

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2018] NZEnvC 183

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under clause 14 of Schedule 1
to the Act
BETWEEN PORT OTAGO LIMITED
(ENV-2016-CHC-086)
Appellant
AND OTAGO REGIONAL COUNCIL
Respondent

Court: Environment Judge J R Jackson
Environment Commissioner R M Dunlop
Environment Commissioner D J Bunting

Hearing: at Dunedin on 19 February 2018
(Final submissions received 9 March 2018)

Appearances: L A Andersen for Port Otago Limited
A J Logan and T Sefton for Otago Regional Council
D A Allan and M C Wright for Environmental Defence Society and
Royal Forest and Bird Protection Society of NZ Incorporated
(section 274 parties)
R B Enright for BP Oil NZ Limited, Mobil Oil NZ Limited and Z Energy
Limited (section 274 parties)

Date of Decision: 28 September 2018

Date of Issue: 28 September 2018

INTERIM DECISION

A: Under section 292 RMA the Environment Court directs that the Council amends policy 4.3.4 (which is already to be treated as operative) by numbering the two parts of the policy (1) and (2) respectively.



- B: By consent the Environment Court confirms amendment of the definition of "Port activity" in the decisions version of the PORPS as agreed in mediation so that it reads:

Port Activities means the loading or unloading of ships for export or import purposes, including storage facilities and other related activities for the operation of the port area.

- C: Under clause 16(1) of Schedule 1 and section 293 to the Resource Management Act 1991 the Environment Court directs the Otago Regional Council ("the Council"):

- (1) to redraft proposed policy 4.3.7 to correct concerns expressed by the court over the versions put forward by the parties;
- (2) to consult the parties and any other persons it considers appropriate on a redrafted policy 4.3.7(d)-(e) to the Proposed Otago Regional Policy Statement ("PORPS") either
 - (a) along the lines in paragraph [135] of the Reasons or to similar effect; or
 - (b) otherwise to give effect to the policies of the New Zealand Coastal Policy Statement and their inter-relationships as explained in the Reasons for this Decision.

- D: Leave is reserved for any party to make submissions as to whether and to what extent resort to section 293 RMA is necessary to give effect to the spirit and intent of this decision and the Reasons below.

- E: Leave is reserved for any party to apply for an order under section 293 RMA directing the Council to consult over, and report to, the court on an addition to PORPS policy 5.4.9 which would make that policy subject to policy 4.3.7.

- F: Costs are reserved.



REASONS

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1. Introduction1.1 The general issue

[1] The general issue for this decision is how to provide for ports under the Proposed



Otago Regional Policy Statement ("the PORPS") in a manner that gives effect to the New Zealand Coastal Policy Statement ("NZCPS"). There is tension between Port Chalmers and Port Dunedin as part of the national shipping network that connects New Zealand's islands and are vital to the economic, social and cultural wellbeing of the Otago region, on the one hand; and on the other, that Otago Harbour (which contains both ports) is an ecosystem which contains considerable indigenous biodiversity and some "key" habitats for indigenous flora and fauna. In addition parts of the harbour have at least high natural character and may be classified as within an outstanding natural landscape.

[2] The decisions version of the PORPS issued by the Council on 1 October 2016 did not contain express provision for the two ports. Instead they were covered by general provisions relating to infrastructure. Port Otago Ltd ("POL") was not satisfied with that and appealed to this court under clause 14 of Schedule 1 the Resource Management Act 1991 ("RMA").

1.2 The parties and the specific issue

[3] There are several section 274 parties: two are the Environmental Defence Society Incorporated and the Royal Forest and Bird Protection Society of New Zealand Incorporated – together called "the Societies" as they presented a joint case. Another set of section 274 parties comprises BP Oil NZ Ltd, Mobil Oil NZ Ltd and Z Energy Ltd (the "oil companies"). Counsel for the oil companies appeared with a watching brief stating that their interest is in ensuring that the definition of "Port Activity" as agreed between parties in mediation was not changed. Specifically, the oil companies wished to ensure a function-based definition, not a location-based definition of that phrase. There is no opposition to that and no party suggests there need be consequential changes to that definition when resolving the live issue before the court.

[4] The active parties have made some progress on the matters in dispute in that they have agreed that a policy¹ specifically managing activities at the ports should be introduced but they do not agree on the precise wording. The form proposed by the appellant POL is as follows:

Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin

Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage

¹ To be numbered 4.3.7 in the PORPS.



their effects by:

- (a) ensuring that other activities in the coastal environment do not adversely affect port activities;
- (b) providing for the efficient and safe operation of these ports and effective connections with other transport modes;
- (c) providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;
- (d) providing for those ports by:
 - (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment;
 - (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
 - (iii) considering the use of adaptive management as a tool to avoid adverse effects;
- (e) where the efficient and safe operation of port activities cannot be provided for while achieving the policies under objective 3.1 and 3.2 avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area; and
- (f) otherwise managing effects by applying policy 4.3.4.

[5] There is no controversy over (a) to (c). The parties say that the precise issue for this decision is whether paragraphs (d) to (f) give effect to the NZCPS when read with the policy and policy statement as a whole. POL says that the version above does give effect to the NZCPS. The Council takes a similar position, but proposes some amendments to the wording of the POL version. The Societies maintain that paragraph (e) – with its options to “avoid, remedy or mitigate as necessary” – does not give effect to the avoidance provisions of the NZCPS, specifically policies 11(a), 13(1), 15(a) and (b), and 16 of that document.

[6] As a preliminary matter we record that because the PORPS was publicly notified on 23 May 2015 the applicable version of the RMA includes all amendments up to and inclusive of the Resource Management Amendment Act 2013 (but does not include the extensive amendments made by the Resource Legislation Amendment Act 2017).

[7] To understand the context for the arguments we next briefly describe the relevant environment – the Otago Harbour – and then set out the matters to be considered when preparing the challenged parts of the PORPS before addressing the issues before us.



1.3 A brief description of Otago Harbour

[8] The entrance to Otago Harbour is immediately west of Taiaroa Head (where a Northern Royal Albatross colony is located). On the western side of the harbour's entrance, at Aramoana, a long mole protrudes one kilometre northeast into the Pacific Ocean.

[9] The Otago Harbour is part of the (Miocene) Dunedin Volcanic Complex. Vulcanism has formed both a high western ridge and a lower eastern peninsula (the Otago Peninsula). They are separated by the harbour which runs southwest from the open sea and is approximately 21 km long. It has a mean surface area at high spring tides of 46 km² and is surrounded by hills. The harbour is relatively shallow and narrow (about 2 km across). Outside the main channels water depths are mostly less than 2 metres. At low spring tides² about 30% of the harbour's surface is exposed sediment.

[10] About halfway up the harbour from the sea it is nearly blocked by two smaller peninsulas and two islands: the Port Chalmers (on the north side) and Portobello (on the south side) Peninsulas — and Goat (Rakiriri) and Quarantine (Kamau Taurua) Islands³. The lower harbour is northeast of this line, and the upper harbour southwest of it. Port Chalmers is located on the eponymous peninsula, and Port Dunedin is at the head of the upper harbour.

[11] At or below high water mark, floral and faunal abundance and diversity increase as one moves down the harbour towards the entrance. Key habitats within the lower Otago Harbour are⁴:

(a) Seagrass beds⁵:

Seagrass beds cover about 32 hectares and are key habitat because they provide nursery grounds for a wide variety of intertidal invertebrates and fish and as feeding areas for birds and fish⁶. Part of the Seagrass beds off Harwood (on the south side of the lower harbour) fall within a coastal

² NIWA, 2009 *Biological resources of Otago Harbour and offshore*.

³ Goat and Quarantine Islands are outstanding natural features in the Proposed Dunedin District Plan, 2015.

⁴ G I Ryder evidence-in-chief 16 [Environment Court document 2].

⁵ *Zostera muelleri subsp. capricornl*.

⁶ Mills, S 2006. *Benthic macrofauna assemblages of fragmented Seagrass (Zostera capricornl) beds in two southern New Zealand inlets*.



protected area – COA17 – in the Otago Regional Plan: Coast (“ORP:C”);

(b) Saltmarsh (at Aramoana):

This is described as a Coastal Protection Area (“CPA”) by the Council in the Otago Regional Plan: Coast. It is also an “Area of Significant Conservation Value” in the Dunedin City District Plan and is highly valued by Kāi Tahu for mahika kai or other waahi taoka. The assemblage of organisms found on this saltmarsh is diverse and contains communities common on sheltered sandy intertidal areas of southern New Zealand⁷;

(c) Rocky shore habitat:

There is a limited⁸ area of rocky shore habitat within Otago Harbour. Dr Ryder described⁹ the biota as comprising largely “foliose¹⁰ red and brown algae, sponges, ascidians, crabs and gastropod molluscs”;

(d) Clam (cockle) beds:

The clam bed habitat is a soft bottom habitat within Otago Harbour. It has been studied extensively because of POL’s dredging programme; it is a source of mahika kai and has potential as a commercial resource;

(e) Deep channels:

Species encountered in the deep channels are not unique to them and most are common to soft bottoms in other parts of the harbour;

(f) Shell banks:

The string of shell islands is unique within Otago Harbour and very rare locally, nationally and internationally with birds using the banks in the harbour for roosting.

[12] Beyond the entrance to Otago Harbour, some important characteristics of the coastal marine area are:¹¹

(1) three proposed “marine protected areas”¹² being:

- a two kilometre stretch of coast, Pleasant River to Stony Creek to the north of Blueskin Bay and the harbour entrance;

⁷ Morton, J E and Millar, M C 1973. *The New Zealand Seashore*, Collins London.

⁸ Stewart, B G 2005. Peninsula Road Improvements Projects: Ecological Impact Assessment. Report prepared for OPUS International Consultants Ltd by Ryder Consulting Ltd.

⁹ G I Ryder evidence-in-chief 16(c) [Environment Court document 2].

¹⁰ “Foliose” means leaf-like.

¹¹ D L Meredith evidence-in-chief 66 [Environment Court document 3].

¹² South-east Marine Protection Forum, *Proposed Marine Protected areas for New Zealand’s South Island South-east Coast*, Volume 1, 2016, pp 174-175.



- two canyons (Saunders and Papanui Canyons) off the harbour entrance.
- (2) kelp forests (important habitat for fish) extending from Pipikaretu Point, on the Otago Peninsula, to Timaru, important habitat for commercial, recreational, social and cultural reasons¹³;
 - (3) the East Otago Taiapure, extending from Potato Point and westwards towards Warrington, and from there, northeastwards to Cornish Head which provides for the community's customary, recreational and commercial needs¹⁴. In fact, under the Ngāi Tahu Claims Settlement Act 1998 the whole of the Otago coastline, including the Otago Harbour, is a statutory acknowledgement area¹⁵;
 - (4) Blueskin Bay and the adjacent coastal waters which are important for fish migration, and for recreational and commercial fishing of flatfish, rock lobster and a range of other inshore fish species¹⁶.

[13] The PORPS does not itself identify any natural landscapes of high or outstanding natural character. However POL's witness Ms O'Callahan produced¹⁷ a map showing that two relevant areas are perceived as potentially being within an area of high or outstanding natural value or landscape:

- the Heyward Point dredging disposal site;
- the shipping channel.

[14] There are "nationally significant surf breaks" – as identified in the NZCPS – at:

- the Spit, Aramoana;
- Whareakeake, immediately west of The Spit.

We note that the surf break of The Spit is maintained in part by managed disposal of

¹³ South-east Marine Protection Forum, *Proposed Marine Protected areas for New Zealand's South Island South-east Coast*, Volume 1, 2016, pp 23-24.

¹⁴ Kāi Tahu ki Otago Ltd (2010) *Cultural Impact Assessment Project Next Generation*, pp 20-22.

¹⁵ Ngāi Tahu Claims Settlement Act 1998, Schedule 103.

¹⁶ NIWA, *Biological resources of Otago Harbour and offshore*, 2009.

¹⁷ M E O'Callahan rebuttal evidence Appendix 2 [Environment Court document 6A]. The map is based on *The Coastal Environment of Otago: Natural Character and Outstanding Natural Features and Landscapes Assessment – Dunedin City Section* (2015) commissioned by the Otago Regional and Dunedin City Councils to inform the reviews of the ORPS and City District Plan.



dredged sediment from the main channel of the harbour¹⁸, and there was some evidence that the break at Whareakeake is similarly affected.

[15] Ōtākou, the Otago Harbour, offers the only significant natural port location in Otago, and indeed in the South Island between Timaru and Bluff. Consequently, port facilities were developed at Dunedin and Port Chalmers in the early days of European settlement. Dredging of Otago Harbour started in 1865, and remains necessary to remove sediment as the channel fills in. A sand bar at the entrance initially restricted the size of vessels which could enter so the Aramoana mole was built in the late 1880s.

[16] After the shipping channel passes on the eastern side of the Aramoana Spit it turns west inside the shelter of the harbour and then runs south along the western shore for much of the harbour's length. The lower harbour channel, from the entrance to Port Chalmers, has recently been increased in depth to 13.5 metres¹⁹. The upper harbour channel to Dunedin is maintained at a depth of 7.5 metres.

[17] Port Chalmers is one of New Zealand's two deepest container ports. It services the largest container ships in the New Zealand trade. It is the country's third largest port by product value and one of New Zealand's major ports for cruise ships. The harbour is a regional centre for major export industries based on meat, dairy and forestry production, and also handles exports of fish, apples and other agriculturally based products. Imports include fuel, fertilizer and cement²⁰. POL has plans to extend its capacity to accommodate larger container and cruise ships.

[18] POL operations include full services for ships at berth and manoeuvring within the coastal marine area, as well as various wharf and land based activities such as²¹:

- berthing;
- departure and movement of ships;
- storage areas and cargo handling;
- handling of goods;
- all activities associated with the movement, storage and handling of cargo

¹⁸ D L Meredith evidence-in-chief 66 [Environment Court document 3].

¹⁹ D L Meredith evidence-in-chief 72 [Environment Court document 3].

²⁰ POL submission on the notified PORPS, July 2015.

²¹ D L Meredith evidence-in-chief 73 [Environment Court document 3].



within the port areas;

- embarking and disembarking of passengers, mainly from visiting cruise ships;
- transport to and from the area, which is handled by road and rail.

[19] POL employs about 310 staff and a number of other businesses are closely allied to port operations²². Port operations generated gross revenue of \$82.6 million, with a \$38.7 million tax-paid profit in the 2016/17 year²³. It is also important for tourism: of the 494 ships that visited in the 2016/2017 year, 79 were cruise ships²⁴.

[20] Resource consents granted recently – the “Next Generation” resource suite – enable port and channel works over the next 20–25 years to meet the needs of increasingly bigger ships. Current and proposed works include:

- extension of the multi-purpose wharf at Port Chalmers;
- maintenance dredging;
- disposal of material at three sites, including to maintain the nationally significant surf break at Aramoana;
- deepening the channel to 15 metres.

[21] In addition to the financial benefits which the ports’ activities bring to the region (and New Zealand) as a whole, there are actual and potential adverse effects from their operations. These relate to air quality, noise – which is seen as the most problematic issue for the local community – visual characteristics and the landscape lighting, public access to the harbour, buffer zones and transport. Dredging alone has a range of negative environmental effects in addition to the positive operational and financial gains. These include²⁵ social effects, physical effects on coastal processes, effects on water quality, effects on ecosystems, contamination, effects on recreational and commercial fishing, cultural impacts and natural hazards and hazardous substance risk.

²² D L Meredith evidence-in-chief 74 [Environment Court document 3].

²³ Including some sale of land and rental income: D L Meredith evidence-in-chief 74 [Environment Court document 3] citing *Annual Report 2017*, Port Otago Limited.

²⁴ *Annual Report 2017*, Port Otago Limited.

²⁵ D L Meredith evidence-in-chief 83 [Environment Court document 3] referring to POL’s Disposal of Dredged Material: Resource Consent Application and Assessment of Environmental Effects, 2016.



1.4 The problem scenarios

[22] For POL Mr Andersen suggests²⁶ there are four potential scenarios any one of which might result in the ports having to shut down if policy 4.3.7(e) in the POL version was not adopted. The scenarios are that the following activities would be prohibited if policy 4.3.7(e) in the POL version was not included:

- relocating navigation beacons along the shipping channel when it is widened ([pursuant to existing consents);
- disposal of dredging spoil;
- effects of activities on the surf breaks²⁷; and
- effect of inshore disposal grounds.

[23] For the Council Mr Logan submits that there are evidential difficulties with POL's scenarios²⁸:

(1) beacons²⁹

relocation of navigation beacons will be incidental to widening the shipping channel in accordance with the consents already granted. The existing channel is marked by beacons which are part of the environment at present. It is possible that the re-sitting of the beacons has none of the adverse effects which are to be avoided under the NZCPS.

(2) the Aramoana surf break³⁰

the Aramoana surf break is effectively created by the shipping channel because of the effect that the build-up on the southern side of the channel has on currents. Mr Logan submits if a natural event affected the channel, then it is likely the adverse effects on the surf break would stem from that event, not reinstatement of the channel.

(3) dredging spoil and surf breaks³¹

POL's own evidence³² is that these breaks are not adversely affected³² by the current, consented regime for deposition of dredged materials.

(4) disposal grounds

it is unclear how the use of existing disposal grounds for dredged materials might

²⁶ Port Otago Limited opening submissions para 2.10 [Environment Court document 4].

²⁷ Identified in policy 3.2.11 PORPS.

²⁸ Mr Logan's closing submissions at 41.1 to 41.4 [Environment Court document 12].

²⁹ Port Otago Limited opening submissions para 2.11.

³⁰ Port Otago Limited opening submissions para 2.12.

³¹ Port Otago Limited opening submissions para 2.13.

³² K Winders, evidence-in-chief, section V; M O'Callahan, evidence-in-chief, paras 6.12 to 6.15.



conflict³³ with policies 13 and 15 of the NZCPS if those areas are recognised as having high or outstanding values. Disposal can likely continue without being impeded by recognition of those values. Whether there are adverse effects at all requires a case-by-case assessment.

We concur with Mr Logan that there are certain factual difficulties.

[24] We find that the four general sets of effects of port operations described by Mr Andersen, even though slightly inaccurate on the evidence, are useful illustrations of potential problems for the safe and efficient operation of the ports which policy 4.3.7 would address (if there is to be a policy 4.3.7).

2. The preparation of the proposed Otago Regional Policy Statement

2.1 The scheme of the PORPS

[25] Before we set out the matters to be considered in relation to the challenged policy 4.3.7 it will be useful to give the context for those provisions. The PORPS contains four parts:

- A. Introduction
- B. Five chapters of objectives and policies
- C. Implementation
- D. Schedules and Appendices.

[26] Part B contains five chapters of objectives and policies about:

- 1. Integrated resource management
- 2. Kāi Tahu values
- 3. Natural resources and ecosystems
- 4. Resilient, safe and healthy communities
- 5. Use of the natural and built environments.

There is no express guide to the weight to be given to the various chapters where they may relate to the same resources. At first sight, all chapters of the PORPS appear to

³³ Port Otago Limited opening submissions para 2.14.



have equal weight. However as we shall see there are express directions that some policies “prevail” over others in certain circumstances, with the apparent implication that usually the reverse is the case.

[27] Three chapters – 3, 4 and 5³⁴ – in the PORPS are relevant to this proceeding.

Chapter 3 (Natural resources and ecosystems)

[28] Chapter 3 of the PORPS addresses Otago’s high quality natural resources and ecosystems. It includes a suite of objectives and policies to protect, maintain, or enhance the region’s natural values. The court will refer to the mediated version of Chapter 3, even though it has not yet been approved³⁵ by the court. Objective 3.1 is that “the functions and values of Otago’s ecosystems and natural resources are recognised, maintained or enhanced where degraded”. The most relevant implementing policy in the current context is³⁶:

Policy 3.1.10 Biodiversity in the coastal environment

Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

- (a) areas of predominantly indigenous vegetation in the coastal environment;
- (b) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
- (c) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
- (d) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;
- (e) habitats, including areas and routes, important to migratory species, and
- (f) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[29] Objective 3.2 seeks that significant and highly valued natural resources are “identified, and protected or enhanced where degraded”. Implementing policies provide a set of identifying and then managing policies for each of the following sets of resources: significant indigenous vegetation and habitats of significant indigenous fauna³⁷,

³⁴ Particularly policy 5.4.9 (Activities in the coastal marine area).

³⁵ The court has questions about the proposed amendments in this chapter as raised in the Minute of 31 August 2018 in ENV-2016-CHC-82 as the first numbered appeal (of many).

³⁶ PORPS.

³⁷ Policy 3.2.2 PORPS.



outstanding³⁸ and highly valued³⁹ landscapes and features, the outstanding⁴⁰ and high natural character of the coastal environment, surf breaks⁴¹, outstanding fresh water bodies⁴² and wetlands⁴³.

[30] Of those policies 3.2.2 is particularly relevant in this context. It states:

Policy 3.2.2 Managing significant indigenous vegetation and habitats

Protect and enhance areas of significant indigenous vegetation and significant habitats of indigenous fauna, by all of the following:

- (a) in the coastal environment, avoiding adverse effects on:
 - (i) the values that contribute to the area or habitat being significant;
 - (ii) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
 - (iii) Taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
 - (iv) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
 - (v) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
 - (vi) areas containing nationally significant examples of indigenous community types;
 - (vii) areas set aside for full or partial protection of indigenous biological diversity under other legislation;
- (b) beyond the coastal environment, and in the coastal environment in significant areas not captured by (a) above, maintaining those values that contribute to the area or habitat being significant;
- (c) avoiding significant adverse effects on other values of the area or habitat;
- (d) remedying when other adverse effects cannot be avoided;
- (e) mitigating when other adverse effects cannot be avoided or remedied;
- (f) encouraging enhancement of those areas and values that contribute to the area or habitat being significant;
- (g) controlling the adverse effects of pest species, preventing their introduction and reducing their spread.

[31] Policy 3.2.3 is to “identify areas and values” of outstanding natural features, landscapes and seascapes using the attributes stated in Schedule 3 to the proposed

38 Policy 3.2.4 PORPS.
 39 Policy 3.2.6 PORPS.
 40 Policy 3.2.9 PORPS.
 41 Policy 3.2.12 PORPS.
 42 Policy 3.2.14 PORPS.
 43 Policy 3.2.16 PORPS.



RPS. Policy 3.2.4 is also particularly relevant. In relation to the coastal environment it requires "... avoiding adverse effects on the outstanding values of the natural feature, landscape or seascape"⁴⁴.

[32] In relation to surf breaks there are two particularly relevant⁴⁵ policies. The first⁴⁶ repeats the NZCPS in recognising the surf breaks of national importance at Karitane; Papatowai; The Spit; and at Whareakeake. The next policy states:

Policy 3.2.12 Managing surf breaks of national importance

Protect surf breaks of national importance, by all of the following:

- (a) Avoiding adverse effects on the natural and physical processes contributing to their existence;
- (b) Avoiding adverse effects of other activities on access to, and use and enjoyment of, those surf breaks.

Chapter 4 (a resilient, safe and healthy region)

[33] The only issue identified in Chapter 4 of the PORPS is the very broad issue as to how to enable Otago communities to be "resilient, safe and healthy". Objectives 4.1 and 4.2 deal with natural hazards and climate change respectively and, despite their undoubted importance, are not directly relevant to this proceeding. Objective 4.3 of the PORPS is that "infrastructure is managed and developed in a sustainable way". This objective is now unchallenged. We add that "infrastructure" is defined in section 2 of the RMA to include a port-related commercial undertaking as defined by section 2(1) of the Port Companies Act 1988⁴⁷. The appellant is such an undertaking⁴⁸ under that Act.

[34] There is a suite of implementing policies approved by consent order⁴⁹. The first policy is:

Policy 4.3.1 Managing infrastructure

(1)⁵⁰ recognise and provide for infrastructure by all of the following:

- (a) protecting and providing for the functional needs of lifeline utilities and

⁴⁴ Policy 3.2.4(a) PORPS.

⁴⁵ Others relate to the role of surf breaks in relation to natural character, e.g. policies 3.1.11 PORPS; 3.2.8 PORPS.

⁴⁶ Policy 3.2.11 PORPS.

⁴⁷ Glossary (appeals version) p 208.

⁴⁸ It is also a lifeline utility under the Civil Defence Emergency Management Act 2001.

⁴⁹ Dated 6 July 2018.

⁵⁰ For ease of reference we have numbered the sub-policies as (1) and (2).



- essential or emergency services;
 - (b) increasing the ability of communities to respond and adapt to emergencies, and disruptive or natural hazard events;
 - (c) improving efficiency of natural and physical resource use;
 - (d) minimising adverse effects on existing land uses, and natural and physical resources;
 - (e) managing other activities to ensure the functional needs of infrastructure are not compromised.
- (2) policies 4.3.2 – 4.3.6 regarding infrastructure that has regional or national significance prevail where there is a conflict with policy 4.3.1.

The final sentence is the first of a number of policies which provide for a complex hierarchy under (and beyond) objective 4.3.

[35] All ports within the region are recognised⁵¹ as nationally and regionally significant infrastructure by the second implementing policy. Then as a result of mediation a rather poorly worded policy 4.3.3 has been added to the PORPS to “[p]rovide for the functional needs of infrastructure that has regional or national significance, including safety”. We assume this should be read as including safety as a functional need.

[36] The adverse effects of “nationally and regionally significant infrastructure” are then managed under the fourth policy which states:

Policy 4.3.4 Adverse effects of nationally and regionally significant infrastructure

- (1)⁵² Manage adverse effects of infrastructure that has national or regional significance, by:
- a) giving preference to avoiding its location in all of the following:
 - (i) areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal environment;
 - (ii) outstanding natural character in the coastal environment;
 - (iii) outstanding natural features and natural landscapes, including seascapes, in the coastal environment;
 - (iv) areas of significant indigenous vegetation and significant habitats of indigenous fauna beyond the coastal environment;
 - (v) outstanding natural character in areas beyond the coastal environment;
 - (vi) outstanding natural features and landscapes beyond the coastal environment;

⁵¹ Policy 4.3.2 PORPS.

⁵² For ease of reference we have numbered the sub-policies as (1) and (2).



- (vii) outstanding water bodies or wetlands;
 - (viii) places or areas containing historic heritage of regional or national significance;
- b) where it is not practicable to avoid locating in the areas listed in a) above because of the functional needs of that infrastructure:
- (i) avoid adverse effects on the values that contribute to the significant or outstanding nature of a) (i – iii);
 - (ii) avoid significant adverse effects on natural character in all other areas of the coastal environment;
 - (iii) avoid, remedy or mitigate, as necessary, adverse effects in order to maintain the outstanding or significant nature of a) (iv-viii);
- c) avoid, remedy or mitigate as necessary, adverse effects on highly valued natural features, landscapes and seascapes, in order to maintain their high values;
- d) avoiding, remedying or mitigating other adverse effects;
- e) considering offsetting for residual adverse effects on indigenous biological diversity.
- (2) where there is a conflict, policy 4.3.4 prevails over the policies under objectives 3.2 (except for policy 3.2.12), 5.2 and policy 4.3.1.

Policy 4.3.4 contains a complex hierarchy of directions as to how to manage the adverse effects of the relevant significant infrastructure. It identifies specific areas in which preference must be given to avoiding adverse effects. We elaborate on this policy when we explain its reference to the proposed policy 4.3.7 in contention.

[37] As intimated earlier, there is an important consequence of policy 4.3.7 which is easily overlooked when reading the PORPS. Policy 4.3.4(2) states that in most circumstances the policies under objectives 3.2, 5.2 and policy 4.3.1 prevail over those in Chapter 4 generally with the implication that all other policies in Chapter 4 defer to those in Chapter 3. Possibly that should be more clearly articulated (if that is indeed the Council's intention) at the beginning of Chapter 3. Obviously we do not need to (and have no power to) make any determination about that here. However, we observe that the apparent failure to be explicit about the relationship between policies is a recurring problem in the PORPS and in fact is part of the problem with the proposed policy 4.3.7 before the court in this proceeding.

[38] The way policy 4.3.4(1) works in respect of natural resources in the coastal environment is that it prefers locations which first avoid adverse effects of infrastructure on:



- (i) areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal environment;
- (ii) outstanding natural character in the coastal environment;
- (iii) outstanding natural features and natural landscapes, including seascapes.

— then if it is not practicable to avoid locating significant infrastructure in those three areas (or perhaps if the effects are indirect⁵³), the policy is⁵⁴ to avoid adverse effects “... on the values that contribute to the significant or outstanding nature of (a)(i) – (iii)”. While this looks reasonable at first sight, in fact some of the values of resources protected under the NZCPS are areas or at least have a spatial component: see, for example, NZCPS policy 11 (Indigenous biodiversity): sub-policies (a)(iii), (iv), (v), and (vi). Or quite often a value of an ONL may be its integrity or wholeness. There is a potential issue here as to whether the PORPS policy 4.3.4 gives full effect to the NZCPS. However, that is not an issue before us in this proceeding.

[39] The main focus in this proceeding is the avoidance policies in 4.3.4(1)(b)(i). POL’s concerns about them have driven its version of proposed policy 4.3.7.

[40] There are other implementing policies which are not relevant⁵⁵ for present purposes. As stated, the parties have agreed there should be a specific policy 4.3.7 for Port Otago. The questions are:

- (1) whether paragraphs (d) and (e) in proposed policy 4.3.7 give effect to the NZCPS and if so, in what form?
- (2) if not, how that might be remedied?

Chapter 5 (Use and enjoyment of Otago’s environment)

[41] There are two potentially relevant policies in Chapter 5. These were added by a Consent Order of the Environment Court dated 6 July 2018 and state:

Policy 5.4.3 Precautionary approach to adverse effects

Apply a precautionary approach to activities where adverse effects may be uncertain, not able to be determined, or poorly understood but are potentially significant or irreversible.

⁵³ For example, sediment dispersal into saltmarsh or cockle beds.

⁵⁴ Policy 4.3.4(1)(b)(i) PORPS.

⁵⁵ Policy 4.3.5 PORPS is to protect infrastructure with national or regional significance. Policy 4.3.6 relates to the national grid (for energy supply).



...

Policy 5.4.9 Activities in the coastal marine area

In the coastal marine area minimise adverse effects from activities by all of the following:

- (a) avoiding activities that do not have a functional need to locate in the coastal marine area;
- (b) when an activity has a functional need to locate in the coastal marine area, giving preference to avoiding its location in:
 - (i) areas of significant indigenous vegetation and significant habitats of indigenous fauna;
 - (ii) outstanding natural features, landscapes and seascapes;
 - (iii) areas of outstanding natural character;
 - (iv) places or areas containing historic heritage of regional or national significance;
 - (v) areas subject to significant natural hazard risk;
- (c) where it is not practicable to avoid locating in the areas listed in (b) above, because of the functional needs of that activity:
 - (i) avoid adverse effects on the values that contribute to the significant or outstanding nature of (b)(i-iii);
 - (ii) avoid significant adverse effects on natural character and natural landscapes in all other areas of the coastal environment;
 - (iii) avoid, remedy or mitigate adverse effects on values as necessary to preserve historic heritage of regional or national significance;
 - (iv) minimise any increase in natural hazard risk through mitigation measures;
 - (v) avoiding, remedying, or mitigating adverse effects on other values;
- (d) providing for the efficient use of space by requiring structures be made available for public or multiple use wherever reasonable and practicable;
- (e) applying a precautionary approach to assessing the effects of the activity where there is scientific uncertainty, and potentially significant or irreversible adverse effects.

[42] Policy 5.4.9 applies only to activities in the coastal marine area. In many ways it is very similar to the “significant infrastructure” policy 4.3.4 in Chapter 4. It too has a special preference for avoiding adverse effects in areas of significant ecological value, or of outstanding natural character, or in ONFs and ONLs. This policy 5.4.9 largely has the same complex structure as policy 4.3.4 and in our view is more relevant to dredging activity than policy 4.3.4. The difference is that the latter has the sub-policy (2) – as numbered by the court to draw its attention to its separate importance – which states:



- (2) where there is a conflict, policy 4.3.4 prevails over the policies under objectives 3.2 (except for policy 3.2.12), 5.2 and policy 4.3.1.

2.2 The matters to be considered

[43] The purpose of a regional planning scheme under the RMA is to⁵⁶:

... achieve the purpose of the Act 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.

Curiously, there is no mention here⁵⁷ of the statement of objectives to achieve that purpose, so in this context “policies” is to be read very broadly.

[44] A regional council must⁵⁸ prepare its RPS in accordance (relevantly) with its functions under section 30 RMA, Part 2, any relevant national policy statements and the NZCPS⁵⁹, and its obligation to prepare and have regard to⁶⁰ an evaluation report in accordance with section 32 RMA. A RPS must⁶¹ state the region’s significant resource management issues including those of significance⁶² to iwi authorities in the region. It must then state the objectives⁶³ to be achieved by the RPS, the policies for achieving⁶⁴ the objectives, and methods (excluding rules) to implement⁶⁵ those policies. It must also – and this raises a key issue in this proceeding – “give effect to”⁶⁶ any national policy statement and the NZCPS under section 62(3) RMA⁶⁷. “Give effect to” means simply “implement”: in *Environmental Defence Society Inc v The New Zealand King Company Salmon Ltd & Ors* (“*King Salmon*”)⁶⁸ the Supreme Court stated that the requirement to

⁵⁶ Section 59 RMA.

⁵⁷ This is remedied by section 62(1)(c) RMA.

⁵⁸ Section 61(1)(a) RMA.

⁵⁹ Section 61(1)(da) RMA.

⁶⁰ Section 61(1)(c) and (d) RMA.

⁶¹ Section 62(1)(a) RMA.

⁶² Section 62(1)(b) RMA.

⁶³ Section 62(1)(c) RMA.

⁶⁴ Section 62(1)(d) RMA.

⁶⁵ Section 62(1)(e) RMA.

⁶⁶ Section 62(3) RMA.

⁶⁷ Pre-RMLAA 2017 version of the RMA as per Schedule 12, Pt 2, cl 13 of the Resource Management Legislation Act 2017.

⁶⁸ *Environmental Defence Society Inc v The New Zealand King Company Salmon Ltd & Ors* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.



“give effect to” the NZCPS is intended to constrain decision-makers⁶⁹.

[45] In addition a regional council must (relevantly) have regard to⁷⁰ any management plans and strategies prepared under other statutes, and to regulations relating to (*inter alia*) Taiapure and Mahinga Kai⁷¹.

[46] On appeal we must have regard to⁷² the Council decision which seemed (the argument is unclear) to consider⁷³ that port operations in the region would be covered by the infrastructure policy 4.3.4. However, since the parties have at least implicitly – by putting forward Policy 4.3.7 – agreed that is not the case, the Council decision is of little relevance and we do not refer to it again.

2.3 The changes to section 32 RMA

[47] We should set out section 32 since it was completely replaced⁷⁴ in 2013. In its relevant⁷⁵ form it states:

32 Requirements for preparing and publishing evaluation reports

- (1) An evaluation report required under this Act must—
 - (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
 - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
 - (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - (iii) summarising the reasons for deciding on the provisions; and
 - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
- (2) An assessment under subsection (1)(b)(ii) must—

⁶⁹ *King Salmon* above n 68 at [91].

⁷⁰ Section 61(2)(a)(i) RMA.

⁷¹ Section 61(2)(a)(iii) RMA

⁷² Section 290A RMA.

⁷³ The Council decision dated 1 October 2016 p. 83 and 84.

⁷⁴ By section 70 Resource Management Amendment Act 2013 (2013 No. 63).

⁷⁵ It has been further amended by the 2017 legislation but that is not relevant here.



- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
 - (i) economic growth that are anticipated to be provided or reduced; and
 - (ii) employment that are anticipated to be provided or reduced; and
 - (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
 - (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.
- (3) If the proposal (an **amending proposal**) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an **existing proposal**), the examination under subsection (1)(b) must relate to—
- (a) the provisions and objectives of the amending proposal; and
 - (b) the objectives of the existing proposal to the extent that those objectives—
 - (i) are relevant to the objectives of the amending proposal; and
 - (ii) would remain if the amending proposal were to take effect.
- (4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.
- (5) The person who must have particular regard to the evaluation report must make the report available for public inspection—
- (a) as soon as practicable after the proposal is made (in the case of a standard or regulation); or
 - (b) at the same time as the proposal is publicly notified.
- (6) In this section,—
- objectives** means,—
- (a) for a proposal that contains or states objectives, those objectives;
 - (b) for all other proposals, the purpose of the proposal
- proposal** means a proposed standard, statement, regulation, plan, or change for which an evaluation report must be prepared under this Act
- provisions** means,—
- (a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change;
 - (b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

[48] The first part of subsection (2) seems to be economically orthodox in that it directs local authorities to assess the benefits and costs of implementing policies and methods. The second part is less so when it directs that the assessment should include opportunities for “economic growth” and for “employment”. “Economic growth” usually means broadly “an increase in the quantity of goods and services per head over time”. The reason the reference to “economic growth” in section 32(2)(a)(i) is puzzling is that, if



the term is used in that broad sense, then an analysis of the benefits and costs of a proposal⁷⁶ compared with an alternative (often called a counterfactual⁷⁷) should always reveal which produces more economic growth – see the 2017 Treasury Report adopted in *Self Family Trust v Auckland City*⁷⁸ (“*Self FT*”).

[49] The isolation of “economic growth” suggests that a narrower sense of economic growth – perhaps growth in quantifiable goods and services – is intended. Since “economic growth” in that narrow sense is only a part of economic growth in the wider sense (which is what is relevant under section 7(b) RMA) the traditional analysis of positive effects is probably all that is required under the augmented section 32(2) RMA.

[50] Slightly different considerations apply under section 32(2)(a)(ii) with its reference to employment opportunities. Orthodox economics suggest employment opportunities should be taken into account, but as a cost rather than a benefit – *Memon v Christchurch City Council*⁷⁹, although the court was often (as in that case) prepared to consider employment opportunities as a benefit. These now expressly have to be assessed under section 32 but whether as a benefit or cost is not stated.

[51] We consider that paragraphs (b) and (c) of section 32(2) have not changed the fundamental analysis in any significant way. They simply mean that the analysis of economic growth and employment prospects should be given in more detail (and wherever possible expressly rather than implicitly).

[52] Section 32(3) states that amending proposals should be assessed both against the relevant (un-amended) objective in the proposed instrument under consideration, and against the objectives and other provisions of the amending proposal itself. It is not clear how that helps: since those two sets of objectives and other provisions may work with or against each other.

[53] The new (2013) section 32AA states:

32AA Requirements for undertaking and publishing further evaluations

(1) A further evaluation required under this Act—

⁷⁶ Noting this is now a defined term; see section 32(6) RMA.

⁷⁷ Corresponding to the “change” defined in section 32AA RMA.

⁷⁸ *Self Family Trust v Auckland City* [2018] NZEnvC 49 at [352].

⁷⁹ *Memon v Christchurch City Council* (EnvC) C116/2003 at [78] and [79].



- (a) is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the **changes**); and
 - (b) must be undertaken in accordance with section 32(1) to (4); and
 - (c) must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and
 - (d) must—
 - (i) be published in an evaluation report that is made available for public inspection at the same time as the approved proposal (in the case of a national policy statement or a New Zealand coastal policy statement), or the decision on the proposal, is publicly notified; or
 - (ii) be referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with this section.
- (2) To avoid doubt, an evaluation report does not have to be prepared if a further evaluation is undertaken in accordance with subsection (1)(d)(ii).
- (3) In this section, **proposal** means a proposed statement, plan, or change for which a further evaluation must be undertaken under this Act.

[54] Section 32AA makes explicit what is implicit in section 7(b) RMA, that not only does an analysis of the costs and benefits of a proposed policy have to be carried out but so does an analysis of the costs and benefits of any relevant alternative. Because all efficiency is relative, that has been the practice of some local authorities and the Environment Court since *Memon v Christchurch City Council*⁸⁰ as elaborated on in *Port Gore Marine Farms v Marlborough District Council*⁸¹ and subsequent cases. A recent example is *Self FT*⁸² cited earlier. The new section 32 and 32AA RMA in 2013 appear both to adopt what was developing in practice anyway and to apply conventional social cost benefit analysis as explained in the Treasury *Guide to Social Cost Benefit Analysis* applied in *Self FT*⁸³.

[55] The weight to be given to the analysis is not stated in section 32 or section 32AA of the Act. It appears that is determined under section 7(b) RMA which requires the decision-maker to have particular regard to the result of the efficiency analysis.



⁸⁰ *Memon v Christchurch City Council* above n 79 at [74].

⁸¹ *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] et ff.

⁸² *Self FT* above, n 78.

⁸³ *Self FT* above, n 78 at [313] and [352].

3. What does giving effect to the NZCPS require in this context?

3.1 The relevant objectives of the NZCPS

[56] There are three relevant objectives. Objective 1 reads:

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
- protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and
- maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

Objective 1 is implemented by policies that preserve, protect or enhance the ecosystems and indigenous biodiversity of the coastal environment. There is a collection of policies in the NZCPS – policies 11, 13, 15 and 16 (which the parties called “the avoidance policies”) – which direct that, to achieve this objective, adverse effects should be avoided.

[57] Objective 2 states:

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.

[58] In *King Salmon* the Supreme Court observed about this⁸⁴:

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

⁸⁴ *King Salmon* above n 68 at [49].



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.

[59] Another objective of the NZCPS relevant to this proceeding states (relevantly):

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- ...
- the 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 Act is an important means by which the natural resources of the coastal marine area can be protected; and
- ...

[60] In *King Salmon* the Supreme Court stated⁸⁵:

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.



⁸⁵ *King Salmon* above n 68 at [51].

[61] A port is a classic example of an activity which is important for the wellbeing of the community, indeed for the region, and which can only occur in the coastal environment, so it should be enabled while protecting significant (natural) ecosystems and indigenous biodiversity⁸⁶ the natural character and landscape values of the coastal environment⁸⁷.

3.2 The authorities on the application of the policies in the NZCPS

[62] In *King Salmon* policies 6 (Activities in the coastal environment), 7 (Strategic planning), 8 (Aquaculture), 13 (Preservation of Natural character) and 15 (Natural features and natural landscapes) of the NZCPS were particularly relevant. The relevant parts of policy 6 were (and some are relevant here also):

Policy 6 Activities in the coastal environment

- (1) In relation to the coastal environment:
 - (a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;
 - (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
 - ...
 - (j) where appropriate, buffer areas and sites of significant indigenous biological diversity, or historic heritage value.

- (2) Additionally, in relation to the coastal marine area:
 - (a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations;
 - (b) recognise the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
 - (c) 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;
 - ...



⁸⁶ Objective 1 NZCPS.

⁸⁷ Objective 2 NZCPS.

[63] Policy 7 states:

Policy 7 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 Act 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".

[64] The Supreme Court said of this in *King Salmon*⁸⁸:

[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.

[65] In a particularly important passage, Arnold J continued⁸⁹ for the majority:

[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.

⁸⁸ *King Salmon* above n 68 at [54].

⁸⁹ *King Salmon* above n 68 at [55].



(Underlining added)

[66] We will not set out all the avoidance policies in the NZCPS but, to give their flavour, quote the commencement of policy 15. Policy 15(a) states:

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

[67] At first sight there is a conflict between (for example) policy 7 and 15. However, in *King Salmon* the Supreme Court's majority set out the way in which decision-makers should apply the NZCPS:

[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.

[68] In relation to the particular issue before it – which concerned the relationship of policy 8 (Aquaculture) to the avoidance policies – the Supreme Court stated:

[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. 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.

[69] *King Salmon* applied that approach by holding that policy 8, which contains a direction to recognise the significant existing and potential contribution of aquaculture to social, economic and cultural wellbeing of people and communities, in effect “deferred”⁹⁰ to policies 13 and 15 (two of the avoidance policies) which require the preservation of outstanding natural character and the protection of outstanding natural features and outstanding natural landscapes in the coastal environment. The Supreme Court held that avoidance policies such as 13(1)(a) and (b) (preservation of natural character) and 15(a) and (b) (natural features and landscapes) which state simply that adverse effects must be avoided, “provide something in the nature of a bottom line”⁹¹ because of the way in which they are expressed.

[70] There is one other important decision which is binding on us – the decision of the High Court in *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council*⁹² (“*Bay of Plenty*”). That case was concerned with objectives, policies and rules in a proposed regional plan relating to the provision of “regionally significant infrastructure”⁹³. The NZCPS policies of particular relevance were 6 (Activities in the coastal environment), 7 (Strategic planning), 11 (Indigenous biodiversity) and 13 (Preservation of natural character). In addition, there were a regional planning statement and some unchallenged objectives in the regional plan which was the subject of the

⁹⁰ This is our word, not that of Arnold J giving the majority judgment in *King Salmon*.

⁹¹ *King Salmon* above n 68 at [132].

⁹² *Royal Forest and Bird Protection Society of New Zealand v Bay of Plenty Regional Council* [2017] NZHC 3080.

⁹³ *Bay of Plenty* above n 92 at [2].



proceeding.

[71] The Environment Court had “started by focusing on the documents lowest in the planning hierarchy – ... the unchallenged objectives in the [regional plan]”⁹⁴. The High Court held that approach was wrong⁹⁵. It appears that the Environment Court considered the settled objectives in the Regional Plan sufficiently particularised the higher order objectives and policies in the RPS and, above that, against the NZCPS, and considered it did not need to go higher. The High Court held that approach “ignored the statutory directive contained in section 67(3) RMA”⁹⁶. Wylie J held that the Environment Court should have first referred to NZCPS policies 6 and 7. Wylie J analysed those and summarised them as being⁹⁷ “... broadly about planning, providing for growth, and the associated provision of infrastructure ... they are less prescriptive policies”.

[72] In contrast the more prescriptive policies 13 and 15 of the NZCPS were also relevant. The High Court quoted⁹⁸ *King Salmon* to the effect that these policies provide “something [in the] nature of a bottom line”⁹⁹. Wylie J continued:¹⁰⁰

In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 – which is in more [sic] prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.

It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8¹⁰¹.

As I have noted, the Environment Court’s consideration of the NZCPS policies was brief and

⁹⁴ *Bay of Plenty* above n 92 at [82].

⁹⁵ *Bay of Plenty* above n 92 at [83].

⁹⁶ *Bay of Plenty* above n 92 at [89].

⁹⁷ *Bay of Plenty* above n 92 at [113].

⁹⁸ *Bay of Plenty* above n 92 at [118].

⁹⁹ *King Salmon* above n 68 at [132].

¹⁰⁰ *Bay of Plenty* above n 92 at [120]-[123].

¹⁰¹ And see *Opoutere Ratepayers and Residents’ Association v Waikato Regional Council* [2015] NZEnvC 105, (2015) 19 ELRNZ 254 where the Environment Court considered the relationship between policy 7(1)(b) and policy 11.



incomplete. The Court concluded that policy 11(a) is “not absolute or binary”¹⁰² but it did not attempt to reconcile policy 11, or policies 13 and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.

In my judgment, the Environment Court erred in approving policies and a rule that do not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a).

With respect, while policy 6 of the NZCPS certainly provides for infrastructure, policy 7 does so only in passing. The word ‘infrastructure’ is not actually used although it falls naturally within the phrase “... other activities”. Further, as *King Salmon* confirmed (in a passage quoted above), policy 7 is about strategic planning (as its heading suggests). If there is a conflict between the decisions *King Salmon* is considerably more authoritative.

3.3 What are the NZCPS policies relevant to this proceeding?

[73] The particularly relevant policies in this proceeding are 6, 7, 9, 11 and 16. The relationship of policies 6 and 7, which we have already quoted, to the avoidance policies was the subject of the higher authorities discussed. The difference in this case is that policy 9 is relevant here. Because policy 9 deals with ports, it is central. It:

Recognise[s] that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by:

- (a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and
- (b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes.

The primary legal issue for this decision is whether policy 9 (Ports) is less deferential to the avoidance policies than policy 8 (Aquaculture) as decided in *King Salmon*, or policy 6 (Infrastructure etc.) in the *Bay of Plenty* decision. Before we turn to consider that issue we set out the avoidance policies in the NZCPS which are relevant.



¹⁰² *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 45 at [52].

Indigenous biodiversity

[74] The first particularly relevant avoidance policy in the current context is policy 11. It reads:

Policy 11 Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

- (a) avoid adverse effects of activities on:
 - (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
 - (ii) taxa that are listed by the International Union for conservation of Nature and Natural Resources as threatened;
 - (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
 - (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
 - (v) areas containing nationally significant examples of indigenous community types; and
 - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
 - (i) areas of predominantly indigenous vegetation in the coastal environment;
 - (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
 - (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
 - (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;
 - (v) habitats, including areas and routes, important to migratory species; and
 - (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[75] It is a notorious fact that New Zealand's indigenous biodiversity is generally declining¹⁰³, so the strong avoidance thrust of policy 11 needs to be given full weight. The policy is a curious mix of the very general and quite specific. It commences with a

¹⁰³ See the description in the MFE's *Our Land 2018* www.mfe.govt.nz/publications/environmental-reporting/our-land-2018.



direction “to protect” which means “to keep safe from harm, injury or damage”¹⁰⁴. And “harm” properly understood is an effect that causes detriment to the qualities and/or values in question¹⁰⁵. The policy requires simply “avoid[ance of] adverse effects of activities” without any distinctions about the whole complex range of potential effects. On the other hand it is usefully detailed about what biota or habitats of biota should be protected.

Natural character and ONL (policies 13(a) and 15(a))

[76] We have already quoted policy 15(a) of the NZCPS. Policy 13(a) is a similar avoidance policy.

Surf breaks (policy 16)

[77] This policy states:

Policy 16 Surf breaks of national significance

Protect the surf breaks of national significance for surfing listed in Schedule 1, by:

- (a) ensuring that activities in the coastal environment do not adversely affect the surf breaks; and
- (b) avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.

There are two sub-policies applicable to surf breaks of national significance as identified in Schedule 1. These policies have to be applied in two of the most dynamic geomorphological systems on the planet: the estuarine and neritic zones. It is very difficult to assess, let alone predict, the effects of human activities when there are continual and continuous cause-effect relationships over a number of different natural cycles – tidal/seasonal/storm cycles – all affecting a rough equilibrium (for a time).

[78] It does not seem to be generally recognised that only sub-policy (a) relates to activities in the coastal environment (and their effects); sub-policy (b) deals with the effects of activities outside the coastal environment. That distinction is important because the way the sub-policies manage those effects is also different. The first sub-policy –

¹⁰⁴ *Royal Forest and Bird Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219; (2015) 19 ELRNZ 122 at [63].

¹⁰⁵ *Zhi Li, Jing Niu and Weili Yang and Okura Holdings Limited v Auckland Council* [2018] NZEnvC 87 at [675].



16(a) – is to make certain that activities in the coastal environment – for example port activities of dredging or installation or maintenance of safety equipment – “do not adversely affect” the surf breaks. It is notable that the usual formula of “avoid adverse effects” is not used here (but is in policy 16(b)). In our view the phrase “do not adversely affect” is deliberately used to allow some flexibility over the way it is to be applied given both the complexity of the coastal marine area and the nature of human activities in the coastal environment.

[79] The second sub-policy uses the direct language of “avoidance”. What is slightly more obscure is the reference to avoiding adverse effects of “other activities”. That appears to apply to other activities which affect access to and the use and enjoyment of the breaks, rather than the breaks themselves.

The submissions on the legal issue

[80] Policy 9 contains a recognition that a sustainable national transport system requires an efficient network of ports. The question for this case is where, how and when the regional policy statement (and plans under it) should provide for ports, their development and their connections to transport on land. Mr Andersen’s primary submission for POL is that there is a conflict between policy 9 of the NZCPS providing for ports and the “avoidance” policies. He submits that the joint witness statement of the planners confirms the “potential” for conflict and that the Council seems to recognise the conflict but takes the view that policy 9 is subject to the “avoidance” policies and therefore the port can only operate if it can comply with them. Mr Andersen submits that policy 9 requires¹⁰⁶:

- (a) a recognition of the efficient national network of safe ports; and
- (b) having recognised the safe networks, considering where how and when to provide “for the efficient and safe operation of these ports” i.e. policy 9 requires that the actual ports that make up the efficient national network of safe ports be specifically recognised and their requirements provided for in the [PORPS].

[Underlining added].

[81] For the Council Mr Logan submits that¹⁰⁷:

¹⁰⁶ POL closing submissions at 3.2 [Environment Court document 11].

¹⁰⁷ The Council opening submissions 64 to 67 [Environment Court document 1].



... The words "recognise" and "considering" allow decision-makers a degree of discretion. They must "recognise" and "consider"; but how recognition is effected and what results from "consideration" are matters for the judgment of the decision-maker. That discretion is fettered by the other requirements of the NZCPS.

...

Policy 9 is not a standalone code for port activities. Policy 9 does not override the stringency of the avoidance provisions in the NZCPS. In these respects it is analogous to Policies 6 and 8. Neither policy deals with the effects of the activities to which they relate.

[82] Mr Logan reminds us that the majority of the Supreme Court in *King Salmon* emphasised the importance of "paying close attention" to the way in which the NZCPS' policies are expressed. Some policies give Councils considerable flexibility and scope for choice. Others are more specific and directive. Policies which use the word "avoid" come within the second category, so that "avoidance" policies take precedence over policies to "provide for" or "consider" or "recognise". He submitted that in these proceedings the avoidance policies restrain policy 9 just as they do policies 6 and 8.

[83] The Societies too say that there is not a conflict¹⁰⁸. Put simply, Mr Allan's argument is that any one of the avoidance policies trumps the earlier policies. This gives rise to the difficulty (suggested on the facts of this case by the scenarios discussed in part 1.4 of these Reasons) raised by William Young J giving his minority decision in *King Salmon*¹⁰⁹. He was concerned that regional councils would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character"¹¹⁰. He was concerned that there might be disproportionate outcomes as a result of the strict approach inherent in the majority judgment in *King Salmon*.

3.4 How does policy 9 (Ports) work with the other NZCPS policies?

[84] What has been largely overlooked in the submissions is the relevance of NZCPS policy 7. Because it is difficult to see how policy 9 can be read as deferring to policies 11 and 16 whenever there is a probability of more than minimal adverse effects on the

¹⁰⁸ Societies' submission para 39 [Environment Court document 9].

¹⁰⁹ *King Salmon* above n 68.

¹¹⁰ *King Salmon* above n 68 at [201].



values protected by policies 11 and 16, it seems to us that one answer may lie in the NZCPS policy 7's formula for identifying areas where development is appropriate and others where it is inappropriate.

[85] It is useful to recall that policy 6 directs¹¹¹ local authorities to consider the rate at which public infrastructure should be enabled without compromising the other values of the coastal environment. Policy 7 (strategic planning) then expands that policy both in its scope and in the recipes given to local authorities (when preparing policy statements or plans) for dealing with the problems. It stipulates¹¹² that regional policy statements (and plans) should consider where, how and when to provide for "other activities" in the coastal environment, and to determine areas where they reasonably could be placed and others where they might be inappropriate¹¹³. The ports policy in the NZCPS then manages a specific type of infrastructure with more specific policies than for both the general activities policy and the strategic planning.

[86] On the question of appropriate locations for activities, we refer to policies 6 and 7 for one further point. Policy 6(2)(c) recognises that some activities have a functional need to be located in the coastal marine area and therefore they should be provided for in appropriate places. Policy 7(1)(b)(ii) then assists by directing local authorities to identify areas where particular "activities and forms of ... development":

- (ii) may be inappropriate without consideration of effects through a resource consent application, notice of requirement for a designation or Schedule 1 of the Act process.

[87] We have already described how the *Bay of Plenty*¹¹⁴ decision held that where avoidance policies also apply then policies 6 and 7 defer to the avoidance policies even where the proposed infrastructure is regionally significant. However, the *Bay of Plenty* decision did not expressly refer to policy 7(1)(b)(ii) in relation to the avoidance policies. Rather Wylie J wrote¹¹⁵:

Policy 7 deals with strategic planning. It provides that, in the preparation of regional plans, there is a need to consider where, how and when to provide for future residential and rural residential settlement, urban development and other activities in the coastal environment at

¹¹¹ Policy 6(1)(b) NZCPS.

¹¹² Policy 7(1)(a) NZCPS.

¹¹³ Policy 7(1)(b) NZCPS.

¹¹⁴ *Bay of Plenty* above n 92.

¹¹⁵ *Bay of Plenty* above n 92 at [112] and [113].



both a regional and district level. There is also a need to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate, or may be inappropriate without consideration of the effects through a resource consent application.

These policies are broadly about planning, providing for growth, and the associated provision of infrastructure, in a sustainable and interpreted way. They are less prescriptive policies.

[88] With respect policy 7 is about more than infrastructure. In relation to the effect of policy 7 we either distinguish *Bay of Plenty* on the ground that the facts in this case raise the application of a further policy, or prefer to follow the more authoritative and (with respect) more careful and detailed decisions of the Supreme Court in *King Salmon*. In specific, 'hard', cases a regional policy statement may suggest that the issues be resolved by plans requiring resource consent applications. This is not to endorse the too-common practice of making land use discretionary over entire landscapes, but to recognise that for regionally and nationally important infrastructure such as ports, providing for a resource consent regime is a legitimate option for a regional policy statement.

[89] Policy 11(a) of the NZCPS provides protection against adverse effects of development on certain indigenous taxa or in specific limited areas of the coastal environment. These taxa and areas are those which are listed in policy 11(a) NZCPS. Policy 9 recognises that an efficient network of safe ports is required for a sustainable national transport system and this should be identified by considering "where, how and when" to provide for ports all against the background¹¹⁶ that policy 11 provides: namely, that port development "cannot occur"¹¹⁷ if one of the taxa or areas identified in policy 11(a) will suffer adverse effects.

[90] Some effects of port operations may be transitory. We note that the Supreme Court clearly recognised¹¹⁸ that rules would not normally prohibit (port) activities if effects are "minor or transitory" – although that must presumably be read in light of the adverse cumulative effects in policy 7(2) NZCPS.

[91] In summary, if the NZCPS policies for avoidance of adverse effects on natural

¹¹⁶ *King Salmon* above n 68 at [131].

¹¹⁷ *King Salmon* above n 68 at [131].

¹¹⁸ *King Salmon* above n 68 at [145].



character and outstanding natural landscape (13 and 15) are (incorrectly) considered only with policy 9, then there appears to be a conflict since policy 9 does not have the deferential qualification that the infrastructure policy (6(1)(b)) has (the phrase "... without compromising the other values of the coastal environment"). However, the NZCPS is more nuanced than that. First, there is no suggestion that the avoidance policies automatically require activities which may cause adverse effects to be prohibited¹¹⁹. Second, policy 7 (strategic planning) recognises that some activities which have the potential to cause adverse effects – and are therefore inappropriate at first sight – may need to be considered on a case by case basis so that the potential adverse effects can be considered in the context of a specific factual and predictive situation. Policy 7 suggests a procedural resolution for a substantive conflict. It suggests that the methods for resolving the conflict include methods in a subordinate plan requiring a resource consent be applied for and determined having regard to purposively framed objectives and policies.

[92] We hold that reference to policy 7(1)(b)(ii) may be used to resolve any conflict between the directory provisions of policy 9 (Ports) and the even more directory avoidance policies of the NZCPS.

4. Considering the options for policy 4.3.7

4.1 What are the reasonably practicable options for port infrastructure?

[93] Under section 32(1)(b)(i) RMA we must identify the other reasonably practicable options for achieving the objectives of the PORPS but always bearing in mind that we must give effect to the NZCPS amongst other statutory obligations.

[94] Practically, there are three proposed versions of policy 4.3.7 (d) and (e) before us. Each gives a different effects management regime. They are:

- (1) That proposed by Ms D Meredith for the Council in primary evidence¹²⁰ (the "ORC option") and supported by Ms M E O'Callahan for POL in her primary evidence. It reads:

(d) providing for those ports by:

¹¹⁹ *King Salmon* above n 68 at [55].

¹²⁰ D Meredith evidence-in-chief at 112 [Environment Court document 3].



- (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment;
 - (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
 - (iii) considering the use of adaptive management as a tool to avoid adverse effects;
- (e) where the efficient and safe operation of Port Otago activities cannot be provided for while achieving the policies under objectives 3.1 and 3.2 avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area; and
- (f) otherwise managing effects by applying policy 4.3.4.
- (2) That proposed by Ms O'Callahan in her rebuttal evidence¹²¹ ("the POL option"). For comparison purposes we quote this again. It would see subparagraphs (d) and (e) amended as follows:
- (d) providing for those ports by:
 - (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment; and
 - (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
 - (e) where the efficient and safe operation of Port Otago activities cannot be provided for while achieving the policies under objectives 3.1 and 3.2 avoid effects as far as practicable and use adaptive management as necessary to protect the outstanding or significant nature of the areas;
 - (f) otherwise managing effects by applying policy 4.3.4.
- (3) A third option is to have no policy 4.3.7(e) at all. The Societies support deletion of paragraph (e) from policy 4.3.7 altogether, as proposed by Mr M H Langman in his primary evidence¹²². We will call this "the Societies' option".

[95] In an honourable if misguided attempt at compromise Ms Meredith¹²³ gave another option for (e). However, we do not consider that further because any policy that resorts to stating simply "... giving effect to the NZCPS in the coastal environment" lacks utility, in that it does not address the issues.

¹²¹ M E O'Callahan rebuttal evidence at 34 [Environment Court document 6A].

¹²² M H Langman evidence-in-chief at 6.1 [Environment Court document 10].

¹²³ D L Meredith rebuttal evidence at 30 [Environment Court document 3A].



4.2 Efficiency considerations

[96] Because there is no such thing as absolute efficiency, any analysis of efficiency involves comparison of the status quo (the decisions version) against at least one of the other policy options for 4.3.7(d) and (e) in achieving objective 4.3 (that infrastructure is managed and developed in a sustainable way)¹²⁴. Section 32AA RMA, which requires an assessment under section 32 of each of the options or possible "amending proposals", is complemented by section 7(b) of the RMA. That requires particular regard to the efficiency of the use and development of the resources: *Self FT*¹²⁵.

[97] No attempt was made by any witness to quantify, or even to compare, the net benefits of the options, although some specific costs were identified.

[98] Ms O'Callahan referred¹²⁶ to the delays (which have a cost) and the direct costs of applying for resource consent. We have little doubt that the transaction costs of requiring resource costs are considerable, as are the opportunity costs if, for example, very large ships cannot enter the port because the channel has not been deepened or widened.

[99] On the other hand there are potential "environmental costs" in the form of effects on bequest values as identified in *Self FT*¹²⁷. These are the effects on biodiversity, landscape and natural character, and (possibly) the effects on surf breaks, which were recognised, if only implicitly, by Mr Langman, in his evidence. He wrote¹²⁸:

In relation to efficiency, relying on the wording of the directive protective policies (as preferred by Forest and Bird) is efficient. It provides a clear bottom line to be achieved. Any activity locating in the coastal environment will have a clear guide as to the outcomes to be achieved, and the allowable level of effects on those matters which have national significance.

¹²⁴ Objective 4.3 PORPS: this of course begs the questions "what is a sustainable way?" and "does it include the bottom lines in Chapter 3 PORPS?". We discuss these issues in Part 4.3 of these Reasons.

¹²⁵ *Self FT* above n 78 at [311] and [314].

¹²⁶ M E O'Callahan rebuttal at 16 [Environment Court document 6A].

¹²⁷ *Self FT* above n 78 at [316], [354] and [357].

¹²⁸ M H Langman evidence-in-chief para 9.4 [Environment Court document 10].



[100] Mr Langman added¹²⁹:

It is my view that needing to consider the costs and benefits of Council's and Port Otago's preferred version is not necessary, as there is a jurisdictional bar to considering their approach, given it does not properly accord with, or give effect to, the higher order documents.

That is not evidence, but an assertion about the law which we hold is incorrect. We hold that when read as a whole the NZCPS contemplates that adverse effects of port structures on certain landscapes or ecosystems are to be avoided in almost all circumstances but not in all, so there is no jurisdictional bar to considering the express costs of protecting the environment. Indeed the whole point of section 32(2)(a) and (b) and of section 32AA is that costs and benefits should be quantified if practicable. That has the advantage that the community (and the region) can be clear-sighted about what the costs of environmental protection are. But equally the analysis needs to make an – in this case unquantified – value judgment about the benefits of protecting the life-supporting capacity of the biodiversity estuarine and near-shore (neritic) ecosystems, and of protecting the natural character of the coastal environment.

[101] Ms Meredith said little about efficiency¹³⁰:

Proposed Policy 4.3.7 recognises that there may be times when the safe and efficient operation of the port risks damage to significant indigenous biodiversity and identifies a path to resolve the conflict – through protection of the significant nature of the area, and through considering the use of adaptive management tools.

The benefit of this specific approach for ports is to enable the port to develop safely and efficiently to meet international shipping demand, where there is uncertainty regarding the risk of adverse effects. Regulatory agency and public scrutiny of monitoring results ensures that adverse effects can be quickly identified and remedial action taken. Such a policy approach provides a more effective and efficient way of addressing port activities as it recognises that:

- Some adverse are not fully known, for example because of the limitations of modelling;
- some adverse effects are unknown, or not expected.

¹²⁹ M H Langman evidence-in-chief para 9.7 [Environment Court document 10].

¹³⁰ D L Meredith evidence-in-chief [132] and [133] [Environment Court document 3].



Those references appear to be to the technical efficiency of port operations rather than to the efficient use of the relevant resources generally, so it does not assist us under section 32 RMA. At most she recorded¹³¹ in her conclusion that “the benefits and costs” of having specific provisions for ports in the RPS warrant including them, but she does not identify what those are, nor is there any comparison with the benefits and costs of any of the other options or (most importantly) of the status quo.

4.3 Comparing the effectiveness of the options

[102] The next thing to be assessed under section 32 RMA is the effectiveness of the options in achieving the objectives of the PORPS. In relation to ports the most relevant objective is 4.3 which is that “[i]nfrastructure is managed and developed in a sustainable way”. Some of the other objectives in Chapter 4 give some guidance as to what is sustainable (e.g. objective 4.1 – minimising the risks of natural hazards, or in 4.2 – being prepared for and adapting to the effects of climate change).

[103] But at first sight, the most relevant guides to sustainability in objective 4.3 are those in Chapter 3 relating to the region’s natural resources and ecosystems. There are only two relevant objectives – objectives 3.1 and 3.2 – and they are both very general. The first is to recognise and maintain (or enhance where degraded) the functions and values of natural resources and ecosystems¹³² and the second is to protect (or enhance where degraded) all significant and highly valued resources.¹³³ If those objectives are all that need to be looked at, they are so general (more general than the NZCPS) that they are incomplete or unclear so that guidance from the NZCPS on Part 2 of the Act will be necessary. On the facts of this case, any of the options for policy 4.3.7 of the PORPS could be seen as implementing the two objectives.

[104] The unhelpful generality of the objectives is implicitly recognised in the POL option for policy 4.3.7(e) which refers not to objectives 3.1 and 3.2 but to the policies under them. That suggests an alternative approach, not advanced by the parties, which is that the identified policies in Chapter 3 should be considered either as objectives for the purposes of Chapter 4 (since Chapter 3’s policies set out in some detail how to manage adverse effects on the region’s resources) or, at least, as prevailing over the

¹³¹ D L Meredith evidence-in-chief [162] [Environment Court document 3].

¹³² Objective 3.1 PORPS.

¹³³ Objective 3.2 PORPS.



Chapter 4 policies. Then policy 4.3.4(2)¹³⁴ expressly states that the policies implementing objective 3.2 and the policies under objective 5.2 and policy 4.3.1 defer where there is a conflict between them and policy 4.3.4.

[105] We consider that to assess the effectiveness of the options for policy 4.3.7, its place in the scheme of policies which implement objective 4.3 must be considered, particularly its relationship to policy 4.3.4. We have already described how policy 4.3.4(2) overrides all the policies implementing objective 3.2 (except curiously, Policy 3.2.12 for the surf breaks of national importance). Policy 4.3.4(1) then provides a set of policies – replacing those under objective 3.2 – for managing the adverse effects of nationally and regionally significant infrastructure. The general prescriptions are that:

- significant adverse effects on natural character and natural landscapes on the coastal environment are to be avoided¹³⁵; and
- all other adverse effects are to be avoided, remedied or mitigated¹³⁶.

[106] Policy 4.3.4(1)(b) then provides an important exception to those general prescriptions where the nationally or regionally significant infrastructure may cause adverse effects on “the values that contribute to the significant or outstanding nature”¹³⁷ of¹³⁸:

- (i) areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal environment;
- (ii) outstanding natural character in the coastal environment; and
- (iii) outstanding natural features and natural landscapes, including seascapes, in the coastal environment.

One of the key issues in this case is whether the region’s ports are such important infrastructure that they should be special subsets of the already small special subset which is policy 4.3.4(1)(a)(i) to (iii) and 4.3.4(1)(b)(i).

¹³⁴ Our numbering of sub-policy (2). As approved in the Consent Order this important sub-policy is simply tagged onto the end of policy 4.3.4.

¹³⁵ Policy 4.3.4(1)(b)(ii).

¹³⁶ Policy 4.3.4(1)(b)(iii) and (c) and (d).

¹³⁷ Policy 4.3.4(1)(b)(i).

¹³⁸ Policy 4.3.4(1)(a).



4.4 What are the risks of acting or not acting?

[107] The safe operation of ports is a matter of national importance¹³⁹. Port safety is governed (in part) by the Maritime Transport Act 1994 and rules made under it. As far as possible maritime safety obligations can and should be given effect to. In that sense¹⁴⁰ safety is more important than mere (technical) transport efficiency.

[108] As for section 32(2)(c) RMA Mr Langman's view was that¹⁴¹:

... that there is sufficient information available to make a decision on this policy, having regard to the evidence provided to date. As such, no decision is needed as to the risk of acting or not acting in relation to the making of this provision.

While we have at various times in our deliberations been inclined to adopt Mr Langman's view, we consider on reflection that it would be better for the PORPS to give more guidance and we make some suggestions later.

5. **Does the tentatively preferred version of PORPS policy 4.3.7(e) give effect to the NZCPS?**

5.1 Introduction: the words of policy 9

[109] All parties agreed that the PORPS must give effect to the NZCPS. For the Societies, Mr Allan submitted¹⁴²:

The requirement for policies to achieve objectives is a separate and distinct obligation to "giving effect to" the NZCPS¹⁴³. The requirement to "give effect to" the NZCPS applies to the Proposed RPS as a whole – both its objectives and its policies. Agreement that the Proposed RPS's objectives are appropriate and give effect to the NZCPS does not open the door for any policy direction to achieve those objectives. If the NZCPS stipulates a specific policy direction applies, then it must. By way of illustration, the Societies consider that policy 4.3.4 of the RPS reflects that approach while the proposed policy 4.3.7(e) does not.

¹³⁹ NZCPS policy 9.

¹⁴⁰ And indeed under section 5(2) RMA itself.

¹⁴¹ M H Langman evidence-in-chief para 9.8 [Environment Court document 10].

¹⁴² Opening submissions for the Societies at 14 [Environment Court document 9].

¹⁴³ *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [73].



[110] In the eyes of the planners the issue came down to whether policies 11, 13 and 15 trump policy 9 of the NZCPS, when read in the context of all the policies of the NZCPS. It was interesting that the planning witnesses, when assessing the effectiveness of the options for proposed policy 4.3.7, did so in terms of the NZCPS, rather than against achieving the other objectives (and policies) of the PORPS.

[111] For the Societies Mr Langman was of the opinion that¹⁴⁴ removing ambiguity around the level of effects required for port activities will ensure that there is certainty for the management of the natural resources subject to the protective elements of NZCPS policies 11, 13, 15 and 16. In his opinion, this would better protect those resources, and provide the community with measurability and certainty as to the effectiveness of the provisions. In summary he opined in relation to the section 32 assessment, that of the versions of proposed policy 4.3.7 before the court the Societies' version is more appropriate in relation to objective 4.3 because¹⁴⁵:

- it recognises the finite nature of New Zealand's highly valued natural resources covered by the protective elements in NZCPS policies 11, 13, 15 and 16;
- it removes the ability for incremental and cumulative adverse effects on those nationally significant resources;
- it provides a clear bottom line as to how sustainable management is to be achieved; and
- it properly gives effect to the NZCPS.

[112] Ms O'Callahan stated that¹⁴⁶ the POL version of 4.3.7(e):

... allows for effective and efficient policy interpretation in the future, when compared with the earlier versions of the document (notified and decisions versions) that simply reiterated conflicting provisions as for the *pre-King Salmon* NZCPS document. I support the wording of sub-clause (e) in policy 4.3.7 but note there could be alternative wording options for sub-clause (e) which would also resolve the conflict without reverting to "avoid, remedy or mitigate". For example, using the word "balance", to codify a case-by-case balancing approach.

[113] An answer as Ms O'Callahan suggested, may lie in approaching each situation case-by-case. Her views echo those of Ms Meredith who, as we have recorded, pointed

¹⁴⁴ M H Langman evidence-in-chief para 9.5 [Environment Court document 10].

¹⁴⁵ M H Langman evidence-in-chief para 9.6 [Environment Court document 10].

¹⁴⁶ M E O'Callahan evidence-in-chief 6.10 [Environment Court document 6].



out that policy 9 (Ports) of the NZCPS is not qualified in the way policies 6 or 8 NZCPS are, e.g. by the use in Policy 6(1)(b) of the phrase "... without compromising the other values of the coastal environment". We consider that, given the undoubted regional (and national) importance of Port Otago's activities, more detail as to how their safety and efficiency (in a narrow sense) can be facilitated is appropriate

[114] While much of the language of policy 9 is discretionary or flexible rather than prescriptive, to use the categorisations applied in *King Salmon*¹⁴⁷, a prescriptive verb – "requires" – is used to ensure an efficient network of safe ports. These must be able to service both national and international shipping, with the implication that even large ships need to be catered for if not necessarily the very largest supertankers or container ships. The core of policy 9 is accordingly strongly prescriptive even if there is some discretion as to where, when and how ports are to be located and developed.

[115] The word "efficient" occurs four times in policy 9 so it too is obviously important. It is used to qualify different attributes:

- "efficient national network";
- "efficient connections";
- "efficient operation" (twice).

We consider that "efficient" in each of those contexts is being used in a relatively narrow and technical sense of "fast with minimal delays or a maximum output with the given resources". Of course our reference to "resources" highlights the difficulty: what if one of the "given" resources (i.e. a resource to be used either directly or indirectly for channel works) is, for example, a nationally significant area of seagrass?

[116] The phrase "an efficient ... network of safe ports" – with its use of the indefinite article and the adjective "efficient" – shows that policy 9 contemplates not only the existing ports around New Zealand in their current state but also the potential development of new ports, and more frequently perhaps, the development and improvement of existing ports. The policy recognises that every port in New Zealand is an entrepôt (given our geographic isolation) so efficient connectivity is important. Two sub-policies to achieve the efficient network of ports are expressly identified, but without precluding others. Sub-

¹⁴⁷ *King Salmon* above n 68 at [129] and [127].



policy (a) is to ensure that other coastal development does not adversely affect the efficient and safe operation of "these ports" i.e. the ports recognised as part of the national network.

[117] Sub-policy 9(b), which is more directly relevant to this proceeding, requires consideration of "where, how and when" to provide for the safe and efficient operation of ports, the development of their capacity for shipping and their connections with other transport modes. That wording is not ideally clear because at first sight the phrase "where, how and when" qualifies "... to provide in regional policy statements and plans". That would mean the policy decision is simply a set of neutral grammatical instructions to consider when a policy statement should include a statement about the regional ports, and what the wording should be. But in our view policy (b) is more substantive than that. It is intended by Parliament to be read as: "considering where, how and when to provide (in regional policy statements and in plans) for the efficient and safe operation of these ports ...". The brackets make the meaning of policy (b) clearer.

[118] We consider that the reference to "these ports" in policy 9 is to:

- existing ports in their current state;
- existing ports with changes; and
- potential future ports

— as contemplated by the relevant policy statements and plans.

[119] In summary, the most relevant and detailed part of policy 9 is sub-policy (b) which requires local authorities (and the court on appeal) to consider where, how and when to provide for three matters:

- the efficient and safe operation of existing and future ports;
- the development of their capacity for shipping; and
- connecting shipping with other transport modes.

[120] While there are choices to be made as to where, how and when these facilities are to be provided, there is no discretion about if they must be put in place to ensure New Zealand shipping services can continue. The other particularly important aspect of policy 9(b) is that it contemplates the development of ports beyond their existing characteristics



(intensity of use, area, volume) in 2010 when the NZCPS came into force. Again there is no statement this must not detract from other values of the coastal environment.

[121] Overall, while policy 9 NZCPS is more resolute in its terms than policies 6 and 7, it is not wholly prescriptive. New ports need to be supplied but not in any particular place or at a particular time; and even existing ports cannot necessarily expand indefinitely and whenever their operators want. All these are part of the questions “where, when and how”?

5.2 Can (and should) policy 4.3.7 contain an exception to the avoidance policies?

[122] Having held that a policy in a subordinate instrument may give some effect to policy 9 of the NZCPS supported by Policy 8 without giving full effect to one or more of the avoidance policies in the NZCPS, the next issue is, should the proposed policy 4.3.7 provide an exception to the avoidance policies in the NZCPS? In our view the answer depends first on the place of its exceptional policy in the proposed plan or regional policy statement and, second, on the resources involved.

[123] The first matter to observe about the effectiveness of proposed policy 4.3.7 in the POL version (especially sub-paragraphs (d) and (e)) is how complex the PORPS is becoming with the introduction of policy 4.3.7. Even without that policy there are three sets of policies which potentially govern the activities of the port companies:

- the policies implementing objectives 3.1 and 3.2;
- policy 4.3.4 (significant infrastructure); and
- policies 5.4.3 (precautionary approach) and 5.4.9 (activities in the coastal marine area).

[124] The introduction of the POL version of policy 4.3.7(d) and (e) adds an extra layer of complexity to an already complicated policy framework, before adding the even more convoluted subparagraph (f) which is to “... otherwise apply in 4.3.4 ...”. Presumably the point of 4.3.7 (f) is to gain the policy 4.3.4(2) over-ride.

[125] In our view, in order to improve the coherence and coordination of the PORPS, it should be made clear first that the proposed ports’ policy is related to the bottom lines in the policies implementing objective 3.2 of the PORPS, and second that it is a backup to



policy 4.3.4 which expressly exempts some infrastructure from having to comply with objective 3.2's policies.

[126] We consider that the application of policy 7 of the NZCPS suggests an amendment to the POL's proposed 4.3.7(d) to (f) by providing for case-by-case assessment of proposals which might affect the values in paragraphs 4.3.4(1)(a)(i) to (iii).

[127] We will now turn to consider what needs to be done to protect the specific resources in the coastal environment recognised as being of value under the NZCPS, as particularised in Chapter 3 of the PORPS.

5.3 Should effects on different values be treated differently?

Indigenous biodiversity

[128] We consider that the potential conflict between policies 9 and 11 of the NZCPS can be resolved by reference back to Part 2 of the RMA and section 6 in particular. Unlike section 6(a) and (b) RMA which only protect the coastal environment and outstanding natural landscapes from "inappropriate development and use", section 6(c) RMA is more absolute in its terms. That reinforces the strength of the avoidance aspect of policy 11(a) of the NZCPS and highlights an apparent conflict with policy 9 if only those two policies are considered. However, as we have recorded, both those policies must be read with NZCPS policy 7, and that suggests "conflicts" be resolved on a case-by-case basis by requiring applications for resource consent to be made.

Natural Character and ONL

[129] We will treat effects on natural character and in ONLs together, although there are separate policies in the NZCPS. Both policies have a different matter of national importance behind them in that ONLs and natural character are usually to be avoided where subdivision, use and development is inappropriate¹⁴⁸. It seems to us that effects of port activities on these resources might have a (slightly) lower standard applied when requiring a resource consent to be obtained. For example it might be the case that relocated navigation beacons – [22] – may not have any different or greater effect on an ONL than existing beacons. The two could co-exist – as the Court of Appeal found farm

¹⁴⁸ Section 6(a) and section (6)(b) RMA.



buildings could co-exist with an ONL on Waiheke in *Man O' War Station Limited v Auckland Council*¹⁴⁹.

Surf breaks

[130] We have described the complex relationship between port operations and the surf breaks – the cross-section and alignment of the channel at the entrance to the harbour affects the size and shape of the Aramoana break, and the inshore dumping at Heyward Point. In the latter case particularly, the dumping of dredgings is at least partly the creator of the surf break. In our view, having a policy of straight avoidance of effects in the PORPS on the surf breaks would not only cause problems of proof as to causation, but also cause practical problems in deciding whether port activities were improving or harming the surf breaks. In the light of those practical difficulties it is difficult to understand why policy 3.2.12 of the PORPS contains an avoidance policy when policy 16 of the NZCPS does not for activities within the coastal environment.

[131] The wording of the proposed surf breaks policy is beyond the scope of this proceeding specifically but we consider provision should be made in policy 4.3.7(e) for port activities for safety and transport efficiency to be able to override the policy for surf breaks. In this context an “avoid or remedy or mitigate” policy – perhaps complemented by an adaptive management policy – is entirely appropriate.

6. Outcome

6.1 Summary

[132] A dilemma that the Environment Court routinely has on an appeal about a proposed policy statement or plan (or change) is what it should do if it is not simply going to endorse the local authority's decision. At first sight the court's powers are simply those in section 293 of the RMA since clause 16 of Schedule 1 to the RMA states:

16 Amendment of proposed policy statement or plan

- (1) A local authority must, without using the process in this schedule, make an amendment to its proposed policy statement or plan that is required by section 55(2) or by a direction of the Environment Court under section 293.

¹⁴⁹ *Man O' War Station Limited v Auckland Council* [2017] NZCA 24; (2017) 19 ELRNZ 662; [2017] NZRMA 121.



- (2) A local authority may make an amendment, without using the process in this schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

[133] However, the Environment Court observed in *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council*¹⁵⁰ (Eighth Decision) it appears that the court also has the powers in section 290 RMA. It is difficult to know which powers should be exercised and when, and the preferred modus operandi appears to be to ignore the problem. For example in *Motiti Rohe Moana Trust v Bay of Plenty Regional Council*¹⁵¹ the Environment Court made interim orders without identifying the powers it was purporting to exercise. Its orders are redolent of section 293 RMA powers but did not direct consultation, although that seems mandatory under section 293 RMA. We consider the most appropriate wording in this case would involve the section 293 process but reserve leave for submissions on the issue.

[134] After considering all the matters identified in this decision as applied to the facts and environment of Port Otago we conclude that there should be an extension to proposed policy 4.3.7, to give effect to policy 9 (Ports) of the NZCPS. We have explained why we think considerations of efficiency and effectiveness entail that policy 4.3.7(d) to (f) should be amended both to make their place in the scheme of the PORPS easier to understand and to make a distinction between management of the effects of ensuring safety and the effects of ensuring transport efficiency. We also consider that it might be useful if the policy was to give some guidance as to the different standards that might be expected of port activities in relation to different resources. In our view the seriousness of the potential for adverse effects increases from:

- effects on surf breaks, through
- effects on natural character and ONL to
- effects on biodiversity.

The reasons for that view are that effects on human enjoyment of surfing and landscapes, while very important – and in the latter case, are of national importance – are largely reversible and potentially amenable to mitigation. Effects on biodiversity values may be irreversible.

¹⁵⁰ *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council* (Eighth Decision) [2013] NZEnvC 304.

¹⁵¹ *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67.



[135] To illustrate what we mean, we suggest a wording of policy 4.3.7 (after 4.3.7(a) to (c)) along these lines:

...

- (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to naturally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;
- (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;
- (f) in respect of naturally significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.

[136] That wording is of course provisional because it is for the Council, not the court, to set the wording: *Federated Farmers of New Zealand Incorporated v Mackenzie District Council*¹⁵².

[137] It may be appropriate to save time now if the parties agreed on something like the version of policy 4.3.7(d) to (f) which we have suggested in these Reasons, leaving the suggested different management of the harbour's different resources to the regional plan. If that is the preferred programme we envisage that, to comply with section 293 RMA, the Council may not have to do more than consult with the parties (and anyone else it considers appropriate) before reporting back to the court. In contrast adding more detail to the policies, for example, to distinguish further between safety and transport efficiency-motivated activities between the types of resources affected, might necessitate both wider consultation and public notification.



¹⁵² *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council* [2014] NZHC 2616; [2015] NZRMA 52 at [154].

6.2 The definition of port activities

[138] As for the oil companies' concern, this can be met by an order confirming the function-based definition as follows:

Port Activities means the loading or unloading of ships for export or import purposes, including storage facilities and other related activities for the operation of the port area.

For the court:



J R Jackson
Environment Judge

