RESOURCE MANAGEMENT

Port Otago Limited v Environmental Defence Society Inc

BY **HELEN ANDREWS**, **JEANNINE CHEONG** AND **ALEX PARKINSON**

IN THIS COLUMN WE COVER THE FOLLOWING:

- When "avoid" no longer means "no" – the Supreme Court clarifies (and walks back) its *King Salmon*[1] decision in *Port Otago*[2]; and
- Resource management reform and intensification – the latest updates

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The decision

In its recent *Port Otago* decision, the Supreme Court unanimously found that the Court of Appeal (majority decision) erred in determining that the "ports" policy (Policy 9) of the New Zealand Coastal Policy Statement 2010 (NZCPS) is subordinate to its various "avoidance" policies (Policies 11, 13, 15 and 16). Instead, it held that both the "ports" and "avoidance" policies in the NZCPS are directive in nature, so required equal (and appropriate) recognition.

The proceedings related to Port Otago's appeal on the proposed Otago Regional Policy Statement (ORPS), which sought an additional policy providing for port activities at Port Chalmers. The Environment Court recommended a policy that allowed adverse effects from the operation or development of Port Otago in areas of outstanding natural character to be "*avoided, remedied or mitigated*".

Both the High Court and Court of Appeal held that the policy, as worded by the Environment Court, did not "give effect" to the NZCPS "avoidance" policies, in accordance with the relevant tests formulated by the Supreme Court in *King Salmon*.

The key issue before the Supreme Court was the validity of the ports policy proposed for the ORPS, and how to balance enabling port operations against the NZCPS "avoidance" policies. Port Otago argued that there was unavoidable conflict between the two: in short, port operations were unlikely to be able to continue in future without having effects on 'sensitive' areas (as identified by the NZCPS "avoidance" policies) and this may have a constraining effect on port operations.

The Supreme Court clarified that both the "avoid" policies and the "recognise" and "require" policies (such as Policy 9) from the NZCPS should be seen as inherently directive. The use of the verb "requires" in Policy 9 influences what decision-makers are tasked to "recognise". In essence, the directive character of Policy 9 arises from the combined effect of these verbs. Therefore, enabling policies that are expressed in directive terms (such as Policy 9) must be considered alongside avoidance policies (such as Policies 11, 13, 15 and 16) aimed at preventing certain adverse effects.

The Supreme Court further held that:

- The "avoidance" policies in the NZCPS must be interpreted in light of what is sought to be protected and when considering any development, whether measures can be put in place to "*avoid material harm to those values and areas*".[3]
- The definition of "*avoid*" from *King Salmon* does not prohibit minor or transitory effects, where the prohibition of those effects would likely not be necessary to preserve the characteristic of the environment in question.
- The concepts of remediation and mitigation may also meet the "*avoid*" standard by bringing the level of harm down such that material harm is avoided.

On this basis, the Supreme Court then found that on a correct and careful interpretation, it will be rare for seemingly contradictory policies to actually be in conflict. Resolving such conflicts requires careful attention to policy wording, with more directive policies carrying more weight. Ideally, conflicts should be resolved at the regional policy statement and plan levels. But there will be circumstances where this will not be possible (or appropriate).

In such cases, consent authorities must then conduct a "structured analysis" to reconcile conflicting policies, while safeguarding relevant values and areas, when determining resource consents. The Supreme Court went on to provide some general guidance as to how such an analysis may be undertaken in the present case. In summary, the Supreme Court found that a decision-maker would have to be satisfied that:

- the proposed work is necessary (not just desirable) for the safe and efficient operation of the port;

- if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, an option chosen that does not breach the avoidance policies, and
- where a breach of the avoidance policies is unable to be averted, the conflict should be narrowed so that any breach is only to the extent required to provide for the safe and efficient operation of the port.

Finally, the Supreme Court was careful to note that applications are fact-specific, and that even where a decision-maker is satisfied of the above, this does not mean that a resource consent will necessarily be granted. Put simply, the Court held that there can be no presumption that one directive policy will always prevail over another.

What does this decision mean?

This decision sought to strike a balance between enabling policies for infrastructure development in sensitive environments and the necessity for the safe, efficient and necessary operation of ports when strict adherence with avoidance policies might not be feasible. The decision emphasised that each application is unique, with no presumption favouring one directive policy over another. Decision-makers must assess conflicting directive policies within the context of specific circumstances and environmental values.

This marks a move away from the Supreme Court's previously strict position in *King Salmon* by acknowledging the need for flexibility when interpreting and applying environmental policies. Of note is the Court's comment that the 'structured analysis' it discussed is not a return to the "overall judgment" approach rejected in *King Salmon.*

While this case primarily focussed on port operations, the principles established in this decision provide helpful guidance in the interpretation of higher order documents including but not limited to the NZCPS, and are likely to be applicable and tested in various resource management and environmental planning scenarios where conflicts between policies may arise. The decision also provides guidance for private plan change applications (for example to "live zone" land for urban development) as to how various national direction instruments are to be interpreted and given effect to while reconciling any conflict that may exist between them.

This decision remains relevant even in light of the recent enactment of the Natural and Built Environment Act 2023 (NBEA), given that the Resource Management Act 1991 (RMA) is currently intended to remain in place for many years while we transition to the NBEA. Further, the cornerstone of the NBEA is the National Planning Framework (NPF), which will incorporate (and replace) many existing national direction instruments. Insofar as the NPF uses similar language to those instruments, the *Port Otago* decision is likely to remain influential.

Other key updates

While Aotearoa remains in "limbo land" post the general election, the following are the updates that can be provided on resource management system reform and are current, at least as of the date of writing. While National has pledged that the NBEA will be "gone by Christmas", there are no details on what (if anything) it proposes should take its place. And Act has been clear it considers there should be no environmental/planning controls at all. We will therefore provide a fuller update on the fate of the resource management system in our upcoming columns.

RMA reform

Transitional National Planning Framework (NPF)

The NBEA and Spatial Planning Act (SPA) came into effect on 24 August 2023. While most of the NBEA and the entire SPA are now in force, the existing RMA instruments and processes will generally remain in place until the "NBEA date" for each region. The "NBEA date" is the date the decisions version of the region's NBE Plan is treated as operative. As such (and as noted), it is proposed that the transition from the RMA to the NBEA occur over a period of several years.

As a first step in that transition, a draft of the first (or "transitional") NPF was released on 10 September 2023 for pre-notification targeted consultation with certain groups. Those groups include iwi authorities, local government representatives and customary marine title holders under the Marine and Coastal Area (Takutai Moana) Act 2011. This pre-notification engagement is a requirement for preparing each iteration of the NPF. For the transitional NPF, the consultation is intended to occur between September and December 2023. Schedule 5 of the NBEA also includes the National Māori Entity as one of the groups with which there must be pre-notification consultation

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on the NPF. However, that Entity is not required to be established until March 2024, so has not yet been formed.

As required by the NBEA, the draft transitional NPF consolidates a range of existing national direction. It also provides direction on a range of new areas, including outstanding natural landscapes, cultural heritage, natural hazards and effects of climate change.

Feedback from the targeted consultation now underway is intended to inform the notified version of the proposed transitional NPF, currently scheduled for release in April 2024. Under the NBEA as enacted (should that remain), the notified NPF would then be subject to a public submissions and hearing process before a specifically appointed Board of Inquiry. The Board would then make recommendations to the Minister for the Environment, following which the Minister would make a decision on the final content of the NPF. The current intention is that as the transitional NPF proposal is being progressed, Ministry staff would begin work on a second NPF proposal that focuses on directing the development of NBE plans and provides more detailed direction on some topic areas. That second NPF would then be subject to further consultation and engagement with the groups outlined above.

The Third Bill: Climate Change Adaptation Bill

The third part of the RMA reform, the Climate Change Adaptation Act, was expected to be introduced into Parliament in 2024. In the meantime, the Parliament's Environment Committee has initiated an inquiry on integrating community-led retreat into New Zealand's climate adaptation framework. This Inquiry into Climate Adaptation is evaluating existing system gaps, assessing the need for new powers, and considering how a Te Tiriti-based system could work for iwi, hapū and Māori communities. This inquiry is also drawing lessons from recent and historical severe weather events and natural disasters. If it is continued, this inquiry would provide its findings to Parliament in 2024, in order to inform the development of the Climate Change Adaptation Bill. Whether this work will be allowed to continue under the incoming government remains to be seen, given the relevant parties consider it to be of little (if any) value.

Plan Change 78 (PC78)

There have been two key recent developments on PC78 (being the Auckland Council's (Council) "intensification planning instrument" under the RMA) as follows:

- With some limited exceptions, all hearings and alternative dispute resolution for PC78 has been paused, while the Council progresses variations to PC78 regarding flooding/natural hazards issues and the Auckland Light Rail Corridor (ALRC) respectively.
- Due to having prior commitments in 2024, both Greg Hill and Kitt Littlejohn have resigned from the Independent Hearings Panel for PC78. They have been replaced by new Chairperson, Matthew Casey KC and a new Panel member, Sarah Shaw.

The Panel has also required the Council to provide regular updates on the progress of the proposed variations. Most recently, the Council informed the Panel that the work still to be completed on those includes a workshop for the content of the draft natural hazards engagement plan, and iwi engagement on the ALRC variation which occurred in August 2023.

The Panel has directed the Council to provide details on their work programme for the variations, including definitive notification dates, by 30 October 2023. If that direction is not complied with, the Panel will resume hearing submissions on natural hazards and the ALRC (presumably along with all other currently "paused" PC78 topics), as this is required to meet the timeframe for PC78 set by the Minister for the Environment.

The Panel's directions reflect that under the Minister's current directions, the Council must issue its decisions on the Panel's recommendations regarding PC78 no later than 31 March 2025. The Panel will therefore need to be conducting hearings throughout 2024, in order to meet that timeframe. ■

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1. *Environmental Defence Society Inc. v New Zealand King Salmon Company Limited* [2014] 1 NZLR 593.
2. *Port Otago Limited v Environmental Defence Society Inc.* [2023] NZSC 112.
3. Ibid, at [68].