The King Salmon Decision – a think piece for planners

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INTRODUCTION

This think piece has been commissioned by the New Zealand Planning Institute ("**NZPI**") to assist planners. Much has been said about decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* ("***King Salmon***")[1] so this think piece attempts to provide some context to the debate specific to the issues that face planners in their day-to-day work[2].

The think piece starts with an overview of the Supreme Court's decision before traversing the decision's possible application to the following:

- Policy and plan making matters involving the application of the New Zealand Coastal Policy Statement 2010 ("**NZCPS**");
- Policy and plan making matters involving the application of other national policy statements ("**NPSs**");
- Policy and plan making generally – ie not involving NPS considerations;
- Resource consents.

ANCIENT HISTORY

For those who can recall the enactment of the Resource Management Act ("**RMA**") in 1991 you will also recall the debate that occurred over the meaning of section 5 which sets out that the purpose of the RMA is to achieve "sustainable management".

Over the years (and as early as 1994[3]) the Courts have determined, on a case-by-case basis that this purpose is met by taking an overall judgment approach to the economic benefits and environmental effects of a plan or consent proposal.

In the *King Salmon* decision the Supreme Court appears to have shed doubt on the appropriateness of an overall judgment approach, particularly in relation to clear direction in higher order policy documents.

THE SUPREME COURT DECISION

On 17 April 2014 the Supreme Court released its decisions on two appeals in relation to New Zealand King Salmon's proposals to establish salmon farms in the Marlborough Sounds. The decision of the Supreme Court was by majority, but appropriate reference in this think piece is made to the dissenting judgment of William Young J.

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[1] [2014] NZSC 38.

[2] The think piece only addresses the overall judgment aspect of the Supreme Court decision

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

The application by King Salmon

The basis of the proceedings began when King Salmon proposed to establish and operate nine additional salmon farms to the six it already operated in the Marlborough Sounds.

At eight of the proposed sites King Salmon sought to change the current activity status of marine farming from prohibited to discretionary and lodged concurrent resource consent applications. The ninth site was not within an existing prohibited activity status area and resource consent only was sought for this site as a discretionary activity.

Ultimately, after exploring other decision making avenues, King Salmon applied via the national consenting route to be heard by a Ministerial appointed Board of Inquiry ("**Board**").

An overview of the Board's findings

In relation to the proposed salmon farm location that was the subject of the key aspect of the Supreme Court's decision, the Board[4] found that this site (the Papatua salmon farm) would have high to very high adverse effects on the natural character and landscape of that location and as a consequence policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to. Despite that finding the Board approved the Papatua plan change application because, applying an overall broad judgment pursuant to Part 2 of the RMA, the Board considered that the proposal would be appropriate and achieved the RMA's purpose.

Ultimately the Board approved four of the eight plan changes and granted resource consent for those sites. The Board declined the remaining ninth resource consent application.

The Board's decision was appealed to the High Court by Sustain Our Sounds and the Environmental Defence Society ("**EDS**"). This think piece focuses on the EDS appeal.

The nature of the EDS appeal

EDS was opposed to the Papatua location because it was in an outstanding landscape and natural landscape area. In addition, EDS argued that the Board had misapplied the NZCPS and had not considered alternatives in relation to two of the sites.

The High Court dismissed the appeal agreeing with the Board.[5]

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[4] Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

[5] [2013] NZHC 1992.

EDS sought, and received, leave to appeal directly to the Supreme Court. The questions in front of the Supreme Court were:

- Whether the NZCPS has standards or policies which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, did the Papatua Plan Change comply with s67(3)(b) RMA even though it did not give effect to NZCPS Policies 13 and 15;
- Whether the Board gave effect to the NZCPS in coming to a balanced judgment; and
- Whether the Board was obliged to consider alternative sites because the plan change was located in an outstanding natural landscape or outstanding natural character area.[6]

The Supreme Court's overview of the operation of the RMA in policy and plan making

Prior to considering the specific questions posed by EDS the Supreme Court provides a 'very brief' overview of the RMA. This overview provides a useful insight into the analysis behind the Court's key findings. The key points made in this overview are:

- There is a three tiered management system – national, regional and district;
- A hierarchy of planning documents is established at the national, regional and district levels;
- The scheme of the RMA moves from the general to the specific. As one goes down the hierarchy of documents greater specificity is provided both as to substantive content and to locality, in the following manner:
    - Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources;
    - National policy statements (including the NZCPS) set out objectives and identify policies to achieve those objectives from a national perspective;
    - Regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions;
- Rules are by definition found in regional and district plans, which must also identify objectives and policies and may identify methods;
- The RMA requires the various planning documents be prepared through structured processes, and that these provide considerable opportunities for public consultation.

[6] This matter is not covered in this think piece.

Key findings

The meaning of 'sustainable management' in section 5

The Supreme Court made four points about the definition of sustainable management:

- It is broadly framed – s5 is a guiding principle which is intended to be followed by those performing functions under the RMA rather than a prescriptive provision subject to literal interpretation;
- In the sequence of 'avoiding, remedying or mitigating':
  - 'avoiding' means 'not allowing' or 'preventing the occurrence of'.
  - 'Remedying' and 'mitigating' indicate that developments which might have adverse effects on particular sites can nonetheless be permitted if those effects are mitigated and/or remedied.
- The word 'while' does not mean that the definition of section 5 has two distinct parts. The definition must be read as an integrated whole meaning that the matters listed in subparagraphs (a), (b) and (c) must be observed in the course of the management referred to in the opening part of the definition. The 'while' means 'at the same time as'.
- The word 'protection' in the phrase 'use, development and protection of natural and physical resources' and the use of the word 'avoiding' in sub-para (c) indicate that s5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management – sustainable management involves protection as well as use and development.
- Sections 6, 7 and 8 supplement s5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.

Section 5 is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in s5(2) are achieved.

The interrelationship between the various objectives and policies in the NZCPS

Of the seven objectives and 29 policies in the NZCPS the Supreme Court focused on two objectives (2 (preservation and protection) and 6 (enabling wellbeing)) and four policies (7 (strategic planning); 8 (aquaculture); 13 (preservation of natural character) and 15 (natural features and landscapes)).

In relation to Objective 2, first, it is concerned with preservation and protection of natural character, features and landscapes. Secondly, it contemplates that this will be achieved by articulating the elements of natural character, features and

landscapes, and identifying areas (in the next order of planning documents) which possess such character, features or landscapes. Thirdly, the objective contemplates that some of the areas identified may require protection from 'inappropriate' subdivision, use and development.

Objective 6 recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments. Secondly, the objective refers to use and development not being precluded 'in appropriate places and forms' and 'within appropriate limits'. In other words there will be places that are 'appropriate for development and others that are not. Thirdly, the objective reinforces the point that one of the components of sustainable management is the protection and/or preservation of deserving areas.

In relation to Policy 7 this requires a regional council to look at its region as a whole in formulating a regional policy statement ("**RPS**") or plan. 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.

Policy 8 requires regional councils to recognise aquaculture's potential by including in RPSs and plans provision for aquaculture 'in appropriate places' in the coastal environment.

Policies 13 and 15 are policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding features and outstanding natural landscapes in the coastal environment. The obligations imposed by these policies vary depending on the nature of the area at issue. Areas which are 'outstanding' receive the greatest protection – the requirement to 'avoid adverse effects'. Areas that are not 'outstanding' receive less protection – to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.

In summary, the Supreme Court is saying that, to give effect to policies 13 and 15 a regional council must:

- ***assess the natural character/natural features/natural landscapes of the region***
- ***identify areas where natural character, natural features and landscapes require preservation or protection***
- ***ensure RPSs and plans include objectives, policies and rules which require the preservation of natural character and the protection of natural features and landscapes in particular areas.***

Relationship between Part 2 and requirement to "give effect to" the NZCPS

The Supreme Court (referring to the Environment Court in *Clevedon Cares v Manukau City Council*[7]) states that 'give effect to' simply means 'implement'. It is a strong directive creating a firm obligation on those subject to it.

The Court noted that the implementation of such a strong directive will be affected by what it relates to, that is, what must be given effect to:

> A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.[8]

The Board's approach in determining whether the NZCPS had been given effect to in determining a regional plan change application was dependent on an overall judgment reached after consideration of all relevant circumstances. The Supreme Court held that the effect of the Board's view is that:

> … the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations.[9]

The Supreme Court also noted that the Board ultimately determined the applications by King Salmon not by reference to the NZCPS but by reference to Part 2 due to the language in s66(1) (namely that plans must be in accordance with Part 2). The Supreme Court held that the Board was incorrect in its interpretation of the RMA because:

> … the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. …
>
> … we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.
>
> National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the

[7] [2010] NZEnvC 211.

[8] See n 2 at [80].

[9] Ibid at [83].

> NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[10]

The Court acknowledged that there may be circumstances when resorting to Part 2 may be necessary:

- If any part or the whole of the NZCPS was asserted to be invalid, that issue would need to be resolved before it could be determined whether there was a requirement to give effect to it.
- If the NZCPS did not provide complete coverage of the matter concerned, a decision maker may have to consider whether Part 2 provides assistance in dealing with the matters not covered.
- If there is uncertainty of meaning of provisions, reference to Part 2 may be justified to assist in a "purposive interpretation".

In the case before it the Supreme Court concluded:

> … it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.[11]

In short:

> …The requirement to "give effect to" the NZCPS is intended to constrain decision makers.[12]

In summary, the Court concluded that in the context of giving effect to the NZCPS, resort to Part 2 is not appropriate except where there is a claim of invalidity; the NPS does not cover the field; or the provisions are uncertain.

Meaning of 'avoid'

The Supreme Court was considering the meaning of the word 'avoid' as it is used in s5(2)(c) and in the relevant provisions of the NZCPS and held that 'avoid' has its ordinary meaning of 'not allow' or 'prevent the occurrence of'. The Court notes that 'avoid' must be considered against the background of the particular goals that the

[10] Ibid at [85]-[86].

[11] Ibid at [90].

[12] Ibid at [91].

avoidance is the means to achieve, in this case the goals stated in policies 13 and 15[13].

Whether 'avoid' (in the sense of 'not allow' or 'prevent the occurrence of') bites depends upon whether the overall judgment approach or the environmental bottom line approach is adopted as follows:

- Under the overall judgment approach a policy direction to avoid adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight;
- Under the environmental bottom line approach it has greater force.

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

Meaning of 'inappropriate'

The Court noted that the scope of the words 'appropriate' and 'inappropriate' is heavily affected by context:

> When the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.[14]

The Court concluded that a planning instrument which provides that any subdivision, use or development that adversely effects an area of outstanding natural attributes is inappropriate would be consistent with the requirement in s6(b) of the Act.[15]

What adverse effects are to be avoided and what is 'inappropriate' should be assessed by reference to what is being 'protected'. The higher the value being protected the more likely a development will be inappropriate.

What does 'avoid adverse effects' mean?

In response to the criticism (in the minority decision[16]) that the majority's interpretation of policies 13 and 15 will have an over-broad reach the Court stated:

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[13] At [93]

[14] Ibid at [101]

[15] Ibid and also at [149] "We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management."

[16] Dissenting judgment of William Young J at [175]-[205]

> The definition of "effect' in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area. [17]

Therefore, the Court appears to be suggesting that some activities with minor or transitory effects would not fall foul of the absolute requirement to avoid adverse effects in areas of outstanding natural value, where their avoidance is not necessary (or relevant) to preserve the natural character of the coastal environment, or protect natural features and natural landscapes.

It may be acceptable to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to policies 13 and 15 of the NZCPS where their avoidance is not necessary (or relevant) to preserve the natural character of the coastal environment, or protect natural features and natural landscapes.

Overall judgment

The Supreme Court briefly describes the history of the overall judgment and environmental bottom line approaches before noting the High Court upheld the overall judgment approach as the approach to be adopted.

The Court considered the following as being the steps a decision maker must go through when dealing with a plan change application:

- Identify those policies that are relevant, pay careful attention to the way that they are expressed and to the resolution of any apparent conflicts.
- Policies expressed in directive terms carry greater weight than those expressed in less directive terms – i.e. 'avoid' is stronger than 'take account of';
- Only if a conflict remains, after close attention to the way they are expressed, is there justification for determining that one policy prevails over another.

[17] At [145]

The Supreme Court sounded a note of caution in relation to the overall judgment approach:

> A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular polices and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them.[18]

In the context of the matter before them the Court held that there is no insurmountable conflict between policy 8 and policies 13(1)(a) and 15(a). The latter policies provide protections against adverse effects of development in particularly limited areas of the coastal region. The former recognises the need for sufficient provision of salmon farming in areas suitable for salmon farming – against a background that salmon farming cannot occur in the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. In short, the policies do not conflict.

The Court held that policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS do provide something in the nature of a bottom line and that this is consistent with the definition of sustainable management in s5(2) which contemplates protection as well as use and development.

In summary the Court found that it was inappropriate to adopt the overall judgment approach in relation to the implementation of the NZCPS because:

- It is inconsistent with the elaborate process that is required to be undertaken before a NZCPS can be issued;
- It creates uncertainty – if there is no bottom line and development is possible in any coastal areas no matter how outstanding there is no certainty of outcome[19]. The findings summarised above in respect of the relationship between Part 2 generally and the NZCPS is one area in which the application of the overall broad judgment approach is narrowed by the Supreme Court;
- It has the potential to undermine the strategic, region wide approach that the NZCPS requires regional councils to take to planning. It would allow the possibility of development having adverse effects on outstanding landscapes being permitted without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole.

As noted above but repeated here due to its importance in practical terms, in answer to criticisms that the approach the Court was adopting will have implications for any development in outstanding areas the Court dismissed these saying:

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[18] At [131].

[19] In this regard the Court refers to the EC case of *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 where an application to renew consents for mussel farms in the same part of the Sounds was declined.

> So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? ... It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses of developments may enhance the natural character of an area.[20]

Conclusion on the overall judgment matter

In conclusion the Supreme Court found:

1. That the Board accepted that the proposed plan change in relation to Papatua would have high adverse effects on an area of outstanding natural character and landscape, so that the direction in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted.

2. That the Board was obliged to deal with the application in terms of the NZCPS and given the Board's findings in relation to policies 13(1)(a) and 15(a) the plan change should not have been granted.

3. The NZCPS requires a whole of region approach and recognises that because the proportion of the coastal marine area under formal protection is small management under the RMA is an important means by which the natural resource of the coastal marine area can be protected.

Policies 13(1)(a) and 15(a) of the NZCPS are essentially bottom lines and to apply the overall judgment to their implementation would be inconsistent with the process of issuing the NZCPS, create uncertainty, and undermine the strategic region wide approach required under the NZCPS.

APPLICATION OF THE FINDINGS TO THE REST OF THE RMA WORLD

Prior to commenting on the specific matters that planners have to grapple with on a daily basis it is important to provide some overarching context to the *King Salmon* decision.

While the Supreme Court made determinations about the meaning of some words (avoid and appropriate) and determined that policies 13 and 15 of the NZCPS operate like bottom lines the decision is still very much based on the factual situation it was dealing with. This factual situation included the finding of the Board that the Papatua salmon farm would have high to very high adverse effects on natural character and outstanding natural landscapes.

[20] At [145]

It is not appropriate for this think piece to refer to any particular policy statement or plan and comment on whether or not the provisions are consistent with the decision in *King Salmon*. Instead what is set out below are some practical considerations to assist planners when they are considering matters that may be affected by the implications of the *King Salmon* decision.

Policy and plan making matters involving the application of the NZCPS

Clearly the findings of the Supreme Court are directly relevant to policy and plan making involving the application of the NZCPS.

There are a number of practical implications of the findings, as set out in the following section.

Identification of the extent of the coastal environment

RPSs and/or plans must identify areas of natural character, and natural features and natural landscapes, in the coastal environment.

The first step in identifying these areas is to define the extent and characteristics of the coastal environment, particularly the inland extent of the coastal environment, as this (including the coastal marine area) is where policies 13 and 15 of the NZCPS apply. Identifying too extensive an area may have unintended consequences for the implementation of NZCPS objectives and policies, although the strong direction of these NZCPS policies should not be used to justify an unreasonably restrictive extent.

Policy 1 of the NZCPS addresses this, however, many of the characteristics listed in policy 1(2) do not provide strong guidance in identifying the extent of the coastal environment, which can be far from clear in many coastal situations. The most useful consideration is (c) – the identification of "*areas where coastal processes, influences or qualities are significant*". Areas beyond the coastal environment may well still be influenced by their coastal processes, but not to a significant extent.

Identification of Areas with High / Outstanding Values

The Supreme Court has found the 2010 NZCPS to have plain and strong policy direction relating to areas of natural character, features and landscapes in the coastal environment:

- Policies 13(1)(a) and 15(a) – avoid adverse effects of activities on natural character in areas with outstanding natural character; and on outstanding natural features and landscapes;
- Policy 13(1)(b) and 15(b) – avoid significant adverse effects of activities on natural character in all other areas; and all other natural features and landscapes.

With the policies using the word avoid, the Court has held this to mean prevent the occurrence of – i.e. no adverse effects can occur.

This means that areas of outstanding natural character, features and landscapes in the coastal environment may need to be treated differently in RPSs and plans, compared with those away from the coastal environment. However, although this needs to be borne in mind, it does not mean that a different approach, or threshold, is justified to identifying the areas of outstanding natural character or outstanding natural features and landscapes.

As is currently the case, when identifying these areas, councils need to be careful and clear and have a strong methodology for their identification and mapping. Within the coastal environment, policy makers need to be aware of the implications of the NZCPS policies for areas identified as outstanding, and the level of protection that must be afforded to them to give effect to the NZCPS. The Supreme Court observed that the classification of such areas as outstanding will not be the norm[21], however, where an area does justify this identification, the strong direction of the NZCPS policies should not be used to adopt an even higher threshold in the coastal environment than would normally apply, such as 'unique'.

More helpfully in terms of giving effect to policies 13 and 15, when identifying areas of natural character, features and landscapes, councils should address and document the following:

- What are the characteristics, attributes, elements that contribute to an area being identified as having outstanding natural character or being an outstanding natural feature or landscape – what are their key/outstanding values?
- What changes to these characteristics, attributes, elements would (or would not) adversely affect their key values, and why?
- Where already modified environments are identified as having outstanding values, do the existing modifications / activities contribute to, or adversely affect, these values; and:
    - can they continue to be accommodated, maintained, upgraded, be further modified,
    - can reconsenting of existing activities with finite consent terms be provided for (such as in the coastal marine area), whilst avoiding adverse effects on the identified outstanding values?

Formulation of RPS/Plan Provisions

Clearly and systematically addressing and defining the above matters can provide the context for the RPS and/or plan policies, zoning and rules. As the Supreme Court

[21] At [131]

noted, the adverse effects to be avoided relate to this context - what characteristics of an area contribute to its outstanding natural character or to its being identified as an outstanding natural feature or landscape, and which therefore require protection from adverse effects (and conversely which don't)? Similarly, what subdivision, use and development is inappropriate will also relate to this context.

Giving effect to the "avoid adverse effects" requirements of policies 13 and 15 will be assisted where:

- This context is clearly stated in formulating RPSs and/or plans;
- Policies are formulated that are specific to the characteristics / values of each area that need to be protected, the relevant adverse effects that need to be avoided, and what activities are inappropriate; and
- The zoning and rules reflect these policies.

The Supreme Court noted that developments with minor or transitory adverse effects may be considered appropriate – those with minor effects or those which enhance values may be able to be provided for. Another way of looking at this can be derived from this contextual evaluation – what effects are of concern for the outstanding values identified for each area – and what effects will not be adverse to, or even enhancing of, those values.

What does this mean in practice

In practical terms what the decision does mean for marine farming is that there is a very tough threshold to meet for any policies and rules which would enable such farming to be located in areas with high/outstanding value. This is because the analysis in the *King Salmon* decision directly applies to such farming.

As described above, each natural character area and landscape has its own set of characteristics / values that may result in it being identified as outstanding. Having identified these areas, the Supreme Court is basically saying that very little development is warranted in those areas if it would result in adverse effects on the characteristics that contribute to its outstanding values.

The decision highlights the need to be very careful with mapping and terminology. Councils should have a clear and strong methodology for their identification and mapping. This should lead to well-defined statements of the characteristics / values of each area that need to be protected, the relevant adverse effects to be avoided, and what activities are inappropriate. The policies, zoning and rules in RPSs and plans should clearly reflect this context.

Determining that an area has outstanding natural character or landscape values will mean that the protection of those values may trump the economic, social and cultural wellbeing policies in the NZCPS[22].

Councils need to be careful and clear, and have a strong methodology for their identification and mapping of areas of outstanding natural character, features and landscapes. This should lead to well-defined statements of the characteristics / values of each area that need to be protected, the relevant adverse effects to be avoided, and what activities are inappropriate. The policies, zoning and rules in RPSs and plans should clearly reflect this context.

Policy and plan making generally

For planning practice, there is much that is positive about the approach taken by the Supreme Court. The Court's decision (albeit based on the factual situation it was dealing with) reinforces:

- The hierarchy of planning documents required under the RMA and the importance of the higher level documents in directing those that must follow them;
- That the planning documents are intentional documents and mean what they say;
- That language is important, and wording (and differences in wording) does matter;
- The need to be precise and careful with words, to create certainty of meaning;
- That policies, even in higher level documents, can be strong and directive, and then need to be implemented as such;
- That reconciling the potential for conflicts between different provisions of a planning document is important.

In relation to Part 2 of the RMA, the Court's decision means that where planning documents are established (have gone through their formulation process), they are assumed to be in accordance with Part 2[23]. There would appear to be less need (or no need) to go back to consider Part 2 in RPS / plan preparation (or for resource consents) where the document(s) higher in the hierarchy are established and address the relevant issues. The focus can then be on the wording of the relevant documents in the hierarchy and on giving effect to them. Similarly, lower level

[22] See Policies 6, 8, and 9 NZCPS.

[23] This could also extend to provisions (objectives) in established planning documents being assumed to be the most appropriate way to achieve the purpose of the Act (s 32(1)(a))

planning documents can generally be assumed to have given effect to those higher in the hierarchy (e.g. an RPS can be assumed to have given effect to the relevant NPS in the formulation of a plan). The planning documents can then concentrate on giving substance to the provisions of the next level up in the hierarchy.

The Supreme Court noted that although sections 6(a) and (b) of the RMA do not give primacy to preservation or protection within the concept of sustainable management, this does not mean, that a particular planning document may not give primacy to preservation or protection in particular circumstances[24]. The provisions of an RPS or plan cannot, therefore, be challenged just because they go beyond the "inappropriate" qualifier in ss6(a) and (b), and give full priority to protection or preservation, as the NZCPS does not provide for adverse effects in areas of outstanding natural character, features or landscapes.

The specific findings of the Supreme Court may be relevant to policy and plan making generally, where the wording of higher order polices (such as may be found in other NPSs or RPSs) is directive, triggering a similar interpretation to that in *King Salmon*.

The Court has said the higher the value given to something, the higher the level of protection it ought to benefit from. So if the Minister (in an NPS) or a council (in an RPS) has identified certain areas as having certain values and directs that adverse effects on those values are be avoided in those areas, then the lower order documents that follow must give effect to this policy direction and essentially prevent (ie prohibit) activities that would have adverse effects on those values.

For planning practice, there is much that is positive about the approach taken by the Supreme Court in terms of reinforcing the hierarchy of planning documents, the importance of their wording, and the need to consider and reconcile conflicts.

Where planning documents are established (have gone through their formulation process), they can be assumed to be in accordance with Part 2. Lower level planning documents (RPS and plans) can concentrate on giving substance to the provisions of the next level up in the hierarchy, rather than decision-makers going back to consider Part 2 in the preparation of these documents.

The specific findings may be relevant to policy and plan making generally, where the wording of higher order polices is directive.

[24] At [149]

Policy and plan making matters involving the application of other NPSs

The specific findings of the Supreme Court may be relevant to policy and plan making involving the application of other NPSs depending on the nature of the wording of those NPSs.

The recently gazetted 2014 NPS on **Freshwater Management** ("**NPSFM**") has one provision that uses the word 'avoid' in any absolute sense and this is in Objective B2 that states '*To avoid any further over-allocation of fresh water and phase out existing over-allocation*.'[25] It is clear from the context of this objective that avoiding further over- allocation of fresh water in over-allocated catchments is to be prevented and regional policies that do not achieve this objective would not be giving effect to the NPS. The NPSFM now contains a National Objectives Framework that sets out the national values for freshwater and requires regional councils to follow certain processes in applying these values at the regional level. The framework also provides a series of attributes which are intended to operate as national bottom lines allowing for flexibility to go below the bottom lines in certain circumstances[26].

The NPSs on **Electricity Transmission** and **Renewable Energy Generation** are enabling of the matters they relate to. The primary provisions in those NPS's do not focus on avoiding adverse effects on the environment per se but rather on providing a more positive national development framework for nationally significant infrastructure. However, both these NPSs include provisions with directive wording, giving strong directions to councils to provide for renewable electricity generation and the National Grid. They both also require decision-makers, to the extent reasonably possible, to avoid reverse sensitivity effects on these national resources. The Supreme Court's decision will mean that these directives cannot be trumped lightly.

The implications of the application of the *King Salmon* decision on these other NPSs very much depends on the wording of the objectives and policies adopted by councils in the lower order RPSs, regional and district plans.

For matters involving other NPSs the applicability of the King Salmon findings depends on the wording of those NPSs. The current NPSs are generally not worded in the same manner as the NZCPS.

RPS and Plan making matters

The direct outcome from the Supreme Court decision is a move away from an overall judgment approach to the implementation of provisions in higher order planning documents, when giving effect to them. These documents now need to be written in the knowledge that there will be no reverting to the uncertainty (or

[25] Note this objective is unchanged from the 2011 NPS.

[26] See Policy CA4.

flexibility) of the previous overall judgment approach when they come to be implemented.

The Court's decision supports the importance of certainty in planning documents, or at least clarity. A disciplined focus is required to create clear policy direction, to define what outcomes are sought and what adverse effects or inappropriate activity are to be avoided, where and under what circumstances. This does not mean that there can be no flexibility in RPS and plan provisions, however, the flexibility itself needs to be specifically determined and clearly applied – what provisions (and therefore outcomes) can be flexible in their implementation (with resulting uncertainty) and what is to be directive?

The inability to deal with specific circumstances flexibly, as and when they arise, may result in a reluctance to use directive terms in higher level planning documents. There is potential for wider use of qualifiers to such policies, for example, "*as far as practicable", "where appropriate*". However, for any such qualifiers, good policy writing demands that the context for application of the qualifier is clear, directing the policy maker to define what flexibility is available and under what circumstances it should be applied.

The Supreme Court undertook a detailed analysis of the relevant NZCPS objectives and policies, in order to reconcile apparent differences between their directions. The Court emphasised the importance of undertaking such a reconciliation for any differences in policy / planning provisions. It stated that there should be infrequent occurrences of policies pulling in different directions, and effort should be made to avoid this. Apparent conflict between particular policies should dissolve if close attention is paid to the way in which the policies are expressed. This would apply to both the preparation and the interpretation of policies.

One implication relates to the tendency to prepare "Chapter-based" RPSs and plans, where each topic is covered in a separate chapter, with any conflicts between the policies in different chapters being worked through in an overall judgment, potentially referring back to Part 2. An example could be potentially conflicting provisions in RPS chapters on natural character and landscapes, and on infrastructure, when considering how to give effect to the RPS in the utilities provisions of a district plan. Without reverting to an overall judgment approach, an enabling policy in relation to infrastructure may well not be able to be implemented in a way that over-rides a more specific avoidance policy regarding adverse effects on high /outstanding natural character or landscape values. This may lead to RPSs and plans being more complex in structure, with exceptions stated or allowable adverse effects (or activities) defined throughout the chapters, qualifying any avoidance policies.

However, none of this is really new, and in relation to RPS and plan making, the Court's decision acts to strengthen the focus on good policy and plan making practice.

Generally, applying an overall judgment is not appropriate when giving effect to provisions in higher order planning documents.

The importance of certainty of policy direction in planning documents, or at least clarity, is supported. Where flexibility is provided for, plans should specify what flexibility is available and under what circumstances. There should be infrequent occurrences of policies pulling in different directions, and effort should be made to avoid this.

Resource Consents

The findings of the Supreme Court are not, at face value, relevant to resource consents due to the different test that applies. However resource consents will be affected due to the way in which the Court's findings affect the policy and plan making functions of councils. This in turn will filter down into the activity status for developments and have a direct impact on what can and cannot occur in certain locations.

Section 104 provides for the consideration of the effects of an activity and the policy documents that relate to that activity, and this consideration is subject to Part 2. This means the approach decision makers have taken to assessments of using an overall judgment is still appropriate for resource consents. For completeness, it is important to note that for controlled[27] and restricted discretionary activities[28] these do not include a consideration of Part 2.

However, many of the broader principles applied by the Court will also apply to consideration of resource consents:

- Words mean what they plainly say – language is important, as are differences in wording;
- Prescriptive policies should be awarded more weight than flexible ones;
- A thorough attempt should be made to reconcile apparent differences between policies, so as to minimise interpretation of policies as pulling in different directions;
- Careful consideration should be given to any remaining conflicts between policies and appropriate weighting determined for differing policies.

[27] See s104A.

[28] See 104C and *Lambton Quay Property Nominees v Wellington City Council* [2014] NZHC 878.

Where a plan's provisions are settled, clear and direct in relation to the relevant matters, and have been prepared in a way that specifically gives effect to the relevant provisions of the higher order planning documents, there would appear to be less need (or no need) to consider Part 2 for resource consents. Irrespective of the requirement in s104 for consideration to be subject to Part 2, where plan provisions are settled and relevant, and have been tested in relation to the higher order planning documents (including Part 2), the focus should be on consideration of the particular plan provisions and the reconciliation or weighting of the direction provided by those provisions.

For consideration of consents there is little change, the overall judgment is still appropriate.

Many of the broader principles of the Court's findings will apply, such as the importance of language, weight to prescriptive policies, and reconciliation of apparent policy differences.

Where plan provisions are settled and relevant, and have been tested, the focus should be on considering the particular plan provisions and the reconciliation or weighting of the direction provided by those provisions.

CONCLUSION

This conclusion is an amalgam of the text boxes in the main part of this think piece.

Section 5 is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in s5(2) are achieved.

In summary, the Supreme Court is saying that to give effect to policies 13 and 15 a regional council must:

- Assess the natural character/natural features/natural landscapes of the region
- Identify areas where natural character, natural features and landscape require preservation or protection
- Ensure RPSs and plans include objectives, policies and rules which preserve the natural character and the protection of natural features and landscapes in particular areas.

The Court concluded that in the context of giving effect to the NZCPS resort to Part 2 is not appropriate except where there is a claim of invalidity; the NPS does not cover the field; or the provisions are uncertain.

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

What adverse effects are to be avoided and what is 'inappropriate' should be assessed by reference to what is being 'protected'. The higher the value being protected the more likely a development will be inappropriate.

It may be acceptable to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to policies 13 and 15 of the NZCPS where their avoidance is not necessary (or relevant) to preserve the natural character of the coastal environment, or protect natural features and natural landscapes.

Policies 13(1)(a) and 15(a) of the NZCPS are essentially bottom lines and to apply the overall judgment to their implementation would be inconsistent with the process of issuing the NZCPS; create uncertainty; and undermine the strategic region wide approach required under the NZCPS.

Councils need to be careful and clear, and have a strong methodology for their identification and mapping of areas of outstanding natural character, features and landscapes. This should lead to well-defined statements of the characteristics / values of each area that need to be protected, the relevant adverse effects to be avoided, and what activities are inappropriate. The policies, zoning and rules in RPSs and plans should clearly reflect this context.

For planning practice, there is much that is positive about the approach taken by the Supreme Court in terms of reinforcing the hierarchy of planning documents, the importance of their wording, and the need to consider and reconcile conflicts.

Where planning documents are established (have gone through their formulation process), they can be assumed to be in accordance with Part 2. Lower level planning documents (RPS and plans) can concentrate on giving substance to the provisions of the next level up in the hierarchy, rather than decision-makers going back to consider Part 2 in the preparation of these documents.

The specific findings may be relevant to policy and plan making generally, where the wording of higher order polices is directive. Generally, applying an overall judgment is not appropriate when giving effect to provisions in higher order planning documents. For matters involving other NPSs, the applicability of the King Salmon findings depends on the wording of those NPSs. The current NPSs are generally not worded in the same manner as the NZCPS.

The importance of certainty of policy direction in planning documents, or at least clarity, is supported. Where flexibility is provided for, plans should specify what flexibility is available and under what circumstances. There should be infrequent occurrences of policies pulling in different directions, and effort should be made to avoid this.

For consideration of consents there is little change, the overall judgment is still appropriate. However, many of the broader principles of the Court's findings will apply to consents, such as the importance of language, weight to prescriptive policies, and reconciliation of apparent policy differences. Where plan provisions are settled and relevant, and have been tested, the focus should be on considering

the particular plan provisions and the reconciliation or weighting of the direction provided by those provisions.