law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

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

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

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be irreconcilable in the context of a particular case.[81] No

---

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

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

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

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

81 At [258].

individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

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

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

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

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

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate

---

82 *Man O'War Station*, above n 46, at [41]–[43].

83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].

84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

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

subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

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

[49] Objective 2 provides:

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

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

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

---

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

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

- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the coastal environment contains renewable energy resources of significant value;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;
- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

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

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

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

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

[53] Policy 7 provides:

Strategic planning

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

(a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and

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

(i) are inappropriate; and

(ii) may be inappropriate without the consideration of effects

> through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

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

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

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

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

[59] Policy 13 provides:

> **Preservation of natural character**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> including by:
>
> (c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
>
> (d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.
>
> (2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
>
> (a) natural elements, processes and patterns;
>
> (b) biophysical, ecological, geological and geomorphological aspects;
>
> (c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
>
> (d) the natural movement of water and sediment;
>
> (e) the natural darkness of the night sky;
>
> (f) places or areas that are wild or scenic;
>
> (g) a range of natural character from pristine to modified; and
>
> (h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

> **Natural features and natural landscapes**

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

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
  (i) natural science factors, including geological, topographical, ecological and dynamic components;
  (ii) the presence of water including in seas, lakes, rivers and streams;
  (iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;
  (iv) aesthetic values including memorability and naturalness;
  (v) vegetation (native and exotic);
  (vi) transient values, including presence of wildlife or other values at certain times of the day or year;
  (vii) whether the values are shared and recognised;
  (viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
  (ix) historical and heritage associations; and
  (x) wild or scenic values;
(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
(e) including the objectives, policies and rules required by (d) in plans.

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

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision,

use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

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

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

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

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

> 7.2.8 **POLICY – COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.

---

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).

92 Italics in original.

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 their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

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

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

8.1.3 **POLICY – OUTSTANDING LANDSCAPES**

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

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the

93 Italics in original.

> *New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.*
>
> *The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.*

Regional and district plans

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

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

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

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

---

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

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

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

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

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against

---

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

which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

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

Requirement to "give effect to" the NZCPS

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

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

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

---

101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.
105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

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

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

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

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

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

108 RMA, s 293(3)–(5).
109 *King Salmon* (Board), above n 6 (citations omitted).

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.

[1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.

[1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

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

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

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

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

[84] Moreover, as we indicated at [34]–[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 Part 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 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 Part 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" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be Part 2 and not the NZCPS. The more plausible view is that Parliament considered that Part 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 Part 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that Part 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which Part 2 is given effect in relation to the coastal environment.[110]

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

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

---

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

background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

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

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

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

Meaning of "avoid"

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

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

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

the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

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

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

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

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

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

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

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

---

111 *Man O'War Station*, above n 46, at [48].
112 *Wairoa River Canal Partnership*, above n 46.
113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

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

Meaning of "inappropriate"

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

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

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

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

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

> ... in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
> (ii) the need for land-based facilities associated with marine farming;

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

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

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

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

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

region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character.* The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

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

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

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

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

[106] In the extracts from its decision which we have quoted at [34]–[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 Part 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.

117 (28 August 1990) 510 NZPD 3950.

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

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

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

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

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

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

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

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

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

---

118 (4 July 1991) 516 NZPD 3019.
119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

(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 Part 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 to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

---

122 RMA, s 58(a).
123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
124 At 19.
125 At 22.

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. ...

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not

---

126 At 23.
127 At 23.

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 (s 58(a) and (ga));
(b) the Crown's interests in the coastal marine area (s 58(d));
(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));
(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));
(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and
(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110(a)] above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of s 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's

relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> (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: ...

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with s 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> ...
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in

---

128 Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

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.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher 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 1 5 provided "more guidance" than other policies or constituted "starting points", but argued

---

129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).
140 *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

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 development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

---

141 See [16] above.

[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 remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant

142 Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

> for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison

---

143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that Part 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which ... is intended to allow the application of policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the

---

146 See [63] above.
147 *New Zealand Rail Ltd*, above n 71, at 86.
148 At 86.

NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of Part 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from

the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular s 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 s 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. Section 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that s 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist body, has been entrusted by Parliament to construe and apply

149 At 85.

the principles contained in Part 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 Part 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of 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.

[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 Part 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

[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 Part 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal

150 At 86.

protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32. Consideration of alternatives, benefits, and costs –** (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—

---

151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].
153 *King Salmon* (Board), above n 6, at [121]–[172].

> ...
> (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 has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal

154 At [124].
155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).
156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

> alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider

---

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).
158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).

alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on

---

160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand ... the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public

---

163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

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 s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable

---

165 *King Salmon* (HC), above n 2, at [171].

requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

WILLIAM YOUNG J.

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

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

166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the *New Zealand Gazette* on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].
167 At [17] of the majority's reasons.
168 At [165]–[173] of the majority's reasons.
169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate ... use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate ... use, and development:

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

> **13. Preservation of natural character –** (1) To preserve the natural character of the coastal environment and to protect it from inappropriate . use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> ...
>
> **15. Natural features and natural landscapes –** To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate ... use, and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of s 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 s 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58. Contents of New Zealand coastal policy statements**
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate ... use, and development:
>
> ...
>
> (c) activities involving the ... use, or development of areas of the coastal environment:
>
> ...
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*)[170] and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> ... does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited,

---

170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

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

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of ... use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of ... use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first

category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through ... use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> ...
>
> - the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
>
> ...
>
> - the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

[192] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
> (i) the need for high water quality for aquaculture activities; and
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8 and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate ... use [unhandled character] development" in the NZCPS is taken directly from s 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 s 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate ... use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate ... use, and development:
>
> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; ...

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from

---

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

"inappropriate ... use, and development" – what follows should read as confined to activities which are associated with "inappropriate ... use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

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

---

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".

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

---

175 At [144] of the majority's reasons.
176 See above at [195].

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Orders

(A) The appeal is allowed.
(B) The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.
(C) Costs are reserved.

Appeal allowed/dismissed.

Solicitors for Environmental Defence: *DLA Phillips Fox* (Auckland).
Solicitors for King Salmon: *Russell McVeagh* (Wellington).
Solicitors for Sustain Our Sounds: *Dyhrberg Drayton* (Wellington).
Solicitors for Marlborough District Council: *DLA Phillips Fox* (Wellington).
Solicitors for Minister of Conservation and Director-General for Primary Industries: *Crown Law Office* (Wellington).
Solicitors for Board of Inquiry: *Buddle Findlay* (Wellington).

Reported by: Bernard Robertson, *Barrister*