BEFORE THE COMMISSION
APPOINTED BY THE OTAGO REGIONAL COUNCIL

UNDER	the Resource Management Act 1991 (RMA)
IN THE MATTER	Of an application by Dunedin City Council for resource consent being processed with reference RM20.280
BY	**DUNEDIN INTERNATIONAL AIRPORT** **Submitter**

CASEBOOK

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CASEBOOK

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Para No

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

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

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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

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

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

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

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

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

7 At [1341].

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

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

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

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8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].
15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

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

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

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16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

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

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

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23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

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

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

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

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

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

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

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

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

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

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
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> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
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> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

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40 See s 87A.

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

> Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

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

We will focus initially on question (a).

First question: proper approach

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

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

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
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> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

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

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

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

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

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

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

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

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

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

> (a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

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43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

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

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

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

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

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

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49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

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

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

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

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

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[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

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

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.
>
> …

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

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

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

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

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

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

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

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

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

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

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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

66 At [1180].

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

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

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

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

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

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

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

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

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

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

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

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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

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

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

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

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

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

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

(ii) Objectives and policies in the NZCPS

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

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

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

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

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

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

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

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

[49] Objective 2 provides:

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

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

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

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

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

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

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

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

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

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

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

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

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

[59] Policy 13 provides:

Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

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

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

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

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

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

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

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

> *The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.*
>
> (b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.
>
> *Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.*
>
> *Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.*

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

> **8.1.3 POLICY — OUTSTANDING LANDSCAPES**
>
> Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.
>
> *The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.*
>
> *The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.*

[93] Italics in original.

Regional and district plans

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

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

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

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

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

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

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

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

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

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

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

Requirement to "give effect to" the NZCPS

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

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

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

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

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

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

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

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

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

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

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[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

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

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

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

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

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to 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. There are several caveats to this, however, which we will mention shortly.

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

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be 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.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to 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 NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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

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

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

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

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to 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.

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

Meaning of "avoid"

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

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

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

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

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

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

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

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

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

[111] *Man O'War Station*, above n 46, at [48].
[112] *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

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

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

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

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

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

Meaning of "inappropriate"

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

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

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

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

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

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

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

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

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

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

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

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

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

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

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

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

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

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

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

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

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

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

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

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

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

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

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

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

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

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

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

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

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

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

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

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

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

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

(ii) Section 58 and other statutory indicators

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

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

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

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

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

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

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

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

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

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

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

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

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

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

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

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

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

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

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

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

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

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

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

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

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

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

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

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

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

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

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

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

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

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

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

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

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

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

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

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

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

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

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. 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.

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

Conclusion on first question

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

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

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

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

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

Second question: consideration of alternatives

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

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

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

[151] *King Salmon* (Leave), above n 10, at [1].
[152] At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

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

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

We will address the question in that form.

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

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

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
>
> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

> (a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and
>
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> …
>
> (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.
>
> …

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

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

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

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

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

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

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

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

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

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

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

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

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

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

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

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

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

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

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

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

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

WILLIAM YOUNG J

A preliminary comment

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

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

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

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

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

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166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

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

> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate … use, and development:
>
> (b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:
>
> …

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

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

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

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

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

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

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

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

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

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

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

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

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

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

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

[191] Objective 6 of the NZCPS provides:

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

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

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

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

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

> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

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

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

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[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

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

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

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

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

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

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

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

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

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

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

My conclusion as to the first issue

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

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

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Russell McVeagh, Wellington for First Respondent
Dyhrberg Drayton, Wellington for Second Respondent
DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2020-470-31
[2021] NZHC 1201

BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	TAURANGA CITY COUNCIL and BAY OF PLENTY REGIONAL COUNCIL Respondents
	TRANSPOWER NEW ZEALAND LIMITED Applicant for consent

Hearing: 3-4 September 2020

Appearances:
J D K Gardner-Hopkins for the appellant and the Maungatapu Marae Trustees as an interested party
M H Hill and R M Boyte for the respondents
A J L Beatson, J P Mooar and E M Taffs for the applicant for consent
Appearance excused for Ngāi Tūkairangi Trust, an interested party

Judgment: 27 May 2021

JUDGMENT OF PALMER J

This judgment was delivered by me on Thursday 27 May 2021 at 2.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

……
Registrar/Deputy Registrar

Counsel/Solicitors:
J D K Gardner-Hopkins, Barrister, Wellington
Sharp Tudhope Lawyers, Tauranga
Cooney Lees Morgan, Tauranga
Bell Gully, Wellington
Lara Burkhardt, Mt Maunganui

Contents

Summary

[1] Ngati Hē was dispossessed of most of its ancestral lands but retains the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranga (Tauranga Harbour). Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will require replacement soon. In 2016, to address Ngāti Hē's grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported removal of the existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal. Consents were granted for the proposal realignment which the Environment Court upheld.[1] The Tauranga Environmental Protection Society Inc appeals the decision of the Environment Court, supported by the Maungatapu Marae Trustees from Ngati Hē.

[2] I uphold the appeal. I find:

(a) The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law.

(b) Proper application of the law requires a different answer from that reached by the Environment Court. When the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the Outstanding Natural Features and Landscapes (ONFL), it is not open to the Court to decide it would not.

(c) The Court erred in law in applying an "overall judgment" approach to the proposal and in its approach to pt 2 of the Resource Management

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1 *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2020] NZEnvC 43 [Environment Court] at [218].

Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified (the Bay of Plenty Regional Coastal Environment Plan (RCEP) in particular) and apply them to the proposal.

(d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement on Electricity Transmission (NPSET). There are cultural bottom lines in the RCEP:

(i) Policy IW 2 requires adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable".

(ii) Policy NH 4, NH 5(a)(ia) and NH 11(1) require the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

(e) Determining whether the exceptions to the cultural bottom lines apply requires interpretation and application of the "practicable", "practical" and "possible" thresholds. The Court erred in failing to recognise that this determines whether the proposal could proceed at all. The technical feasibility of alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. On the basis of the Court's existing findings, Policy NH 11(1)(b) is therefore not satisfied and consideration providing for the proposal under Policy NH 5 is not available.

[3] These are material errors. I quash the Environment Court's decision. But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise

on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. I remit the application to the Environment Court for further consideration consistent with this judgment.

The application for consents in context

Ngāti Hē and te Maungatapu Marae

[4] Ngāti Hē is a hapū of Ngāi Te Rangi. After the battles of Pukehinahina (Gate Pā) and Te Ranga in 1864, much of Ngāi Te Rangi's land was confiscated for settlement under the New Zealand Settlements Act 1863 and Tauranga District Lands Act 1868.[2] The confiscations were then reviewed by Commissioners and land was returned.[3]

[5] The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. In 1884, the Crown "awarded" back to Ngāti Hē two blocks of land on Maungatapu peninsula, some three kilometres east of central Tauranga.[4] Block 2 was part of the tip of the Maungatapu peninsula. Ngāti Hē has since lost part of that land too. Some was taken for the public purposes of putting in a motorway and electricity transmission lines. Some was subject to forced sale, because Ngāti Hē was unable to pay rates, and then sub-divided.[5] As stated in the agreed Historical Account in the Deed of Settlement between Ngāi Te Rangi and the Crown, upon which the Crown's acknowledgement and apology to Ngāi Te Rangi was based:[6]

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2 *Ngāi Te Rangi and Ngā Pōtiki Deed of Settlement of Historical Claims* (14 December 2013) [Deed of Settlement], cl 2 (CBD 303.0702 and 303.0703). The Deed is conditional upon settlement legislation coming to force, which has not yet occurred.

3 See generally Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at chs 4 and 10.

4 Maungatapu 1 and 2 Blocks. Commissioner Brabant "Land Returned to Ngaiterangi Tribe Under Tauranga District Land Acts" [1886] AJHR G10; Heather Bassett *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga* (July 1996) at 6 (CBD 301.0024); and Des Heke *Transpower Rangataua Realignment Project: Ngāti Hē Cultural Impact Assessment* (September 2017) at 6 (CBD 304.0966).

5 Deed of Settlement, above n 2, cl 2.71.

6 Clause 2.72.

> The Maungatapu subdivision contributed to the reduction of Ngāti He landholdings on the peninsula to 11 hectares by the end of the twentieth century. Maungatapu was once the centre of a Ngāti He community who used their lands for gardens, but now the hapū only maintains the marae and headland domain, along with a small urupā.

[6] Amongst the Crown's many acknowledgements in the Deed, it acknowledged:

(a) public works, including "the motorway and infrastructure networks on the Maungatapu and Matapihi Peninsulas", have had "enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi";[7]

(b) "the significant contribution that Ngāi Te Rangi . . . [has] made to the wealth and infrastructure of Tauranga on account of the lands taken for public works";[8] and

(c) "the significance of the land, forests, harbours, and waterways of Tauranga Moana to Ngāi Te Rangi . . . as a physical and spiritual resource".[9]

[7] As stated in evidence in this proceeding:[10]

> The result of all these forms of alienation has been that very little land in Maungatapu and Hairini is still owned by Māori. There are a handful of reserve areas, such as marae and urupā, and some families live in the area on their individual sections. The traditional rohe of Ngāti Hē and Ngāi Te Ahi now has the overwhelming characteristics of a well populated residential suburb, in which there is less scope for Māori interests and activities to be promoted than there was in the past.

[8] The Maungatapu Marae (the Marae) of Ngāti Hē , also called Opopoti, is on the northern tip of the Maungatapu peninsula.[11] The wharenui, Wairakewa, and wharekai, Te Ao Takawhaaki, look to the northeast, towards the bridge and Matapihi peninsula. Te Kōhanga Reo o Opopoti is established on the eastern side of the Marae, between the Marae and a health facility next to State Highway 29A. To the west of

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7 Clauses 3.15 and 3.14.5.
8 Clause 3.16.1.
9 Clause 3.18.1.
10 Bassett, above n 4, at 6 (CBD 301.0024).
11 Environment Court, above n 1, at [10].

the Marae is a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park, home to the rugby field, tennis/netball courts and clubrooms of Rangataua Sports and Cultural Club. The land on which the Club is situated is a Maori reservation managed by Ngāti Hē.[12]

Ngāi Tūkairangi

[9] Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland.[13] Te Ngāio Pā, near the southern tip of the Matapihi Peninsula, is associated with Ngāi Tūkairangi, Ngāti Hē, Ngāti Tapu, and Waitaha.[14] Approximately 60 hectares in Matapihi is owned by over 1,470 Ngāi Tūkairangi or Ngāti Tapu landowners.[15] The Ngāi Tūkairangi No 2 Orchard Trust has managed orchard land in the area since 1992.[16]

The A-line

[10] In the 1950s, the Maungatapu 2 block was implicated in plans for a motorway and a new electricity transmission line.[17] In 1958, the Maungatapu 2 block, including the beach in front of it, was reserved as a marae and recreation area under s 439 of the Māori Affairs Act 1953.

[11] Also in 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. It is supported by poles in Rangataua Bay and passes over some 40 private residences and above the playing fields of Te Ariki Park. Ngāti Hē complained but the Ministry took the position that there was no alternative route for the power lines.[18] The Crown Law Office has acknowledged that the electricity department did not properly inform those affected.[19] The Crown acknowledged in the

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12 Heke, above n 4, at 15 (CBD 304.0975).
13 Environment Court, above n 1, at [28].
14 At [29].
15 Brief of Evidence of Peter Te Ratahi Cross, (25 March 2019) [Cross Brief] at [7] (CBD 202.0388).
16 Environment Court, above n 1, at [188].
17 Bassett, above n 4, at 10 (CBD 301.0030).
18 At 11 (CBD 301.0032).
19 Rachael Willan *From Country to Town: A Study of Public Works and Urban Encroachment in Matapahi, Whareroa and Mount Maunganui* (December 1999) at 85 (CBD 301.0081).

Treaty settlement that it did not send notices to all the owners of land taken, which may have been why Ngāti Hē owners did not apply for compensation within the required timeframe.[20] Ngāti Hē's concerns about the location of the A-Line infrastructure were included in their claim to the Waitangi Tribunal in 2006.[21] The claim referred to the absence of compensation for, or adequate notification of, the construction of the power lines.

[12] The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition.[22] The A-Line went directly over Te Ngāio Pā on the southern tip of the Matapihi peninsula. The effect of the A-line on the use and development of horticultural lands at Matapihi was also the subject of Treaty of Waitangi claims to the Waitangi Tribunal by Ngāi Tūkairangi in 1988 and 1997.[23] These claims also concerned the construction of the power lines without compensation nor adequate consultation.[24]

[13] In 1959, a bridge was constructed from the northern end of the Maungatapu peninsula to the southern end of the Matapihi peninsula. This is now State Highway 29A, to Mt Maunganui. Construction substantially altered the site of Te Pā o Te Ariki of Ngāti Hē, disturbing an ancient urupā and exposing bones.[25]

The B-line

[14] Under the State-Owned Enterprises Act 1986, the electricity assets of the Ministry of Works were transferred to the Electricity Corporation of New Zealand. In 1991, the electricity transmission assets were further transferred to Transpower, the SOE which still manages the national grid. In mid-1991, work began on a second transmission line to Mt Maunganui and Papamoa. In 1993, Transpower undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of

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20 Deed of Settlement, above n 2, cl 2.54.

21 Environment Court, above n 2, at [44]; and Waitangi Tribunal *Tauranga Moana: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2006).

22 Cross Brief, above n 15, at [10].

23 Environment Court, above n 1, at [44]; and Hikitapua Ngata *Transpower Line Realignment Project: Ngai Tūkairangi Hapu Cultural Impact Assessment* at 10 (CBD 304.1008). Wai 211 was heard as part of the foreshore and seabed inquiry. Wai 688 was heard as part of the Kaipara inquiry.

24 Ngata, above n 23, at 10 (CBD 304.1008).

25 Bassett, above n 4, at 13 (CBD 301.0034); and Deed of Settlement, above n 2, cl 2.56.

the state highway.[26] That would enable the A-line to be removed. The B-line was constructed in 1995. It crosses Rangataua Bay through a duct underneath the Maungatapu-Matapihi bridge and underground on the approaches at each end of the bridge.[27] Ms Raewyn Moss from Transpower confirms the resulting expectation:[28]

> … When the B-line was constructed in 1995, there was an expectation at the time that the A-line would eventually be re-aligned onto the B-line. I understand that Ngāti Hē, Ngāi Tūkairangi, Māori trustee land owners also share this expectation. This has been the subject of discussion between the parties and Transpower over many years.

The realignment proposal

[15] The A-Line has not yet been moved. Now, the condition of Poles 116 and 117, located in Te Ariki Park, is deteriorating and the poles need to be replaced. In particular, Pole 117 is close to the edge of the cliff above the harbour and recently required temporary support to protect it from coastal erosion.[29] Tower 118, situated in Rangataua Bay, is due for major refurbishment in the next 10 years.[30]

[16] Recently, Transpower developed a realignment proposal that would remove Poles 116 and 117 and Tower 118 from Rangataua Bay. Instead, aerial lines would extend between two new steel monopoles, Pole 33C on Maungatapu, at a height of approximately 34.7 metres, and Pole 33D at Matapihi, at a height of approximately 46.8 metres. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. This is depicted in the illustration below, with the red lines and poles to be removed, the green lines and poles to be added and the blue lines and poles to be retained.[31]

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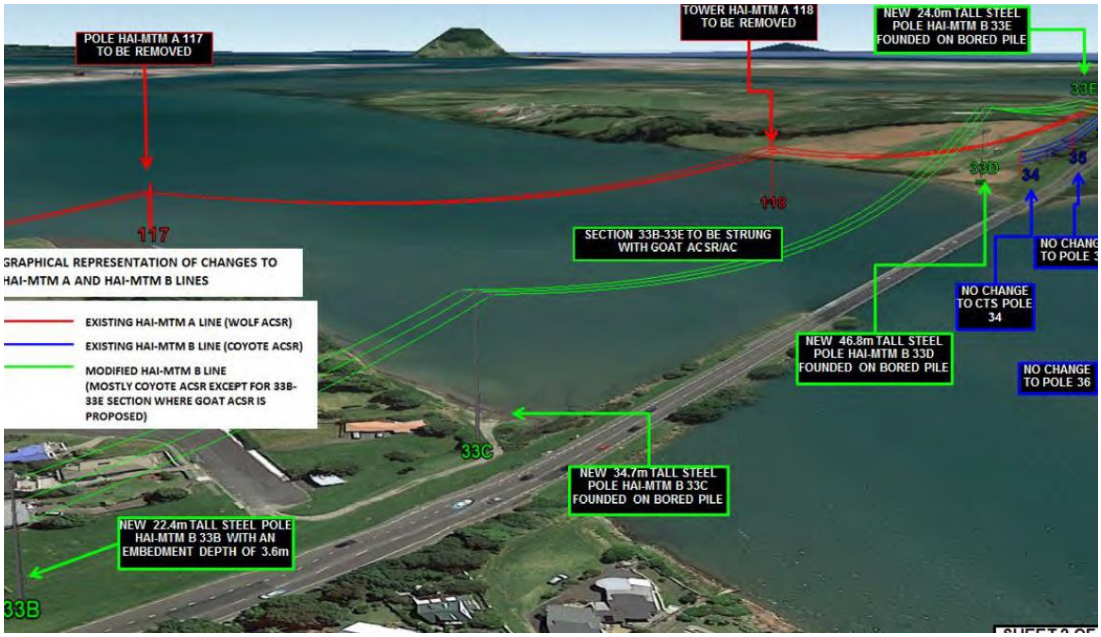
26 Willan, above n 19, at 79 (CBD 301.75).
27 Environment Court, above n 1, at [42].
28 Notes of Evidence of Environment Court [NOE] 15/9–14 (CBD 201.0015).
29 Environment Court, above n 1, at [40].
30 At [42].
31 Transpower *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at Sch A.1 (CBD 304.1103).



[17] Transpower's objectives for this project, set out in its Assessment of Effects on the Environment, are to:[32]

> a) Enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;
>
> b) Remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and
>
> c) Honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

[18] From March 2013, Transpower discussed the project with Ngāti Hē and Ngāi Tūkairangi, among others.[33] The proposal was a "welcome surprise" to Ngāi Tūkairangi, which supports it.[34] Removal of the lines will allow more flexible farming practices, use of shelter planting and reconfiguration of the orchard.[35]

[19] Ngāti Hē and the Marae also initially supported the proposal. But once the applications were notified, and Ngāti Hē and the Marae realised the size, nature and

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32 Transpower *Assessment of Effects on the Environment: Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga* (24 October 2017) at 8 (CBD 304.0784).

33 Environment Court, above n 1, at [47].

34 At [12].

35 At [14].

location of the new Pole 33C, directly adjacent to the entrance to the Marae, they opposed it. A mock-up of the view of Pole 33C from the Marae is depicted below.[36]

The application and Council decisions

[20] In 2017, Transpower applied for the required resource consents for the proposal from the Tauranga City Council and the Bay of Plenty Regional Council (the Councils):[37]

(a) From the Tauranga City Council under the National Environmental Standards for Electricity Transmission Activities (NESETA) regulations for relocation of support structures, removal of willow and other vegetation and construction of the additional poles.

(b) From the Bay of Plenty Regional Council for earthworks, disturbance of contaminated land, drilling of foundations below ground water, modification of wetland, disturbance of the seabed and occupation of the coastal marine area airspace.

[21] Section 2 of the RMA defines the "coastal marine area" to mean "the foreshore, seabed, and coastal water, and the air space above the water", up to the line of mean high water springs.

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36 *Transpower Hairini to Mount Maunganui Re-Alignment: Landscape and Visual Graphics, Attachments to the Environment Court Evidence of Brad Coombs* (30 January 2018) at 39 (CBD 202.0514).

37 Environment Court, above n 1, at [50], Table 1.

[22] The Councils each appointed an independent hearing commissioner to consider and decide the consent applications. On 23 August 2018, the commissioners jointly decided to grant land use consents to realign the A-Line, subject to various conditions.

Appeal to the Environment Court

[23] The Tauranga Environmental Protection Society (TEPS) is an association of 14 people whose views of the harbour after realignment would be impacted by the new powerlines or poles and who made submissions opposing the application. TEPS appealed to the Environment Court. The trustees of the Maungatapu Marae, Ngāi Tūkairangi Hapū Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys joined the appeal as parties under s 274 of the RMA:

(a) The Marae supported removal of the A-Line, as the subject of their long-held grievance and a danger to users of the Sports Club. But the Marae opposed the new poles and lines. Ngāti Hē would rather wait longer to get the right result.

(b) Similarly, Ngāi Te Rangi supported removal of the A-Line and its relocation. It opposed the method by which the realignment would cross Rangataua Bay.

(c) Ngāi Tūkairangi conditionally opposed the appeal on the basis it would delay the removal of transmission infrastructure on Matapihi land, which would have positive cultural and other effects for them.[38] However, if the appellants' concerns could be met through changes within the scope of the application, Ngāi Tūkairangi would wish to consider that.

(d) Mr Meys, whose property is under the existing A-Line, supported the proposal, with urgency, and opposed the appeal.

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38 At [16]–[17].

The Environment Court decision

[24] The Court refused the appeal and amended the conditions of consent.[39] The structure of its decision was to:

(a) identify the background to, and nature of, the proposal and consent application;

(b) outline the legal framework and the relevant policies and plans;

(c) identify three preliminary consenting issues: bundling; alternatives; and maintenance or upgrade;

(d) consider the cultural effects of the proposal;

(e) consider the effects on the natural and physical environment; and

(f) consider and amend the conditions of the consents.

[25] In its conclusion, the Court observed that neither the Councils nor the Court on appeal "have the power to substantially alter Transpower's proposal or to require any third party, such as the New Zealand Transport Authority, to participate in the proposal".[40] It said "[i]f we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent".[41] In summary, the Court in its concluding reasoning:

(a) Found the removal of the A-Line will result in positive effects for all people, land and water and for Ngāti Hē and Ngāi Tūkairangi.[42]

(b) Noted it had found the proposal is a single one and its elements should be considered together.[43]

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39 At [271]–[272].
40 At [260].
41 At [260].
42 At [261].
43 At [262]–[263].

(c) Held that the proposed relocation "does not result in wholly positive effects" and it must have regard to Policy 15 of the NZCPS because the "location is not ideal". In particular, placing the line above the bridge with the associated tall poles "creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A".[44]

(d) Found the alternatives of laying the A-Line on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", though they are technically feasible, because of the cost.[45] The Court does not have the power to require Transpower to amend the proposal.

(e) Found "[t]he character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori."[46] The positive effects of removal of the existing A-Line are "significantly greater than the adverse effects in intensity and scale" in terms of land use, visual impact and effects on sites of significance to Māori, "even while taking account of the impact of the relocated line on views from the marae and proximity to the kōhanga reo".

(f) Considered it "must undertake a fair appraisal of the objectives and policies read as a whole".[47] The Court did not accept Policy 15 of the NZCPS requires consent to be declined or the proposal amended on the basis it has adverse effects on the ONFL. The NZCPS "does not have that kind of regulatory effect" and its terms do not provide that "any use or development in an ONFL would be inappropriate". What is inappropriate "requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the

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44 At [264].
45 At [265].
46 At [266].
47 At [267].

effects of the use or development may be on the things which are to be protected".

(g) Noted it is important that the existing environment of the ONFL includes the existing bridge and national grid infrastructure.[48]

(h) Considered it must also "have regard under s 104(1)(b)" to the relevant objectives and policies of the NPSET, RCEP and District Plan.[49] Those instruments "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved". Policy 6 of the NPSET guides the Court, consistently with the proposal, but "there is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved".

(i) Said finally:

> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

The appeal

[26] Under s 299 of the RMA, a party to a proceeding before the Environment Court "may appeal on a question of law to the High Court" against a decision, report or recommendation of the Environment Court. Under r 20.18 of the High Court Rules 2016, the appeal is "by way of rehearing".

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48 At [268].
49 At [269].

[27] TEPS appeals the Environment Court's decision. The Marae Trustees support the appeal as an interested party. Transpower, as the applicant for consent, supports the Environment Court's analysis. Ngāi Tūkairangi Trust supports the submissions of Transpower and does not make any additional submissions. The Councils, as the consent authorities, separately support the Court's decision.

[28] Counsel argued six or seven grounds of appeal. There was quite a lot of overlap in all parties' submissions from one ground to another. I group the grounds of appeal in terms of five issues and treat them in a different order. I treat submissions made by counsel in relation to the issue to which they are most relevant. The issues are:

(a) Was the Environment Court wrong to "bundle" the effects together?

(b) Was the Court wrong in its findings about adverse effects?

(c) Did the Court err in its approach to pt 2 of the RMA?

(d) Did the Court err in interpreting and applying the planning instruments?

(e) Was the Court wrong in its assessment of alternatives, including the status quo?

Issue 1: Was the Environment Court wrong to bundle the effects together?

The Environment Court's decision

[29] The Environment Court addressed the issue of "bundling" as the first preliminary issue. It stated:

> [96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[50] Where, however, the effects to be

[50] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580; and *King v Auckland City Council* [2000] NZRMA 145 (HC) at [47]–[50].

> considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[51]

[30] The Court recorded but rejected the appellant's argument that the proposal was in two parts that should be assessed separately using a structured approach.[52] It considered the term "effect" is defined broadly and inclusively in s 3 of the Resource Management Act 1991 (RMA) and is subject to the requirements of context.[53] The Court considered case law has generally interpreted and applied the statutory definition of "effect" in a realistic and holistic way.[54] It concluded:

> [110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.
>
> [111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units which can assist in such integration.
>
> [112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

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51 *Bayley v Manukau City Council,* above n 50, at 580; and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 (CA) at [21]–[22].

52 Environment Court, above n 1, at [100].

53 At [104].

54 At [106]–[108], citing *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC); *Marlborough District Council v New Zealand Rail Ltd*]1995] NZRMA 357 (EnvC); and *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

[31] In its overall conclusion, the Environment Court said that, even though it was "treating the proposal as a single one", the effects of the elements of the proposal "must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate … must be done in terms of all the effects".[55]

Submissions

[32] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Environment Court erred in rejecting a structured approach. He submits the Court should have considered the two distinct elements of the removal of the A-Line and construction of the new infrastructure separately. He submits doing so is particularly important given the "avoid" policies which require a proposal with adverse effects to be squarely confronted. He submits the Court netted off the adverse effects on the Marae with the benefits of removing Poles 116 and 117. The effect of that approach was to subsume the adverse effects into an overall net-effect analysis. This masked the effects on cultural values and circumvented the requirement to confront the terms of the planning documents.

[33] Mr Beatson, for Transpower, submits the Court properly accepted that relocation of the A-Line depended on consents being granted, which determined whether or not to consider the effects in a holistic way. He submits the Court was correct, given that the removal and placement are integrally related, and was consistent with the assessment of all expert witnesses and the authorities.

[34] Ms Hill, for the Councils, submits there is no material error of law. Separate assessment of each part of the proposal against the avoid policies would not necessarily prohibit a proposal with adverse effects. It would just require the effects to be squarely confronted. The Environment Court was clear that the effects of the separate parts of the proposal must be identified and analysed separately and it squarely confronted the effects of the proposal. The structured approach is not supported by the policy framework. The Court's "realistic and holistic" approach was

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55 Environment Court, above n 1, at [263].

appropriate and consistent with sound resource management practice, whereas the structured approach has no supporting authority.

Did the Court err in applying a bundling approach?

[35] The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, are integrally related. One would not occur independently of the other, as Mr Gardner-Hopkins acknowledged. The effects on cultural values were incorrectly determined, as I discuss in Issue 2. But they were not masked by the Court's approach. The Environment Court was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way. The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here. The problems with the Court's reasoning were not caused by its approach to bundling.

Issue 2: Was the Court wrong in its findings about adverse effects?

[36] The Court was required to consider whether the proposal had certain adverse effects. This issue concerns whether the Court's findings regarding adverse effects constituted an error of law.

Relevant provisions

[37] The Court was required to interpret and apply two policies of the Bay of Plenty Regional Coastal Environment Plan (RCEP).[56]

[38] First, Iwi Management Policy IW 1(d) requires proposals "which may affect the relationship of Māori and their culture, traditions and taonga" to "recognise and provide for" "[a]reas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements,

[56] Relevant extracts from the RCEP and other planning instruments are provided in full in the Annex to this judgment.

iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumātua".

[39] Schedule 6 identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

> Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ng*ā *Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> …
>
> Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.
>
> Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

[40] IW 2 of the RCEP applies to "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS [Regional Policy Statement]". Advice Note 2 to the Policy states that "[t]he Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS".

[41] Second, Natural Heritage Policy NH 4 applies to "adverse effects" "on the values and attributes of" "[ONFL] (as identified in Schedule 3)". Te Awanui (Tauranga Harbour) is identified as ONFL 3, including the harbour around Maungatapu and Matapihi. Schedule 3 states "[t]he key attributes which drive the requirement for classification of ONFL, and require protection, relate to the high natural science values associated with the margins and habitats; the high transient

values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns".

[42] Schedule 3 of the RCEP provides assessment criteria for "Māori values" as "Natural features and landscapes that are clearly special or widely known and influenced by their connection to the Māori values inherent in the place". "Māori values" of ONFL 3 are rated as "medium to high" and evaluated as follows:

> Ancient pā, mahinga kai, wāhi tapu, kāinga, taunga ika.
>
> Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.
>
> Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

[43] Policy NH 4A provides:

> When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedule … 3 to this Plan …:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape …
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor;
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values, and
>
> (e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

[44] The Tauranga City Plan, which has the legal status of a District Plan, should also be interpreted and applied. It identifies Te Ariki Pā/Maungatapu as a significant Māori area (No M 41) of Ngāti Hē.[57] Its values are recorded as:

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[57] Environment Court, above n 1, at [26].

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[45] The iwi management plans, included in the Annex to this judgment, and invoked in other planning instruments, relevantly provide:

(a) Policy 10 of Te Awanui Tauranga Harbour Iwi Management Plan 2008 specifically records that "[i]wi object to the development of power pylons in Te Awanui".

(b) Policy 15.1 and 15.2 of the Tauranga Moana Iwi Management Plan is to "[o]ppose further placement of power pylons on the bed of Te Awanui" and "[p]ylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge".

(c) The Ngāi Te Rangi Resource Management Plan states:

> Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.
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> …
>
> Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

[46] Te Tāhuna o Rangataua (Rangataua Bay) is also listed in the New Zealand Heritage List/Rārangi Kōrero as a wāhi tapu historically associated with several iwi and hapū, including Ngāti Hē.[58]

Environment Court's decision on adverse effects

[47] In its lengthy discussion of cultural effects, the Environment Court outlined the consultation process, the iwi management plans, and the cultural impact assessments of the proposal.[59] It summarised the evidence of each witness from the Marae, Ngāi Te Rangi and Ngāi Tūkairangi.[60] In particular:

(a) The late Mr Taikato Taikato, chairperson of the Maungatapu Marae Trust and kaumātua, supported the removal of the A-Line from Te Ariki Park but did not support its replacement as an aerial line. This was because the cable would be directly in front of the marae and would "move the lines from our backs and put them back in front of our faces".[61] He had concerns about the noise from the lines. He believed Ngāti Hē could wait another year or two to get the right result. Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with electricity, and that, should consent be refused, negotiations about replacing Poles 116 and 117 would have to start all over again.

(b) Dr Kihi Ngatai focused on the significance of Te Pā o Te Ariki, the pā site of Ngāti Hē. He told the Court his main purpose as a member of the Te Pā o Te Ariki Trust is to get the line shifted away from this significant site because it is wāhi tapu and should be left as it was when it became tapu; without powerlines.

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58 Heritage New Zealand *New Zealand Heritage List/Rārangi Kōrero – Report for a Wāhi Tapu Area: Te Tāhuna o Rangataua* at 5 and 22 (CBD 303.0663 and 303.0680).

59 Environment Court, above n 1, at [153]–[169].

60 At [170]–[193].

61 At [170]; and Statement of Evidence of Taikato Taikato on behalf of the Maungatapu Marae Trust, (25 March 2019) at 3 (CBD 202.0370).

(c) Ms Hinerongo Walker, a kuia and a Trustee of both the Maungatapu Marae and the kōhanga reo, and Ms Parengamihi Gardiner, a kuia who lives in the Kaumātua Flats on Te Ariki, gave evidence together. Ms Walker was concerned about the visual aesthetics and constant humming of the realignment and the impact on the marae and kōhanga reo. Ms Gardiner said they had been trying to have the lines removed, and confirmed she had submitted in favour of the proposal to remove the lines from Te Ariki Park. However, she said she did not want them removed if it meant an impact on the marae, the kōhanga reo or other people. When asked whether they supported the removal of Tower 118 from the middle of Te Awanui, they said that depended "on the removal of lines from here" and they looked it as a whole package.[62]

(d) Ms Matemoana McDonald, of Ngāti Hē and a councillor on the Bay of Plenty Regional Council, gave evidence on the changes to the cultural landscape of Ngāti Hē over her lifetime.[63] She said the Transpower proposal adds insult to injury in terms of what Ngāti Hē have lost in providing for the needs of the city, and said they do not want two new poles in close proximity to their sacred marae. She wanted to see alternative options considered and discussed to find a better solution to the proposal. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the A-Line issue. She questioned why Pole 33C could not go to the other side of SH 29A, because although it could have effects on other parties on that side of the road, those houses would change hands over time, whereas Ngāti Hē would always be present at their marae. She confirmed that "Te Awanui and Te Tahuna has much significance as what the marae does".[64]

(e) Ms Ngawaiti Hera Ririnui, chairperson of Te Kōhanga Reo o Opopoti, said the potential effect of Pole 33C on tamariki that live on the marae

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62 NOE 260/3.
63 Statement of Evidence of Matemoana McDonald (8 April 2019) (CBD 202.0378).
64 NOE 276/6–9.

or attend the kōhanga reo was seen as negative, as there is no research that proves or disproves whether there is an impact on health from such powerlines.[65] She gave evidence of tamariki having full access to the area around the Marae and "tamariki out on the beach at Rangataua being taught by our kaimahi about what it means to be part of our community and be a member of Ngāti Hē".[66] She saw the pole as a "monstrous dark structure that's going to be hanging over our marae on a daily basis, lines that are going to be slung across our marae swinging in the wind for our tamariki to see".[67] She said generations have tried to fight the changes in the surrounding environment, but have never won. She agreed removal of the poles and wires from Te Ariki Park would be a benefit, but not if the poles were relocated to beside the kōhanga reo.

(f) Ms Yvonne Lesley Te Wakata Kingi, secretary of the Maungatapu Marae committee for 25 years, said she felt they were having to continue a battle to maintain the mana on their land. She talked about their use of the beach.[68] She stated they are being treated in the way Māori were when new people first began to settle there. She described wanting the marae to be a happy place, not only for Māori but for the visitors who come there.

(g) Mr Mita Michael Ririnui, a kaumātua, the chair of the Ngāti Hē Hapū Trust, and the Ngāti Hē representative on the Ngāi Te Rangi Settlement Trust and Te Rūnanga O Ngāi Te Rangi Iwi Trust, clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park. However, the Trust had not given any support to the proposed structures including Pole 33C. He said the proposed

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65 Environment Court, above n 1, at [179].
66 NOE 281/12–25.
67 NOE 281/27–30.
68 NOE 286/4–15.

structures are considered "a blight on the [Ngāti Hē] estate" and marae.[69]

(h) Mr Paul Joseph Stanley, Chief Executive of Te Runanga o Ngāi Te Rangi Iwi Trust, submitted "[i]t will be much better … if those lines were put across with the bridge or underneath the harbour".[70]

[48] In relation to cultural effects, the Court:

(a) said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui";[71]

(b) identified "the key cultural issues" to be "the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kōhanga reo there";[72]

(c) traversed the process of consultation in preparing the application;[73]

(d) summarised the submissions on the notified consent application, focussing on Ngāti Hē's position, including in this (implicitly critical) paragraph:[74]

> [205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tūkairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below

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69 NOE 291/5–6.
70 NOE 265/19–20.
71 Environment Court, above n 1, at [194].
72 At [195].
73 At [196]–[197].
74 At [198]–[206].

> the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

(e) found that Transpower had carried out a full and detailed consultation, and that Ngāti Hē changed its mind, as it was entitled to do;[75]

(f) noted Ngāti Hē's frustration and anger about the original construction of the A-Line and accepted the cultural effects of that had adversely affected them for the last half-century;[76]

(g) found the removal of the A-Line and poles from Ngāti Hē's land at Te Ariki Park and of Tower 118 in Rangataua Bay would have positive effects;[77]

(h) "deeply regretted" the "adverse effects from their point of view" of Pole 33C, but found there was no opportunity to move the pole without adversely affecting other persons not before the Court;[78]

(i) found Ngāti Hē's preferred alternatives of a strengthened or new bridge or under-sea-bed crossing would reduce the effects on the marae and kōhanga reo but "may also, from our understanding of the evidence" have greater effects within the [Coastal Marine Area] and on the ONFL than those that will result from the aerial transmission line";[79]

(j) observed that Ngāi Tūkairangi consider the effects of the proposal on their land would be highly beneficial;[80]

(k) observed there is no certainty that a proposal Ngāti Hē can support will come forward or achieve their desired outcomes;[81]

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75 At [207]–[208].
76 At [209].
77 At [211].
78 At [212].
79 At [213].
80 At [214].
81 At [214]–[215].

(l) suggested changes to activities or to the environment may result in the cumulative effect being less than before and doubted the only proper starting point for assessing cumulative effects was prior to any development;[82]

(m) held that the question was whether Ngāti Hē is better or worse off in terms of the assessment of cumulative effects, deducting the removal of adverse effects from the creation of adverse effects, and noted Ngāti Hē "are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects";[83]

(n) considered no other group would be worse off by the proposal and some, "particularly Ngāi Tūkairangi and the residents along Maungatapu Road" would be better off and refusing consent would leave them worse off;[84]

(o) noted Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent;[85] and

(p) concluded:[86]

> [220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. **From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē.** Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kōhanga reo. We are conscious that the benefits to Ngāi Tūkairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tūkairangi, are greater than the adverse

82 At [216].
83 At [217].
84 At [218].
85 At [219].
86 Emphasis added.

> effects of Pole 33C's placement near the marae and the kōhanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

[49] In relation to the effects on the ONFL, the Environment Court compared and assessed the evidence of expert witnesses, in particular that of Ms Ryder for the Councils and Mr Brown for TEPS.[87] The Court was "unable to confirm Mr Brown's opinions in relation to what he considered [were] the significant effects on Māori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses".[88]

[50] The Court further concluded:

> [246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui – and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.
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> [247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kōhanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.
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> [248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

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87 Summarised at [243], Table 3.
88 At [244].

Submissions on adverse effects

[51] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in light of the evidence before it, because the true and only reasonable conclusion is that there would be:

(i) at least some adverse effects in terms of ASCV 4 or otherwise on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment, contrary to Policy IW 2; and/or

(ii) significant, or at least some, adverse effects on Ngāti Hē's association with the cultural values of ONFL 3, contrary to Policy NH 4(b).

(b) It is for Ngāti Hē to identify the cultural impacts on them and they have done so. All the Ngāti Hē witnesses promoted the same overall outcome and gave a consistent message. They did not support the proposal because the benefits of the removal of the A-Line did not outweigh the adverse effects. Not one witness said the proposal should proceed if the cost was the poles being in front of the Marae. The evidence focussed on the visual dominance of the poles but kaumātua and kuia also raised wider issues of the connectedness of the Marae and the reserve with Rangataua Bay. The visual effects can clearly affect the aesthetic and experience of the ONFL. The moderate to high rating of Māori values in ONFL 3 answers the submission that Māori values are not a key component of the ONFL at the Bay.

(c) The Environment Court navigated around all that, finding the effects were de minimis. It was focussed on the effects of aerial lines crossing the harbour on the ONFL, not the effects of the large structures on either side that will impact on Ngāti Hē's cultural association with the harbour. If the Court had applied the right framework and focussed on

the poles as well as the lines, it could not have found the effects to be *de minimis*.

(d) It cannot be right that any adverse effect needs to be assessed against the Tauranga harbour as a whole, because that would require a proposal of a massive scale. In the context of this proposal, the appropriate scale must be Rangataua Bay. If the project proceeds and Poles 33C and 33D are constructed, the effects on Ngāti Hē and the Marae will continue for another two to three generations. They do not want an additional visual intrusion into their connectedness with Rangataua Bay from their marae or beach. If that is not available now, they are prepared to wait.

[52] Mr Beatson, for Transpower, submits:

(a) It could not be further from the truth to suggest the Court found there were no effects on cultural values at all or it imposed its own assessment of the cultural effects. The Court spent some 20 pages summarising the consultation and evidence on cultural effects. It weighed the evidence before concluding there was an overall positive cultural effect. The benefits of the realignment to Ngāti Hē and Ngāi Tūkairangi would be greater than the adverse effects of Pole 33C on the Marae and kōhanga reo. Its approach is consistent with *SKP Incorporated* and *Trans-Tasman Resources*.[89]

(b) The Court focussed its enquiry on the effects of ONFL. It noted the main adverse cultural effects related to visual effects on the Marae and kōhanga reo enjoyment of the ONFL, rather than on the values and attributes of ONFL 3. The description of the values and attributes is a guide to the key focus of the ONFL. Adverse effects on Māori values would not necessarily lead to the conclusion there is an adverse effect on the ONFL as a whole, in terms of the description. The Court found

[89] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

the conclusion that the effects on the Māori values would be significant was not supported by the evidence of the cultural witnesses.[90]

(c) The Environment Court's findings were well supported by the landscape and cultural evidence. As the primary finder of fact it should be given latitude to do so. The appellant has not cleared the high bar of an "only true and reasonable conclusion". An assessment of the effects should take an overall approach, allowing the significant positive effects of the relocation to be taken into account. The relocation is more desirable than retaining the status quo.

[53] Ms Hill, for the Councils, submits:

(a) The weight given to particular considerations by the Environment Court is not able to be revisited as a question of law. It should be given some latitude in reaching findings of fact within its area of expertise, with which the High Court should not readily intervene.

(b) The Environment Court thoroughly set out and carefully evaluated the cultural evidence. It observed the evidence given by the cultural witnesses focussed on the visual effects of the pole in front of their marae rather than the effects on the cultural values of ONFL 3. The values and attributes of the ONFL include the national grid infrastructure so that is why the effect of the proposal is *de minimis*.

(c) Policy IW 2 is not a directive policy. The Court clearly explained its approach to the cumulative effects on Ngāti Hē arising from historical matters. The effects on Ngāti Hē are only part of the wider cultural equation. Cultural values are often intangible and it is difficult to avoid something that cannot be seen.

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90 Environment Court, above n 1, at [228].

Did the Court err in its findings about adverse effects?

[54] It is clear from the evidence before the Court, as summarised above, that Ngāti Hē considers the re-alignment proposal would have an overall adverse effect compared with the status quo. In particular, they are concerned about the implications of the location of Pole 33C on their use and enjoyment of their marae and kōhanga reo, and the effects on the ONFL. The Environment Court summarised the submissions this way:

> [198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kōhanga reo children, effects on the mana of the marae, ongoing cumulative effects on the Hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[55] That view is understandable given the history and cultural values of Ngāti Hē that are recognised in ASCV 4 and ONFL 3 of the RCEP and substantiated by the evidence of kuia and kaumātua of Ngāti Hē. It is consistent with the identification in the Tauranga City Plan of Te Ariki Pā and Maungatapu as a significant area for Ngāti Hē with special values and significance in terms of mauri, wāhi tapu, korero tuturu and whakaaronui o te Wa. It is consistent with the significance of Tauranga Moana to Ngāi Te Rangi as a physical and spiritual resource, recognised by the Crown in the Deed of Settlement. It is consistent with the objections in the Iwi Management Plans to power pylons and the emphasis of Ngāi Te Rangi's Resource Management Plan on the importance of marae. It is consistent with the Marae Sightlines Report, which was in evidence before the Environment Court and referred to by several witnesses. That report was prepared for SmartGrowth and the Combined Tāngata Whenua Forum in 2003 to review the visual setting, values and landscape context of 36 marae in the Western Bay of Plenty.[91] Its conclusions stated:[92]

> Protecting visual access and linkages to the ancestral landscape is critical to the personal and cultural wellbeing of the tāngata whenua of the rohe.

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91 Kaahuia Policy Resource Planning & Management *Marae Sightlines Report* (December 2003) (CBD 301.0143).

92 At 34–35 (CBD 301.0163–301.0164).

> Discrete taonga identifiable as landscape markers or pou whenua cue the oral traditions, poetry and waiata, traces events leaders and traditions, catalyses and facilitates the education of generation to generation and serves as personal mentor.
>
> …
>
> The sense of belonging and turangawaewae is dependent on the quality of the visual of the surrounding landscape. The challenge then is to promulgate a landscape management principle dedicated to tāngata whenua interest to protect the mnemonic – iconic values associated with their rohe and turangawaewae. Particular regard for their relationship with the landscape as a component of landscape quality and diversity is required.

[56] In its decision, the Court explicitly noted that Ngāti Hē "were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing".[93] It recorded that "[t]hey are clear in their view that they [will be] worse off, not least because they see the proposed change as continuing to subject them to adverse effects".[94] The Court recorded that "the evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view".[95] In its conclusion, the Court said:

> [264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A.

[57] The depth of Ngāti Hē's opposition to the proposal is reflected in their preference for the status quo over the proposal. In its Deed of Settlement with Ngāi Te Rangi, the Crown acknowledged the infrastructure networks on the Maungatapu peninsula "have had enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi" while making a "significant contribution . . . to the wealth and infrastructure of Tauranga".[96] The Court said:

> [209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pā and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions provided about the history of development activities in the Ngāti Hē rohe and accept

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93 Environment Court, above n 1, at [200].
94 At [217].
95 At [205].
96 Deed of Settlement, above n 2, cls 3.15.5 and 3.16.1.

> that these cultural effects have adversely affected the hapū for the last half century.

[58] Yet Ngāti Hē preferred that status quo to the proposal.

[59] The Environment Court's conclusion in relation to the cultural effects of the proposal, relevant to IW 2, or the effects on the values of the ONFL relevant to NH 4, did not reflect the evidence before it:

(a) Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects.[97] That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē,[98] even though it had found Ngāti Hē clearly considers it would.[99]

(b) In relation to the ONFL, the Court said it had no doubt about the importance of Rangataua Bay to the marae and Ngāti Hē.[100] That is clearly demonstrated by the evidence before it. But the Court concluded the long-term visual effects of the works from the marae and vicinity to be "de minimis".[101]

[60] The Supreme Court's judgment in *Bryson v Three Foot Six Ltd* is the most authoritative current exploration of the parameters of questions of law.[102] In summary:

(a) Misinterpretation of a statutory provision obviously constitutes an error of law.[103]

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97 Environment Court, above n 1, at [220].
98 At [220].
99 At [217].
100 At [246].
101 At [248].
102 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72. Applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].
103 At [24].

(b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[104]

(c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer".[105] The three rare circumstances in which that "very high hurdle"[106] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[107]

[61] I consider the Court's conclusions about the evidence were insupportable in terms of *Bryson v Three Foot Six Ltd*. The Court accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL. But it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis".

[62] The evidence of Ngāti Hē, as summarised above, is contradictory of those findings. The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing

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104 At [25].

105 At [26]. The sentence quoted in *Bryson* contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52].

106 *Bryson v Three Foot Six Ltd*, above n 102, at [27].

107 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. These can also be seen as circumstances of unreasonableness: *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and footnote 27.

adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

[63] The Court's approach is not saved by a distinction between the "values and attributes" of the ONFL and the ONFL itself. The Māori values of ONFL 3 are rated as medium to high and clearly encompass connections to ancestral and cultural heritage sites. The evidence is that Pole 33C would interfere with those connections with Rangataua Bay, including on the beach.

[64] As Mr Gardner-Hopkins submits, an effect of a proposal at Rangataua Bay does not have to be assessed for its impact on the whole Tauranga Harbour, just Rangataua Bay. And neither is the Court's approach saved by it being an overall assessment of cultural effects, including the effects on Ngāi Tukairangi. The Court clearly rested its conclusions on its findings that the effects on Ngāti Hē alone would be, on balance, positive for Ngāti Hē. It relied on evidence from an expert landscape architect for the councils, Ms Ryder, to that effect.[108] But that was not Ngāti Hē's view. As the Court recorded Mr Gardner-Hopkins submitted:[109]

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant

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108 Environment Court, above n 1, at [228]–[229].
109 At [245].

and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018 that:[110]

> … persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

[67] Deciding otherwise is also inconsistent with the requirement of Policy IW 5 of the RCEP, and similar statements in Policies IW 2B(b) and IW 3B(e) of the RPS. Contrary to the Court's finding, the RCEP is specific enough about the cultural values and attributes of Rangataua Bay and Te Awanui. Policy IW 5 states:[111]

> Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

[68] Mr Taikato and Mr Ririnui are kaumātua. Ms Walker and Ms Gardiner are kuia. The evidence of Ngāti Hē is clear.

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110 *SKP Incorporated v Auckland Council*, above n 89, at [157]. On appeal, Gault J considered the general statement of position in support of the proposal by the party taken to represent mana whenua "resolved any cultural effects issue". (He accepted that finer grained evidence would be required in an application for re-hearing where two entities were claiming mana whenua with competing evidence on cultural effects): *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [57].

111 Bay of Plenty Regional Council *Proposed Bay of Plenty Regional Coastal Environment Plan (RCEP)* at 38 (CBD 302.0302).

[69] I do not readily reach a different view of the facts to that of the Environment Court. But I consider proper application of the law requires a different answer from that reached by the Court regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of the ONFL. Accordingly, the Court's findings about those matters constitute an error of law. Whether that matters to the outcome of the appeal depends on how material the error was, which I consider in the context of the remaining issues.

Issue 3: Did the Court err in its approach to pt 2 of the RMA?

[70] This ground of appeal is whether the Court erred in not applying pt 2 of the RMA. It is integrally related to the submissions of counsel about whether the Court should have, and did, apply an "overall judgment" approach.

Part 2 of the RMA and the former overall judgment approach

[71] Part 2 of the RMA provides the overall sustainable management purpose and principles of the Act. Section 5(1) in pt 2 states that the purpose of the Act "is to promote the sustainable management of natural and physical resources". Section 5(2) explains that "sustainable management" means "managing the use, development, and protection of natural and physical resources in a way … which enables people and communities to provide for their "social, economic, and cultural well-being" while:

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[72] The Act then provides for a cascading hierarchy of legal instruments in "a three-tiered management system" which give effect to pt 2.[112] A document in a tier must give effect to, or not be inconsistent with, those in the tiers above. The highest tier is national policy statements, which set out objectives and identify policies to

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[112] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*EDS v King Salmon*] at [10] and [30].

achieve them. The next tier are regional policy instruments, which identify objectives, policies and methods of achieving them including rules, that are increasingly detailed as to content and location.

[73] The tiers of planning instruments are the legal instruments which "flesh out" how the purpose and principles in pt 2 apply in a particular case in increasing detail and specificity.[113] The Supreme Court explained in *EDS v King Salmon* the importance of attending to the wording of the planning instruments, as with any law:

> [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.
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> [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.
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> [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…

[74] So, although pt 2 is relevant to decision-making, because it sets out the RMA's overall purpose and principles, the basis for decision-making is the hierarchy of planning documents.[114] The Supreme Court noted in *EDS v King Salmon* that pt 2 of the RMA may be relevant if a planning document, there the NZCPS, does not "cover the field" or to assist in a purposive interpretation if there is uncertainty as to the meaning of particular policies in the NZCPS.[115]

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113 At [151].
114 At [151].
115 At [88].

[75] There has been some debate as to the implications for this approach of following the subsequent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council*.[116] There, the Court of Appeal accepted that, in considering a resource consent application compared with a plan change proposal, a decision-maker must have regard to the provisions of pt 2 when appropriate.[117] The Court said that applications for resource consent "cannot be assumed" to "reflect the outcomes envisaged by pt 2" and "the planning documents may not furnish a clear answer to whether the consent should be granted or declined".[118] It did not consider that the Supreme Court's rejection of the "overall judgment" approach prohibited consideration of pt 2 in the context of resource consent applications.[119]

[76] There are obiter comments by the Court of Appeal in *RJ Davidson Family Trust* that appear to suggest the Supreme Court's proscription of the "overall judgment" approach in *EDS v King Salmon* might not apply outside a context that engages the NZCPS.[120] However, this case does engage the NZCPS. It is clear that, where the NZCPS is engaged, any consent application will necessarily be assessed applying the provisions of the NZCPS and other relevant plans, and also pt 2 if it is otherwise unclear whether the consent should be granted or not.[121] Part 2 cannot be used "for the purpose of subverting a clearly relevant restriction in the NZCPS".[122] Where there is "doubt" as to the outcome of the consent application on the basis of the NZCPS, recourse to pt 2 is necessary.[123] Recourse to pt 2 may or may not assist, depending on the provisions of the relevant plan.[124]

[77] In any case, I read the Court of Appeal's comments as being focussed on permitting reference to pt 2 of the RMA. I do not read the Court of Appeal to be endorsing the previous approach of courts simply listing relevant considerations, including provisions of planning documents, and stating a conclusion under the rubric

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116 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
117 At [47].
118 At [51].
119 At [66].
120 At [67]–[69] and [71].
121 At [71] and [73].
122 At [71].
123 At [75].
124 At [75].

of an "overall judgment" in relation to consent applications that do not engage the NZCPS. The Supreme Court was clear about the obvious defects of that approach.[125] It is inconsistent with the text and purpose of the RMA, inconsistent with the need to give meaning to the text of the plans as the legal instruments made under the RMA, and inconsistent with the rule of law. The Court of Appeal's statement, that in all cases not involving the NZCPS "the relevant plan provisions should be considered and brought to bear on the application" makes it clear it does not advocate for that.[126] Rather, the Court considered there must be "a fair appraisal of the objectives and policies [of a plan] read as a whole".[127] While the Court of Appeal expanded on the use of pt 2 of the RMA, I do not consider its judgment contradicted the reasoning of the Supreme Court in warning about the defects of the overall judgment approach in relation to particular consent applications.

[78] This was illustrated in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[128] That case involved a challenge to the formulation of natural heritage policies for the Regional Coastal Environment Plan (RCEP) on the basis of inconsistency with the NZCPS. Wylie J held:

(a) The Environment Court was not entitled to focus on the unchallenged provisions of the planning document at issue, or the one immediately above it and ignore or gloss over higher order planning documents.[129]

(b) The Court erred in resolving tensions in RCEP policies primarily by reference to the RCEP's objectives, with only limited reference to the RPS and NZCPS.[130] The Court "failed to make 'a thoroughgoing attempt to find a way to reconcile' the provisions it considered to be in tension".[131]

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125 *EDS v King Salmon*, above n 112, at [131]–[140].
126 *RJ Davidson Family Trust v Marlborough District Council,* above n 116, at [73].
127 At [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
128 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.
129 At [84].
130 At [89].
131 At [98], citing *EDS v King Salmon*, above n 112, at [131].

(c) The "proportionate" approach adopted by the Environment Court was an overall judgment approach, "albeit by a different name", of the sort that had been "roundly rejected" by the majority of the Supreme Court in *EDS v King Salmon*.[132] It was not available to the Court to suggest that the benefits and costs of regionally significant infrastructure that could have adverse effects on areas of Indigenous Biological Diversity, which are areas with outstanding natural character in the coastal environment, should be assessed on a case-by-case basis having regard to all relevant factors.[133]

(d) Accordingly, the Environment Court erred in:

(i) approving policies and a rule that did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS;[134]

(ii) by failing to consider the directive nature of Policies CB 2B and CE 6B of the RPS;[135] and

(iii) by failing to recognise that the objectives in the RCEP recognise that "provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area".[136]

[79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed.[137] As with any legal instrument, the text of the

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132 At [103]
133 At [106].
134 At [123].
135 At [129].
136 At [135].
137 At [128]–[129].

instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required.[138] The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. That is consistent with the standard purposive interpretation of enactments, as summarised by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[139]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The Environment Court's treatment of pt 2

[80] Here, the Environment Court held, with reference to *RJ Davidson*, that it is "necessary to have regard to Part 2, when it is appropriate to do so", but reference to pt 2 is "unlikely to add anything" where it is clear a plan has been competently prepared having regard to pt 2.[140] "[A]bsent such assurance, or if in doubt, it will be appropriate and necessary to do so".[141] The Court considered submissions about whether reference to pt 2 was required here, in particular regarding the relationship between the NPSET and NZCPS, or whether those instruments were clear and had been reconciled in the formulation of the RCEP.[142] The Court considered evidence of expert planning witnesses about whether to refer to pt 2,[143] which is irrelevant and an error given that the necessity or otherwise of reference to pt 2 is an issue of law. The Court said:

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138 At [75].

139 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

140 Environment Court, above n 1, at [59].

141 At [59].

142 At [60]–[67], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 128, and related Environment Court judgments.

143 At [66].

> [68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

[81] The Court acknowledged the need to give effect to national policy statements according to their particular terms, rather than on the basis of a broad overall judgment.[144]

[82] In the final two paragraphs of its concluding reasoning, after rejecting the argument that the NZCPS required consent to be declined, the Court said:

> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on pt 2 and the overall judgment approach

[83] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Court erred by failing to assess the proposal against pt 2, including ss 6(3), 7(a) and 8, directly. The nature of the issues, the meaning of the policies and the relationship between the NZCPS and NPSET made it "appropriate and necessary" for it to do so. He submits the Court erred in applying an overall judgment of the proposal against s 5 selectively, without analysis, and without consideration of the balance of pt 2. *RJ Davidson* does

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144 At [92].

not mean that reference to pt 2 only occurs if there is a problem. Rather, pt 2 and superior planning instruments must be taken into account in a difficult case, as it was here. He submits that pt 2 should be used in a purposive interpretation of the terms in the RCEP.

[84] Mr Beatson, for Transpower, submits:

(a) *EDS v King Salmon* rejected the previous "overall broad judgment approach". *RJ Davidson* confirms recourse to pt 2 is only necessary where there is a question as to whether a plan has been competently prepared having regard to pt 2. The Court was correct that it is up to a decision-maker to give competing policies such weight as it thinks necessary in the context.

(b) The Court found there is no need for an overall evaluation under pt 2 at the consenting stage where plans have been prepared having regard to pt 2. Here, the Court found the RCEP is comprehensive and provides a clear policy and consenting pathway for the project, so it focussed on the RCEP policies. The relevance to a proposal of higher order documents, which have been reconciled and prepared in accordance with pt 2, does not justify concluding it is unclear as to whether consent should have been granted. No defect within the RCEP has been identified that makes recourse to pt 2 necessary. The Court's concluding paragraphs were not attempting to undertake a pt 2 analysis.

(c) Regardless of its decision that recourse to pt 2 was not necessary, the Court carefully set out the cultural evidence provided by witnesses, the consultation undertaken by Transpower, the potential cumulative cultural effects and how the cultural effects on both hapū would be impacted by the proposal. That is the same analysis that would be undertaken under ss 6(e), 7(a) and 8. Addressing those sections directly would have added nothing. Sections 7(b), 7(c) and 7(f) of pt 2 of the RMA would also be relevant. The conclusions reached would inevitably have been the same.

[85] Ms Hill, for the Councils, submits the Environment Court exercised a discretionary judgment not to consider the proposal against pt 2.[145] As the Court of Appeal held in *RJ Davidson*, assessment against pt 2 is only necessary where a plan has not been competently prepared in accordance with pt 2. The Court correctly observed that, in applying the policies, no specific outcomes are particularised and no outcome that would wholly avoid adverse effects was possible.[146] Its consideration of s 5 did not purport to be an assessment against pt 2.

Did the Court err in its approach to pt 2?

[86] I outlined above the proper approach to pt 2 of the RMA and the legal defects of the overall judgment approach. Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust,* a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

[87] Mr Beatson is correct that the Court here considered that the RCEP is comprehensive and provides a clear policy framework and consenting pathway for the proposal.[147] The Court also correctly acknowledged the need to give effect to the National Policy Statement according to their particular terms "rather than on the basis of a broad overall judgment".[148] But the Court did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal. It stated that the planning instruments contain "relevant objectives and policies to which we must have regard".[149] That generic characterisation recalls the overall judgment approach that the Supreme Court ruled out in *EDS v King Salmon*. The planning instruments are more than "relevant" and the Court must do more than "have regard" to them.

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145 Environment Court, above n 1, at [59]–[68].
146 At [269].
147 At [68].
148 At [92].
149 At [269].

[88] In the last two paragraphs of its reasoning, the Court characterised the regional and district plans as generally treating as desirable both the protection of ONFL and provision of network infrastructure. It characterised Policy 6 of the NPSET as guiding it to reduce existing adverse effects of transmission. But the Court said the NPSET and NZCPS do not provide guidance as to how potential conflict between them should be resolved. So it fell back on reaching "a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA".[150] In only two further sentences, the Court made a "judgment" that the proposal was "more appropriate overall" than the status quo.[151] This is effectively, and almost explicitly, the application of an overall judgment approach. As such, it was an error of law.

[89] Instead, what the Court was required to do was to carefully interpret the meaning of the planning instruments it had identified, the RCEP in particular, and apply them to the proposal. If the text of the RCEP was not sufficient to do that, as the Court considered they were not, it was required to have recourse to the higher-level instruments such as the NZCPS and NPSET, and to pt 2 of the Act. The Court did consider the NZCPS and NPSET and found them insufficient. Yet all parties agreed the Court did not have recourse to pt 2.

[90] The Court's approach to pt 2, and its use of an overall judgment approach, was a legal error. Whether that makes sufficient difference to the outcome to sustain the appeal depends on the outcome of that exercise, which I examine next.

Issue 4: Did the Court err in interpreting and applying the planning instruments?

[91] The submissions on this ground of appeal centred on whether one national policy statement, the NZCPS, is inconsistent or takes priority over another, the NPSET. Lying behind that were submissions as to whether the NZCPS or the RCEP contains directive provisions determining the result of the application.

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150 At [270].
151 At [270].

The RMA and bottom lines

[92] The Supreme Court in *EDS v King Salmon* clarified that a policy of preventing adverse effects of development on particular areas is consistent with the sustainable management purpose of the RMA.[152] It held that "avoid", in s 5 and the NZCPS, is a strong word that has its ordinary meaning of "not allowing" or "preventing the occurrence of".[153] The use in s 5 of "remedying and mitigating" indicates that developments with adverse effects could be permitted if they were mitigated or remedied, assuming they were not avoided.[154]

[93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application.[155] This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".[156]

[94] The RMA also envisages that there may be cultural bottom lines. As Whata J stated recently in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, "… there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively".[157] The cascading hierarchy of the RMA, and the legal instruments under it, accord an important place to the cultural values of Māori. That is reflected in pt 2 of the Act:

(a) The core purpose of the Act, stated in s 5, is to promote sustainable management by managing the "use, development and protection of resources in a way which enables people and communities" to provide for their "social, economic, and cultural well-being" at the same time as sustaining the potential of resources to meet the reasonably foreseeable needs of future generations.

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152 *EDS v King Salmon*, above n 112, at [24](d).
153 At [24](b), [96] and [126].
154 At [24](b).
155 At [47].
156 At [39]–[41].
157 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [29].

(b) The requirements on all persons exercising functions and powers under the Act in relation to "managing the use, development, and protection of natural and physical resources":

(i) to "recognise and provide for" "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one matter of national importance in s 6(e);

(ii) to "have particular regard to" kaitiakitanga in s 7(a); and

(iii) to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in s 8.

Māori values in the RMA recognised in case law

[95] The implications of those pt 2 provisions have been recognised in case law. In 2000, in his last sitting in the Judicial Committee of the Privy Council in *McGuire v Hastings District Council*, Lord Cooke described pt 2 of the RMA as "strong directions, to be borne in mind at every stage of the planning process".[158] They mean "that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads".[159] In that case, which involved a challenge to the designation of a road through Māori land, the Privy Council held "if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route".[160] This principle would extend to not constructing the new route at all in that case if "other access was reasonably available".[161] All authorities making decisions are therefore "bound by certain requirements, and these include particular sensitivity to Maori issues".[162] The Judicial Committee was satisfied that Māori land rights are adequately protected by the RMA.[163]

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158 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
159 At [21].
160 At [21].
161 At [21].
162 At [21].
163 At [29].

[96] Similarly, in 2014 the Supreme Court in *EDS v King Salmon* affirmed that "the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind".[164] In its reasoning rejecting the "overall judgment approach", the Supreme Court held that s 58 of the RMA was inconsistent with the NZCPS being no more than a statement of relevant considerations.[165] Section 58 contemplates the possibility, depending on the meaning of the planning instruments, that there might be absolute protection from the adverse effects of development — a potential environmental bottom line.

[97] The Supreme Court's emphasis on s 58 is also relevant to this case. Section 58(1)(b) empowers a NZCPS to state objectives and policies about "the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga" and, in s 58(1)(gb), "the protection of protected customary rights". This indicates that cultural bottom lines, as well as environmental bottom lines, can be provided for under the NZCPS. Whether there are particular cultural bottom lines depends on the text and interpretation of the relevant planning instruments.

[98] In 2020, the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (currently under appeal to the Supreme Court), the Court of Appeal considered an appeal of decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[166] The Court held the decision-maker erred by "failing to give separate and explicit consideration" to environmental bottom lines; failing to address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga; and in failing to identify relevant environmental bottom lines under the NZCPS and consider whether the proposal would be consistent with them.[167]

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164 *EDS v King Salmon*, above n 112, at [88].
165 At [117].
166 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 89.
167 At [12](a), [12](c), and [12](d) and [201].

[99] The Court held the interests of Māori in relation to all taonga, referred to in the Treaty of Waitangi and regulated by tikanga, were included in a statutory requirement to take into account the effects of activities on "existing interests".[168] It held it was necessary for the decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[169] The Court stated:

> [174] In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whānua – that iwi have an obligation to care for and protect.

[100] Also in 2020, in *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, after comprehensively traversing the ways in which the RMA recognises Māori cultural values, Whata J observed that:[170]

> [73] … the obligation 'to recognise and provide for' the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. …
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> …
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> [102] … where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e) , 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. …

The NZCPS and NPSET

[101] The NZCPS and NPSET are national policy statements which bear on the interpretation of lower order planning instruments. The NZCPS of 1994 was the first national policy statement formulated. It was substantially revised in 2010, under s 58 of the RMA. Under s 56, the purpose of a NZCPS is "to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand". Under ss 62(3), 67(3) and 75(3), regional policy statements, regional plans and district plans must "give effect" to the NZCPS. Its 29 policies support seven

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168 At [163] and [177].
169 At [170].
170 *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd,* above n 157.

stated objectives. The relevant Objectives and Policies are set out in the Annex to this judgment. As explored further below they involve three sets of relevant values: protection of natural features and landscape; culture; and social, economic, and cultural values.

[102] Policy 15 of the NZCPS was a particular focus in *EDS v King Salmon* and is in this case too. The Supreme Court held that:

(a) Policy 15 of the NZCPS, in relation to natural features and landscapes, states a policy of directing local authorities to avoid adverse effects of activities on natural character in areas of outstanding natural landscapes in the coastal environment.[171]

(b) The overall purpose of the direction is to "protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development".[172] It provides a graduated scheme of protection that requires avoidance of adverse effects in outstanding areas but allows for avoidance, mitigation or remedying in others.[173]

(c) The broad meaning of "effect" in s 3 must be assessed against the opening words of the policy.[174] Consistent with Objectives 2 and 6, "avoid" in Policy 15 bears its ordinary meaning as stated above.[175] Similarly, "inappropriate" use and development should be assessed against the characteristics of the environment that the Policy seeks to preserve.[176]

(d) Policies 15(a) and 15(b) provide "something in the nature of a bottom line".[177] It considered "there is no justification for reading down or otherwise undermining the clear terms" of the policy.[178]

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171 *EDS v King Salmon*, above n 112, at [58] and [61].
172 At [62].
173 At [90].
174 At [145].
175 At [96].
176 At [100]–[102] and [126].
177 At [132].
178 At [146].

[103] The NPSET was the second national policy statement formulated. Under s 45 of the RMA its purpose is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act". Sections 62(3), 67(3) and 75(3) also require regional policy statements, regional plans and district plans to effect to it. The NPSET sets out the objectives and policies for managing the electricity transmission network under the RMA. The relevant Objectives and Policies are also set out in full in the Annex to this judgment. They set out relevant considerations for, and impose requirements on, decision-makers.

The relationship between the NZCPS and NPSET

[104] In an interim judgment in *Transpower New Zealand Ltd v Auckland Council*, Wylie J considered the respective relationships of the NZCPS and NPSET to the purposes of the RMA.[179] He noted that documents lower in the planning hierarchy are required to give effect to both of them and he considered *EDS v King Salmon*.[180] He noted that a national policy statement "can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary" and accepted that the NPSET does so provide.[181] Before undertaking a detailed analysis of the text of the NPSET policies, regional policy statement and district plan provisions relevant there, he said:

> [83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".
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> [84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set

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179 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [77]–[84].
180 At [77]–[78].
181 At [82].

> out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.

Regional and District planning instruments

[105] Regional and District planning instruments sit below the national policy statements but are more detailed in their provisions. The RCEP is required by s 67(3)(b) of the RMA to give effect to the NZCPS and national policy statements including the NPSET. The RCEP sets out issues, objectives and policies in relation to the coastal environment in the Bay of Plenty regarding the same three sets of values as the NZCPS and taking into account the requirements of the NPSET. The relevant provisions of the RCEP involve the same three sets of values involved in the NZCPS noted above.

[106] Consent authorities consider the granting of consents under s 104 of the RMA, which provides that "the consent authority must, subject to Part 2, have regard to: actual and potential effects on the environment of allowing the activity; relevant provisions of planning instruments; and any other matter it considers relevant and necessary". Here, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (NESETA Regulations) specify what activities relating to existing transmission lines are permitted, controlled, restricted discretionary, discretionary, or non-complying. They are national environmental standards made under s 43 of the RMA and take precedence over the District Plan, under s 43B. Transpower's proposal here involved controlled, restricted discretionary or discretionary activities under the NESETA Regulations.[182]

[107] The Tauranga City Plan is a District Plan for the purposes of s 43AA of the RMA. Its purpose is to enable the Council to carry out its functions under the RMA. Relevant provisions are included in the Annex. They involve the same three sets of values involved in the NZCPS and RCEP.

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[182] Environment Court, above n 1, at [55] and Table 1.

The Court's treatment of the planning instruments

[108] The Environment Court agreed that the RCEP is comprehensive, has been tested and "provides a clear policy framework and consenting pathway for these applications."[183] Accordingly, its "evaluation of the statutory provisions focusses on the relevant policies in the RCEP". It also addressed the higher order policy documents and the District Plan.

[109] After outlining the NPSET and the NZCPS in its decision, the Environment Court noted the *Transpower New Zealand Ltd v Auckland Council* decision. Despite its later recourse to an overall judgment approach, the Court said:

> [77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

[110] The Court noted no party had identified any policy in the RPS which set out anything not otherwise found in the other planning instruments. It noted the RCEP gives effect to the RPS through more specific direction, and there was no contest in relation to any of the RPS provisions.[184] Therefore, it did not quote any of the RPS provisions. It set out relevant provisions of the RCEP. It considered it should have regard to the District Plan and iwi management plans and outlined some of their relevant provisions.

[111] The Court addressed the issue of whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure, for the purposes of Policies 4 and 6 of the NPSET.[185] It agreed with expert evidence that the proposal is a "substantial" rather than "major" upgrade and that it is not new infrastructure.[186] The

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183 At [68].
184 At [78].
185 From [145].
186 At [150].

Court also said it was guided by Policies 7 and 8 of the NPSET but concluded those policies were not determinative. They are expressed to deal with the planning and development of the transmission system, which "indicates these policies relate to future and new works rather than to upgrades of the existing system".[187]

[112] The Court said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui".[188]

[113] In its concluding reasoning, the Court said:

> [259] … While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.
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> …
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> [267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b) RMA we must undertake a fair appraisal of the objectives and policies read as a whole.[189] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.
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> [268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.
>
> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how

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187 At [152].
188 At [194].
189 *Dye v Auckland Regional Council*, above n 127, at [25]; and *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].

> potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcomes would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on application of the planning instruments

[114] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in not giving the more directive provisions of the NZCPS priority over the less directive provisions of the NPSET. NZCPS is a mandatory document at the top of the hierarchy of planning instruments with the purpose under s 56 of achieving the purpose of the RMA. It could have, but did not, refer specifically to NPSET. The NPSET states objectives and policies that are only relevant to achieving the purpose of the RMA. The NPSET is not as all-embracing of the RMA's purpose. It was intended to be only a guide for decision-makers — a relevant consideration, subject to pt 2, which is not to prevail over the RMA's purpose. Accordingly, if one national policy statement has to give way to another, the NPSET must give way to the NZCPS, particularly Policy 15.

(b) The Court erred in finding that the proposal constitutes a substantial, rather than a major, upgrade and that it is not new infrastructure. This follows from the extent of works proposed in a different location, amounting to almost 40 new structures and several kilometres of lines, the benefit to mana whenua as promoted by Transpower, and the major nature of some of the new poles such as Poles 33C and 33D.

Accordingly, the Court should have applied Policy 4 of the NPSET, which contains an "avoid" directive, rather than Policy 6.

(c) The Court failed to have regard to Policy IW 2 of the RCEP and its directive to avoid adverse effects on sites of cultural significance or to be sure that it is not possible to avoid them or not practicable to minimise them. It also failed to apply NH 4, which provides that adverse effects on the values and attributes of ONFLs must be avoided. Policy SO 1 confirms the primacy of IW 2 and NH 4.

[115] Mr Beatson, for Transpower, submits:

(a) There is no difference in the status of the NZCPS and the NPSET. When they are both engaged and read together, the specific overrides the general, according to *EDS v King Salmon* and *Transpower New Zealand Ltd v Auckland Council.* Therefore, the "reduce existing adverse effects" language in Policy 6 and "seek to avoid" language of Policy 8 of the NPSET should be preferred over the NZCPS "avoid". Making anything of the silence of NZCPS as to NPSET is a speculative and fruitless exercise.

(b) There is no bottom line, or absolute policy of avoidance of all adverse effects, in Policy 15(a) of the NZCPS. That policy directs that the adverse effects of *inappropriate* development should be avoided, which is context-dependent. The Court assessed the proposal against Policy 15(a) and other instruments. Policy IW 2 of the RCEP does not have direct relevance to this ground of appeal because it does not reference the criteria in set 2 to the RPS. The Court accepted Ms Golsby's expert planning evidence for the Council that Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them.[190]

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[190] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(c) In any case, the RCEP gives effect to both the NZCPS and NPSET, as it is required to do by s 67(3) of the RMA. It reconciles the tensions between them. As the Environment Court held in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, higher order instruments should be regarded as particularised in the relevant plan unless there is a problem with the plan itself.[191]

(d) The Court presumably did not engage with Policies NH 4, NH 5 and NH 11 on the basis of the evidence that effects on the ONFL were avoided. If NH 4 is triggered, Policies NH 5(a) and NH 11(a) provide an alternative consenting pathway. Transpower adopts the Councils' submissions on that issue. A project should not have to meet two different thresholds within the same policy context. Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them. The Court relied on the evidence of Ms Ryder for the Councils, and concluded the proposal was consistent with NH 4.[192]

(e) Even if there were adverse effects on the Māori values of ONFL 3, they would not have made a difference to the outcome. Māori values are only one part of the values and attributes associated with the ONFL. They would not necessarily lead to the conclusion there was an adverse effect on the ONFL as a whole. ONFL 3 is identified in the RCEP as having existing infrastructure located within it, which must be relevant to assessing the appropriateness of its relocation.

(f) The Court's findings that Policy 6 of NPSET had greater relevance than Policy 4, that the proposal was consistent with it, and that the finding that the proposal is a substantial upgrade, are not susceptible to being overturned on appeal unless it is clear there is no evidence to support the interpretation. This is not the case.

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191 *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479.

192 Environment Court, above n 1, at [228]–[229]. Statement of Evidence of Rebecca Keren Ryder, 11 February 2019 (CBD 202.0517).

[116] Ms Hill, for the Councils, adopts Transpower's submissions. In addition, she submits:

(a) The Environment Court correctly applied *EDS v King Salmon* by directly applying the RCEP without recourse to the NZCPS and NPSET. There is no authority requiring otherwise. The process of reconciling the NZCPS and NPSET has already been undertaken through the recent development of the RCEP. If the Court is required to re-examine whether the NH policies appropriately reconcile relevant national policy statement directions in every subsequent consent application, planning processes could be rendered futile.

(b) The Court was not required to assess the proposal against the detail of each policy such as IW 2, but to undertake a fair appraisal of the objectives and policies read as a whole. The Court did consider the proposal against the intent of IW 2. It carefully evaluated the cultural effects based on the evidence of the tāngata whenua witnesses and Mr Brown and gave considerable attention to cultural mitigation opportunities.[193] It was conscious that the existing environment includes the existing bridge and national grid infrastructure.

(c) The finding of adverse effects was not contrary to Policies IW 2 or NH 4(b) because: those policies require consideration as a whole; avoidance of adverse effects is not required by IW 2; NH 4(b) only requires avoidance of effects on the particular "values and attributes" of ONFL 3; the effect of Poles 33C and 33D does not detract from the identified factors, values, and associations with the ONFL of the whole harbour; the Māori values component of the ONFL is only one of several components; and the Court was unable to confirm there were significant effects on the Māori values of ONFL 3.

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[193] Environment Court, above n 1, at [165], [167], [194]–[220], [232], [233] and [244]–[248].

Did the Court err in applying the planning instruments?

[117] I agree it was reasonable for the Environment Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction.[194] There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP undertaken below. It is arguable that provisions of the Tauranga City Plan further constrain the decision.[195] But this was not the subject of submission, so I do not consider it further.

[118] The more major difficulty with the Court's decision is that, consistent with its overall judgment approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition that the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested the regional and district plans "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable".[196] But it considered they did not "particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved".[197] Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how "potential conflict" between the NPSET and NZCPS is to be resolved, and moved to its overall judgment.[198] As I held above, the Court's employment of the overall judgment approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.

[120] Interpreting and applying the natural heritage provisions of the RCEP:

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194 At [68] and [78].
195 For example, Policy 6A.1.7.1(g).
196 At [269].
197 At [269].
198 At [269].

(a) Issue 7 of the RCEP, which gives a clue to its purpose, is that "Māori cultural values … associated with natural character, natural features and landscapes … are often not adequately recognised or provided for resulting in adverse effects on cultural values". Consistent with Policy 15 of the NZCPS, Objective 2(a) is to protect the attributes and values of ONFL from inappropriate use and development "and restore or rehabilitate the natural character of the coastal environment where appropriate".

(b) Te Awanui is identified in sch 3 of the RCEP as ONFL with medium to high Māori values, "a significant area of traditional history and identity" and as including "many cultural heritage sites", many of which are recorded in iwi management plans and Treaty settlement documents. That is reinforced by the recognition in the Tauranga City Plan of Te Ariki Pā/Maungatapu as a significant area for Ngāti Hē in terms of mauri, wāhi tapu, kōrero tuturu and whakaaronui o te wa. I found in Issue 2 that the proposal would constitute a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3.

(c) The natural heritage policies include a requirement on decision-makers in Policy NH 4 to avoid adverse effects on the values and attributes of the OFNL, in order to achieve Objective 2: protecting the attributes and values of ONFL from inappropriate use and development. This is consistent with and reflected in the Tauranga City Plan, as it must be. As noted in relation to Issue 2, I consider the proposal's adverse effect on Ngāti Hē's values in ONFL 3 would constitute an adverse effect on the ONFL.

(d) Under Policies NH 4A and 9A respectively:

(i) The assessment of adverse effects should: recognise the activities existing at the time the area was assessed as ONFL and have regard to the restoration of the affected attributes and

values and the effects on the cultural and spiritual values of the tāngata whenua.

(ii) Recognise and provide for Māori cultural values, including by "avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape", "assessing whether restoration of cultural landscape features can be enabled", and "applying the relevant iwi resource management policies". Those policies object to power pylons and emphasise that "Marae provide the basis for the cultural richness of Tauranga Moana".[199]

(e) So, if a proposal is found to adversely affect the values and attributes of the ONFL having regard to all those considerations, as I have held this one does, the default decision is that it should be avoided under NH 4.

(f) But, nevertheless, Policy NH 5(a)(ia) requires decision-makers to "consider providing for" proposals that relate to the construction, operation, maintenance, protection or upgrading of national grid, even though will adversely affect those values and attributes. Policy 11(1) in turn sets out the requirements for NH 5(a) to apply, including that:

> (a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and
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> (b) The avoidance of effects required by Policy NH 4 is not possible; and
>
> …
>
> (d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and
>
> (e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

[199] Ngāi Te Rangi Resource Management Plan. See also Te Awanui Tauranga Harbour Iwi Management Plan 2008 (Objective 1, Policies 1, 2, 10), Tauranga Moana Iwi Management Plan 2016 (Policies 15.1, 15.2, 15.4).

(g) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, if all the circumstances specified in NH 11 apply, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A (including the iwi management plans).

[121] The Iwi Resource Management Policies of the RCEP must also be applied:

(a) Schedule 6 of the RCEP identifies Te Awanui as an ASCV, with reference to iwi management plans and other historical documents and Treaty settlement documents.

(b) Policy IW 1 of the RCEP requires proposals "which may" affect the relationship of Māori and their culture, traditions and taonga, to "recognise and provide" for" areas of significant cultural value identified in sch 6, and other sites of cultural value identified in hapū resource management plans or evidence. Policy IW 5 provides that "only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga".

(c) Similarly, but slightly differently to Policy NH 4, Policy IW 2 requires "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS" to be avoided as a default. As Advice Note 2 states, ASCVs are likely to strongly meet one or more criteria in Appendix F. Unlike the ONFL, the ASCV applies directly to the land on which the Marae is situated. I held in Issue 2 that the proposal constitutes a significant adverse effect on an area of cultural significance to Ngāti Hē.

(d) The qualification in IW 2 is that, where avoidance is "not practicable", the adverse effects must be remedied or mitigated. Where that is not possible either, it may be that offsetting positive effects can be provided. Policy 7C.4.3.1 of the District Plan expands slightly on that.

[122] The issues, objectives and policies related to activities in the coastal marine area must also be interpreted and applied:

(a) Issue 40 recognises that activities in the coastal marine area can promote social, cultural, and economic wellbeing, may need to be located in the coastal marine area in appropriate locations and in appropriate circumstances, but may cause adverse effects.

(b) Policy SO 1 recognises infrastructure is appropriate in the coastal marine area but that is explicitly made subject to the NH and IW policies "and an assessment of adverse effects on the location", which involve the practicability tests as above. That is reinforced by Objective 10A.3.3 and Policies 10A.3.3.2(c) and 10A.3.3.2(d) of the District Plan that minor upgrading of electric lines "avoids or mitigates" and "address[es]", respectively, potential adverse effects. Objective 10B.1.1 and Policy 10B.1.1.1 of the District Plan provides that adverse effects should be "avoided, remedied or mitigated to the extent practicable". Policy 10A.3.3.1 requires network utility infrastructure to be placed underground unless certain conditions apply.

[123] So, read carefully together, the iwi resource management policies are consistent with the natural heritage policies and with the structures and occupation of space (SO) policies:

(a) Policy IW 2 of the RCEP requires that adverse effects on areas of spiritual, historical or cultural significance to tāngata whenua must be avoided "where practicable". The Environment Court erred in failing to interpret and apply Policy IW 2. This is not a matter of evidence, however expert. Expert witnesses cannot and should not give evidence on issues of law, as it appears Ms Golsby was permitted to do.[200] The interpretation and application of the law is a matter for the Court.

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[200] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(b) Similarly, Policies NH 4 and 4A of the RCEP require that "adverse effects must be avoided on the values and attributes of ONFL". However, a decision-maker can still consider providing for a proposal in relation to the national grid if, under NH 5(a)(ia) and NH 11(1), there are "no practical alternative locations available" outside the areas listed in NH 4, the "avoidance of effects" is not possible, and "adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements". The Court did not apply these either.

(c) I do not accept the submission that there cannot be two different thresholds in the IW and NH policies. The thresholds are similar and must each be satisfied for the proposal to proceed.

(d) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, in the circumstances specified in NH 11, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A.

(e) Under Policy SO 1, the analysis of adverse effects overrides the default approach that infrastructure is appropriate in the coastal marine area. Policy SO 2 also invokes the requirements of both the NZCPS and NPSET.

[124] The last point expressly directs reference to the "requirements" of NZCPS and NPSET. Even if it did not, as I held in Issue 3, a Court will refer to pt 2 and higher order planning instruments if careful purposive interpretation and application of the relevant policies requires that. But it is wrong to turn first to the NZCPS and NPSET. Whether consent needs to be declined depends on an application of the RCEP (and District Plan) provisions interpreted in light of the NZCPS and NPSET.

[125] I agree with the Environment Court that the NZCPS itself does not necessarily require consent to be declined.[201] That is clear on the face of the relevant policies and because of the operative role of the RCEP. I also agree with the Court that, in relation

[201] Environment Court, above n 1, at [267].

to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as "trumping" the other and neither should be given priority over or "give way" to the other.[202] As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. In *Transpower New Zealand Ltd v Auckland Council,* Wylie J characterised the NPSET as providing relevant considerations in general.[203] I agree that a number of the policies do that. And it may be that the NPSET is not as "all embracing" of the RMA's purpose as the NZCPS.[204] But the terms of both national policies inform the interpretation and application of the relevant planning instrument to the specific issue in determining the outcome, as Wylie J demonstrated.[205]

[126] I do not agree with the implication of the Environment Court's reasoning that the NZCPS and NPSET conflict in their application to this proposal.[206] I accept the submissions of Mr Beatson and Ms Hill that, in relation to this issue, the RCEP gives effect to the NZCPS and NPSET and reconciles them. I consider their requirements are consistent with each other as expressed in both the RCEP and District Plan. In more detail:

(a) Objective 2 and Policy 15 of the NZCPS, as interpreted by the Supreme Court in *EDS v King Salmon*, reinforce the nature of the natural heritage policies of the RCEP as bottom lines in requiring adverse effects to be avoided. The circumstances in which use and development are "appropriate" under Policy 15 are set out in the RCEP. Adverse effects should be avoided, but may be considered if no practical alternative locations are available, avoidance of adverse effects is not possible and they are avoided to the extent "practicable".

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202 At [77].
203 *Transpower New Zealand Ltd v Auckland Council,* above n 179, at [82].
204 At [84].
205 At [85]–[104].
206 Environment Court, above n 1, at [269].

(b) Objective 3 and Policy 2 of the NZCPS, as outlined above, reinforce the Iwi Resource Management policies of the RCEP as cultural bottom lines in requiring adverse effects to be avoided unless "not practicable".

(c) Objective 6 and Policy 6 of the NZCPS reinforce the recognition in Issue 40 and Policies SO 1 and SO 2 of the importance to well-being of use and development of electricity transmission in "appropriate places and forms" on the coast or coastal marine area and within "appropriate limits". Policy 6 specifically references the need to make "appropriate" provision for marae and associated developments of tāngata whenua, to "consider how adverse visual impacts of development can be avoided" and "as far practicable and reasonable" apply controls of conditions to avoid those effects. Policy 6 also recognises that activities with a "functional need to be located in the coastal marine area" should be, in "appropriate" places, and those that do not, should not.

(d) The NPSET similarly recognises the national significance of electricity transmission while managing its adverse effects. Policies 2, 5, 6, 7 and 8 put requirements on decision-makers. But Policy 2 is general in requiring that they "recognise and provide for the effective operation" etc of the network. Policy 5 is more specific in requiring decision-makers to "enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects. That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to "reduce" existing adverse effects where there are "substantial upgrades of transmission infrastructure". And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to "avoid" or "seek to avoid" certain adverse effects.

[127] I do not consider Mr Gardner-Hopkins' submission that the Court erred in finding the proposal constitutes a "substantial" rather than "major" upgrade makes much difference to the outcome. Policy 4 of the NPSET requires decision-makers to

"have regard" to the extent to which adverse effects of major upgrades have been minimised, which must be relevant anyway, under other provisions. Policy 6 adds an element of proactivity in requiring "substantial upgrades" to be used as an opportunity to "reduce existing adverse effects". Each bears on the outcome of the application, but neither is determinative. If it does matter, I consider it was open to the Court to find the proposal was a "substantial" upgrade on the basis of the evidence before it. I am more dubious about the Court's conclusion that Policies 7 and 8 relate only to future and new works rather than to upgrades of the existing system. I see no reason why upgrades do not involve planning of the transmission system and the purpose of those policies, of avoiding adverse effects, may apply to upgrades.

[128] More generally, to the extent that there is room for differences to be found between the NZCPS and NPSET, both instruments are reconciled and given effect in the RCEP and District Plan. But the Court needed to carefully interpret the RCEP and apply it to the facts here, as outlined above, in light of the higher order instruments. Reference to the general principles in pt 2 of the Act, particularly ss 6(e), 7(a) and 8, simply confirms the analysis undertaken above.

[129] I found in Issue 2 that as a matter of fact and law, the proposal would have a significant adverse effect on an "area of spiritual, historical or cultural significance to tāngata whenua" and a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL. That means the bottom lines in Policies IW 2 and NH 4 of the RCEP respectively may be invoked:

(a) Under IW 2, the adverse effects on Rangataua Bay as an "area of spiritual historical or cultural significance to tāngata whenua" must be avoided "where practicable".

(b) Under NH 4, NH 5(a)(ia) and NH (11), the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 must be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

[130] So, whether the cultural bottom lines in the RCEP are engaged depends on whether the "practicable", "possible" and "practical" thresholds are met. That requires consideration of the alternatives to the proposal, which is the next issue.

Issue 5: Was the Court wrong in its assessment of alternatives?

[131] In this issue I deal with the grounds of appeal regarding whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual. Both of those issues relate to how the Court assessed the alternatives.

Law of alternatives

[132] In *EDS v King Salmon*, the Supreme Court considered whether a decision-maker was required to consider alternatives sites when determining a site-specific plan change that is located in, or fails to avoid, significant adverse effects on an ONFL.[207] It considered previous case law, including the High Court's judgment in *Meridian Energy Ltd v Central Otago District Council*, which rejected the proposition that alternatives must be considered.[208]

[133] The Supreme Court held that consideration of alternatives may be necessary depending on "the nature and circumstances" of the particular application and the justifications advanced in support of it.[209] If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect the preservation of the natural character, or that a particular site has features that make it especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities.[210] In that case, it considered the obligation to consider alternatives sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.[211]

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207 *EDS v King Salmon*, above n 112, at [156].
208 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
209 *EDS v King Salmon*, above n 112, at [170].
210 At [170].
211 At [172].

The Environment Court's treatment of alternatives

[134] In its decision, the Environment Court stated:[212]

> [46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.

[135] In its second preliminary issue section, the Court considered whether it was necessary for Transpower to consider alternative methods for realignment of the A-Line and, if so, whether its assessment and evaluation was adequate.[213] In summary, the Court said:

(a) An assessment of alternatives "may be relevant" under s 104(1)(a) of the RMA if the adverse effects are significant or, under the RCEP, if there are adverse effects of an activity on the values and attributes of ONFL 3.[214] The Court referenced Policies NH 4 and NH 5.

(b) It noted that the identification of the attributes of ONFL 3 in sch 3 of the RCEP recognises that the current uses of ONFL 3 includes national grid infrastructure.[215] It considered it may follow, "in the absence of any policy for the removal of such uses", that it "might be considered to be generally appropriate within it on the basis that they do not undermine or threaten the things that are to be protected".[216] This does not take into account IW 2, NH 4, NH 5 and NH 11(1).

(c) The Court considered "an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms"

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212 Environment Court, above n 1, at [46], citing Transpower's Assessment of Effects on the Environment, above n 32.
213 At [113].
214 At [115].
215 At [116].
216 At [116].

and "[a]ll that is required is a description of the alternatives considered and why they are not being pursued".[217]

(d) The Court considered a list of seven options considered by Transpower in Table 2, entitled "Principal options considered by Transpower":

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
2	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge - east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on

[217] At [117].

		west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

(e) The Court recorded that Transpower rejected option 2 for cultural reasons and lack of wider benefits.[218] Transpower rejected the options attaching a cable to the bridge or beneath the seabed for reasons of operational and security of supply risk, unacceptable costs and the need for substantial termination structures on either side of the waterway. Transpower shortlisted the two aerial crossing options. Its preferred option was the single span, option 3(a).

(f) The Court considered in some detail the potential alternatives of under-seabed and bridge-attachment cables because they were particularly mentioned by TEPS, the Marae and Ngāi Te Rangi.[219] The cost of the bridge-crossing option was estimated by Transpower at more than 10 times that of the aerial crossing.[220] The costs of undergrounding was "at least an order of magnitude more" than an aerial route.[221] On that basis, the Court considered these alternatives were "impracticable".[222]

(g) The Court held that "[a] relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible".[223] But it considered that the cost alone meant Transpower "has a clear reason for discounting a bridge option".[224] It considered imposing a condition requiring that cost "could well be unreasonable" and "would also be likely to go beyond the Court's proper role in adjudicating disputes under the RMA".[225] The Court considered that, if it were to conclude that level of expenditure was necessary to avoid,

218 At [122].
219 At [123] and [124]–[137].
220 At [130].
221 At [136].
222 At [265].
223 At [138].
224 At [139].
225 At [140].

remedy or mitigate the adverse effects "then the more appropriate course could be to refuse consent to the proposal".[226] It accepted Transpower's dismissal of the under-sea options on the same basis.

(h) The Court considered all of the alternatives would place tall structures in the ONFL "whether above or below it or on its margins".[227]

(i) Accordingly, it concluded "the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound".[228]

[136] Later, in considering the cultural effects of the proposal, the Court held that the alternatives may have greater effects on the values and attributes of the harbour than the proposal.[229] In acknowledging Ngāti Hē's view that the effects of a new Pole 33C outweigh the benefits of the A-Line removal, the Court said "there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire".[230] It noted evidence, though not from NZTA, that NZTA has no plans to upgrade the bridge to a standard that could support the lines.[231] The Court also said:

> [219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an inappropriate position: it simply recognises that if an activity requires resources consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[137] As noted in relation to Issue 4, in its concluding reasoning, the Court said:

> [265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we

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226 At [140].
227 At [143].
228 At [144].
229 At [213].
230 At [214].
231 At [215].

> do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[138] And, in the last two sentences of its last paragraph, the Court said:

> [209] … In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on alternatives

[139] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) It is accepted there is a functional need for the lines to cross Rangataua Bay at some location. But Transpower did not try very hard to consider alternatives. It did not commission a detailed investigation as to whether strengthening the bridge would feasibly accommodate the A-Line. Its costs were "back of the envelope" figures provided by email.

(b) The RCEP's requirements that adverse effects be avoided in the IW 2 and NH 11 policies mean the Court must satisfy itself there are not possible alternatives or no practicable alternatives that would avoid the adverse effects. The terms "not practicable" and "not possible" in Policies IW 2 and NH 11 establish a very high threshold. The term "not possible" must impose a higher threshold than "not practicable". The threshold in NH 11(1)(d) is not met because it only requires having regard to technical and operational requirements.

(c) The Environment Court did not engage with what it understood the two terms to mean. It simply listed the relevant policies, applied the *Meridian Energy* test, and made no assessment of the requirements. It dismissed the bridge and under-sea alternatives solely for cost reasons, but cost is not the determining element — its weight depends on the context. The Court made no findings as to whether the bridge and

under-sea alternatives were "possible" or "practicable", or what they mean in the regulatory context here, so it failed to have regard to Policies IW 2 and NH 11.

(d) It would accord with the spirit of pt 2 of the RMA, consistent with *McGuire*, to prefer an alternative. Transpower's 2017 Options Report identifies two alternative ways of achieving the project while avoiding the adverse effects required to be avoided by IW 2. They would involve using a cable across the bridge, with a termination structure of, at most, half the height of the proposed structures, some distance away from the Marae.[232] It was not established that the termination structures of these alternatives, however "Dalek-like" (as apparently discussed at the Environment Court hearing), would need to be placed where Pole 33C is proposed to go or whether they could go in a different location, further away from the Marae.

(e) Posing the status quo as the obvious counterfactual was a mistake, given the evidence. At the least, the Court should have acknowledged that declining consent would not necessarily deprive Ngāti Hē and others of the benefits of the current proposal in removing the A-Line alignment across Rangataua Bay. But it is unlikely the status quo would be maintained, given the evidence that Pole 117, on a cliff face, is subject to erosion and episodic erosion events of three to six metres at a time.

(f) Mr McNeill, Transpower's Investigations Project Manager, agreed that if Transpower had known the proposal did not have Ngāti Hē and Maungatapu Marae support, it would have said "no way" and would "continue to meet and to, yeah, come up with other proposals…".[233] Ms Raewyn Moss, a General Manager at Transpower, gave evidence that Transpower would need to consider whether to proceed with the

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232 Transpower New Zealand Ltd *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Taurauga* (July 2017) at 16–18 (CBD 304.1087–304.1089).

233 NOE 34/19–21.

Matapihi aspect of the proposal if that was the only aspect granted consent.[234] Another Transpower witness confirmed it was possible from an engineering perspective, with modification to how the lines connected.[235]

(g) Transpower has an obligation to address the historical breach of the Treaty of Waitangi, especially given the assurance that the A-Line would be relocated to the new B-Line path when the B-Line was proposed some 25 years ago. Otherwise, the existing bridge and motorway will be a justification for further infrastructure being located alongside them with further negative cumulative effects.

[140] Mr Beatson, for Transpower, submits:

(a) The approach in *Meridian Energy Ltd* is correct. Transpower undertook a comprehensive analysis of all technically viable alternative options. "Practicable" imports feasibility, viability, and cost considerations. In NH 11(1), "practicable" is clearly informed by Transpower's technical and operational requirements.

(b) Transpower satisfied the requirements of NH 5 and NH 11, given avoidance of all effects is not possible and adverse effects are avoided to the extent practicable. Ugly termination structures of 23 metres, characterised as "Daleks" would be required for any alternate option.[236] The alternatives of laying the relocated A-Line on or under the seabed or attached to the bridge were found to be impracticable, not solely for cost reasons. The Court's findings were reasonable and supported by evidence.

(c) The Court was entitled to rely on, and prefer, the evidence of Transpower as to its plans and ability to retain the existing A-Line alignment if consent is declined. Mr McNeill's comments provide no

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234 NOE 27/12–15.
235 NOE 114/10–20.
236 Evidence of Richard Joyce (1 February 2019) (CB 203.623) at [28] and following photograph.

guarantee unspecified alternatives would have been pursued. Ms Moss provided clear statements that Transpower would maintain Poles 116 and 117.[237] It is not clear whether it would be practically possible to split the Matapihi and Maungatapu aspects of the proposal.

(d) Mr Thomson confirmed maintenance of the A-Line is achievable if realignment does not proceed, with Pole 117 being relocated further inland.[238] The Court accepted Transpower could apply for a new consent for the anchor blocks associated with Pole 117 and continue to operate until all appeals were determined. Mr Beatson advises this is what has transpired. The Court also noted other regulatory avenues open to Transpower to secure the failing poles.

(e) What Transpower is trying to do is entirely consistent with *McGuire.* It has worked extremely hard to come up with a solution that it felt struck the right balance between cost and resolving the ongoing source of contention. It put it forward in good faith and got agreement and still considers it is a suitable response. There is no legal obligation on Transpower to move the A-Line under the RMA. Transpower does not have the obligations of the Crown under s 9 of the State-Owned Enterprises Act 1986 and there has been a Treaty settlement with Ngāi Te Rangi. Transpower would not be creating an additional transgression by maintaining the A-Line where it is. But dialogue with Ngāti Hē would continue in any case.

[141] Ms Hill, for the Councils, submits:

(a) *Meridian Energy* does not require all possible alternatives to be evaluated nor proof that the intended proposal is the best of the alternatives. Avoidance of adverse effects to the "extent practicable"

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237 Statement of Evidence of Raewyn Moss, 1 February 2019 at [38] (CBD 203.0612); and NOE 15/18–22.

238 Statement of Evidence of Colin Thomson, 1 February 2019 at [26] (CBD 203.645).

under NH 11(d) and NH 11(e) clearly relates to the particular proposal rather than to alternatives.

(b) The Environment Court did not dismiss particular options but assessed the adequacy of Transpower's consideration of them and whether a clear rationale for discounting an option was provided.[239] It set out detailed reasons why Transpower discounted particular options. It clearly considered whether avoidance of adverse effects was "not possible" having regard to the alternatives.[240] The Court assessed mitigating or offsetting adverse effects and found the alternatives were impracticable. It found the alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, and avoidance of adverse effects was not possible under any scenario.

(c) The Councils adopt the submissions of Transpower in relation to the status quo issue. In addition, it is difficult to know how such an error, if established, would be material to the outcome. Even if the prospect of the A-Line remaining is less certain than the Court considered it to be, the Court would be unable to establish there is another feasible alternative to the status quo with the requisite certainty or to direct Transpower to implement that.

Did the Court err in its treatment of alternatives?

[142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).

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239 Environment Court, above n 1, at [46] and [144].
240 At [143].

[143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.[241] *EDS v King Salmon* has overtaken *Meridian Energy* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

[144] In *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*, the Supreme Court considered the meaning of "practicable" in the context of the Civil Aviation Act 1990:[242]

> [65] 'Practicable' is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

[145] The Environment Court dealt with practicability rather differently. In its conclusion, the Court considered that the alternatives favoured by Ngāti Hē were technically feasible but would "entail costs of an order of magnitude greater" than the proposal.[243] It therefore concluded, apparently because it did not consider it had the power to require Transpower to amend its proposal, that the alternatives "appear from

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241 At [115].

242 *Wellington International Airport Ltd v New Zealand Air Line Pilots Association Inc Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780.

243 Environment Court, above n 1, at [46] and [265].

the evidence to be impracticable".[244] The Court determined that, when faced with a range of competing concerns and no possible outcome would be wholly without adverse effects, it had to decide which outcome better promotes the sustainable management of natural and physical resources as defined in s 5 of the RMA.[245]

[146] The Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.[246]

[147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

[148] What cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances. I do not rule out the possibility that, if the Court had itself examined robust costings of the alternatives, it may still have concluded the cost to be too high to be "practicable". I do not consider the reference in NH 11(d) to having regard to technical and operational requirements excludes the possibility of having regard to cost implications. A court would have to consider and weigh that. For the same reason, it may reasonable for a court to conclude that no "practical" alternative locations are available. It is hard to draw a meaningful distinction between "practical" and "practicable" in this context.

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244 At [265].
245 At [270].
246 At [265].

[149] But the requirement of Policy NH 11(1)(b), that "the avoidance of effects required by Policy NH 4 is not possible", does not involve an assessment of costs. The plain meaning of "possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost. That interpretation is reinforced by the use of "practical" in NH 11(1)(a) and "practicable" in NH 11(d). This interpretation is not inconsistent with the wording of NH 11(1)(a) because (a) relates to the practicality of alternative locations while (b) relates to the possibility of avoidance of effects. It is not inconsistent with NH 11(1)(d) and (e) because they relate to the avoidance, remedying or mitigation of all "adverse effects" to the extent practicable, while (b) requires the avoidance of effects required by Policy NH 4 to be possible. Policy NH 4 relates to the values and attributes of ONFL, which are different. It is the values and attributes of the ONFL that are the subject of the cultural bottom line in Policy 15(a) of the NZCPS, supported by pt 2 of the RMA.

[150] So, the technical feasibility of the alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. Policy NH 11(1)(b) is therefore not satisfied and consideration of providing for the proposal under Policy NH 5 is not available.

[151] I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

[152] The status quo was one of the alternatives that Transpower, and the Court, considered. The Court was obliged to consider Transpower's evidence that it would walk away from the realignment project if the appeal was granted. It was open to the Court to regard that as an obvious option for Transpower. It was not required to give greater weight to Mr McNeill's evidence or even to make a finding either way. Predicting the future of this proposal is inherently speculative. But examination of the

status quo option needed to be included in the analysis of alternatives. It was not a matter of preferring the proposal to the status quo, as the Court said. In law, it was a matter of whether the proposal was lawfully available, given the alternatives.

[153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Relief

Law of relief on RMA appeals

[154] Section 299 of the RMA provides that appeals are made in accordance with the High Court Rules 2016. Rule 20.19 provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …
>
> (3) The court may give the decision-maker any direction it thinks fit relating to—
>
> (a) rehearing any proceedings directed to be reheard; or

> (b) considering or determining any matter directed to be considered or determined.
>
> (4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.
>
> …
>
> (6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[155] As Dunningham J observed in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, the "usual course" is to refer the matter back to the Environment Court.[247] But "the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court".[248]

[156] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau*, Heath J quashed a decision imposing a condition and referred it back to the Environment Court for rehearing, leaving the rest of the decision undisturbed.[249]

[157] In *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, Gault J said: [250]

> [207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted. The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same. That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble, and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

Submissions on relief

[158] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the errors are material. He submits it cannot be assumed the Environment Court would reach the same decision and the matter should be referred back to it for reconsideration. He also submits that I should refuse the consent if I find the effects of the proposal are adverse

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247 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [112].
248 At [112].
249 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [69].
250 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, [2020] NZHC 3388.

in terms of Policy 15(a) of the NZCPS and Policies IW 2 and NH 4 of the RCEP and that Transpower has failed to demonstrate it is not practicable or possible to avoid those effects. It would only be if I definitively found that there are practicable alternatives that would avoid the adverse effects, and other errors, that I could quash the consents and not refer the matter back to the Environment Court.

[159] Mr Beatson, for Transpower, submits that the Environment Court has not made an error of law. Thus, the High Court is not able to interfere with a decision made on the merits where there is no error of law.

[160] Ms Hill, for the Councils, submits that it is not the role of the High Court to weigh the evidence or substitute its own assessment of the consistency of the proposal with a plan. If the Court finds the Environment Court erred in its approach to assessing effects, Ms Hill submits the matter should be remitted to the Environment Court to reconsider in light of this Court's directions.

Should the decision be remitted?

[161] In summary, I have concluded the Environment Court made errors of law in:

(a) its findings regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of ONFL 3;

(b) its "overall judgment" approach and treatment of pt 2 of the RMA;

(c) interpreting and applying to the proposal the cultural bottom lines in the planning instruments; and

(d) its treatment of the practicability, or practicality and possibility of avoiding the adverse effects of the proposal.

[162] These are material errors. I have determined the true and only reasonable conclusion about the adverse effects of the proposal. I have indicated the correct approach to interpreting and applying the planning instruments. I have interpreted and

applied the meaning of Policy NH 11(1)(b) in light of the Environment Court's existing findings. But the Court's findings were not premised on the legal need for it to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal.

[163] I consider it is desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the questions about the alternatives that I have identified. It is likely that further evidence on that will be required from Transpower.

[164] The interpretation of "possible" in Policy NH 11(1)(b) in this judgment suggests that, if the proposal remains as it is and the Environment Court comes to the same conclusion as it did before on the basis of further evidence about alternatives, the proposal will not proceed as it is. But further consideration of alternatives with a narrower focus on the size, nature and location of Pole 33C might lead Transpower to amend its proposal. Evidence of Ngāti Hē's considered views of any such alternatives would be required in order to determine the adverse effects of any such amendments. With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[165] Furthermore, no issue has been taken with the part of the realignment proposal from Matapihi north. There are clear benefits to that part of the proposal, including to Ngāi Tūkairangi. If the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. There is evidence that may be possible, but the implications are not clear to me. I leave that to the Environment Court as well.

Result

[166] I quash the Environment Court's decision and remit the application to it for further consideration, consistent with this judgment.

[167] Costs should be able to be worked out between counsel. If not, I give leave for the appellant to file and serve a memorandum of up to 10 pages on outstanding issues

regarding costs within 10 working days of the judgment and leave for the respondents to file and serve a memorandum of an equivalent length within 10 days of that. If that happens, the appellant then has five days to file and serve a memorandum in reply of up to five pages.

Palmer J

Annex: Relevant planning provisions

New Zealand Coastal Policy Statement 2010

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.

Objective 3

To take account of the principles of the Treaty, recognise the role of tāngata whenua as kaitiaki and provide for tāngata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tāngata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tāngata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tāngata whenua.

…

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;

…

Policy 2 The Treaty of Waitangi, tāngata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tāngata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

…

(c) with the consent of tāngata whenua and as far as practicable in accordance with tikanga Māori, incorporate matauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision-making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; …

(f) provide for opportunities for tāngata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment, through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tāngata whenua;

(iii) …; and

(g) in consultation and collaboration with tāngata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tāngata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori . . .

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, . . . 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;

…

(d) recognise tāngata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;

…

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment;

(2) Additionally, in relation to 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;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there

Policy 15 Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

National Policy Statement on Electricity Transmission

5. Objective

To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:

• managing the adverse environmental effects of the network; and

• managing the adverse effects of other activities on the network.

7. Managing the environmental effects of transmission

Policy 2

In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.

Policy 3

When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.

Policy 4

When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

Policy 5

When considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.

Policy 6

Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.

Policy 7

Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.

Policy 8

In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

Bay of Plenty Regional Coastal Environment Plan

Issues of the RCEP

1.2 Natural Heritage

Issue 7 Māori cultural values, practices and mātauranga associated with natural character, natural features and landscapes and indigenous biodiversity are often not adequately recognised or provided for resulting in adverse effects on cultural values.

1.4 Iwi Resource Management

Issue 17 Ko te moana ko au, ko au ko te moana (I am the sea – the sea is me). Tangata whenua, as indigenous peoples, have rights protected by the Te Tiriti o Waitangi (the Treaty of Waitangi) and that consequently the RMA accords tangata whenua a status distinct from that of interest groups and members of the public.

Issue 19 Wāhi tapu and other sites of significance to tāngata whenua can be adversely affected by human activities and coastal erosion. Degradation of coastal resources and the lack of recognition of the role of tāngata whenua as kaitiaki of this resource can adversely affect the relationship of Māori and their ancestral lands, waters, sites, wāhi tapu and other taonga.

Issue 20 Māori have a world-view that is unique and that can be misunderstood, unrecognised and insufficiently provided for in the statutory decision-making process.

Issue 26 Policy 6 of the NZCPS recognises tangata whenua needs for papakainga, marae and associated developments in the coastal environment; but tangata whenua aspirations in relation to use, values

and development are not well understood, particularly in the coastal marine area.

1.8 Activities in the coastal marine area

Issue 40 The use and development of resources in the coastal marine area can promote social, cultural and economic wellbeing and provide significant social, cultural and economic benefits but may also cause adverse effects on the coastal environment.

Objectives of the RCEP

2.2 Natural Heritage

Objective 2 Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development, and restore or rehabilitate the natural character of the coastal environment where appropriate.

2.4 Iwi Resource Management

Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of Tāngata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

2.8 Activities in the Coastal Marine Area

Objective 27 Activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and

provided for in appropriate locations, recognising the positional requirements of some activities.

Objective 28 The operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

Policies of the RCEP

Natural Heritage (NH) Policies

Policy NH 4 Adverse effects must be avoided on the values and attributes of the following areas:

…

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3).

…

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules . . . 3 to this Plan . . :

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape . . .

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

Policy NH 5 Consider providing for … use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

…

(a) The proposal:

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid;

Policy NH 9A Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

(a) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

(b) Assessing whether restoration of cultural landscape features can be enabled; and

(c) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Policy NH 11

(1) An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

…

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

Iwi Resource Management (IW) Policies

Policy IW 1 Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:

(a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;

(b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;

(c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and

(d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and.

(e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 2 Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Policy IW 8 Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Structures and Occupation of Space (SO) Policies

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:

…

(c) Structures associated with new and existing regionally significant infrastructure…

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission;

Schedule 3 of the RCEP identifies areas of Outstanding Natural Features and Landscapes (ONFL) using the criteria of Policy 15(c) of the NZCPS and Appendix F, set 2 to the RPS.

Te Awanui Harbour, Waimapu Estuary & Welcome Bay – ONFL 3

Description:

Tauranga Harbour is a shallow tidal estuary of 224 km². At low tide, 93% of the seabed is exposed. The harbour and its estuarine margins comprise numerous bays,
estuaries, wetland and saltmarsh. The key attributes which drive the requirement for classification as ONFL, and require protection, relate to the high natural science
values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns.

Current uses:

Bridges, national grid infrastructure, wharves, moorings, residential development, boardwalks, stormwater and sewer infrastructure, boat ramps, reclamations,
recreational activities such as water skiing, fishing, boating, channel markers, navigational signs.

Evaluation of Māori values: Medium to High

Ancient pa, mahinga kai, wāhi tapu, kāinga, taunga ika.

Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.

Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

Schedule 6 of the RCEP identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ngā Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land.

Maintenance of kaimoana and coastal water quality is particularly important.

…

Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.

Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

Bay of Plenty Regional Policy Statement (RPS)

Policy IW 2B: Recognising matters of significance to Māori

Proposals which may affect the relationship of Māori and their culture and traditions must:

(a) Recognise and provide for:

(i) Traditional Māori uses and practices relating to natural and physical resources such as mahinga mātaitai, waahi tapu, papakāinga and taonga raranga;

(ii) The role of tangata whenua as kaitiaki of the mauri of their resources;

(iii) The mana whenua relationship of tangata whenua with, and their role as kaitiaki of, the mauri of natural resources;

(iv) Sites of cultural significance identified in iwi and hapū resource management plans; and

(b) Recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act

Exercise the functions and powers of local authorities in a manner that:

(a) Takes into account the principles of the Treaty of Waitangi;

(b) Recognises that the principles of the Treaty will continue to evolve and be defined;

(c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and

kaupapa Māori, among council decision makers, staff and the community;

(d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and

(e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

Policy IW 4B: Taking into account iwi and hapū resource management plans

Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.

Policy IW 5B: Adverse effects on matters of significance to Māori

When considering proposals that may adversely affect any matter of significance to Māori recognise and provide for avoiding, remedying or mitigating adverse effects on:

(a) The exercise of kaitiakitanga;

(b) Mauri, particularly in relation to fresh, geothermal and coastal waters, land and air;

(c) Mahinga kai and areas of natural resources used for customary purposes;

(d) Places sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; and

(e) Existing and zoned marae or papakāinga land.

Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

Encourage tangata whenua to recommend appropriate measures to avoid, remedy or mitigate adverse environmental effects on cultural values, resources or sites, from the use and development activities as part of consultation for resource consent applications and in their own resource management plans.

Tauranga City Plan (the District Plan)

Objectives

Objective 6A.1.3 The natural character of the City's coastal environment, wetlands, rivers and streams is preserved and protected from inappropriate subdivision, use and development.

Objective 6A.1.7 The landscape character values of the City's harbour environment is maintained and enhanced.

Objective 6A.1.8 The open space character of the coastal marine area and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins is maintained and enhanced.

Objective 10A.3.3 Construction, Operation and Maintenance of Network Utilities

a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values;

b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.

Policies

Policy 6A.1.7.1 By ensuring that subdivision, use and development along the margins of Tauranga Harbour does not adversely affect the landscape character values of that environment by:

…

g) Protecting areas of cultural value;

h) Avoiding built form of a scale that dominates the harbour's landscape character;

i) Siting buildings, structures, infrastructure and services to avoid or minimise visual impacts on the harbour margins environment;

…

m) Ensuring activities maintain and enhance the factors, values and associations of outstanding natural features and landscapes and/or important amenity landscapes.

Policy 6A.1.8.1 By ensuring that buildings, structures and activities along the margins of the coastal marine area, outstanding natural features and landscapes and important amenity landscapes do not compromise the natural character, factors, values and associations of those areas, through:

a) The impact of the bulk and scale of buildings, structures and activities on the amenity of the environment;

…

d) Buildings, structures and activities detracting from the existing open space character and the factors, values and associations of outstanding natural features and

landscapes and important amenity landscapes and their margins;

Policy 7C.4.3.1 By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria:

a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;

b) The magnitude, scale and nature of effects in relation to the values and associations of the area;

c) The opportunities for remediation, mitigation or enhancement;

d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.

Policy 10A.3.3.1 Undergrounding of Infrastructure Associated with Network Utilities

By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:

a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;

b) The existence of a natural or physical feature or structure makes underground placement impractical; c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;

d) It is existing infrastructure.

Policy 10A.3.3.2 Effects on the Environment

By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:

a) On other network utilities;

b) Of emissions of noise, light or hazardous substances;

c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;

d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.

Objective 10B.1.1 Electricity Transmission Network

The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.

Policy 10B.1.1.1 Electricity Transmission Network

By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

The Tauranga City Plan identifies Te Ariki Pā/Maungatapu as a significant Māori area of Ngāti Hē (Area No M41). Its values are recorded as:

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu/Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa/ Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

Iwi Management Plans

The Te Awanui Tauranga Harbour Iwi Management Plan 2008

> OBJECTIVE
>
> 1. To reduce the impacts on cultural values resulting from infrastructural development in, on or near Te Awanui.
>
> POLICIES
>
> 1. To restrict the placement of structures in, on or near Te Awanui, and to promote the efficient use of existing structures around Te Awanui.
>
> …
>
> 8. To avoid adverse effects on culturally important areas, including waterways and cultural important landscape features as a result of works, including the storage and or disposal of spoil as a product of works.

…

10.Iwi object to the development of power pylons in Te Awanui, appropriate alternative routes need to be investigated in conjunction with tāngata whenua.

The Tauranga Moana Iwi Management Plan 2016-2026

15.1 Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).

15.2 Pylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.

…

15.4 In relation to the placement, alteration or extension of structures, within Tauranga Moana:

(a) Ensure that:

(i) tāngata whenua values are recognised and provided for.

…

(b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas.

Ngāi Te Rangi Resource Management Plan

All environmental activities that take place within the rohe of Ngaiterangi must take into account the impact on the cultural, social, and economic survival of the Ngaiterangi hapu.

…

The cultural significance of Ngaiterangi's links to their lands and the values they hold in respect of land, whether still in customary title or not, should be acknowledged and respected in all resource management activities.

…

Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.

…

Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

IN THE SUPREME COURT OF NEW ZEALAND

SC 84/2013
[2014] NZSC 40

BETWEEN	SUSTAIN OUR SOUNDS INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	M S R Palmer and K R M Littlejohn for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent D A Kirkpatrick, R B Enright and N M de Wit for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Enquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal with regard to the Waitata, Richmond and Ngamahau sites is dismissed.

B Costs are reserved.

REASONS

(Given by Glazebrook J)

Table of Contents

Introduction

[1] New Zealand King Salmon applied to establish nine new salmon farms in the Marlborough Sounds. Under the Marlborough District Council's combined Regional, District and Coastal Plan (the "Sounds Plan"),[1] the Coastal Marine Area in the Marlborough Sounds is divided into two zones: Coastal Marine Zone 1 where marine farms are prohibited and Coastal Marine Zone 2 where marine farming is usually a discretionary activity. With regard to eight of the sites, the application asked for a plan change so that these sites would be re-zoned to a new zone, Coastal Marine Zone 3, where the farming of salmon would be a discretionary (rather than prohibited) activity. Resource consents for the salmon farms at those eight sites were also sought. In addition, there was a separate resource consent application for the White Horse Rock site, which was situated in Zone 2.

[2] King Salmon's requested sites for spot zoning changes were in three different areas of the Sounds. Four were in Waitata Reach in Pelorus Sound: Waitata, Kaitira, Tapipi and Richmond. The White Horse Rock site was also in Waitata Reach. King Salmon requested its largest site, referred to as Papatua, in Port Gore in the outer Sounds. In Queen Charlotte Sound, the requested sites were at Kaitapeha and Ruaomoko. The final site was on the western shores of the Tory Channel, at Ngamahau.[2]

[3] The applications for the plan changes and the consents were referred by the Minister of Conservation[3] to a Board of Inquiry chaired by retired Environment Court Judge Whiting on 3 November 2011[4] and were heard and considered at the same time.[5] The Board granted plan changes in relation to four of the proposed sites

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

2 For further details, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

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

4 Pursuant to ss 147(1)(a) and 147(2) of the RMA. The Minister considered the proposals to be of "national significance".

5 This is allowed through an application under the RMA, s 165ZN. This section, and the other sections under subpart 4 of Part 7A of the RMA were introduced by the Resource Management Amendment Act (No 2) 2011. The purpose of these changes was to streamline planning and consent processes in relation to, among other things, aquaculture activities. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and*

(Papatua, Ngamahau, Waitata and Richmond). This meant that salmon farming became a discretionary rather than prohibited activity at those sites.[6] Resource consents were also granted for those four sites, subject to detailed conditions of consent that were designed to monitor and address adverse effects under an adaptive management approach.[7] The application for consent for the White Horse Rock site was declined.

[4] Sustain Our Sounds Inc (SOS) appealed to the High Court[8] against the Board's decision on all four sites, primarily on issues relating to water quality. That appeal, and an appeal by the Environmental Defence Society (EDS) in relation to the Papatua and Waitata sites only, was dismissed by Dobson J on 8 August 2013.[9] Both SOS and EDS were granted leave to appeal to this Court[10] against Dobson J's decision[11] and the appeals were heard together. In a judgment on the EDS appeal, released at the same time as this judgment, the EDS appeal with regard to the Papatua site in Port Gore has been allowed.[12] In practical terms, this means that the SOS appeal now relates to the three remaining sites.[13]

[5] As indicated, SOS challenges the Board's decision with regard to all four sites. This is on the basis that there was inadequate information on water quality issues before the Board to enable it to grant the applications for plan changes at all

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Resource Management Law (looseleaf ed, LexisNexis) at [5.71] and following.

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

7 At [1341]. A map showing the location of the sites that were approved and those that were not is set out in *King Salmon* (HC), above n 2, at Appendix A.

8 An appeal from a Board of Inquiry to the High Court is available as of right, but only on a question of law: RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 Section 149V(6) of the RMA gives the ability for a party to apply to the Supreme Court for leave to bring an appeal on a question of law against a determination of the High Court. In terms of s 149V(7), if the Supreme Court refuses to give leave, but considers that an appeal against the High Court determination is necessary, it may remit the proposed appeal to the Court of Appeal. If remitted to the Court of Appeal, in terms of s149V(8), that decision cannot be appealed to the Supreme Court.

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101. We have contemporaneously issued a separate judgment (*Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41) setting out our reasons for granting leave. That judgment also deals with the submissions made by the Board, which have not been considered.

12 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38. In this Court, only the Papatua site was challenged by EDS.

13 Although this Court's judgment in the EDS appeal renders the SOS appeal with regard to Papatua unnecessary, we still include discussion on that site in this judgment as the Board's comments on that site are relevant to its approach to water quality issues.

and particularly at the maximum feed levels. Although there had been modelling of the effects on water quality at the maximum initial feed levels, there had been none at the maximum feed levels. (The application envisaged a process whereby feed levels could be raised over time up to a ceiling maximum feed level.) Even at the initial feed levels, however, it is submitted that there was insufficient baseline information to rely on the modelling of the maximum initial feed levels, without rectifying the information deficit. In addition, SOS submits that the Board was wrongly influenced by the adaptive management measures contained in the resource consents in deciding to make the plan changes and that, even if an adaptive management approach was available, the parameters of that approach should have been in the plan and not the resource consents.

[6] The SOS submissions therefore raise three broad issues:

(a) whether the adaptive management approach that the Board took was available;

(b) whether the Board's decision on the plan changes was wrongly predicated on the consent conditions; and

(c) if an adaptive management approach was available, whether that should have been contained in the plan as against the consents.

[7] In order to put these issues and the SOS submissions in context, we first explain the water quality issue in more detail and then set out the statutory framework applicable to this appeal, including the relevant provisions of the New Zealand Coastal Policy Statement, the Marlborough Regional Policy Statement and the Sounds Plan. After this, we give more detail on the plan change approved by the Board, outline the evidence before and the findings of the Board on water quality and summarise the Board's approach to the plan change. We then summarise the decision on the consent applications, set out the conditions of consent for the four sites that were approved and discuss the modifications made in the course of the hearing to the consent conditions as originally proposed by King Salmon.

The water quality issue

[8] The trophic state of bodies of water is indicative of their biological productivity (that is, water quality). The quantities of particular nutrients in water, including nitrogen, are the primary determinants of a body of water's trophic state. The five trophic states are microtrophic (least productive), oligotrophic, mesotrophic, eutrophic and hypertrophic.[14] Typical water column characteristics for the different trophic states, as measured by total nitrogen, total phosphorus, water clarity and chlorophyll-*a*, were set out by the Board in its decision.[15]

[9] The classifications of trophic level are broad and there had been discussion among the expert witnesses as to the proper classification of the Sounds as a whole.[16] The concentrations of nitrogen in the Sounds are currently at the oligotrophic end of the spectrum, while chlorophyll-*a* levels are within the levels indicative of a mesotrophic state. It appears, too, that there may be seasonal variations in trophic levels, due to natural fluctuations in nutrient inputs and flushing.[17]

[10] It was accepted by the Board that a change from the current trophic state of the Sounds from a oligotrophic/mesotrophic to an eutrophic state "would represent an ecological disaster with significant implications for recreation and tourism, natural character, cultural values and other primary production operators within the Sounds".[18]

[11] The issue with the proposed salmon farms is that the feed given to salmon introduces a new nutrient source to the water, mostly through fish waste. The salmon process fish pellets and excrete ammonia/nitrogen and faeces into the receiving waters.[19] The concentration of nutrients is higher in close proximity to salmon farms but there is also a cumulative effect from all farms in the Sounds.

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14 Lake Ecosystem Restoration New Zealand "Trophic State" <www.lernz.co.nz>. The Trophic Level Index is the recommended index for trophic level assessments by the Ministry for the Environment and has been adopted for the New Zealand Lakes Water Quality Monitoring Programme. The scale referred to by the Board in its decision contained only four trophic states (oligotrophic to hypertrophic): *King Salmon* (Board), above n 6, at [361].

15 *King Salmon* (Board), above n 6, at [361].

16 At [427].

17 At [362].

18 At [456].

19 At [1311].

Increased nutrient concentration can lead to enhanced growth of phytoplankton and, potentially, an increase in harmful algal blooms.[20]

[12] The main concern with regard to the Sounds and the proposed salmon farms is nitrogen level increases.[21] In this regard, salmon farming is not the sole source of nitrogen. Nitrogen additions also occur naturally from ocean exchange and from land runoff from farming and forestry.[22] By contrast, nitrogen is removed through mussel farming.[23] The estimated sources and sinks of nitrogen are set out by the Board for the three regions where the plan changes were sought.[24]

[13] The Board considered that the salmon farms "could very well become the dominant source of 'new' nitrogen into the Sounds".[25] It said that the "oceanic exchange of nitrogen can be regarded as part of the natural background" and considered that the inputs from rivers are "almost certainly significantly elevated due to farming and forestry operations" but are mitigated to a large extent by the mussel farms which remove nutrients.[26]

The statutory framework

[14] We have discussed the statutory framework and the hierarchy of instruments in the principal judgment under the EDS appeal. We do not repeat that analysis here but merely summarise the relevant sections of the RMA.

[15] Under ss 67(3)(b) and (c), a regional plan must give effect to any New Zealand coastal policy statement and any regional policy statement. Under s 66(1), a regional council,[27] when changing any regional plan, must do so in accordance with its functions under s 30, the provisions of Part 2, any direction given under s 25A(1),

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[20] At [353]. The danger of increased algal blooms is that some algal species can cause mass mortalities of marine flora and fauna, contaminate shellfish and kill fish in sea cages. Degraded coastal water quality can promote the development and persistence of such blooms: see [413].

[21] At [375].

[22] At [378].

[23] At [377] and [378].

[24] At [377].

[25] At [384].

[26] At [384].

[27] The Board, under s 149P(6)(c) of the RMA, in exercising its functions to change any regional plan must act as if it were a regional council.

its duties under s 32 and any regulations. It must also have regard, among other things, to the Crown's interests in the coastal marine area.[28]

[16] In addition to the matters required under ss 66 and 67, s 32, as it was at the relevant time,[29] sets out the framework for evaluations required to be carried out for changes to regional plans. The evaluation framework, according to the heading of the section, is to ensure the consideration of alternatives, benefits and costs by the relevant decision-maker. Under s 32(3), the evaluation must consider the extent to which the objectives of the proposals are the most appropriate way to achieve the purpose of the RMA and whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives. The evaluation must also take into account the benefits and costs of policies, rules or other methods[30] and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.[31]

[17] Section 87A sets out various classes of activities. For the purposes of this appeal, the relevant classifications are discretionary activities and prohibited activities. Discretionary activities require resource consent.[32] A consent authority may decline the consent or grant the consent with or without conditions.[33] The activity "must comply with the requirements, conditions, and permissions, if any, specified in the [RMA], regulations, plan or proposed plan".[34] Where an activity is prohibited, no application for a resource consent may be made for the activity and the consent authority must not grant a consent for it.[35]

[18] When considering an application for a resource consent under s 104(1), the consent authority must, subject to Part 2, have regard to any actual and potential effects on the environment of allowing the activity, to any relevant provisions of a

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28 Section 66(2)(b).
29 Section 32 was replaced on 3 December 2013 by s 70 of the Resource Management Amendment Act 2013.
30 RMA, s 32(4)(a).
31 Section 32(4)(b).
32 Section 87A(4).
33 Section 87A(4)(a).
34 Section 87A(4)(b).
35 Section 87A(6).

New Zealand coastal policy statement, a regional policy statement or plan and to any other relevant matter.

[19] Finally, s 15(1)(a) of the RMA allows the discharge of contaminants into water as long as the discharge is expressly allowed by either a national environmental standard or other regulations, a rule in a regional plan[36] or a resource consent.[37] Salmon feed meets the statutory definition of a "contaminant".[38]

The New Zealand Coastal Policy Statement

[20] Objective 1 of the Coastal Policy Statement is to "safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems" by, among other things, "maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition".[39]

[21] Objective 6 relates to enabling "people and communities to provide for their social, economic and cultural wellbeing and their health and safety, through subdivision, use, and development", recognising, among other things, 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".

[22] Turning now to the policies of particular relevance to this appeal, Policy 3 requires the adoption of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse".[40] In particular, a precautionary

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36 As well as a rule in a proposed regional plan for the same region (if there is one).

37 The Board also discussed s 107 of the RMA in its decision and rejected the submission that it was engaged: see *King Salmon* (Board), above n 6, at [1300]–[1325]. That finding is not challenged before us.

38 Under s 2 of the RMA a "contaminant" is defined as a substance that, when discharged into water, changes or is likely to change the physical, chemical, or biological condition of the water. Salmon feed and resultant waste was treated as a contaminant by the Environment Court in *New Zealand King Salmon Co Ltd v Marlborough District Council* [2011] NZEnvC 346.

39 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).

40 Policy 3(1).

approach must be adopted to the use and management of coastal resources vulnerable to climate change.[41]

[23] Policy 8 recognises "the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities". Regional policy statements and regional plans are required to provide for aquaculture in appropriate places, recognising that relevant considerations may include the need for high water quality for those activities.[42] Policy 8 also requires that the social and economic benefits, both national and regional where assessments exist, of aquaculture are taken into account.[43] It also requires ensuring that development in the coastal environment does not make water quality unfit for aquaculture in areas that are approved for that purpose.[44]

[24] Policy 12 relates to the control of activities that could have adverse effects on the environment through the release or spread of harmful aquatic organisms.[45] Policy 21 relates to the enhancement of water quality. This requires priority to be given to the enhancement of water quality where it has deteriorated to the extent that "it is having a significant adverse effect on ecosystems, natural habitats or water based recreational activities or where it is restricting existing uses".

[25] The management of the discharge of contaminants into water is required under Policy 23. Particular regard must be had to the sensitivity of the receiving environment, the risks if the concentration of contaminants is exceeded and the capacity of the receiving environment to assimilate the contaminants.[46]

The Marlborough Regional Policy Statement

[26] The Marlborough Regional Policy Statement,[47] after a discussion of the statutory framework, sets out a number of principles. These are stated to be "an

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41 Policy 3(2).
42 Policy 8(a).
43 Policy 8(b).
44 Policy 8(c).
45 Policy 12(1).
46 Policy 23(1)(a), (b) and (c).
47 Marlborough District Council *Marlborough Regional Policy Statement* (1995). This was promulgated in 1995 before the Coastal Policy Statement.

attitude of the Council rather than an achievable target with supporting policies and methods".[48] One of the principles is to "[i]ncorporate into resource management policy and plans the concepts within Agenda 21[49] relevant to the sustainable management of natural and physical resources".[50] The Regional Policy Statement also provides that, where there is insufficient information about actual or potential adverse effects, "a precautionary approach to the use and development of resources" will be taken "to ensure there are no adverse effects on the environment".[51]

[27] The Regional Policy Statement then identifies five regionally significant issues for Marlborough. Three of particular relevance to this appeal are the protection of water ecosystems, enabling community wellbeing and control of waste.

[28] Part 5 of the Regional Policy Statement deals with the protection of water ecosystems. The issue is identified as being that the "function of the marine ecosystem is disrupted by effects from land and water based activities".[52] It is recognised that small local effects of contamination and disruption can aggregate to have significant effects on the functioning of the ecosystem and that discharges, including from marine farming, can "cause disturbance to the natural marine ecosystem".[53]

[29] In order to deal with that issue, the Regional Policy Statement sets an objective of maintaining water quality in the coastal marine area at a level which provides for the sustainable management of the marine ecosystem.[54] A number of policies are then set out to achieve this objective. Of particular relevance to this appeal is the policy to "avoid, remedy or mitigate the reduction of coastal water quality by contaminants arising from activities occurring within the coastal marine area".[55] In terms of methods, the incorporation of "controls to avoid, remedy or

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48 At [3.1].

49 See *Agenda 21: Programme of Action for Sustainable Development*, UN GAOR, 46th Sess, Agenda Item 21, A/Conf.151/26 (1992). Agenda 21 was adopted by the Earth Summit in Rio de Janeiro in 1992.

50 *Marlborough Regional Policy Statement*, above n 47, at [3.3.1].

51 At [3.6.1].

52 At [5.3.1].

53 At [5.3.1]. It is also recognised that land based activities affect the marine ecosystem.

54 At [5.3.2].

55 At [5.3.5].

mitigate the effects of water from water based activities [including marine farming], on marine ecosystems" is required in resource management plans.[56]

[30] The Regional Policy Statement also provides that discharge controls are required "to reduce the discharge of contaminants into coastal water and allow for the safe consumption of plants and fish from the water".[57] In addition, research into the cumulative effects of water based activities on water quality must be supported. This applies in particular to marine farming:[58]

> Particular reference needs to be made to the cumulative or long term effects of water based activities on water quality, especially marine farming. Little is known about the cumulative or long term effects of marine farming on existing natural stocks and ecosystems.

[31] Part 7 of the Regional Policy Statement deals with community wellbeing and includes policies and objectives relating to the subdivision, use and development of the coastal environment in a sustainable way. It is recognised that the coastal marine area is "used for a wide variety of purposes to meet the commercial, economic, social and recreational needs of the people who use the area"[59] and that these purposes include marine farming.[60] The aim is to "provide for the continued use and development of these resources but sustainably manage those resources to minimise adverse effects, conflicts between users and ensure efficient and beneficial use".[61] It is recognised that "[a]ppropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing".[62]

[32] Resource management plans are required to identify criteria to indicate where subdivision, use and development will be appropriate. Criteria to indicate where subdivision, use and development is inappropriate may include issues relating to water quality.[63] Allocation of space for aquaculture in the coastal marine area "will be based on marine habitat sustainability, habitat protection, landscape protection,

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56 At [5.3.6(a)].
57 At [5.3.8].
58 At [5.3.6(c)].
59 At [7.2.7].
60 At [7.2.10(d)].
61 At [7.2.7].
62 At [7.2.8].
63 At [7.2.9(a)].

navigation and safety, and compatibility with other adjoining activities."[64] It is acknowledged that there is little information to assess the effects of aquaculture on the sustainability of the marine habitat and that it could be many years before meaningful research is completed. This means that, in the interim, allocation of space for aquaculture will be undertaken in a precautionary manner. Applicants must therefore provide "a detailed assessment of the effects of their proposal".[65]

The Sounds Plan

[33] The Sounds Plan is in three volumes. Volume one deals with objectives, policies and methods. Volume two deals with rules and volume three contains maps. The introduction to the plan, in chapter 1, explains that a comprehensive range of assessment criteria are included in the second volume. These criteria are included to enable "an applicant for a resource consent to understand how any particular activity will be assessed".[66]

[34] Chapter 9 of the plan (in volume one) deals with the objectives, policies and methods for the coastal marine area. It is recognised that the private occupation of coastal space may be required to allow use of that space, including for aquaculture. One of the objectives is to accommodate appropriate activities, while avoiding, remedying or mitigating the adverse effects of those activities, including adverse effects on water quality.[67]

[35] In order to implement this policy, the coastal marine area is divided into two zones. Zone 1 identifies those areas where marine farms are prohibited, being areas "identified as being where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[68] In Zone 2, marine farms are normally a discretionary activity.[69]

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64 At [7.2.10(d)].
65 At [7.2.10(d)].
66 Sounds Plan, above n 1, vol 1 at [1.8].
67 At [9.2.1] (Objective 1, Policy 1.1(l)).
68 At [9.2.2].
69 There were grand-parenting rules for marine farms that were already in existence when Zone 2 was set up.

[36] Section 9.3 of the Sounds Plan deals with the adverse effects of activities on the natural and physical resources of the coastal marine area. It is explained that the Marlborough Sounds are large, drowned river valleys. Queen Charlotte Sound is approximately 45 km long and has many small bays and coves. Pelorus Sound is more complex with a maze of large inlets, bays, coves and islands. It is said that, to a large extent, activities on land determine the environmental quality of the coastal marine area. Rigid controls are necessary as the coastal marine area "is the 'environmental sink' where the effects of all coastal and land-based activities impact".[70] Marine ecosystems depend on "uncontaminated seawater, undisturbed seabed or foreshore and healthy land and freshwater ecosystems adjacent to the coast".[71]

[37] Environmental effects in the area are felt in two ways: degradation of coastal water quality and alteration to the foreshore or seabed. Marine farming is one of the activities that both affects and depends on the quality of the coastal marine area. The objective is to manage the effects of activities so that water quality in the coastal marine area is at a level which enables the gathering or cultivating of shellfish for human consumption. It is explained that shellfish are a good water quality indicator species because of their filter feeding characteristics and their accommodation and harbouring of contaminants.[72]

[38] Chapter 35, in volume 2 of the Sounds Plan, sets out the more detailed requirements for Zones 1 and 2. Marine farming is usually a discretionary activity in Zone 2 and, with certain exceptions, prohibited in Zone 1.[73] There are general assessment criteria set out which must be applied to all discretionary activities involving the coastal marine area. These include taking into account any relevant objectives, policies and rules of the plan and the Coastal Policy Statement. The criteria also include taking into account the significant environmental features (including ensuring that any proposal does not compromise the integrity of any terrestrial or marine ecosystem)[74] and taking into account the protection of natural

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70 At [9.3].
71 At [9.3].
72 At [9.3.2].
73 Sounds Plan, above n 1, vol 2 at [35.4].
74 At [35.4.1.1.5.3(b)].

and physical resources so that any proposal maintains the future use potential of any renewable resource[75] and does not reduce water quality beyond a reasonable zone of mixing.[76]

[39] In terms of standards for marine farms in Zone 2,[77] no part of any farm can be located closer than 50 m to the mean low water mark and no part of any farm can be located further than 200 m from the mean low water mark.[78] In terms of assessment criteria applying to marine farms, the "effect on the marine ecology of feed proposed to be added to the environment, including the type and amount of feed and an assessment of its effect on the environment" must be provided,[79] as well as likely effects on water quality and ecology.[80] Permits may be granted for a period of up to 20 years only.[81]

Plan change approved by the Board

[40] The plan change, as approved by the Board, added a third zone, where marine farms and marine farming would be discretionary activities to the extent they complied with the standards specified.[82] These include limiting the farming to king salmon[83] from roe sources in New Zealand. There are standards on cage size, height and boundaries and also standards relating to feed barges, lighting and noise. Most relevantly for our purposes, the maximum initial annual discharge of fish feed within each site is set, together with annual maximum increases in the annual tonnage of fish feed discharge up to a total maximum annual discharge of fish feed.[84] For example, for the Waitata site, the maximum initial annual discharge of fish feed within the site is 3000 tonnes. The maximum annual increase is 1000 tonnes up to a maximum annual discharge ceiling of 6000 tonnes. There is provision in the rules

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75 At [35.4.1.1.5.4(b)].
76 At [35.4.1.1.5.4(e)].
77 At [35.4.2.9].
78 At [35.4.2.9].
79 At [35.4.2.9.1.2].
80 At [35.4.2.9.1.6(c)].
81 At [35.4.2.9.2].
82 In amended rule [35.4.2.10] as set out in *King Salmon* (Board), above n 6, at Appendix 3. In the rule, the terms "marine farms" and "marine farming" are deemed to include all structures and activities in the coastal marine area, all discharges to water or air associated with the farms and the taking and use of coastal water associated with the farms.
83 Their scientific name being *Oncorhynchus tshawytscha*.
84 In the amended rule, as set out in *King Salmon* (Board), above n 6, at [35.4.2.10(g)]–[35.4.2.10(i)].

that "[t]he annual feed discharge may exceed the relevant maximum feed discharges by up to 15%; provided that over any continuous 3 year period, the average annual feed discharge does not exceed the relevant maximum feed discharges".[85]

[41] Specific assessment criteria are also set,[86] covering a range of matters, including effects on marine mammals and seabirds.[87] The assessment criterion that is specifically related to discharges to coastal water provides:

> g) Assessment of any adverse effects from the discharges to coastal water, including:
>
> - The effects from seabed deposition and changes to water quality;
> - Ecological effects, including cumulative effects, relating to the proximity of ecologically important marine habitats;
> - Environmental standards against which the ecological, water quality and bed deposition effects of the discharges are monitored and evaluated;
> - Provision for staged increases in the scale of feed discharges and for monitoring of the effects of each stage against environmental standards, in particular for Papatua; [and]
> - Adaptive management approaches to the management of effects from seabed deposition and changes to water quality[.]

Evidence and findings on water quality

[42] The Board heard from a number of experts on water quality. These experts caucused and produced a joint statement dated 27 August 2012.[88] Following caucusing, the experts were agreed that the unavailability of baseline data had introduced uncertainty to the interpretation of modelling results and that baseline surveys would need to begin as soon as possible after the issuing of any consent.[89] The Board agreed that there was a paucity of data presented on the existing water

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85 In the footnote to [35.4.2.10(g)]– [35.4.2.10(i)].
86 At [35.4.2.10.3].
87 At [35.4.10.3(f)] and [35.4.10.3(j)].
88 *King Salmon* (Board), above n 6, at [360].
89 At [370].

quality of the Marlborough Sounds.[90] The trend of increasing nutrient additions from the land and the lack of robust research as to the impact of existing land based activities added to the Board's concerns about the characterisation of the existing environment.[91]

[43] An expert for King Salmon (Mr Knight) had presented three models relating to water quality in his evidence before the Board: a mass balance model,[92] a flushed aspatial model[93] and a spatially explicit model, the SELFE model.[94] These models had been modified following a peer review process initiated by the Board and it was the revised models that were considered by it.[95]

[44] The Board concluded that the first two models are a useful first check on the impact of the proposed salmon farms on the Sounds as a whole:[96]

> They provide an overview of the various sources and sinks of nitrogen and put the input from the farms into the context of the natural background variability, the nitrogen inputs from the land and the removal of nitrogen by mussel farming. These models demonstrate that the introduced nitrogen is a significant addition to the Sounds ecosystem but unlikely to cause a major shift or perturbation in the function of the ecosystem as a whole. The extensive mussel farming in Pelorus Sound acts as a buffer to further nutrient additions.

[45] As to the third model, the Board noted that improvements made during the review process had led the experts to agree that the "results are satisfactory except in the very short term (less than two to four weeks) and at a detailed scale of impact (minor embayments)". The experts were also agreed that "the [total nitrogen] increments will be conservative (that is overestimated) for the scenarios modelled". This is because the model ignores the removal of nitrogen by biological and physical processes.[97]

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90 At [373]. The Board noted that additional data did exist but had not been available to the experts.

91 At [374]. We were told at the hearing that the reference to existing farms in this paragraph was a reference to land based farms and not marine farms.

92 Discussed at [385]–[388].

93 Discussed at [389]–[392].

94 Discussed at [393]–[403].

95 At [380].

96 At [404].

97 At [405].

[46] The Board expressed concern, however, that the scenarios modelled did not include the maximum feed discharge set out in the proposed conditions. The Board said:[98]

> The scenarios modelled are for the "maximum *initial* feed discharge" in the proposed conditions of consent. While these levels are increased by 50% to demonstrate the impact of summer loadings Mr Knight has not modelled the "maximum feed discharge" also set out in the proposed conditions. He explained that these levels may never be reached and the intention was to take an adaptive management approach. *We are somewhat astounded and cannot understand why these maximum discharges were not modelled to give the truly worst case scenario for nutrient additions and the potential effects at both local and Sounds wide scale. Such modelling would not have precluded an adaptive management approach.*

[47] The Board said that the lack of spatial modelling of the maximum feed discharges made it "extremely difficult to come to a finding on the nature or magnitude of the effects of this discharge".[99] The Board, however, said that it was satisfied that the SELFE model "is an adequate tool to determine the potential impacts of the salmon farms on water quality."[100]

[48] It had been suggested in evidence that a full food web model should have been produced.[101] The Board agreed that a more sophisticated biogeochemical model would have assisted with the prediction of effects, particularly related to potential biological changes. However, it accepted evidence that such modelling would not necessarily provide any more certainty when attempting to quantify those effects. It said that such a model would be a major research project of considerable assistance in the overall management of the Sounds and the sources and sinks for nutrients. However, it did not consider such a model to be "the sole responsibility of King Salmon or any other individual stakeholder."[102]

[49] The Board then went on to discuss the possible effects on water quality of the proposed salmon farms, beginning with the possibility of harmful algal blooms, the cumulative impact and potential for eutrophication and the issue of mitigation, before coming to its overall conclusion on the water column.

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98 At [406] (emphasis added).
99 At [407].
100 At [412].
101 Discussed at [408]–[410].
102 At [411].

Harmful algal blooms

[50] As to the potential for harmful algal blooms, it had been explained in evidence before the Board that blooms (a high biomass) of plankton in coastal waters are a natural and essential ecosystem process. However, some algal species can cause mass mortalities in the marine environment.[103] Such harmful algal blooms are usually natural events, although degraded coastal water quality can promote the development and persistence of blooms.[104]

[51] The Board, while recognising that the development of harmful algal blooms is not easily predictable, accepted that the salmon farms "are unlikely to materially affect the frequency, duration or extent of such blooms".[105] There is the potential for localised changes in some bays but the availability of nutrients from the farms was but one driver. The Board agreed that ongoing monitoring, including of potentially affected bays, is necessary.[106]

Cumulative effects

[52] Turning to cumulative effects, the experts were agreed (with the exception of Dr Henderson) that, at a Sounds-wide scale, there is unlikely to be a change in the water column from oligotrophic/mesotrophic to eutrophic from the establishment of the salmon farms. The experts were also agreed that changes may occur at a smaller scale and the greatest potential for adverse effects, such as harmful algal blooms, exists in side embayments close to the farms and off the main channels.[107] The Board accepted the majority opinion on the point but did not rule out the possibility of more subtle ecosystem changes in response to the increased nutrients from the farms.[108]

[53] Dr Henderson, an independent expert, considered that the intense production systems of the proposed salmon farms would lead to further eutrophication of the

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103 At [413].
104 Discussed at [413]–[420].
105 At [421].
106 At [421].
107 At [427].
108 At [431].

Sounds that might be difficult to reverse.[109] Dr Gillespie, an expert called by King Salmon, "expected the rapidly flushed environment of the Sounds to ensure easy reversibility and a rapid return to the trophic condition pre-development following the closure of the salmon farms".[110] The Board did not make any explicit finding on this conflict of evidence but, given its rejection of Dr Henderson's concerns on the issue of the dangers of trophic change, may have done so implicitly.

[54] The Board accepted that Mr Knight "has quite correctly modelled the cumulative effects of the existing farms, this proposal and other consented salmon farms."[111] However, the Board noted that little information had been presented on the trends in nitrogen from the land. The possibility of more subtle and long term effects due to climate change were also noted, although there was not enough information to predict whether this would be positive or negative with respect to nutrient inputs.[112] The Board also noted that the conclusions of the experts are based on the present day conditions of the Sounds. It said that:[113]

> Increases in riverine inputs and/or conversions of shellfish to finfish farms would further add to the nitrogen load and have to be factored into the consideration of cumulative effects. That is the baseline is shifting and there is an important question around the assimilative capacity of the Sounds as a whole, given the likely trend of increasing nutrient loads from both land and sea based activities.

Mitigation

[55] There were a number of matters put forward as mitigation. These included possible improvements in feed, farm management and fish breeding to reduce the nitrogen emission rates. Dr Broekhuizen, an expert appointed by the Board, agreed that such improvements were plausible.[114] The Board did not make an explicit finding on those matters. The Board did, however, reject the notion that the location of the farms in high flushing environments was a form of "natural mitigation". It said that the "careful site selection is more correctly characterised as choosing a

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109 At [428].
110 At [429].
111 At [430].
112 At [430].
113 At [433].
114 At [434].

receiving environment where rapid mixing and dilution limit the intensity of the immediate effects on the water column and on the benthos [seabed]".[115]

Overall conclusion on effects on the water column

[56] The overall conclusion of the Board as to the effects on the water column was, in agreement with the experts, that "the data and information on water quality, that had been presented" is not an "adequate description of the existing environment given the scale of the proposed increase in finfish farming and consequential release of nutrients into the marine environment".[116] Some of the uncertainty was to be remedied by the conditions of consent related to baseline monitoring and some through monitoring already under way by the Marlborough District Council. However, the Board considered that there remained considerable uncertainty "as to the nature of the receiving environment, including the trends in other nutrient sources" and consequently in the ability of the Sounds to assimilate a significant increase in nutrients adequately.[117]

[57] The Board accepted that the modelling of the nutrients introduced to the water column is conservative. However, the scenarios presented were generally for the initial feed rates for each farm and in some cases for the higher summer loadings. The Board noted that the applications for each salmon farm seek almost double this feed level and that the approach taken was in marked contrast to the modelling of effects on the benthos which were at the maximum feed levels. The Board commented again that this "astonishing gap in the prediction of effects on the environment cannot be explained away by emphasising that the modelling is conservative". Nor could it "be simply filled by invoking adaptive management".[118]

[58] The Board went on to repeat its concerns as to the lack of modelling at the maximum feed levels, saying that this was a "fundamental failing in the assessment of effects on the environment that we would not expect to see in a project of this magnitude and importance".[119] This meant that the Board could only consider

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115 At [436].
116 At [437].
117 At [437].
118 At [438].
119 At [438].

granting consent for "these graduated increases in feed discharge levels with any increases based on a more robust monitoring and adaptive management regime than that presented in the proposed conditions".[120]

Board's approach to the plan change

[59] The Board began its discussion of the plan change by saying that Part 2 of the RMA is "the framework against which we must exercise our decision-making".[121] The Board then outlined the statutory provisions and instruments applicable to its consideration of the plan change and addressed a number of matters that it saw as being of particular relevance. One of these was the compliance with statutory directions in relation to planning instruments, including the Coastal Policy Statement. We have discussed the problems with the Board's analysis in this regard and the "overall broad judgment" approach the Board adopted[122] in the principal judgment on the EDS appeal and do not repeat that analysis here. The Board also discussed the definition of "most appropriate".[123] We are not to be taken as commenting on that discussion as it was not the focus of argument before us. The Board did say, however, that its findings on the many contested issues "is effectively an evaluation of the various costs and benefits".[124] It said that its conclusion on the contested issues forms the basis for the evaluation.[125]

[60] The contested issues discussed included the economic costs and benefits, the salmon farms and their effects on the seabed,[126] water column, biosecurity, marine mammals, seabirds, natural character and navigation. In relation to the water column, the Board acknowledged "the uncertainty that exists with regards to the ability of the Sounds marine ecosystem to assimilate the nutrient loadings that would eventuate should all the zone locations be approved, thus creating the ability for consents to be considered and granted".[127] The Board said that this was particularly

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120 At [439].
121 At [1156].
122 Set out at [1227].
123 At [1197]–[1199].
124 As required by s 32(4)(a) of the RMA.
125 *King Salmon* (Board), above n 6, at [1209].
126 See [304]–[322]. The main concern with regard to the seabed is the potential for reduced biodiversity and significant changes in the sediment chemistry of the seabed underneath the farms and beyond.
127 At [1212].

critical in the Pelorus Sound and the approval of only two of the four zone locations sought in the Waitata Reach was "partly underpinned by our recognition of the (unresolved) uncertainty and risk that exists with regards to the water column effects should all the zonings be approved and consents granted".[128]

[61] Overall, the Board considered that the additional policies and associated rules that were to be introduced into the plan "are efficient and effective in terms of the provision of space for salmon farming. They address this resource management issue and are most appropriate with respect to the settled objectives of the Sounds Plan." After this summary, the Board discussed the various matters in more detail. It said that it had to "apply our findings of fact to the balancing exercise we must now do".[129] If this is a reference back to the need to evaluate the various "costs and benefits" of the proposed plan changes, then this accords with s 32 of the RMA.[130]

[62] The Board said that the effects have been described and evaluated at a site, region (or reach) and whole of Sounds scale. The Board, for convenience, however, in its report discussed the plan changes at the regional (or reach) scale, given the clustering of the proposed plan change sites within three distinct regions.[131]

Port Gore

[63] With regard to the proposed Papatua site (Port Gore), the finding with regard to water quality was that there would be "localised increases in total nitrogen and, consequently, phytoplankton growth within Port Gore".[132] The Board considered, however, that the open nature of the site, being adjacent to Cook Strait, "reduces the potential for cumulative effects to arise over time". The Board also considered the likelihood of changes in the frequency or duration of algal blooms to be very low.[133]

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128 At [1212].
129 At [1225].
130 See [59] above.
131 *King Salmon* (Board), above n 6, at [1226].
132 At [1239].
133 At [1239].

Waitata Reach

[64] With regard to the four sites proposed in the Waitata Reach area and water quality, the Board said that "[n]itrogen is considered to be the primary limiting nutrient for phytoplankton production in the Pelorus Sounds". Even with the extensive mussel farming removing nutrients from the water, intensive salmon farming would "be a substantial net addition".[134]

[65] In the absence of a sophisticated biogeochemical or "food web" model for Pelorus Sound, the Board considered it difficult to be sure of the outcomes of the salmon farms for the wider ecosystem. It said that, while "some expansion of salmon farming seems able to be accommodated (as indicated by the 'critical nutrient loading rate'[135]) the assimilative capacity for an expansion of this scale has not been demonstrated".[136]

[66] The "cumulative additions of nitrogen, increases in phytoplankton and consequential reduction in water clarity" were also potentially of significance for the King Shag foraging habitat. This merited a precautionary approach, given the threatened status and limited geographic range of the King Shag.[137]

[67] In its overall assessment with regard to this region, the Board said:[138]

> After careful consideration of all the balancing factors, we conclude that the siting of four proposed farms in this Reach would not be appropriate. The assimilative capacity of the receiving waters and the potential cumulative effects on the foraging areas of the King Shag are uncertain. The cumulative effects of the Kaitira and Tapipi [farms] on the natural character, landscape and seascape qualities of the entrance to the Sounds would be high. Further, Tapipi lies in the path of a traditional waka route – a taonga to Ngati Koata. It would also be in the vicinity of recorded sites of significance to Maori.

[68] The Board considered that granting all the plan changes sought in this area "would not give effect to the statutory provisions in respect of natural character, landscape, Maori, or ecological matters. The overall cumulative effects would be

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134 At [1245].
135 The definition of a critical nutrient loading rate was explained by the Board, at [385], as the "nutrient loading rate which cannot be exceeded without loss of ecosystem integrity".
136 At [1245].
137 At [1246].
138 At [1252].

high."[139] The Board accordingly granted the request with respect to Waitata and Richmond, but declined the request with respect to Kaitira and Tapipi.[140]

Queen Charlotte Sounds and Tory Channel

[69] For the Queen Charlotte Sounds, there is no specific mention of water quality issues. The plan change request with regard to Kaitapeha and Ruaomoko was declined for other reasons.[141] As to the Tory Channel site, Ngamahau, again there is no specific mention of water quality but, apart from effects on cultural values, ecological features and the effect on local residents, the effects of the farms at the site were considered to be less than minor.[142] The Board approved that plan change.[143]

Assessment approach

[70] After having outlined its decisions in relation to the three regions, the Board discussed its "Part II Assessment". It said that it considered it had "struck the right balance … between providing for the social and economic well-being of the community and achieving sustainable management of the natural and physical resources of the Sounds".[144] That statement is not the correct approach and King Salmon did not attempt to defend it. The purpose of the Act is set out in s 5 of the RMA as being to promote sustainable management of natural and physical resources. It would be contrary to this purpose to balance economic and social wellbeing against that purpose. In any event, the "overall judgment" approach, based on s 5, does not take proper account of the hierarchy of instruments, such as the Coastal Policy Statement and the Regional Policy Statement.[145]

[71] In this case, any "balancing" approach that led to water quality being compromised would be inconsistent with those instruments. Objective 1 of the

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139 At [1253].
140 At [1254].
141 At [1255]–[1264].
142 At [1265]–[1267].
143 At [1275].
144 At [1276].
145 The approach of the Board to Part II and the overall judgment approach is discussed in more detail in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*, above n 12, particularly at [106]–[149].

Coastal Policy Statement requires, among other things, water quality to be maintained. Policy 21 relates also to water quality and the management of discharges is dealt with in Policy 23. Further, Policy 8, dealing with aquaculture, specifically recognises the reliance of aquaculture on proper water quality.[146] Similar themes arise in the Regional Policy Statement, which recognises the importance of water quality being kept at a level that provides for sustainable management of the marine ecosystem and the importance of avoiding, remedying or mitigating adverse effects from the discharge of contaminants.[147]

[72] Further, any compromise to water quality would be inconsistent with the Sounds Plan. The plan changes instituted by the Board left most of the Sounds Plan intact. One of the objectives of the Sounds Plan is to allow development, subject to avoiding, mitigating or remedying adverse effects on water quality. The importance of uncontaminated seawater and the maintenance of water quality is stressed in the Sounds Plan.[148]

[73] In King Salmon's submission, however, the Board did not undertake any such balancing exercise in relation to the water column effects. The Board recognised that it had to be satisfied that the life supporting capacity of the water and its ecosystems are adequately safeguarded.[149] King Salmon contends that the adaptive management approach adopted achieved that aim.

[74] We accept King Salmon's submission that the Board did not in fact apply the incorrect balancing approach to the decision on water quality and that the Board, when discussing the adaptive management conditions, implicitly accepted that water quality would be adequately protected by those measures.[150] The real issues in this appeal therefore are whether the Board was entitled to accept an adaptive management approach and the other two issues relating to the relationship between

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146 See [23] above.
147 See [29] above. See Marlborough Regional Policy Statement, above n 47, at objective [5.3.2] and policy [5.3.5].
148 See [34] and [36] above.
149 *King Salmon* (Board), above n 6, at [1277(c)].
150 At [454]–[460].

the plan and the consents that were identified at the beginning of this judgment.[151] Before turning to those issues, we discuss the Board's decision on the consents.

The consents

[75] As noted above, the Board granted resource consents for the farms at the four sites that had been the subject of the plan changes. The consent conditions originally proposed by King Salmon underwent modification during the course of the hearing and the conditions that were imposed by the Board are intended to create an adaptive management regime. Objectives involving qualitative standards are set in the conditions, along with a process for developing quantitative standards. The consents provide for monitoring in accordance with those standards and remedial action if required. This process is to be monitored by an independent expert peer review panel.

Modification of consent conditions in course of hearing

[76] In its initial application, King Salmon had suggested detailed conditions for an adaptive management approach. There were extensive modifications made over the course of the hearing to these conditions. The Board set out in detail the reasons for these changes. We do not summarise all of this discussion but do summarise the matters of principle discussed by the Board.[152]

[77] One of the most important additions, in response to the concerns expressed by submitters, was the introduction of a series of objectives, expressed in narrative form, designed to maintain the environmental quality of the Sounds.[153] Dr Gillespie explained that specific quantitative thresholds or management triggers were not recommended "at this stage" because of the wide natural variability in nutrient levels. After three years of monitoring, however, thresholds could be defined for specific indicators or for an integrated trophic index.[154]

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151 See [6] above.

152 The section of the Board decision dealing with the modifications to the proposed conditions of consent preceded the discussion regarding the plan changes.

153 *King Salmon* (Board), above n 6, at [444].

154 At [444].

[78] That approach had been considered by the experts during caucusing and various amendments to the water quality objectives were agreed. At the close of the hearing, King Salmon proposed the recasting of the objectives as "qualitative water quality standards" and at the same time "outlin[ed] the process for developing the quantitative standards and responses".[155]

[79] The Board accepted that it was not able to make a decision on quantitative water standards at this stage. However, it said that the thresholds to be set through the water quality standards are simply a mechanism to achieve the agreed water quality objectives. It pointed out that "the peer review panel is tasked with reviewing the baseline information and the quantitative water quality standards which in turn are to be approved by the Council".[156] It went on to say that the objectives "are robust and would ensure the quantitative water quality standards would be sufficiently constrained to be effective". It noted that, in the end, there had been little dispute as to the setting of the objectives.[157]

[80] Dr Gillespie proposed that both qualitative and quantitative standards should continue to be used in a "holistic approach". Any breach of a threshold would trigger more intensive monitoring to establish cause and effect and then decisions as to whether or not to cut back on production.[158] The Board agreed with Dr Gillespie's holistic approach.[159] It said that it saw the qualitative standards as "objectives for an adaptive management approach to water quality (and the wider ecosystem)". It noted that some of the objectives are able to be stated reasonably precisely "but others are broad and involve a measure of professional judgment." The requirement for a peer review panel was therefore necessary and appropriate.[160]

[81] The Board was concerned that any shift in trophic state needs to be expressed in terms of an "increase" or "shift towards" rather than a full scale change in state. As noted above, the Board considered that a change from today's oligotrophic/mesotrophic conditions to a eutrophic state would represent an

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155 At [448].
156 At [1288].
157 At [1291].
158 At [450].
159 At [454].
160 At [455].

ecological disaster.[161] It said that preventing "such an extreme scenario is hardly an appropriate safeguard, something less must trigger action". It went on to say that what represents a material or significant shift (with respect to magnitude, temporal and spatial extent) must be left to the judgement of the peer review panel in the light of all of the information from the monitoring programme. The Board approved a wording change to make it clear that "avoiding a significant movement along the scale is the objective".[162] The Board also said that it favoured adding an integrated trophic index to the list of quantitative water quality standards, while recognising that it may be some time before such an index can be reliably "calibrated" for the Sounds. The Board believed the creation of an enrichment index for the locations would be a useful indicator for monitoring changes and provide a trigger for an adaptive management response.[163]

[82] The Board said that it must make the decision, based on the evidence presented, as to the levels of acceptable change. It said:[164]

> While we are not able to make a decision as to the appropriate water quality standards the thresholds must relate to the agreed objectives as modified by this decision. And the conditions must clearly set out the process and timelines for setting these standards. We are satisfied that the proposed conditions provided by King Salmon in closing are adequate in this regard. The Peer Review Panel is tasked with reviewing the baseline information, the quantitative water quality standards, the management responses and the supporting monitoring programme.

[83] The Board had also been concerned that any breach of the water quality standards in the original proposals required, first, the gathering of further information and, if that indicated an issue, an "action plan" to be formed. The Board said that it did not entirely disagree with this approach but, if the standards are exceeded greatly, then this should result in more immediate action.[165] There were modifications made to the process originally proposed to ensure that this was the case.

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161 See [10] above.
162 *King Salmon* (Board), above n 6, at [456].
163 At [432]. The creation of an enrichment index was imposed as a condition in each of the resource consents granted: see Appendices 8–11.
164 At [460].
165 At [459].

Overall decisions on consents

[84] In its overall decision on the resource consent applications, the Board said that on balance the concurrent resource consent applications for Papatua, Waitata, Richmond and Ngamahau should be granted, subject to the Conditions of Consent. The Board said:[166]

> While some adverse effects will arise, particularly in respect to the water quality, the seabed, Maori values, natural character and landscape, and amenity values: these effects can be adequately managed through the proposed conditions of consent.
>
> Any adverse effects need to be balanced with the need to provide for the economic and social well-being of the community. We reiterate, that providing for these four farms, this will strike the right balance.

[85] The terms of the consents were set at 35 years.[167] The Board said that, in setting this term, it had taken into account the level of financial investment that the consent holder has made in achieving their resource consent and the ongoing costs. A 35-year term would enable the minimum necessary return on investment threshold to be achieved. By contrast, a 20-year term would significantly reduce the return by a factor of 25 per cent.

[86] The Board did express concern with a 35-year term in relation to the potential effect on the water quality, scientific uncertainty as to the ecosystem response and customary values of the Sounds environment.[168] It said, however, that the adaptive management approach and a robust set of conditions applied to the issued consents "gives certainty to the near field operation of the farms".[169] However, the "far field and Sounds-wide effect of the farms in combination with yet to be fully understood natural variation and trends in sources of nutrients entering the Sounds from the ocean, land and other activities leave a higher degree of uncertainty beyond a 20 year period".[170] The Board considered, however, that this could be addressed, if necessary, by the Council through the review process.[171]

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166 *King Salmon* (Board), above n 6, at [1341]–[1342].
167 At [1340].
168 At [1337].
169 At [1338].
170 At [1338].
171 At [1338]. Sections 128 and 129 of the RMA specify when consent conditions can be reviewed by a consent authority. The resource consents granted by the Board contained a condition

[87] The Board then went on to consider and reject the White Horse Rock application because of adverse effects on recreational fishing, customary fishing, navigation, natural character and landscape. When considered cumulatively with the existing farms and the other consents, the adverse effects "would be sufficiently high to tip the balance against granting the application."[172]

Consent conditions

[88] The consent conditions imposed a requirement for a "baseline plan" to be created by an independent person specifying how the monitoring and analysis is to be undertaken to establish baseline information.[173] A peer review panel (the composition of which is approved by the Council) will review the plan and provide recommendations and a report to the consent holder. The "baseline plan" must be approved by the Council. Prior to any structures being placed on the farms, a "baseline report", prepared by an independent person, containing the results from monitoring and analysis undertaken in accordance with the "baseline plan", must be provided to the peer review panel for its review and assessment.[174] The peer review panel is required to review the baseline report, including the recommended water quality standards and integrated trophic index,[175] and make a recommendation to the Council for its approval.[176]

[89] Importantly, if the "baseline plan" is not approved by the Council, then the consent will lapse after three years from the date of the consent's commencement.[177] If the resulting "baseline report" is not approved by the Council, no structure(s) can

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dealing with the ability of the Council to review the conditions of consent. The condition specifies the times at which the Council may review the various conditions of consent. For example, see condition [80] of the Waitata consent at Appendix 9. For simplicity, subsequent pinpoint references to consent conditions are with reference to the Waitata consent (Appendix 9).

172 At [1356]–[1357].

173 The duration of the baseline monitoring varies between the farms from one to two years, and in the case of the farms with the testing duration of merely one year, can be extended on the recommendation of the peer review panel: at [465].

174 Condition [68(a)].

175 The creation of an enrichment index was imposed as a condition in each of the resource consents granted (referred to as an "integrated trophic index" in the conditions): see condition [44(a)]. An enrichment index is a means of assessing the trophic condition of a body of water (by calculating various nutrient and chemical levels of water) over time and provides a robust indicator of a water column ecosystem: at [426].

176 At [1287].

177 Condition [1].

be placed on the marine farms.[178] Therefore, if the analysis and monitoring of the baseline information shows that the development of a marine farm would be inappropriate, the Council can effectively halt any further development of the marine farms by not approving the report.

[90] In addition to the baseline review before the farms are stocked, the Board set out numerous conditions for the ongoing monitoring of the farm to provide a detailed feedback-loop on the effects on the benthos and water quality. For example, in the Waitata Farm consent,[179] the conditions of consent set an initial maximum feed level and maximum increases allowed per annum.[180] Before any increase in the feed levels can be implemented, the farm must have operated at the current maximum level for at least three years, the results must indicate that the enrichment stages[181] are not statistically significantly more than the enrichment stages from the previous year and that the marine farm complies with all the environmental quality standards set in the consent and does not exceed the relevant standards for each zone.[182] These environmental quality standards include various chemical and ecological measurements.[183]

[91] Any increase in the tonnage of feed must be recommended in the "annual report", which is prepared by an independent person, providing details on the monitoring of results from the previous year, an analysis of those results and recommendations for changes to the monitoring and marine farm management actions for the following year.[184] The peer review panel will review this report and make recommendations and then it must be submitted to the Council.[185] Only upon the approval of the "annual report", including the aspects as to an increase in the tonnage of feed, may there be an increase in feed levels.[186]

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178 Condition [60].
179 At Appendix 9.
180 Condition [35].
181 The various enrichment stages are described in table 5 of the conditions of the consents in the appendices to the Board's decision. The enrichment stages provide seven levels of enrichment from enrichment stage one which is described as "natural/pristine conditions", to enrichment stage seven which is where there is "severe enrichment".
182 See condition [37].
183 See conditions [37(c)] – [44].
184 See conditions [56(d)] and [67(e)].
185 See condition [68(b)].
186 See condition [60].

[92] If and when the farms are stocked and monitoring detects that the enrichment stages are above those allowed under the environmental quality standards for the various zones, then, depending on the extent to which the enrichment stages exceed the environmental quality standards, the amount of feed must be reduced, or in more serious circumstances, stock must be removed from the farms until compliance is achieved.[187]

[93] In essence, the above conditions require the gathering of baseline information for the assessment as to whether the marine farm can be built and stocked. If the marine farm is built and stocked, the conditions mandate extensive monitoring and provide remedial mechanisms if water quality is compromised.

The issues

[94] We now discuss the three issues identified at the beginning of the judgment:

(a) whether an adaptive management approach was available;

(b) whether the plan changes were improperly predicated on the consent conditions; and

(c) whether the parameters of the adaptive management regime (if available) should have been contained in the plan rather than through consent conditions.

Adaptive management

[95] We propose to discuss the question of whether an adaptive management approach was available to the Board under the following headings: the parties' submissions; the precautionary approach under the Coastal Policy Statement; the Board's consideration of the precautionary approach and adaptive management; the guidance notes on the Coastal Policy Statement; international commentary; and caselaw on adaptive management from New Zealand, Australia and Canada. We

[187] See conditions [40(a)]–[40(c)].

then assess whether the requirements for an adaptive management approach were met in this case.

The parties' submissions

[96] SOS submits that there was a threat of serious damage to water quality in the Sounds. Scientific uncertainty meant that the Board could not assess the effects of the proposal on water quality. It was thus contrary to its statutory function to approve the plan changes.[188] SOS relies on *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* to support the proposition that a consent authority can classify an activity as prohibited when it considers it has insufficient information, even if further information may later become available.[189] As an alternative, SOS submits that the Board's decision was inconsistent with the only reasonable conclusion from the evidence.[190]

[97] In particular, SOS submits that:

(a) there was insufficient baseline information available to the Board. This means that, even at minimum initial feed levels, the plan changes cannot be justified; and

(b) the Board had found that there was a "fundamental failing" in the modelling exercise in that there had been a failure to model the effects of the maximum feed discharge on water quality. As this was the case, the Board could not justify the plan changes allowing stocking over time to the maximum level.

[98] King Salmon submits that, under the RMA, discretionary activity status simply allows a person to apply for a resource consent. The change from prohibited to discretionary status for the salmon farms in Zone 3 therefore has no environmental effects in itself. As to the resource consents, it is submitted that the Board had

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188 In arguing this, SOS relies upon ss 5, 12, 15(1), 32(2)(c), 66, 69, 70, 105, 107 and 149P(6) of the RMA.

189 *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562 (Glazebrook, O'Regan and Arnold JJ) at [34(a)] and [36].

190 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

sufficient information on all contested issues, including water quality, for consents to be granted up to the initial feed levels (and that is all that was to be allowed initially). The modelling for those initial feed discharge limits was accepted by the Board as having been undertaken on a conservative basis.

[99] In King Salmon's submission, the Board applied a proper precautionary approach in that it declined four of the eight plan change sites, as well as consent for the White Horse Rock site. It also adopted a robust adaptive management regime with regard to the four sites that were approved so that no increases in feed levels could occur unless it was safe to do so. It is submitted that the SOS contentions amount to a submission that there must be perfect (or near perfect) scientific knowledge of all the potential and actual effects of an activity before it can be classified as other than prohibited. It is submitted that there is no statutory support for such a proposition.

Precautionary approach under the Coastal Policy Statement

[100] Policy 3 of the Coastal Policy Statement requires a precautionary approach to managing activities in the coastal environment when the effects of those activities are uncertain but potentially significantly adverse.[191]

[101] The Board accepted that there was a lack of baseline information.[192] Further, while modelling of initial feed levels had been undertaken, there had been no modelling at the maximum feed levels. The Board also said that, if there were a change in trophic level of the Sounds resulting from nitrogen introduced into the coastal waters through the salmon farms, then this would be an ecological disaster.[193] This means that the requirements set out in Policy 3 for uncertainty and potentially significant adverse effects were met and a precautionary approach was required.[194]

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191 See [22] above. The Marlborough Regional Policy Statement, above n 47, also emphasises the need for the precautionary approach and the uncertainty as to the long term effects of marine farming: see [26] and [30] above.

192 *King Salmon* (Board), above n 6, at [461].

193 See [10] above.

194 Therefore, the approach taken by the High Court that it was open to the Board to assess the weight to be given to the precautionary approach was incorrect: see *King Salmon* (HC), above n 2, at [85].

Board's consideration of the precautionary approach and adaptive management

[102] Despite being required to give effect to the Coastal Policy Statement, the Board did not refer to Policy 3 when it specifically discussed the precautionary approach.[195] However, the Board did accept that it was required to take a precautionary approach, which it said is inherent in the structure of the RMA.[196]

[103] Turning to the adaptive management approach, the Board said that this arose, at least in part, from the precautionary approach. Under adaptive management, ongoing monitoring of the effects of an activity are required and the Board said that this "provides a pragmatic way forward, enabling development while securing the ongoing protection of the environment, in complex cases where there are ecological or technological uncertainties as to the effects of the proposal".[197]

[104] The Board noted that in this case three adaptive management approaches were proposed by King Salmon:[198]

> (a) **Staged development** – Sites are proposed to be developed in a staged manner, with expansion contingent on compliance with pre-defined seabed and environmental quality standards (EQS to be specified in the consent conditions) and on regular reviews of wide-scale water column and wider eco-system monitoring result;
>
> (b) **Tiered approach to monitoring** – Monitoring effort is proposed to increase if and when sites approach or exceed the EQS or in response to other identified environmental issues. Likewise, monitoring intensity may decrease with evidence of sustained compliance and stability;
>
> (c) **Ongoing adaptive management** – The farms are proposed to be managed adaptively long-term, in response to environmental monitoring results. Any breaches of the consent condition standards will be addressed and management responses implemented to ensure the farm becomes compliant. Any other adverse effects identified through monitoring, including from the wide scale water column and wider ecosystem monitoring, can also be addressed by adaptive management approaches.

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195 *King Salmon* (Board), above n 6, at [173]–[182], although Policy 3 is referred to in a quote from one of the experts. However, the Board did refer to Policy 3 when outlining the contents of the Coastal Policy Statement: see [85], [283] and [975].

196 At [175]–[178]. We are not to be taken as making any comment on that discussion or on whether the cases discussed correctly state the legal position.

197 At [179].

198 At [54].

[105] The Board referred to a number of cases where the adaptive management technique had been applied in New Zealand.[199] On the basis of those cases, the Board considered that, before endorsing an adaptive management approach in this case, it would have to be satisfied that:[200]

(a) there will be good baseline information about the receiving environment;

(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;

(c) thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) effects that might arise can be remedied before they become irreversible.

[106] The Board considered that it had appropriately applied the precautionary principle by in some cases refusing consent and in others by the adoption of "the strong proposed adaptive management conditions of consent".[201]

Guidance notes on the Coastal Policy Statement

[107] The guidance note to Policy 3 of the Coastal Policy Statement prepared by the Department of Conservation deals with the precautionary approach and adaptive management.[202] It is said that it will be a matter for local authorities to decide on a case-by-case basis whether the activity should be avoided until sufficient study has

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199 See *Golden Bay Marine Farmers v Tasman District Council* EnvC Wellington W19/2003, 27 March 2003; *Minister of Conservation v Tasman District Council* HC Nelson CIV-2003-485-1072, 9 December 2003; *Golden Bay Marine Farmers v Tasman District Council* EnvC Wellington W89/2004, 3 December 2004; *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC Christchurch C80/2009, 21 September 2009; *Geotherm Group Ltd v Waikato Regional Council* EnvC Auckland A47/2006, 13 April 2006; *Crest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/2009, 22 December 2009; *Biomarine Ltd v Auckland Regional Council* EnvC Auckland A14/2007, 13 February 2007; and *Clifford Bay Marine Farms Ltd v Marlborough District Council* EnvC Christchurch C131/2003, 22 September 2003.

200 *King Salmon* (Board), above n 6, at [181].

201 At [1278].

202 Department of Conservation *NZCPS 2010 Guidance Note – Policy 3: Precautionary approach*.

been done into its likely effects, or whether an activity is allowed, but subject to "complex and detailed conditions and a programme of specified testing and monitoring (as in adaptive management)".[203] It said that adaptive management recognises that:[204]

> … knowledge about natural resource systems is uncertain and that some management actions are best conducted as experiments or "learning by doing". A key issue in implementing an adaptive management approach is to ensure that conditions clearly specify the level of effect that is anticipated. If monitoring shows this threshold to have been reached, then the condition (in the case of a resource consent) should provide for the activity to be adjusted.

[108] The commentary goes on to say that an adaptive management approach must provide for monitoring of issues of concern and will not be appropriate where adaptive management cannot remedy the effects before they become irreversible.[205]

International commentary

[109] In 2007, the International Union for Conservation of Nature (IUCN)[206] approved a set of guidelines on the application of the precautionary principle.[207] These included a guideline on using an adaptive management approach, which it is said should be used unless strict prohibitions are required.[208] Any such approach should include the following core elements:[209]

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203 At 7.

204 At 7–8.

205 At 8.

206 The IUCN is an international environmental organisation founded in 1948. The IUCN is comprised of more than 1,200 member organisations (government and non-governmental organisations), six commissions and a secretariat of over 1,000 people in more than 60 countries. IUCN's main aims are targeted at ensuring biodiversity conservation, the use of nature based solutions and related environmental governance. See <www.iucn.org>.

207 International Union for Conservation of Nature "Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management" (as approved by the 67th meeting of the IUCN Council 14–16 May 2007) [IUCN Report].

208 Guideline 12 at 9–11. This was said in the context of the precautionary principle at international law. In that context, rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment. For example, in the IUCN Report, it is noted that "[a]n element common to the various formulations of the Precautionary Principle is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat": at 1. For a discussion on the precautionary principle in international law, see also: Philippe Sands and Jacqueline Peel *Principles of International Environmental Law* (3rd ed, Cambridge University Press, Cambridge, 2012); Nicolas de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002); World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) *Report of the Expert Group on the Precautionary Principle of the World Commission on the Ethics of Scientific Knowledge and Technology* (UNESCO COMEST, March 2005); and *1992 Rio*

(a) monitoring of impacts of management or decisions based on agreed indicators;

(b) promoting research, to reduce key uncertainties;

(c) ensuring periodic evaluation of the outcomes of implementation, drawing of lessons and review and adjustment, as necessary, of the measures or decisions adopted; and

(d) establishing an efficient and effective compliance system.

[110] In its commentary on this guideline, the IUCN said that an adaptive management approach is:[210]

> … particularly useful in the implementation of the Precautionary Principle as it does not necessarily require having a high level of certainty about the impact of management measures before taking action, but involves taking such measures in the face of uncertainty, as part of a rigorously planned and controlled trial, with careful monitoring and periodic review to provide feedback, allowing amendment of decisions in the light of such feedback and new information.

[111] It is recognised that the precautionary principle may require prohibition of activities. This may be the case, for example, where urgent measures are needed to avert imminent potential threats, where the potential damage is likely to be irreversible and where particularly vulnerable species or ecosystems are concerned.[211]

[112] Where adaptive management is suitable, monitoring and regular review are required. In some cases, further information and research may lead to the precautionary measure no longer being needed. However, it could lead to the conclusion that the threat is more serious than expected and that more stringent measures are required.[212]

Declaration on Environment and Development A/Conf/151/26 (Vol I) (1992).

209 IUCN Report, above n 207, at guideline 12.

210 At 10.

211 At 10.

212 At 10.

New Zealand cases

[113] As indicated by the Board, the concept of adaptive management has been discussed and implemented in a number of Environment Court decisions. We propose to discuss three of these. The first is *Clifford Bay Marine Farms Ltd v Marlborough District Council*, which involved the granting of resource consent for the proposed implementation of a large mussel farm in a "prime Hector's dolphin habitat", with uncertainty as to the effects of the farm on the dolphins.[213] The Environment Court granted a resource consent for a small marine farm, following a two year intensive survey, research and monitoring program regarding Hector's dolphins, allowing a cautious adaptive management strategy.[214] As noted by the Court:[215]

> The two options open to us are to decline consent, or to grant it in such a way that if any adverse effects on the use Hector's dolphin make of the habitat arise, they are limited, and measures to reverse them speedily can be implemented. The probability of undetected adverse effects of significance occurring unrelated to, and unaccompanied by, other existing adverse effects are of sufficiently low probability that they should not lead us to decline the application altogether.

[114] In *Crest Energy Kaipara Ltd v Northland Regional Council*, the Environment Court said that the concept of adaptive management had been developed through a number of decisions of the Court.[216] The Court said that it should not put an applicant in a position of anticipating and researching all hypotheses before making an application.[217] However, the applicant "must establish sufficient of a case to persuade the court to grant consent on the basis of allowing the adaptive management processes to be embarked upon".[218]

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213 *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199.

214 The High Court (*Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127) remitted the case back to the Environment Court for reconsideration in light of issues surrounding unlawful delegation espoused by the High Court. In the subsequent Environment Court decision (*Director-General of Conservation v Marlborough District Council* EnvC Christchurch C113/2004, 17 August 2004) the conditions surrounding the monitoring of Hector's dolphins were slightly modified.

215 *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199, at [157].

216 *Crest Energy Kaipara Ltd v Northland Regional Council*, above n 199, at [224] with reference to *Golden Bay Marine Farmers v Tasman District Council*, above n 199; *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199; and *Lower Waitaki River Management Society Inc v Canterbury Regional Council*, above n 199.

217 At [228], with reference to the Environment Court decision in *Director-General of Conservation v Marlborough District Council*, above n 214, at [40].

218 At [229].

[115] The Court said that it is important in such plans for baseline knowledge to be collected on which management plans can build in "an on-going and cycling process".[219] Plans should set reasonably certain and enforceable objectives, plan and design a process for meeting those objectives, establish a monitoring regime and a process for the evaluation of monitoring results leading to the review and refinement of hypotheses. After that point, the process will often start again at the design and planning level.[220]

[116] In *Lower Waitaki Management Society Inc v Canterbury Regional Council* the Environment Court said that the Court "always has to be careful to ensure that the objectives for the adaptive management are reasonably certain and enforceable."[221] In that particular case, the Court said that the management plans needed more detail.[222]

Australian cases

[117] The concept of adaptive management has also been discussed in a number of Australian decisions. In *Telstra Corporation Ltd v Hornsby Shire Council*, the New South Wales Land and Environment Court (Preston CJ) held that the type and level of precautionary measures required depends on the combined effect of the degree of seriousness and irreversibility of the environmental threat and the degree of uncertainty.[223] The more significant and the more uncertain the threat, the greater the degree of precaution required.[224]

[118] The Judge also said that prudence would suggest that some margin for error should be retained.[225] One means of ensuring this is through an adaptive management approach, whereby the development is expanded as the extent of

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219 At [226].
220 At [226].
221 *Lower Waitaki Management Society Inc v Canterbury Regional Council,* above n 199, at [381].
222 At [555].
223 *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133, (2006) 146 LGERA 10 at [161].
224 At [161].
225 At [162].

uncertainty is reduced.[226] The Judge said that an adaptive management approach might involve the core elements we set out at [109] above.[227]

[119] In *Environment East Gippsland Inc v VicForests*[228] the plaintiff sought to restrain logging in an area of old growth forest, which was significant both ecologically and as a source of timber resources. One of the main contentions was that logging would breach the precautionary principle in respect of habitat preservation for endangered species. The Victorian Supreme Court said that the precautionary principle does not require avoidance of all risks.[229] The degree of precaution will depend upon the combined effect of the seriousness of the threat and the degree of uncertainty.[230] It also held that uncertainty may in some circumstances be adequately remedied by an adaptive management approach.[231] The test set out by the Court was as follows:[232]

(a) Is there a real threat of serious or irreversible damage to the environment?

(b) Is it attended by a lack of full scientific certainty (in the sense of material uncertainty)?

(c) If yes to (a) and (b), has the defendant demonstrated the threat is negligible?

(d) Is the threat able to be addressed by adaptive management?

(e) Is the measure alleged to be required proportionate to the threat in issue?

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226 At [163].

227 At [164]. The elements listed by the Court are identical to those set out in the IUCN Report, above n 207. The *Telstra* judgment was released prior to the IUCN report and the Court sourced the elements from a leading textbook on sustainability: Rosie Cooney and Barney Dickson (eds) *Biodiversity and the Precautionary Principle, Risk and Uncertainty in Conservation and Sustainable Use* (Earthscan, London, 2005).

228 *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

229 At [203].

230 At [204].

231 At [205].

232 At [212].

[120] It is significant that the Victorian Supreme Court considered that, before adaptive management could be considered, the threat had to be shown to be negligible, but this may not have been intended as a general statement of principle. It may have been a requirement arising out of the facts of the particular case and the seriousness of the risk of environmental harm.

[121] In *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council*,[233] a case involving a consent for a limestone quarry, Preston CJ made some further comments on adaptive management. He said that:[234]

> Adaptive management is a concept which is frequently invoked but less often implemented in practice. Adaptive management is not a "suck it and see", trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained. The monitoring program has to be designed so that there is statistical confidence in the outcome. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty, but rather they establish a regime which would permit changes, within defined parameters, to the way the outcome is achieved.

Canadian cases

[122] Adaptive management has also been discussed in Canada. The case of *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)* involved the construction of a winter snow road through a national park.[235] It was held by the Federal Court of Appeal that any environmental harm from the road was likely to be of limited significance because of the mitigation and adaptive management measures and the high degree of reversibility of the project.[236] The Court had earlier said that adaptive management responds to the difficulty of predicting the environmental effects of a project and counters "the potentially paralysing effects of the precautionary principle on otherwise socially and

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233 *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48.

234 At [184].

235 *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)* 2003 FCA 197, [2003] 4 FC 672.

236 At [105]–[107].

economically useful projects".[237] It was said that the precautionary principle states that a "project should not be undertaken if it *may* have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialise".[238]

[123] The case of *Pembina Institute for Appropriate Development v Canada (Attorney General)* involved an iron sands mine project in Alberta.[239] Tremblay-Lamer J referred to *Canadian Parks* and said that adaptive management allows projects to proceed, despite uncertainty and potentially adverse environmental impacts, "based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists".[240]

Was an adaptive management approach available in this case?

[124] The issue for the Court is when an adaptive management approach can legitimately be considered a part of a precautionary approach. This involves the consideration of the following: what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

[125] As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see" approach.[241] The Board did not explicitly consider this question but rather seemed to

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237 At [24]. This paralysing effect is discussed in Cass R Sunstein *Laws of Fear – Beyond the Precautionary Principle* (Cambridge University Press, Cambridge, 2005) at 13–34.

238 At [24]. It is unnecessary to decide whether the Canadian approach is the proper articulation of the precautionary principle in the New Zealand context.

239 *Pembina Institute for Appropriate Development v Canada (Attorney General)* 2008 FC 302.

240 At [32].

241 See [121] above. See also the comments of Tremblay-Lamer J quoted at [123] above; the explicit consideration of the two options in *Clifford Bay Marine Farms Ltd v Marlborough*

assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

[126] The Board had before it modelling showing that water quality would not be compromised at the initial maximum feed levels for all nine locations. The Board accepted that the modelling of the nutrients introduced to the water column was conservative.[242] The experts were agreed too that the results of the modelling were satisfactory except in the very short term and for minor bays.[243] Although there was no modelling for the maximum feed levels, as King Salmon points out, there is no guarantee that these levels will actually be reached.[244] Under the consent conditions, they will only be reached if water quality (and the seabed) will be protected.[245]

[127] Indeed, as also pointed out by King Salmon, the total maximum discharge levels that could ever be enabled under the approved plan changes were less than half of what was sought and were contained within three separate areas. Further, in the Waitata Reach, the combined maximum feed levels for the two farms[246] that were approved (10,000 tonnes per annum) are less than the combined initial maximum feed levels (12,000 tonnes per annum) for the five farms[247] that were proposed in the Waitata Reach. Of course those levels are concentrated in two farms and this may mean that a linear calculation may not adequately capture the risk but it does, as King Salmon submits, illustrate the extent of the precautionary approach applied by the Board in the Waitata Reach where it refused two of the plan changes and consent for the White Horse rock site, partly because of water quality concerns.

District Council, above n 199, at [113]; and the threshold question discussed in *Crest Energy Kaipara Ltd v Northland Regional Council*, above 199, at [229].

242 See [57] above.

243 See [45] above.

244 See [46] above.

245 See [90] above.

246 Waitata and Richmond. The initial feed levels (in tonnes per annum) for the Waitata and Richmond farms are 3,000 and 1,500, respectively. The maximum increase in feed discharge (in tonnes per annum) for the Waitata and Richmond farms is 1,000 and 500, respectively. The maximum feed discharge ceiling (in tonnes per annum) for the Waitata and Richmond farms is 6,000 and 4,000, respectively.

247 Waitata, Richmond, Kaitira, Tapipi and White Horse Rock. The maximum initial feed discharge levels (in tonnes per annum) for each of these farms proposed were 3,000, 1,500, 3,000, 3,000, and 1,500, respectively.

[128] The Board also accepted evidence that the incidence of harmful algal blooms was unlikely to be affected by the salmon farms, apart from localised changes in some bays.[248] Further, the Board also accepted the evidence of the majority of the experts that a trophic shift in the Sounds was unlikely.[249] While recognising the potential for less disastrous shifts, this was to be dealt with in the conditions.[250]

[129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:[251]

(a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);

(b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

(c) the degree of uncertainty; and

(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

[130] In this case with regards to [129](a) above, the gravity of risk if realised (ecological disaster) was grave.[252] The extent of the risk is difficult to assess because of the uncertainties as to the baseline information and the lack of modelling for

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248 *King Salmon* (Board), above n 6, at [421].
249 At [431].
250 At [431] and [432]. See [88]–[93] above.
251 While we have summarised the discussion referring to adaptive management in New Zealand, Australian and Canadian case law and in commentaries, we are not to be taken as having endorsed the approach taken in those cases or commentaries, except to the extent specifically indicated in this section of the judgment at [124]–[134].
252 See [10] above.

maximum feed levels. However, on current information, the majority of the experts considered that a change in trophic level of the Sounds was unlikely.[253]

[131] With regards to [129](b) above, the importance of marine farming is outlined at Policy 8 of the Coastal Policy Statement. It provides that aquaculture is important to the social, economic and cultural well-being of people and communities and thus requires that the social and economic benefits of aquaculture be taken into account in decision making.[254] The Board was also satisfied that these particular projects were individually and collectively of economic benefit at the local, regional and to a lesser extent, the national level.[255]

[132] With regards to [129](c), the uncertainty, particularly as to baseline and increased feed levels, was high. The modelling that had been done could be seen as having reduced the uncertainty somewhat, subject to the limits of modelling. As the Board noted, however, quoting Mr Knight, models "can never perfectly simulate what effects will transpire under real world conditions", or, quoting another witness, "all models are wrong, but some models are useful".[256]

[133] The vital part of the test is contained within [129](d) above. This part of the test deals with the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty. We accept that, at least in this case, the factors identified by the Board[257] are appropriate to assess this issue. For convenience, we repeat these here:

(a) there will be good baseline information about the receiving environment;

(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;

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253 See [52] above.
254 See [23] above.
255 *King Salmon* (Board), above n 6, at [263]–[268].
256 At [380].
257 See [105] above.

(c) thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) effects that might arise can be remedied before they become irreversible.

[134] It is unfortunate that the Board did not return to discuss the factors it had identified explicitly. We must therefore assess the extent to which the findings of the Board as to the measures put in place meet those tests.

[135] Looking first at the question of baseline information under [133](a), normally one would expect there to be sufficient baseline information before any adaptive management approach could be embarked on (as against prohibition until any deficiency in baseline information is remedied). All the experts were agreed that there was a lack of baseline information with regard to water quality.[258] That deficiency will, however, be remedied before the farms are stocked and no structure can be placed on the farms if the Council does not approve the baseline report.[259] Further, the Board had before it the modelling results and the opinions of the experts we have just discussed at [126] to [128] above. The approach of the Board was in these circumstances available to it. In addition, in this case, the baseline information that will be collected will be of use in the managing of the Sounds generally, and in particular provide more understanding of the effects, not just of marine farming but also of land based activities. This is consistent with the various methods in the Regional Policy Statement that encourage research to further the various policies.[260]

[136] With regards to [133](b), the Board was of the view that the consent conditions provided effective monitoring of adverse effects and that appropriate thresholds were set.[261] The environmental quality standards set were agreed to by the experts with little debate as to the content. These standards are to continue to be used in a holistic approach with the quantitative standards that are to be

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258 See [42] above.
259 See [89] above.
260 See [30] above.
261 *King Salmon* (Board), above n 6, at [1277](b).

developed.[262] The qualitative standards provide an overarching framework. The baseline report and the ongoing monitoring reports are to be prepared by an independent person, monitored by the peer review panel and have to be approved by the Council.[263]

[137] As to [133](c), any significant shift in trophic state will lead to remedial action by either reducing the amount of feed, or in serious circumstances, removing fish from the farm until the trophic state improves.[264] SOS expressed concern about the efficacy in practice of the monitoring and remedial measures but it is not an error of law for the Board to rely on the measures being properly implemented.

[138] As to [133](d), although it did not explicitly make findings that the effects could be remedied before they became irreversible, this is implicit from its acceptance of the conditions as complying with a precautionary approach.[265]

[139] The answer to the overall question from [129](d) of whether risk and uncertainty will be diminished sufficiently for an adaptive management regime to be consistent with a precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach.

[140] In this case, while a change in trophic state would be grave, the experts were agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was thus entitled to consider that the four factors it had identified were met. In this case, given the uncertainty will largely be eliminated and the risk managed to the Board's satisfaction by the conditions imposed, it was open to the Board to consider that the

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262 At [454].
263 See [88] and [89] above.
264 See [92] above.
265 See [53] above for a discussion as to expert evidence on reversibility.

adaptive management regime it had approved, in the plan and the consent conditions, was consistent with a proper precautionary approach.

Relationship between the plan change and consent applications

The parties' submissions

[141] In SOS's submission, while the plan changes and the consent applications could be heard together, they remain separate processes with a different focus (the planning role as against a quasi-judicial role for consent applications).[266] The 2011 amendments to the RMA, which allowed the two to be heard together, were not intended to make a substantive change to the nature of the planning and consent processes or the relationship between them.[267] SOS submits that the Board made its decision on the plan change and the consent applications as an integrated whole and that its plan change decision was improperly predicated on the consent conditions it intended to impose.

[142] In response to this submission, King Salmon's position is that the Board's decision was not predicated on the conditions it proposed to impose at the consenting stage. It says that the Board repeatedly reminded itself of the statutory direction in relation to the sequencing of the matters for decision before it.[268] The Board followed the correct sequence by first considering the requested plan changes[269] and then the five remaining resource consent applications.[270] The Board noted, when considering the plan changes, that it did so "aware of" the conditions proposed,[271] but in King Salmon's submission, the decision was not "predicated on compliance with the proposed conditions of consent". In any event, the proposed conditions of consent cannot be an irrelevant factor for the Board to take into account.

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266 *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*, above n 189, at [16] and [22].

267 Section 149P(8) of the RMA necessitates that a board of inquiry, when dealing with a plan change and a concurrent application, must first determine the matters in relation to the plan change request and then determine the matters in relation to the concurrent application.

268 *King Salmon* (Board), above n 6, at [73(e)] and [101]–[102].

269 At [1156]–[1279].

270 At [1280]–[1342].

271 At [1277(b)].

Discussion

[143] We accept that the Board outlined its decision on the plan changes before its decision on the consent applications. We also accept that the Board was aware of the different statutory provisions that governed plan changes and consent applications. However, the influence of the consent conditions on the Board's decision on the plan change is evident from the structure of the report. The modifications to the consent conditions originally proposed by King Salmon were discussed by the Board after it had made findings on the contested effects and before the consideration of the plan changes.

[144] It is quite clear, too, that the Board would not have granted the plan change request in the absence of the detailed consent conditions. The Board referred on more than one occasion to the uncertainty relating to baseline levels and the fundamental failure to model maximum feed levels. The consent conditions require the gathering of baseline information, which had to be done before the farms were stocked. The consent conditions also require ongoing monitoring to ensure that, if water quality becomes at risk of being compromised, then appropriate remedial action can be taken. It is thus the consent conditions that address the uncertainties that the Board had identified and contain the adaptive management regime which is an essential component of the Board's decision.[272]

[145] The issue then is whether it was improper for the Board to take into account the consent conditions when deciding on a plan change to make salmon farming a discretionary activity in Zone 3. We do not consider that it was. If a relevant authority considering a plan change request could not conceive of a consent being granted for an activity no matter what the conditions, then the activity could not be designated as a discretionary activity. If, however, an activity could have significant adverse effects but these effects could be eliminated by a simple consent condition, then it would be irrational to require a planning authority to ignore the fact that such a condition could be imposed. All that occurred in this case is that the Board considered the actual conditions that would ultimately be imposed, rather than

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[272] The Board explicitly noted, at [439], that it could only consider granting consent if there was a more robust monitoring and adaptive management regime than that presented in the proposed conditions by King Salmon.

hypothetical conditions. This is legitimate given that the hearing, and the subsequent decision, covered both plan changes and consent conditions.

[146] It is nevertheless important for the plan change process and the consents to be considered separately, with the different statutory provisions and the different roles of the decision maker firmly in mind: as a planning authority (for plan changes) and as a hearing authority with a quasi-judicial role (for consents). We consider that the Board in this case did consider the plan changes and the consents separately and was well aware of the different roles and statutory provisions when considering water quality issues. It also took a proper regional approach[273] to the issue of water quality, considering the effect of the farms on water quality on a Sounds-wide basis.[274]

[147] We recognise that there could be dangers when a planning authority has regard to anticipated consent conditions where the consents are for only one activity, while the plan change covers a variety of activities. A planning authority must have regard to the full range of activities that a proposed plan change could subsequently permit. In this case, however, both the plan changes and the consent conditions related only to salmon farming.

What should have been contained in the plan?

The parties' submissions

[148] SOS submits that, if the Board could identify conditions that would enable salmon farming to continue consistently with the RMA,[275] then these conditions should have been in the plan and specified in rules and standards. That would have given the community certainty about what is allowed to enable people to "order their lives under it with some assurance".[276] SOS acknowledges that there were assessment criteria in the plan but points out that these are guidelines only. Further,

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273 See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 12, at [170].

274 See *King Salmon* (Board), above n 6, at [406] and [427].

275 Of course, the primary submission of SOS is that no such conditions would adequately safeguard water quality, in light of the lack of information before the Board.

276 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10] per Elias CJ.

it points out that the Board could not even set water quality standards in the resource conditions as it lacked sufficient information to do so. Instead, it imposed a monitoring regime and a means of setting water quality standards to be approved by the Council. This did not give proper assurance that the adaptive management regime, as envisaged by the Board, would be complied with.[277]

[149] In addition, if the adaptive management regime had been specified as rules and standards in the plan, SOS says that any future resource consent application would almost certainly be notified and the community could have participated in decisions relating to resource consent applications in the future that would be made on the basis of the newly gathered monitoring information. Public participation is integral to the RMA.

[150] In response, King Salmon submits that the standards, assessment criteria and the existing provisions of the Sounds Plan, together with all of the relevant higher order planning documents (such as the Coastal Policy Statement), provide specific direction and guidance for conditions of consent to be imposed on any subsequent resource consent application. In its submission, no future consent could be granted without properly providing for the maintenance of water quality. Further, water quality objectives were set as conditions of consent. As to public participation, King Salmon submits that the public has had a proper opportunity to be heard during the Board process.

Discussion

[151] Under s 87A(4), if a resource consent is granted for a discretionary activity, the activity must comply with the requirements, conditions and permissions, if any, of the RMA, regulations, plan or proposed plan. It is common practice for regional plans to include assessment criteria for determining whether a discretionary activity should be granted a resource consent. If such criteria exist, the consent authority must give effect to them. However, the law does not require in all circumstances

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[277] SOS did not, however, pursue in this Court its earlier argument that the Board had improperly delegated its decision to the independent expert, the peer review panel and the Council. In *King Salmon* (HC), above n 2, the High Court dealt with this submission at [114]–[128]. We make no comment on this issue.

comprehensive assessment criteria setting out when resource consent may be granted for discretionary activities.

[152] As to the discharge of contaminant levels, s 15(1)(a) of the RMA allows for the discharge of contaminants into water as long as the discharge is expressly allowed by either a national environmental standard or other regulations, a rule in a regional plan,[278] or a resource consent. Thus in the current case, the discharge levels of fish feed could be set either in the regional plan or in the individual consents.

[153] If, however, a consent for a particular activity would only be granted on certain conditions, then it would certainly be good practice (and may in some circumstances be a requirement) that this be made clear in the plan, either as standards or as assessment criteria. Otherwise consent applications may not address relevant criteria and a future consent authority may risk making a decision on a basis that was not contemplated by the planning authority.

[154] The structure of the Sounds Plan is to have rules and standards but also to have assessment criteria relating to resource consent applications. Assessment criteria are designed to give guidance to those applying for consents as to the types of information and analysis that will be required of applicants.[279] They also give the community information on how such consents will be assessed. Although the assessment criteria are not said to be binding, a reasonable consent authority would have to take them into account, to the extent that they were relevant.

[155] In this case, we accept King Salmon's submission that no future consent for Zone 3 could be granted without properly providing for the maintenance of water quality. This is because of what is contained in the Coastal Policy Statement and the Regional Policy Statement on water quality, along with the general requirements of the Sounds Plan on that topic, as well as the specific standards and assessment criteria relating to Zone 3,[280] including the requirement to assess the adverse effects of any discharge to coastal water, the provision for staged and monitored increases in

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278 As well as a rule in a proposed regional plan for the same region (if there is one).
279 See [33] above.
280 See [40] and [41] above.

feed discharge and the necessity for adaptive management approaches to the management of the seabed and water quality.[281]

[156] As to the submission of SOS relating to the inability of the Board to set water quality standards, it is true that the Board could not set quantitative standards but it did set comprehensive qualitative ones in the consents.[282]

[157] We accept that public participation is a key tenet of decision making under the RMA with many public participatory processes.[283] As noted by Keith J in *Discount Brands Ltd v Westfield (New Zealand) Ltd*, the purpose of these processes is to recognise and protect the particular rights of those who are affected and to enhance the quality of the decision making.[284] With regard to the current case, the hearing before the Board was eight weeks long. The Board heard from 181 witnesses and 1221 submissions were received. Therefore, in this case, there was a significant amount of public participation in the process.

Conclusion, result and costs

[158] The Board was entitled to consider that the adaptive management regime, reflected in both the plan and the consent conditions, was consistent with a proper precautionary approach. The plan changes were not improperly predicated on the consent conditions and there was no need for the plan to contain more than it did on water quality, the plan containing in particular a reference to an adaptive management regime and to controls for water quality.

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281 See [41] above. The amended rule [35.4.2.10.3] set out in *King Salmon* (Board), above n 6, at Appendix 3, also includes a requirement to assess the effects from seabed deposition and changes to water quality, ecological effects and environmental standards in which effects of discharges can be monitored and evaluated.

282 The submissions of SOS contained a number of other complaints about the consent conditions (including the 35-year term of the consents) and also complaints relating to other matters such as the assessment of economic benefit. These matters did not explicitly come within the terms of the leave sought or given and were just noted to support the main grounds of appeal. As such, we have not found it necessary to deal with them. To the extent they were dealt with in the judgment of Dobson J, we are not to be taken as making any assessment of his findings relating to those matters.

283 For example, under s 165ZT of the RMA, an accepted plan change request and a concurrent application for coastal permits needs to be publicly notified in accordance with that section.

284 *Discount Brands Brands Ltd v Westfield (New Zealand) Ltd*, above n 276, at [46].

[159] The appeal with regard to the Waitata, Richmond and Ngamahau sites is dismissed.

[160] If costs cannot be agreed, the parties have leave to file memoranda on or before 2 June 2014.

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DLA Phillips Fox, Wellington for Third Respondent
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Land and Environment Court
of New South Wales

CITATION :	**Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited [2010] NSWLEC 48**
PARTIES :	APPLICANT Newcastle & Hunter Valley Speleological Society Inc FIRST RESPONDENT Upper Hunter Shire Council SECOND RESPONDENT Stoneco Pty Limited
FILE NUMBER(S) :	10497 of 2009
CORAM:	Preston CJ

KEY ISSUES:	APPEAL :- objector appeal against Council's decision to grant consent to limestone quarry – whether species impact statement ('SIS') required - whether endangered ecological community ('EEC') present on project site - whether vulnerable species listed under Threatened Species Conservation Act 1995 present on project site – whether likely significant impact on EEC or listed vulnerable species - no likely significant impact on EEC or vulnerable species – no SIS required - uncertainty as to presence of caves and cave-dwelling fauna on project site - whether quarry likely to cause serious or irreversible environmental damage – threat of environmental damage scientifically likely – precautionary principle applied – precautionary measures – monitoring and adaptive management - included in conditions of consent to prevent environmental damage – whether proposal is consistent with zone objectives - whether proposal is compatible with other land uses - whether improvements to road infrastructure adequately provided for in conditions of consent. PRECAUTIONARY PRINCIPLE: uncertainty as to presence of caves and cave-dwelling fauna on project site - whether quarry likely to cause serious or irreversible environmental damage – threat of environmental damage scientifically likely – precautionary principle applied – precautionary measures – monitoring and adaptive management - included in conditions of consent to prevent environmental damage. THREATENED SPECIES: whether species impact statement ('SIS') required - whether endangered ecological community ('EEC') present on project site - whether vulnerable species listed under Threatened Species Conservation Act 1995 present on project site – whether likely significant impact on EEC or listed vulnerable species - no likely significant impact on EEC or vulnerable species – no SIS required.
LEGISLATION CITED:	Environment Protection and Biodiversity Conservation Act (Cth) 1999 Environmental Planning and Assessment Act 1979 Fisheries Management Act 1994 Land and Environment Court Act 1979 Mining Act 1992 National Parks and Wildlife Act 1974 Native Vegetation Act 2003 Protection of the Environment Administration Act 1991 Threatened Species Conservation Act 1995

CASES CITED:	BGP Properties Pty Ltd v Lake Macquarie City Council [2004] NSWLEC 399; (2004) 138 LGERA 237 BT Goldsmith Planning Services Pty Ltd v Blacktown City Council [2005] NSWLEC 210 Carstens v Pittwater Council [1999] NSWLEC 249; (1999) 111 LGERA 1 Commonwealth of Australia v Randwick City Council [2001] NSWLEC 79 Corowa v Geographe Point Pty Ltd [2007] NSWLEC 121; (2007) 154 LGERA 117 Drummoyne Municipal Council v Maritime Services Board (1991) 72 LGRA 186 Grampian Regional Council v City of Aberdeen District Council (1984) 47 P&CR 633 Hoffman Homes v Administrator, 961 F2d 1310 (7th Circuit 1992) Hoffman Homes v Administrator, 999 F2d 256 (7th Circuit 1993) Hub Action Group Inc v Minister for Planning [2008] NSWLEC 116; (2008) 161 LGERA 136 Masterbuilt Pty Ltd v Hornsby Shire Council [2002] NSWLEC 170 McCarthy v Mulwaree Shire Council (1992) 78 LGERA 158 Minister for Planning v Walker [2008] NSWCA 224; (2008) 161 LGERA 423 Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31 Motorplex (Australia) Pty Ltd v Port Stephens Council [2007] NSWLEC 74 Nambucca Valley Conservation Association v Nambucca Shire Council [2010] NSWLEC 38 Oshlack v Richmond River Shire Council (1993) 82 LGERA 222 Plumb v Penrith City Council [2002] NSWLEC 223 Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426 Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council [2007] NSWLEC 55 Rosemount Estates Pty Ltd v Cleland (1995) 86 LGERA 1 Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning (1996) 90 LGERA 1 Smyth v Nambucca Shire Council [1999] NSWLEC 226; (1999) 105 LGERA 65 Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10 Timbarra Protection Coalition Inc v Ross Mining NL [1999] NSWCA 8; (1999) 46 NSWLR 55 Tuna Boat Owners Association of SA Inc v Development Assessment Commission (2000) 77 SASR 369; 110 LGERA 1 VAW (Kurri Kurri) Pty Ltd v Scientific Committee (Established under s127 of the Threatened Species Conservation Act (1995)) [2003] NSWCA 297; (2003) 58 NSWLR 631, 128 LGERA 419 Zia v WAPDA PLD 1994 SC 693
DATES OF HEARING:	30 November 2009, 1 December 2009, 2 December 2009, 4 December 2009

DATE OF JUDGMENT:	31 March 2010
LEGAL REPRESENTATIVES:	APPLICANT Mr P Larkin with him Mr C Norton (barristers) SOLICITORS Environmental Defender's Office FIRST RESPONDENT Mr P Jayne (solicitor) SOLICITORS Sparke Helmore SECOND RESPONDENT Mr J Robson SC SOLICITORS McPhee Kelshaw

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

PRESTON CJ

31 MARCH 2010

10497 OF 2009

NEWCASTLE & HUNTER VALLEY SPELEOLOGICAL SOCIETY INC V UPPER HUNTER SHIRE COUNCIL AND STONECO PTY LIMITED

JUDGMENT

1 **HIS HONOUR:** The Isis River valley is a rural landscape, with a number of agricultural properties. The river flats in the valley bottom give way to hills supporting woodland. A striking feature of the vegetation are dense stands of tall grass trees (*Xanthorrhoea glauca*). Underlying the hills are limestone deposits.

Consent is granted to a limestone quarry

2 On 29 June 2009, the first respondent in these proceedings, the Upper Hunter Shire Council ("the Council"), granted development consent to the second respondent, Stoneco Pty Ltd ("Stoneco"), to establish a limestone quarry on Lot 31, DP 748776, Timor Crawney Road, Timor Creek. This property is located on the western side of the valley. Timor Crawney Road is also referred to as Waverley Road.

3 The proposed development does not occupy the whole of Lot 31, but is within an area of about 60ha referred to as the Project Site (EIS, Ex P1). It is proposed to remove 2.4 million tonnes of limestone from the Project Site

over a period of 30 years.

An objector appeals to the Court

4 The proposal is designated development under the *Environmental Planning and Assessment Act* 1979 ("EPA Act") and has been subject to an environmental impact statement ("EIS") (Ex P1). The applicant in these proceedings, Newcastle and Hunter Valley Speleological Society Inc (NHVSS), lodged an objection to the grant of consent during the exhibition period. Following the grant of consent, NHVSS appealed under s 98(1) of the EPA Act. The appeal is in Class 1 of the Court's jurisdiction.

5 In these Class 1 proceedings the Court is considering the matter *de novo*: s 39(3) of the *Land and Environment Court Act* 1979 ("the Court Act"). As NHVSS has raised new issues and placed different emphasis on others, the case differed from that which was considered by the Council when it made its original decision.

6 In hearing the proceedings, I have been assisted by Acting Commissioner Adam under s 37(1) of the Court Act.

7 The Court has had the advantage of a view of the site, during which it was assisted by the parties' experts. As well as the Project Site, the Court visited a number of localities further north and the Timor Caves Reserve to the south east. The Court travelled between the New England Highway and the Project Site along the roads which would be used for the transport of the product from the site. Resident objectors had raised a number of concerns about the sustainability of the roads as the haulage route.

8 The Court heard evidence from an objector, Mr McIntyre, the closest neighbour to the east of the Project Site, during the view, and from other local residents, Mr Ian Vaughan, Mr John Hill, Ms Catherine Watt and Mrs Elizabeth Wills at the Scone Court House on the following day. The Court continued to hear evidence on subsequent days in Sydney from the parties' experts.

Other approvals may be required

9 Granting of development consent under the EPA Act for the application to develop the quarry does not exhaust the approvals process necessary for the commencement of a quarrying operation. A grant of a mining lease under the *Mining Act* 1992 ("the Mining Act") will be required, and other approvals or licences may be, or become, needed.

10 Exploration Licence No.5635 has been granted over the site by the NSW Department of Industry and Investment to Snowmist Pty Ltd (Snowmist) and Alamo Limestone Industries Pty Ltd (Alamo). This licence has recently been renewed.

11 The Court was advised that contractual arrangements have been concluded between Snowmist and Alamo and Stoneco giving Stoneco the right to exploit the limestone resource in Lot 31. Stoneco has lodged a Mining Lease Application (MLA315) over the area of 60 hectares within Lot 315 described as the Project Site.

12 Under s 63 of the Mining Act, the Minister may grant a mining lease. However, if development consent is required, as it is in this instance, s 65(2) limits the power of the Minister to grant a mining lease until development consent has been granted.

13 Stoneco proposes to apply to the Upper Hunter Shire Council to subdivide Lot 31, so that the Project Site becomes a separate lot. Clause 11(1) of the Murrurundi Local Environmental Plan 1993 ("the LEP") requires development consent for subdivision. Lot 31 is within Zone no 1(a) - Rural "A" zone, subdivision of which is regulated by cl 12 of the LEP.

14 A mining lease cannot be granted within 200m of a residence: s 62 of the Mining Act. When Mr McIntyre gave evidence he suggested that this was the position in relation to his property. If Mr McIntyre is correct as to the distance between his residence and the boundary of the Project Site, it may not be possible for the Minister to grant a Mining Lease with boundaries contiguous with the Project Site.

The relevant planning controls

15 The Upper Hunter Shire was formed in 2004 though amalgamation of the Merriwa, Murrurundi and Scone Shires. Lot 31 is within what was previously the Murrurundi Shire. The LEP is the applicable local environmental plan for the proposal.

16 The general aims of the LEP in cl 2(1) are:

> "(a) to encourage the proper management, development and conservation of natural and man-made resources within the Shire of Murrurundi by protecting, enhancing or conserving:
>
> (i) prime crop and pasture land,
>
> (ii) timber, minerals, soil, water and other natural resources, and

(iii) the land's environmental heritage, and

(b) to achieve the requirements of the Hunter Regional Environmental Plan 1989 and Hunter Regional Environmental Plan 1989 (Heritage) by consolidating and updating the existing planning controls within the Shire of Murrurundi into a single local environmental plan."

17 The particular objectives for land within a zone are set out in the Table to cl 9 of the LEP.

18 The site is within Zone No 1(a) – Rural "A" zone in the Table in cl 9 of the LEP. The objectives of this zone stated in item 1 are:

"(a) to encourage the productive and efficient use of land for agricultural purposes,

(b) to control subdivision of land having regard to the efficient use of land for the purposes of agriculture,

(c) to ensure that the type and intensity of development is appropriate, having regard to the characteristics of the land, the rural environment and the cost of providing services and amenities, and

(d) to protect, conserve and enhance the natural and scenic resources of the Shire."

19 Clause 9(3) of the LEP provides that "the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of development is consistent with the objectives of the zone within which the development is proposed to be carried out." As the Court on appeal exercises the functions of the Council, the Court also must be of such an opinion. Formation of the opinion of consistency is a pre-condition to weighing the merit considerations under s 79C of the EPA Act and the grant of consent to the carrying out of the development under s 80 of the EPA Act: *Hub Action Group Inc v Minister for Planning* [2008] NSWLEC 116; (2008) 161 LGERA 136 at [38] and cases therein cited.

20 Clause 10 of the LEP sets out general principles applying to determination of applications for development consent in rural zones:

"(1) In addition to the matters specified in section 90 (1) of the Act, the Council, in determining any application for consent to carry out development on land within Zone No 1 (a) or 1 (c), shall have regard to the following:

(a) the suitability and capability of the land on which the development is to be carried out, as indicated on maps prepared by the Director-General of the Department of Agriculture and the Director-General of the Department of Conservation and Land Management and copies of which are deposited in an office of the Council,

(b) the present and potential use of the land for the purposes of agriculture,

(c) whether the development is of a type compatible with the maintenance and enhancement, as far as practicable, of the existing rural and scenic character of the Shire of Murrurundi,

(d) whether the development will unreasonably prejudice the future recovery of known or prospective areas of valuable deposits of mineral, coal, petroleum, sand, gravel or other extractive materials,

(e) whether the development will create significant additional traffic or a condition of ribbon development on any road, having regard to the capacity, standard and safety of the road,

(f) the cost of providing, extending and maintaining public amenities and services by the Council or a public authority.

(2) Subclause (1) does not apply to development being:

(a) minor addition to a building or work,

(b) development ancillary to a purpose which may be carried out with the consent of the Council under this plan, or

(c) the erection of a dwelling-house or dual occupancy building on an allotment of land the Council is satisfied was created in accordance with this plan for the purpose of a dwelling or dwellings."

21 Clause 10(1)(e) and (f) relate to matters of concern raised by the resident objectors. The Court was advised by the Council that the road improvements that would be required if the consent were to be granted have been provided for in the Council's budget.

22 As the proposal is for a quarry it falls within the scope of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 ("the Mining SEPP"). Clauses 12 and 14 of the Mining SEPP prescribe relevant matters for consideration by a consent authority in determining an application for consent for development for the purposes of mining, petroleum production or extractive industry. The current proposal is for the purpose of extractive industry. Clause 12 requires consideration of the compatibility of the proposed development with other land uses in the vicinity. Clause 14 requires consideration of whether any consent for the development:

"should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following:

(a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,

(b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable.

(c) that greenhouse gas emissions are minimised to the greatest extent practicable": cl 14(1).

23 Clause 8 of the Mining SEPP deals with the permissibility of development for the purposes of mining, petroleum production or extractive industry under local environmental plans. Its effect is to make permissible such development notwithstanding provisions of a local environment plan which make the permissibility of such development contingent upon certain provisions of the plan being satisfied (cl 8(1)) or the consent authority being satisfied as to certain matters (cl 8(2)). Clause 8 continues the effect, in relation to mining, of the former State Environmental Planning Policy No 45 – Permissibility of Mining which was introduced in response to the successful judicial review challenge concerning the permissibility of the Bengalla open cut coal mine in *Rosemount Estates Pty Ltd v Cleland* (1995) 86 LGERA 1. The subsequent judicial review challenge to the former SEPP45 was ultimately unsuccessful: *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 reversing *Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 1.

24 NHVSS argued that cl 8 of the Mining SEPPP was not applicable in this case as cl 9(3) of the LEP is not a provision of the kind referred to in cl 8(1) or (2) of the Mining SEPP. Clause 9(3) does not go to the permissibility of development on the site. Within the Rural "A" zone, development for the purposes of extractive industry is permissible with consent. There is no provision requiring provisions of the LEP to be satisfied, or the consent authority to be satisfied of matters, prior to such development being permissible. Rather, cl 9(3) establishes a condition precedent that must be satisfied by the Council prior to the exercise of the discretionary power to grant consent to the permissible development.

25 It is unnecessary to determine this question in this case as, for reasons I will give later, I am satisfied that cl 9(3) of the LEP is met in the circumstances of this case. Hence, any potential conflict between cl 9(3) of the LEP and cl 8 of the Mining SEPP does not arise in the circumstances of this case.

The proposal in brief

26 The proposed quarry operation will, over the life of the project, involve:

(a) the clearing of vegetation over the extraction area;

(b) removal of soil;

(c) fragmentation of limestone by drilling and blasting methods;

(d) crushing and screening of limestone;

(e) transportation of products off the site;

(f) rehabilitation of the extraction area; and

(g) management of vegetation in the Project Site throughout the operation period.

27 Rehabilitation and management may extend beyond the 30 year period for which extraction is proposed. The proposal is that described in the EIS, with reduction in the size of the stockpiling and handing area as proposed during these proceedings and illustrated in Ex P10, and as modified by conditions. The proposal was also modified by numerous conditions proposed by Stoneco and the Council.

The issues on appeal

28 The issues which were raised can, for convenience, be considered under three headings: impacts on surface ecology; impacts on caves and other karst features and cave dwelling fauna; and other issues and concerns of the resident objectors.

29 In relation to the surface ecology issues, NHVSS contended that the vegetation over the whole of the Project Site comprised the endangered ecological community of White Box Yellow Box Blakely's Red Gum Woodland ("the White Box EEC") and habitat of the threatened species *Petaurus norfolcensis* ("Squirrel Glider"). NHVSS contended that the proposal was likely to significantly affect the White Box EEC and the Squirrel Glider so as to require a species impact statement ("SIS") to accompany the development application by reason of s 78A(8)(b) of the EPA Act. No SIS had been prepared. If an SIS was required, neither the Council in the first instance nor the Court on appeal would have the power to grant development consent to the proposal.

30 In relation to the karst issues, NHVSS contended that the limestone on the Project Site is likely to contain caves and other karst features and cave-dwelling fauna. NHVSS contends that the proposal is likely to cause serious or irreversible damage to these karst features and fauna.

31 The third group of issues concerned those raised by cll 9 and 10 of the LEP and cll 12 and 14 of the Mining SEPP and the concerns by the resident objectors. Road safety and the need for upgrading of the road through the provision of new creek crossings and passing bays were common concerns, and the question of whether the financial contributions to be made over the life of the mine would meet the cost of the upgrading and maintenance were raised. The socio-economic justification of the proposal was questioned, and the impact of increased heavy traffic use of the road on the adjacent property values was raised. The possibility of effects on water supplies was a concern and the possible effects of dust, particularly on lucerne, was an issue. Concerns were also expressed about blasting and the danger of silica in fine dust. Restoration/rehabilitation at the end of the mine life was also raised.

The White Box EEC description

32 In 2002, the Scientific Committee, established by the *Threatened Species Conservation Act* 1995 ("TSC Act"), made a Final Determination to list the White Box Yellow Box Blakely's Red Gum Woodland as an endangered ecological community ("EEC") on Part 3 of Schedule 1 of the Act. The listing of EECs is provided for by Part 2 of the TSC Act. The Final Determination was made following the making and advertising of a Preliminary Determination to support a proposal to list the Community (under the name White Box-Yellow Box Woodland) and consideration by the Scientific Committee, as required by the Act, of submissions received in response to the notification.

33 Paragraphs 1 and 2 of the Final Determination provide a general overview of the distribution and nature of the community as follows:

"(1) White Box Yellow Box Blakely's Red Gum Woodland is the name given to the ecological community characterised by the assemblage of species listed in paragraph 3. White Box Yellow Box Blakely's Red Gum Woodland is found on relatively fertile soils on the tablelands and western slopes of NSW and generally occurs between the 400 and 800 mm isohyets extending from the western slopes, at an altitude of c. 170m to c. 1200 m, on the northern tablelands (Beadle 1981). The community occurs within the NSW North Coast, New England Tableland, Nandewar, Brigalow Belt South, Sydney Basin, South Eastern Highlands and NSW South Western Slopes Bioregions.

(2) White Box Yellow Box Blakely's Red Gum Woodland includes those woodlands where the characteristic tree species include one or more of the following species in varying proportions and combinations - Eucalyptus albens

> (White Box), Eucalyptus melliodora (Yellow Box) or Eucalyptus blakelyi (Blakely's Red Gum). Grass and herbaceous species generally characterise the ground layer. In some locations, the tree overstorey may be absent as a result of past clearing or thinning and at these locations only an understorey may be present. Shrubs are generally sparse or absent, though they may be locally common."

34 The distribution of the community extends beyond New South Wales into both Victoria and Southern Queensland.

35 Despite the very large area occupied by the community at the time of European settlement, the Scientific Committee found that the criteria for listing as an EEC were satisfied and in para 8 of the Final Determination stated that:

> "White Box Yellow Box Blakely's Red Gum Woodland has been drastically reduced in area and highly fragmented because of clearance for cropping and pasture improvement. Austin et al. (2000) found the community had been reduced to less than 1% of its pre-European extent in the Central Lachlan region. Comparable degrees of reduction have been documented for NSW south western slopes and southern Tablelands (estimated <4% remaining, Thomas et. al. 2000), and for the Holbrook area (estimated <7% remaining, Gibbons and Boak (2000). Gibbons and Boak (2000) found remnants of woodlands dominated by Eucalyptus albens, E. melliodora and E. blakelyi were severely fragmented. Further remnants of the community are degraded as a consequence of their disturbance history. Some remnants of these communities survive with the trees partly of wholly removed by post European activities, and conversely, often remnants of these communities survive with these tree species largely intact but with the shrub or ground layers degraded to varying degrees through grazing or pasture modification. Remnants are subject to varying degrees of threat that jeopardise their viability. These threats include: further clearing (for cropping, pasture improvement or other development); deterioration of remnant condition (caused by firewood cutting, increased livestock grazing, weed invasion, inappropriate fire regimes, soil disturbance and increased nutrient loads); degradation of the landscape in which remnants occur (including soil acidification, salinity, and loss of connectivity between remnants)."

36 An extensive list of species which characterized the EEC is provided in para 3 of the Final Determination. Within the broad distribution of the community the Final Determination indicates that there is (and would have been prior to European settlement) local and regional variation in species composition related to latitudinal and climatic gradients (para 5) and to topography, drainage and landscape position (paras 3 and 4). The present structure and composition of stands of the EEC will have been influenced by clearing, thinning, grazing and other disturbances (paras 2, 3, 8, 9).

Whether the vegetation on the project site is White Box EEC

The issues of expert disagreement

37 The Court heard expert evidence on the vegetation of the Project Site from Mr Elks for Stoneco and from Dr Clements and Dr Smith for NHVSS. Evidence on soils was provided by Mr Cummings for Stoneco and Dr Hazelton for NHVSS.

38 Mr Elks, in the EIS and subsequently, recognized three communities on the Project Site, which he termed Community 1: Yellow Box – Blakely's Red Gum, Community 2: Large-flowered Bundy – Kurrajong, and Community 3: Slender Rats-Tail Grass.

39 Mr Elks was of the opinion that Community 1, found towards the western side of the Project Site, over the mudstones of the Busches formation, satisfied the description of the White Box EEC in the Final Determination. Community 3, found close to Timor Crawney Road and adjacent to the clean water dam is highly modified, but in accordance with para 11 of the Final Determination was accepted by Mr Elks as part of the White Box EEC.

40 Community 2, which occupies most of the Project Site and in which the extraction area would be situated, was not regarded by Mr Elks as being part of the White Box EEC but as a distinctly different community which is not included as an EEC on Part 3 of Schedule 1 of the TSC Act.

41 Dr Clements and Dr Smith were in agreement in recognising three vegetation noda on the Project Site, with boundaries between them identical, or close to, those recognized by Mr Elks (and depicted in Ex P10). They were also in agreement that Communities 1 and 3 were components of the White Box EEC. The point of difference was over the nature of Community 2, which they contended was also part of the White Box EEC.

42 Resolution of these competing positions requires interpretation of the Final Determination and the application of this interpretation to the Project Site. This flows from the definition of "endangered ecological community". An "endangered ecological community" is defined in s 4 of the TSC Act as meaning an ecological community specified in Part 3 of Schedule 1 of the TSC Act. Part 3 of Schedule 1 specifies the listed endangered ecological communities to date, including the White Box EEC, adding after each of the words "(as described in the Final Determination of the Scientific Committee to list the ecological community)". Hence, the inquiry as to whether the vegetation on the Project Site comprises the White Box EEC must be directed to the description in the Final Determination of the Scientific Committee to list the White Box EEC as an EEC.

43 Documents not referred to in the Final Determination of the Scientific Committee to list White Box EEC, such as the White Box Yellow Box Blakely's Red Gum Woodland (Box-Gum Woodland) Identification Guidelines or the White Box – Yellow Box – Blakely's Red Gum (Box-Gum) Woodland fact-sheet, both produced by the NSW National Parks and Wildlife Service, are useful sources of information. However, where the documents describe the White Box EEC in different terms to the description in the Final Determination, or use of the documents results in different outcomes than the outcome that would arise from application of the description in the Final Determination, the description in the Final Determination must prevail.

44 There was agreement that the Project Site fell within the distribution area of the White Box EEC defined in para 1 of the Final Determination, although there was disagreement between Mr Cummings and Dr Hazelton over interpretation of the phrase 'relatively fertile soils'; this will be discussed later.

45 The differences between the vegetation experts were focused on interpretation of para 2 of the Final Determination.

46 EECs currently listed under the TSC Act vary from ones such as the White Box EEC which have wide geographical distribution and occur across a range of environmental gradients (climate, topography etc) and others which have very limited spatial extent and very narrow environmental requirements. The latter can be described in Final Determinations with much greater specificity (for example, Ben Halls Gap National Park sphagnum moss cool temperate rainforest or the Byron Bay dwarf graminoid clay heath community).

47 Final determinations for many EECs have been worded with some generality. The Court of Appeal in *VAW (Kurri Kurri) Pty Ltd v Scientific Committee (Established under s127 of the Threatened Species Conservation Act* (1995)) [2003] NSWCA 297; (2003) 58 NSWLR 631, 128 LGERA 419, indicated that Final Determinations must be sufficiently certain to enable a citizen to decide whether a specific location supports an EEC, but the inherent spatial and temporal variation in natural communities precluded absolute definitional specificity (*VAW (Kurri Kurri)* at [231]-[233] per Hodgson JA).

48 The White Box EEC is a "high level" unit in the vegetation classification hierarchy, and includes vegetation described in two alliances, the *Eucalyptus albens* alliance and the *E. melliodora/E. blakelyi* alliance described by Beadle (1981) (Final Determination, paragraph 6, Beadle, NCW, *The vegetation of Australia*, 1981). Inherent, therefore, in the Final Determination is a recognition that although all stands attributed to the White Box EEC must conform to the terms of the Final Determination, within the vegetation captured by the Final Determination individual stands could be classified into a series of communities (para 4 of the Final Determination). Thus there is nothing in the Final Determination to rule out *a priori* Communities 1 and 2 being part of the same EEC, provided that the terms of the Final Determination encompass both communities, notwithstanding that at some level of analysis Communities 1 and 2 can be distinguished. This is an illustration of what has been referred to as the Russian Doll nature of ecological communities (BJ Preston and P Adam, "Describing and listing threatened ecological communities under the *Threatened Species Conservation Act* 1995 (NSW): Part 1 – the assemblage of species in a particular area" (2004) 21 *Environmental and Planning Law Journal* 250 at 252-254; P Adam, "Ecological communities: the context for biodiversity conservation or a source of confusion?" (2009) 13 *Australasian Journal of Natural Resources Law and Policy* 7 at 33-34 and *Motorplex (Australia) Pty Ltd v Port Stephens Council* [2007] NSWLEC 74 at [106]).

49 Following joint expert conferencing the issues of disagreement were:

(a) the relevance of the composition of the tree flora in Community 2;

(b) the relevance of patches of shrubs within Community 2;

(c) the relevance of the extent of *Lomandra longifolia* in Community 2;

(d) whether Community 2 is best classified as a Roughbarked Apple-Silvertop Stringybark – Grassy Open Forest; and

(e) whether the edaphic criterion in para 1 of the Final Determination is met.

The tree flora issue

50 Paragraph 3 of the Final Determination lists a number of species characteristic of the White Box EEC, but it is

also noted that the total list of species occurring in the White Box EEC (although not all at the same site) will be much larger than those specifically mentioned. It was agreed between the experts that both Communities 1 and 2 contained a similar number of species from the list in para 3. The fact that there were species in the list which had not been recorded in either community was not raised as an issue. It is established that presence of a defined proportion of the species listed in Final Determinations is not required for recognition of EECs: *Commonwealth of Australia v Randwick City Council* [2001] NSWLEC 79 per Talbot J at [103-104] and *VAW (Kurri Kurri)* per Spigelman CJ at [7].

51 Paragraph 2 of the Final Determination states that the White Box EEC "includes those woodlands where the characteristic tree species include one or more of the following species in varying proportions and combinations – *Eucalyptus albens* (White Box), *Eucalyptus melliodora* (Yellow Box) or *Eucalyptus blakelyi* (Blakely's Red Gum)". Thus not all these three species need be present to qualify an area as part of the EEC, and it is not required that any of the species to be dominant. It was agreed by the experts, and was observed by the Court on the view, that *Eucalyptus albens* occurred within the area mapped by Mr Elks as Community 2 and that the occurrences included both mature trees and regenerating juveniles. *E. albens* was not the most abundant eucalypt in Community 2, that position being taken by *E. nortonii*, but it was present.

52 Both *E. nortonii* and *Brachychiton populneus* (Kurrajong), which together were the most common trees in Community 2, are included in the list of characteristic species in the Final Determination for the White Box EEC.

53 The nature of the tree cover of Community 2 is thus compatible with the Community being part of the White Box EEC.

The shrub issue

54 Paragraph 2 of the Final Determination states "shrubs are generally sparse or absent, though they may be locally common".

55 Mr Elks drew attention to the presence of the number of shrubs recorded from Community 2, and in particular to the presence of a dense patch of the shrub *Santalum lanceolatum* (Sandalwood) in the southeast of the proposed extraction zone. He argues that, in consequence, Community 2 did not satisfy para 2 of the Final Determination.

56 Twenty seven of the ninety five species listed in para 3 of the Final Determination are shrubs, so that the mere presence of a number of species of shrubs in Community 2 does not disqualify the community from being part of the White Box EEC. What then is the intent of the qualifier "locally common"? The various references in the Final Determination to spatial variation within the White Box EEC, permit the occurrence of patches of shrubs within the community while conforming with the description.

57 If floristic composition was being assessed by use of quadrats then, depending on the size of the quadrat, the location of the quadrats and the size of the patch of shrubs, at the individual quadrat level, the data could suggest shrub dominance. However, the single quadrat would be unrepresentative of the vegetation of the stand, although illustrative of part of the range of variation in structure and composition of the stand.

58 As is indicated in the Final Determination, in some parts of the total range of the White Box EEC there has been extensive clearing such that only small, isolated stands remain. In that circumstance an individual stand may be so small, and be essentially homogeneous, so that determining whether its structure and composition was originally part of the wider variation in a larger stand of the White Box EEC could be difficult and there could be unresolvable uncertainty about assignation to the White Box EEC; but this is not the situation in this instance.

59 The Project Site is set within the much larger Lot 31, and that in turn is set within a larger vegetated area, so that "locally" can be assessed within the landscape context.

60 Even within the context of the proposed extraction area, the patches dominated by shrubs occupy a limited extent, and this is still the case if the whole area mapped as Community 2 is considered. At the wider scale of the Project Site, the patches of shrub dominance fall within a description of being "locally common".

61 The occurrence, distribution and abundance of shrubs within the area mapped as Community 2 is compatible with Community 2 being part of the White Box EEC.

The Lomandra issue

62 The ground layer of the White Box EEC is generally characterised by grass and herbaceous species (Final Determination, para 2). *Lomandra longifolia* is the most abundant species in the ground layer within Community 2, particularly in the lower part of the proposed extraction zone. Mr Elks argument was that the presence, and more particularly, abundance, of *L. longifolia* in Community 2 precluded Community 2 from inclusion in the White Box EEC.

63 *L. longifolia* is not included in the list of characteristic species in para 3 of the Final Determination. However, para 3 also indicates that the list is not comprehensive so that the absence is not, of itself, determinative.

64 *L. longifolia* is a herb, and so would be included within the phrase 'Grass and herbaceous species' in para 3. On the view by the Court, Mr Elks suggested that the White Box EEC generally had a predominance of graminoids in the ground layer. However, this is not specified in the Final Determination. In addition "graminoid" is a broad term which is frequently used in a very general sense. The definition of graminoid in the United States Department of Agriculture growth habits definitions (http://plants.usda.gov/growth_habits_def.html is as follows:

Plants Growth Habit Code	**Plants Description**	**Plants Definition**	**Notes**
GR	Graminoid	Grass or grass-like plant, including grasses (Poaceae), sedges (Cyperaceae), rushes (Juncaceae), arrow-grasses (Juncaginaceae), and quillworts (*Isoetes*)	Applies to vascular plants only. A herb in the FGDC classification.

65 On this definition, graminoid encompasses a much broader group of plants than just strictly grasses. Given the tussocky habit and long linear leaves of *L. longifolia*, characterisation as a graminoid would be permissible.

66 There was no evidence available to the Court on either the occurrence of *L. longifolia* outside the Project Site or whether *Lomandra* dominance is a more general phenomenon over a wider area. In any case, however, presence of dense *Lomandra* as a herbaceous or graminoid layer is compatible with the description of the White Box EEC in the Final Determination.

The alternative community issue

67 Mr Elks suggested that Community 2 was not part of the EEC but should instead be regarded as falling within the Roughbarked Apple-Silvertop Stringybark-Grassy Open Forest community. This community is included within the BioMetric tool, developed for use in the context of preparation of Property Vegetation Plans under the *Native Vegetation* Act 2003. The community list recognized in BioMetric is not fully comprehensive, but is a work in progress. Mr Elks has adopted a procrustean approach, forcing Community 2 into the closest entity within BioMetric despite considerable differences in structure and canopy composition. Community 2 is, within the context of the Project Site, a distinctive community, but nevertheless is one which as discussed above, falls within the variation of the White Box EEC.

The soils issue

68 The Final Determination for the White Box EEC indicates in para 2 that the community is found on "relatively fertile soils". There was dispute between Mr Cummings and Dr Hazelton as to whether or not the soils within the area mapped as Community 2 were "relatively fertile".

69 The Final Determination does not provide any definition of either "relative" or "fertile", although the expression "relatively fertile" is widely, but loosely, used in discussion of Australian ecology, in the context that Australia has some of the most infertile soils in the world.

70 The limestone underlying Community 2 is of high purity so that on weathering it provides little material for soil formation. Rather, the major component of the soil is of aeolian (windblown) material, accumulated over long periods and, at least in substantial part, originating from inland Australia, and augmented with organic material derived from biota growing on the site.

71 Part of Mr Cumming's argument appeared to be that the area mapped as Community 2 as a whole was infertile, because much of it was rock exposures. In addition, the pockets of soil were shallow. While these factors will affect the distribution and nature of vegetation in Community 2, they do not influence the fertility of the soil *per se*. The experts were in agreement that the chemical analyses of the soil samples from the site could be regarded as indicating that the soil was, even in an agricultural context, fertile.

72 The evidence shows that the soils in Community 2 can be regarded as "relatively fertile".

Other ecological descriptors

73 The definition of ecological community in s 4 of the TSC Act refers to "an assemblage of species". It is the species composition of the assemblage which provides the essential key to deciding whether or not area of vegetation are to be recognized as constituting an EEC. Inclusion of details of habitat/environmental features in Final Determinations provide extra assistance in identifying communities in the field, but does not displace the

central importance of the presence of the necessary assemblage of species (*Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council* [2007] NSWLEC 55 at [80], BJ Preston and P Adam, "Describing and listing threatened ecological communities under the Threatened Species Act 1995 (NSW): Part 2 – the role of the supplementary descriptors" (2004) 21 EPLJ 372 at 380-382, P Adam (2009) 13 AJNRPL 7 at 38-39).

The presence of dry rainforest

74 Included within the mapped Community 2 are a number of small patches dominated by the fig *Ficus rubiginosa*. Dr Clements contended that these are examples of a dry rainforest community, the presence of which may possibly indicate the local occurrence of deeper soils, although this has not been investigated. Without further investigation at the site and in the broader region it is not possible to decide whether or not these patches occupy a distinct habitat, so deserving recognition as a separate community or whether scattered small groves of figs are a regional feature of the White Box EEC. Nevertheless, the figs were a feature of the site recognized as of significance by the experts in concurrent evidence. Recognizing the patches of fig as a separate community would in the present circumstances be of little practical consequence as the patches are so small and completely embedded within what the Court has decided is an EEC.

Conclusions regarding the White Box EEC

75 As discussed above, the various matters raised against the inclusion of Community 2 within the White Box EEC are, on analysis, compatible with categorization as part of the White Box EEC. The occurrence, albeit in small quantity of *Eucalyptus albens*, and the presence of *E. nortonii* and *Brachychiton populneus* and a large number of other species in the list of characteristic species in para 3 of the Final Determination speaks positively in favour of Community 2 being a component of the White Box EEC.

76 Community 2 is a component of the White Box EEC, albeit a local variant with abundant *E. nortonii*. While ecological communities are not to be regarded as 'super organisms' (P Adam (2009) 13 *Australasian Journal of Natural Resource Law and Policy* 7 at 19-21), so that variants of ecological communities are not analogous with genotypes of species, conservation of biodiversity encompasses the conservation of the diversity of life at all levels of organisation, which includes variation within ecological communities.

77 The White Box Yellow Box Blakely's Red Gum Grassy Woodland and Derived Native Grassland is included on the Schedules of the *Environment Protection and Biodiversity Conservation Act* (Cth) 1999 as a Critically Endangered Ecological Community. The description of this Community is largely consistent with that of the White Box EEC as listed under the TSC Act. The consequences of any Commonwealth listing for the proposal are not matters for determination by this Court.

78 By reason of the conclusion that Community 2 is part of the White Box EEC, and the parties' agreement that Communities 1 and 3 are part of the White Box EEC, all of the vegetation on the Project Site comprises the White Box EEC.

Whether likely significant effect on White Box EEC

79 When the proposal was first before Council it was assessed on the basis that Community 2 was not part of the White Box EEC, and that only 0.2 ha of Community 1 which was acknowledged as White Box EEC, would be disturbed. This was considered not to be a significant impact on the White Box EEC, so that a SIS was not required.

80 With Community 2 now recognized as part of the White Box EEC, the area which would have been disturbed under the original proposal increased to 7.5 ha. With the redesign of the stockpile and handling area (Ex P10), the area of disturbance drops to 5.864 ha (Ex P20), but with some uncertainty regarding final siting of some components the disturbed area can be rounded up to 6 ha for purposes of assessment.

The test for assessing likely significant effect

81 The area proposed to be disturbed is now considerably larger than 0.2 ha, so that the impact needs to be reassessed to determine whether or not a SIS is required. The requirement for a SIS flows from s 78A(8)(b) of the EPA Act which requires that a development application must be accompanied by a SIS if the application is in respect of development on land that "is likely to significantly affect threatened species, populations or ecological communities, or their habitats". The requirement is a jurisdictional fact; satisfaction of the requirement is an essential pre-requisite to granting consent to an application. If a SIS is required, but it has not been prepared, then consent cannot be granted: *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [94], [108] (Spigelman CJ); *Corowa v Geographe Point Pty Ltd* [2007] NSWLEC 121; (2007) 154 LGERA 117 at [35], [51]; *Nambucca Valley Conservation Association v Nambucca Shire Council* [2010] NSWLEC 38 at [78].

82 A number of points may be made about this requirement. First, s 78A(8)(b) focuses on the development proposed in the development application; the inquiry is whether the "development" in respect of which application is made is likely to significantly affect threatened species, populations or ecological communities or their habitats. An application can, of course, be amended after it is initially lodged. The development proposed,

therefore, may be amended. The relevant time for the inquiry is immediately prior to the determination of the application; it is the development as it then stands that is to be evaluated for its likely impact on threatened species, populations or ecological communities or their habitats: *Corowa v Geographe Point Pty Ltd* at [50], [51]. In this case, therefore, the inquiry must focus on the development as it finally stood at the conclusion of the hearing of the appeal.

83 Secondly, the description of the development the subject of the development application is not restricted to the nature, extent and other features of the development but can also include ameliorative measures to prevent, mitigate, remedy or offset impacts of the development. However, in order to be able to be considered in answering the inquiry of likely impact, the ameliorative measures must be proposed as part of the development application. Ameliorative measures not proposed as part of the development application, but which are imposed afterwards, as conditions of consent or restrictions in construction certificates, are not able to be considered in answering the inquiry as to likely impact. This is because the inquiry required by s 78A(8)(b) focuses on the development and its likely impact before the determination of the application and not afterwards: see *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186 at 192; *Smyth v Nambucca Shire Council* [1999] NSWLEC 226; (1999) 105 LGERA 65 at [11]-[13]; *Corowa v Geographe Point Pty Ltd* at [57].

84 Thirdly, the word “likely” means “a real chance or possibility” and “significantly” means “important”, “notable”, “weighty” or “more than ordinary”: *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222 at 233 and cases therein cited; *Plumb v Penrith City Council* [2002] NSWLEC 223 at [22(1)]; *Corowa v Geographe Point Pty Ltd* at [52]; *Nambucca Valley Conservation Association v Nambucca Shire Council* at [82].

85 Fourthly, in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats, the consent authority and the Court on appeal must take the factors in s 5A of the EPA Act into account and in particular the factors in the now seven part test in s 5A(2). However, the consent authority is not limited to consideration of these factors; there may be facts and circumstances relevant to the inquiry which are not specifically contained in any of the factors in the seven part test: *Plumb v Penrith City Council* at [37]; *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210 at [12]; and *Corowa v Geographe Point Pty Ltd* at [52].

86 Fifthly, a positive answer to any one or more of the seven factors does not mandate an affirmative answer to the question of whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats but equally does not preclude a negative answer to the question: *Carstens v Pittwater Council* [1999] NSWLEC 249; (1999) 111 LGERA 1 at [61]; *Masterbuilt Pty Ltd v Hornsby Shire Council* [2002] NSWLEC 170 at [11]; *Plumb v Penrith City Council* at [36]; *Nambucca Valley Conservation Association v Nambucca Shire Council* at [83].

87 Of the factors in s 5A(2), four ((a), (b), (e) and (f)) are not applicable to an EEC but the remaining three ((c), (d) and (g)) are applicable and need to be considered.

Likely risk of extinction of local occurrence of EEC

88 Section 5A(2)(c) states:

> “(c) in the case of an endangered ecological community or critically endangered ecological community , whether the action proposed:
>
> > (i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or
> >
> > (ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction,”.

89 In order for there to be an affirmative answer to this factor the action proposed must, by one or other of the two routes specified in subparas (i) or (ii) result in the specified outcome of the local occurrence of the relevant ecological community likely being placed at risk of extinction. The two routes by which this outcome might occur are, first, an adverse effect on the extent of the ecological community and, second, substantial and adverse modification of the composition of the ecological community.

90 In these respects, the current formulation of this factor in s 5A(2)(c) differs materially from the previous formulation: see, for example, consideration in *Plumb v Penrith City Council* at [41]-[50]; *Corowa v Geographe Point Pty Ltd* at [72] – [73] and *Nambucca Valley Conservation Association v Nambucca Shire Council* at [115] – [116].

91 In this case, as far as s 5A(c)(i) is concerned, the proposal will involve the direct disturbance (clearing) of some 6 ha of the White Box EEC, with the possibility of indirect effects over a larger area. The experts did not agree as to the extent of any indirect effects. As far as s 5A(c)(ii) is concerned, outside the area to be disturbed

by construction and excavation, the proposal does not include adverse modification of the White Box EEC elsewhere on the Project Site. One possible form of modification would be through the promotion of weeds. However, as part of the conditions proposed by Stoneco and the Council, there is to be active weed management so the condition of the White Box EEC within the Project Site should not decline but rather improve.

92 The 6 ha that will be adversely affected are situated with the larger 60 ha of the Project Site and the Project Site is part of the much larger Lot 31. During the view the Court requested that the experts carry out a joint inspection to determine the nature of the vegetation extending beyond the boundaries of the Project Site. There was agreement between the experts that Community 1 (being part of the White Box EEC on the Busches formation) occurred to the west of the Project Site, but lack of data precluded agreement as to how far the White Box EEC extended to the west. The extent of Community 2, which the Court has determined is also part of the White Box EEC, beyond the Project Site was not investigated. Nevertheless, at the minimum, I find that the proposal is likely to adversely affect or modify an extent of 6 ha of the White Box EEC.

93 The critical question then becomes: is this likely adverse effect or modification such that the local occurrence of the White Box EEC is likely to be placed at risk of extinction? The answer to this question will depend on what is the “local” occurrence of the White Box EEC?

94 The concept of “local” occurrence is not a defined term; rather it is an ordinary English word that will take its meaning from the circumstances of the EEC concerned and its distribution, extent, fragmentation and other spatial characteristics.

95 An EEC by its nature might only have local occurrences. The particular EEC of the Hygrocybeae Community of the Lane Cove Bushland Park is an assemblage of 20 species of fungi restricted to a core zone along the Gore Creek catchment in the Lane Cove Valley in Sydney. The EEC of the Mount Canobolas Xanthoparmelia Lichen Community is a community of foliose lichens of the genus *Xanthoparmelia* occurring on Mount Canobolas near Orange. A third example is the Artesian Springs Ecological Community which is naturally restricted to artesian springs in the Great Artesian Basin in north western NSW. The plant assemblages differ between springs. Each spring is a local occurrence of the ecological community. For ecological communities such as these three examples, the local occurrence may be completely within a development site.

96 If the ecological community is a widespread one, as will be the case for higher level communities such as the White Box EEC in this case or the lowland rainforest EECs, the spatial characteristics of the particular occurrence of the ecological community in which the development site is located, will need to be examined. The occurrence of the EEC may have become fragmented by clearing and disturbance, leaving only patches scattered over the former range of the EEC. Is each remaining fragment to be considered a local occurrence of the EEC or is the collection of fragments in the former range to be viewed collectively as the local occurrence? Questions of fact and degree are involved in resolving this problem in any particular case.

97 Evidently, if the area of occurrence of the EEC extends beyond the cadastral boundaries of the development site, the area of local occurrence of the EEC for the purposes of s 5A(2)(c) will also extend beyond the development site.

98 In this case, the local occurrence of the White Box EEC includes the whole of the 60 ha of the Project Site. The extent of further occurrence of the community beyond the Project Site is, however, unclear. On the information available, therefore, the best that can be done is to evaluate whether the clearing of 6 ha in the extraction area of a local occurrence of the White Box EEC of at least 60 ha is likely to place that local occurrence at risk of extinction?

99 Reference to other cases where assessments of significance of loss of EECs have been made is not particularly helpful. Each case must turn on its own facts: *Nambucca Valley Conservation Association v Nambucca Shire Council* at [117].

100 Furthermore, the statutory evaluative framework has altered. In its current form, s 5A(2)(c) requires evaluation of the likelihood of removal or modification of an area of an EEC placing a “local occurrence” of the EEC at risk of extinction. The former s 5A(c) of the then eight part test required the different evaluation of whether, in the context of the regional distribution of the habitat of the EEC, a significant area of known habitat is to be modified or removed. The yardstick for comparison is quite different.

101 Hence, the evaluative conclusion in cases considering the former s 5A(c) using the regional distribution of the habitat of an EEC may not assist in making the evaluative judgment required under the current s 5A(2)(c) which uses the yardstick of local occurrence of the EEC. This is particularly true for EECs with extensive regional distribution of habitat: the denominator is so large that the area removed or modified by the action proposed (which is the numerator) will inevitably be smaller in comparison, with the result that the fraction or percentage

removed or modified will be insignificant. This was the evaluative conclusion in *Plumb v Penrith City Council* at [44] (7 ha of Cumberland Plain Woodland (CPW) EEC of a regional distribution of 26,724 ha or 0.026%) but not in *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* at [80], [82], [87]; *Corowa v Geographe Point Pty Ltd* at [58], [73] (9000 m² of Swamp Oak Floodplain Forest EEC of an unspecified extent of a regional distribution throughout the North Coast region); and *Nambucca Valley Conservation Association v Nambucca Shire Council* at [109], [118], [125] (400 m² lost and 2 ha impacted of River Flat Eucalypt Forest on Coastal Floodplain and Subtropical Coastal Floodplain in Forest EECs of a regional distribution of 800 – 1400 km²).

102 Such a comparison with the regional distribution of an EEC is no longer appropriate for the purposes of s 5A(2)(c). The comparison would need to be with the local occurrence of the EEC, which will be significantly smaller in extent. In *Plumb v Penrith City Council*, for example, the 7 ha of CPW to be modified or removed was part of a remnant of 629 ha. If this remnant could be considered a local occurrence of CPW, then the quantitative comparison for the current s 5A(2)(c) would be between 7 ha and 629 ha, which is significantly different from the comparison undertaken by the Court under the former s 5A(c) of between 7 ha and 26,724 ha, being the extent of regional distribution of CPW.

103 Where the relevant remnant is smaller in size, if it can be considered to be a local occurrence of the EEC concerned, the quantitative effect of removal or modification will be even more significant. In *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* at [81], Pain J noted that a high proportion of the remaining CPW is in fragmented patches of varying degrees of quality and that well over half of the patches are likely to be 7 ha or less. If each of these patches could be considered a local occurrence of CPW, a development such as the one in that case which modified or removed 3.86 ha, or the one in *Plumb v Penrith City Council* which modified or removed 7 ha, could well lead to the conclusion that the local occurrence of CPW would likely be placed at risk of extinction.

104 A mere quantitative comparison of the area of the EEC to be removed or modified with the area of the local occurrence of the EEC, however, may not be sufficient by itself to evaluate the likelihood of removal or modification of the area of the EEC placing the local occurrence of the EEC at risk of extinction. Other factors may need to be considered and a qualitative analysis undertaken: *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* at [64], [65], [73], [74], [79], [80]-[82], [84], [87]-[88], [90]. Other factors that might be relevant to be considered include:

(a) the abiotic components of the environment of the EEC concerned, being the climatic, physiographic and edaphic components, and the proposal's adverse effect on or modification of these abiotic components;

(b) the type of ecological community of the EEC concerned;

(c) the ecological integrity and ecological functioning of the local occurrence of the EEC, and the proposal's likely adverse effect on or modification of the ecological integrity and functioning;

(d) the viability (or conversely the vulnerability) of the local occurrence of the EEC and the proposal's likely adverse effect on or modification of this viability (or vulnerability), having regard to its location; size; shape, configuration and edge to area ratio; fragmentation; isolation or connectivity; condition; threatening processes; and other factors;

(e) the cumulative effect of the proposal with other existing and likely future actions; and

(f) the existence and likely effectiveness of ameliorative measures proposed including compensatory habitat or offsets of the EEC concerned in or adjoining the area of the local occurrence of the EEC.

105 In this case, I do not find that the adverse effect on or modification of 6 ha of the White Box EEC is such that the local occurrence of the White Box EEC on, at least, the 60 ha of the Project Site is likely to be placed at risk of extinction. In reaching this conclusion, I have considered that:

(a) the quantitative effect would be to remove or modify no more than 10% of the area of the local occurrence of the White Box EEC;

(b) the proposal would, over an area of 6 ha, involve the clearing of vegetation, removal of limestone and re-shaping of the topography in the extraction area and clearing of vegetation and modification of the landform in other parts of the Project Site, but these areas would be rehabilitated including revegetating using indigenous plant species, and otherwise there would be minimal, if any, impacts on the abiotic components of the environment outside the 6 ha;

(c) the type of environmental community concerned is a woodland covering a wider area;

(d) the ecological integrity and functioning of the local occurrence of the White Box EEC is high and it is viable community. The proposal will not result in the local occurrence on the Project

Site becoming fragmented or isolated or to lose connectivity with other areas of the White Box EEC habitat. Nevertheless, the proposal will create a “hole” within the Project Site during the period of extraction. No evidence was provided to suggest that the “hole” per se was likely to cause the local occurrence of the White Box EEC on the Project Site to become extinct. The proposal is not likely to lead to adverse modification of the area of the local occurrence outside the 6 ha zone of affectation;

(e) no evidence was provided of any other proposals affecting or about the management of the White Box EEC outside the Project Site (although the extent of the White Box EEC outside the Project Site was not known), so that an assessment of possible cumulative effects could not be made; and

(f) ameliorative measures are proposed to contain the adverse effects within the 6ha zone of affectation and to prevent, mitigate and remediate adverse effects within that zone.

Likely effect on habitat of EEC

106 Section 5A(2)(d) deals with effects on the habitat (i.e. the physical environment) of the EEC:

> “(d) in relation to the habitat of a threatened species , population or ecological community :
>
> (i) the extent to which habitat is likely to be removed or modified as a result of the action proposed, and
>
> (ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and
>
> (iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species , population or ecological community in the locality”.

107 “Habitat” has the same meaning as in the TSC Act, namely “an area or areas occupied, or periodically or occasionally occupied, by a species, population or ecological community and includes any biotic or abiotic component”: s 4(1) of EPA Act adopting the definition in s 4 of the TSC Act.

108 The extent of habitat proposed to be removed over the life of the project is 6 ha.

109 The White Box EEC in the Project Site is contiguous with the same community across the site boundary, although the extent of the White Box EEC in the broader area is not known in detail. No evidence was presented regarding the management of the White Box EEC outside the Project Site. However, at present, the proposed action will not result in the Project Site becoming fragmented or isolated from other areas of White Box EEC habitat. Nevertheless the proposal will create a “hole” within the Project Site during the period of extraction. No evidence was provided to suggest that the “hole” per se was likely to cause isolation.

110 The area to be directly impacted is 6ha within a Project Site of 60ha and within an area of White Box EEC which extends beyond (to a currently unknown extent) the Project Site. Although Community 2 represents, on the available information, a distinct variant of the White Box EEC, the evidence does not suggest that the “local occurrence” of the EEC as a whole, or its more restricted variants, is likely to suffer adverse effects such that the long term survival of the White Box EEC is placed at risk from the reduction in extent or quality.

Likely effect on threatening processes

111 Section 5A(2)(g) addresses threatening processes:

> “(g) whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process .”

112 Clearing of native vegetation, which is necessarily part of the proposal, is a key threatening process (listed under Schedule 3 of the TSC Act: see s 8), but given the modest scale of the clearing required by the proposal relative to the extent and distribution of the White Box EEC, this in itself would not be a basis for an overall assessment of significant impact such as to require completion of a SIS.

Conclusion on application of seven part test

113 Application of the seven part test has resulted in negative answers to the three applicable factors. However, as noted previously, whilst consideration of the seven part test is required in deciding whether there is likely to

be a significant effect on threatened species, populations or ecological communities, or their habitats, the seven part test is not the only input into determining the question. Other relevant factors can be taken into consideration.

114 One factor that might be relevant is whether the local occurrence of the EEC in which the action is proposed has features of interest related to individual species in the assemblage, such as the presence of particular threatened species of flora or fauna or the presence of exceptionally large, mature specimens of tree species. The presence of such features of interest might increase the significance of the adverse impacts on the EEC.

115 Another factor that might be relevant is ameliorative measures which reduce the significance of the adverse impacts on the EEC. In *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* proposals for amelioration for the loss of CPW were advanced, but in the circumstances of the case Pain J did not consider that a proposal to reafforest a nearby area was ameliorative: [at 86].

116 The present case differs from *BT Goldsmith* in a number of respects. First, the extraction area will be rehabilitated so that at the end of the extraction and rehabilitation phases both the habitat and community will be present in some form. Secondly, the conditions proposed by Stoneco and the Council contain provisions for the implementation of management plans designed to ensure the enhancement and maintenance in perpetuity of EEC in the Project Site. These plans allow for ongoing review and adaptive management. These conditions provide sufficient assurance that the adverse impacts of the proposal will be ameliorated such that the overall assessment under s 5A is of no significant impact so that no SIS is required.

117 In contrast to *BT Goldsmith*, in *Nambucca Valley Conservation Association v Nambucca Shire Council*, Biscoe J accepted the proposed ameliorative measures would be practical, enforceable and effective, so that the proposed development with the ameliorative measures was not likely to significantly affect the EEC concerned: at [119]-[124].

118 In conclusion, therefore, I find that the proposal is not likely to significantly affect the White Box EEC and a SIS is not required.

The Squirrel Glider issue

119 The Squirrel Glider *Petaurus norfolcensis* is a vulnerable species listed on Schedule 2 of the TSC Act, whose occurrence on the site was documented by Mr Kendall, fauna consultant for Stoneco in the EIS Vol 2, Section 4, pp 4.81-4.84. Mr Kendall, for Stoneco and Dr Smith for NHVSS prepared a Joint Report (Ex P7) and gave concurrent evidence.

120 Important resources for Squirrel Gliders are tree hollows, for refuge and nest sites, and flowering trees for food (nectar and pollen).

121 Squirrel Gliders were captured (and re-released) within the Project Site by Mr Kendall. Dr Smith expressed doubt as to whether all specimens had been correctly identified, but there was agreement that a number of the animals were indisputably Squirrel Gliders.

122 The experts did not agree on estimated population size. Mr Kendall has recorded Squirrel Gliders outside of the Project Site to the north, and both experts considered that it was likely there was a single population over an area which included, but was not limited to, the Project Site (Ex P7, Points of Agreement 1c).

123 Of particular concern to both experts was the loss of Squirrel Glider habitat in the stockpile and handling area as proposed in the EIS. They agreed (Ex P7, Agreement 1a) that appropriate relocation of the stockpile and handling area could reduce the impact on the Squirrel Glider to a minimum.

124 During the course of the hearing a proposal to substantially reduce the stockpile and handling area, and concentrate activities within the extraction area was presented by Stoneco (Ex P10).

125 The experts agreed that this redesign addressed the concerns in the joint report at least as far as loss of habitat was involved.

126 Dr Smith maintained concerns about disturbance to Squirrel Gliders from noise and dust. Both noise and dust are addressed in the management plans which Stoneco has proposed be prepared, such proposal being secured by the proposed conditions of consent.

127 With the reduction and modification of the stockpile and handling area and the conditions that would apply to a consent, I find the impact on the local Squirrel Glider population proposed is not likely to be significant, so that an SIS is not required.

Limestone issues

> “In Xanadu did Kubla Khan
> A stately pleasure-dome decree:

Where Alph, the sacred river, ran
Through caverns measureless to man
Down to a sunless sea".

"Kubla Khan" by Samuel Taylor Coleridge.

The debate between the parties

128 A major part of the debate between NHVSS and Stoneco related to the occurrence (or otherwise) of caverns (measureless or otherwise) and whether or not there are subterranean aquatic habitats for biota.

129 NHVSS argues that there is a likelihood of caves of some kind in the limestone to be quarried, water in the caves even if intermittently, and biota in the caves constituting a groundwater dependent ecosystem. NHVSS argue that lack of full scientific certainty as to the presence of caves, biota and a groundwater dependent ecosystem and the proposal's impact on them should be addressed by applying the precautionary principle. This would entail assuming the presence of caves, biota and groundwater dependent ecosystems in the limestone to be quarried, and evaluating the measures that should be undertaken to prevent or mitigate environmental degradation. NHVSS argue that the proposal should not be approved until further studies have been undertaken as to whether caves, biota and a groundwater dependent ecosystem do in fact occur on the site, their significance and extent, and the extent of any impact. Alternatively, any approval should be subject to conditions requiring redesign of the quarry to drain outwards and use of systems to protect karst systems from polluting drainage.

130 Stoneco argues that the evidence does not sustain a finding that caves, biota and a groundwater dependent ecosystem are present, and hence a finding that there is a threat of serious or irreversible environmental damage. Stoneco submits in these circumstances the precautionary principle is not triggered. Alternatively, if the precautionary principle is triggered, the measures that should be taken should only go so far as is necessary to avoid environmental harm.

131 Resolution of this debate involves an analysis of the evidence on, first, the karst environment to determine whether some form of caves might be likely; secondly, the likelihood of sufficient water in any such caves to support biota; and thirdly, the biota and any groundwater dependent ecosystem that might be present. If caves, biota and a groundwater dependent ecosystem are likely to be present, there is little doubt that quarrying of the limestone poses a threat of serious or irreversible damage to them. The next step in the analysis, therefore, is to determine the measures that ought be undertaken to prevent or mitigate environmental damage.

The likelihood of caves

132 The experts on geology were Dr Osborne for NHVSS and Dr Swabey for Stoneco who prepared a joint report, participated in the view, and gave concurrent evidence. They also collaborated in developing a protocol on cave discovery, for consideration as a condition of consent.

133 The proposal is for the extraction of limestone, from the Timor Limestone within the Project Site. The Timor Limestone comprises a series of strata in ascending order as follows:

- Lower limestone unit;
- Lower chert band;
- Middle massive limestone unit;
- Upper massive limestone unit; and
- Upper chert band.

Above the upper chert band are the mudstones of the Busches formation.

134 The limestone on the site forms part of the western limb of an anticline, along the central axis of which today flows the Isis River, so that the limestone bands on the site dip steeply to the west. The Timor Caves, on Isaacs Creek, are situated in the eastern limb of the anticline.

135 The proposed quarry would extract product from the middle and upper massive limestones both of which are of high purity (more than 95% calcium carbonate). In some of the documentation the middle limestone unit is referred to as a lithographic limestone, but both Dr Osborne and Dr Swabey agreed that it was a massive limestone. The distinction is important because a lithographic limestone is finely bedded, and Dr Osborne opined that if the middle unit was lithographic then it was unlikely that it would contain cave features and that a number of his concerns about potential impacts would be allayed. However as a massive limestone, he was of the opinion that there would be a higher likelihood of cave features being present.

136 Dr Osborne argued that the lower chert band functioned as an aquitard (but not an aquaclude), impeding, but not totally preventing, the passage of water through it. In particular Dr Osborne was of the view that the chert band would significantly reduce the downward passage of water from the middle to lower limestone units, but that it would be less of a barrier to the upward movement of water under pressure.

137 Both experts were of the view that if quarrying were to proceed, maintaining the integrity of the lower chert band was important, and that fracturing of the chert was to be avoided.

138 The differences between the experts related to the nature and importance of karst features in the limestone. One of the issues that flows from this is the likelihood of there being a groundwater dependent ecosystem, with stygofauna (cave dwelling fauna), within the limestone. The geology experts provided information about availability of potential habitat, but did not discuss biota *per se*, but it was raised as an issue by Dr Smith.

139 A general definition of karst is:

> "Karst is a distinct landform shaped largely by the dissolving action of water on carbonate rock such as limestone, dolomite and marble. This process typically occurs over thousands or millions of years, resulting in a variety of surface and below ground features including gorges, sinkholes, underground streams and caves. Karst features interact with the environment to produce complex ecosystems supporting highly specialised plants, animals and micro-organisms." (From Geologic 2. Department of Environment and Climate Change 2008 – at http://www.environment.nsw.gov.au/resources/geodiversity/08141Geologic2.pdf).

140 A more complex definition is that provided by Klimchouk (Klimchouk, A, "Hypogene speleogenesis: hydrological and morphogenetic perspective", National Cave and Karst Research Institute Special Paper No 1, 2007 at p 5):

> "'an integrated mass transfer system in soluble rocks with a permeability structure dominated by conduits dissolved from the rock and organized to facilitate the circulation of fluids.' Whether karst is expressed at the surface or not is irrelevant. A karst system can operate in the subsurface without any apparent relationship to the surface, being represented exclusively by underground forms that draw their input water from and discharge their output water to other non-karstic rocks."

141 A feature of karst environments is the presence of caves which typically form in two ways (there are other mechanisms of cave origin, such as marine erosion which can occur in a range of rock types):

> "● from surface streams finding their way through cracks in the ground and forming underground rivers;
>
> ● by groundwater rising up through cracks in rocks under the influence of heat and pressure, dissolving out mazes and rounded chambers." (From Geodiversity, Karst and Caves. Department of Environment and Climate Change 2008 – at http://www.environment.nsw.gov.au/geodiversity/).

142 Caves developed by rising groundwater are known as hypogene caves. Importantly they need not have a physical opening to the surface. Many of the world's largest cave systems are of hypogene origin, and entrances to them were created either by erosion from the surface after the cave formation or by deliberate breakthrough of human origin.

143 Dr Swabey argued for a definition of cave that was restricted to structures permitting access by humans. Dr Osborne favoured a broader definition to include smaller, but interconnected voids and fissures. Dr Osborne's definition would include all of the caves recognised by Dr Swabey, but even in well known large cave systems with human visitation there would be connections to smaller structures.

144 On the view the Court was shown various surface erosion features on the site, which collectively are referred to as epikarst. The experts agreed that these features were of value, particularly in an area originally proposed for the stockpiling and handling area. With the redesign of this facility (Ex P10) this group of karst features is at much less risk of direct impact.

145 There are features within the extraction area which Dr Osborne regarded as caves, but which Dr Swabey preferred to treat as karst wells. However, the essential debate was whether there were caves either within the excavation area or sufficiently close to it such that excavation could have impacts on them.

146 There are currently no known hypogene caves in the Project Site. The nearest known caves are further north. On the view, visits were made to a cave, currently being excavated by NHVSS, at a property known as 'Alston' and also to Glen Dhu Cave and Moore's Lake Cave. These are presumed to be in the lower limestone although Dr Osborne emphasised that there had been no geological mapping to define the limestone units, and in particular to trace the lower chert band, north of the Project Site.

147 The Timor Caves Reserve is on the eastern limb of the anticline and detailed mapping to stratigraphically

link the strata to those on the Project Site has not been conducted. The experts agreed that some characteristics of the massive limestone at Timor Caves differed from those in the Project Site. Dr Osborne suggested that a lateral facies change along the strata could explain these differences.

148 Dr Swabey identified three physical characteristics of an area of limestone which were conducive to cave formation (at para 5.19):

> "(a) The presence of pure limestone with low non-limestone mineral content.
>
> (b) The provision of adequate volumes of water to dissolve the limestone rock.
>
> (c) A pathway through which the water may pass to dissolve the rock in sufficient quantities to form caves".

149 The experts agreed that the limestone was of high purity. Dr Swabey also agreed that the second condition was met. (It should be noted that the Timor Limestone is geologically old, so that it would have experienced very different environmental and hydrological conditions over time, with conditions for cave formation varying over time). Dr Swabey was not convinced that the third condition was met given the presence of the lower chert band, although Dr Osborne, by reference to Klimchouk and his own observation elsewhere, believed that the chert band did not preclude the passage of water (particularly upward) permitting cave formation.

150 On the basis of the circumstances of cave occurrence in limestone deposits elsewhere in the world (see Klimchouk), the presence of factors conducive to cave formation at the site and the presence nearby of known significant caves, Dr Osborne concluded that significant weight should be placed on the possibility of caves occurring within the Project Site. Dr Swabey argued on the basis of the absence of knowledge of the occurrence of caves on the Project Site and the different conditions and lithologies associated with nearby known caves that there was little likelihood of caves occurring on the Project Site, but he could not completely rule out the possibility.

151 Video camera examination within the exploratory boreholes in the Project Site disclose the presence of cracks and small voids. There were few boreholes, so the situation throughout the extraction area is unknown. Stoneco (in response to the Court's Inquiry (No 5) at 7.8) acknowledged that "Limestone forms a single, unbroken unit over a distance of approximately 6km on the western side of the Isis River Valley. Small fractures, cracks, bedding planes and other discrete voids of this nature are present in the limestone at the project site and at other locations in the Isis River Valley …".

152 I find that it is likely that there are small, interconnected voids and fissures in the limestone to be quarried. However, it is highly unlikely that there are large caves of a size comparable to Moore's Lake Cave.

The likelihood of biota in caves

153 If there are voids and fissures within the limestone, with available water, could they contain organisms? Neither Dr Osborne nor Dr Swabey felt qualified to comment on this matter. Dr Smith, for NHVSS did suggest that it would be possible, based upon the scientific literature. However, Dr Smith had not carried out any sampling or made any direct observations, and the investigations carried out in preparation of the EIS had not considered stygofauna.

154 The issue having been raised, even on the basis of limited information, it is necessary that it be given serious consideration. The Court drew the parties' attention to some recent literature on stygofauna and requested that, if considered appropriate, they make submissions. The literature was:

- Gibert, J et al, "Groundwater ecosystems: human impacts and future management", in Polunin, N V C (ed), A*quatic Ecosystems, Trends and Global Prospects*, Cambridge University Press, 2008, pp 30-44.

- Gibert, J and Culver D C, "Assessing and conserving groundwater biodiversity: an introduction", (2009) 54 *Freshwater Biology* 639.

- Hancock, P J and Boulton A J, "Sampling groundwater fauna: efficiency of rapid assessment methods tested in bores in eastern Australia", (2009) 54 *Freshwater Biology* 902.

155 The parties each availed themselves of the opportunity to make written submission on the literature, but did not seek to adduce further evidence.

156 Caves provide habitat for a diversity of organisms. Photosynthetic organisms are absent, except close to cave entrances. Food chains are based on organic material falling or being washed into caves from terrestrial ecosystems or production by chemoautotrophic bacteria. The faunal component of a cave system may be classified as troglofauna (those species occupying dry voids and caves) and stygofauna in wet (at least intermittently) systems.

157 One of the major developments in ecology in recent years has been increasing recognition of the diversity and extensive distribution of subterranean organisms. These include microorganisms which have now been found at considerable depth in voids in a diversity of rock types and macroscopic organisms (some of which are

nevertheless very small) living in water filled interstices and larger voids and fractures in a variety of rocks but particularly in limestone. These macroscopic organisms collectively constitute the stygofauna of which those obligatory dependent on living in water are stygobites (Humphreys, W F, "Aquifers: the ultimate groundwater – dependent ecosystems", (2006) 54 *Australian Journal of Botany* 115 at 115-116).

158 Stygobites are taxonomically very diverse, although many have convergent morphologies (Humphreys, 116). In Australia, stygobites are often members of old lineages and often have restricted geographic distributions (Humphreys, 116).

159 Stygofauna are difficult to sample (Hancock, P J and Boulton, A J, "Sampling groundwater fauna: efficiency of rapid assessment methods tested in bores in eastern Australia" (2009) 54 *Freshwater Biology* 902 at 913-914), so that recording the distribution of species and their abundance, and the delineation of assemblages is in its infancy.

160 Within Australia the majority of studies of stygofauna have been conducted in Western Australia (Humphreys, 118), but there have been sufficient studies to document the presence of stygofauna in eastern Australia (Humphreys, 119; Hancock and Boulton, 903).

161 No members of the stygofauna have been listed as threatened species in NSW, and the paucity of studies would currently make it difficult to assess status against the relevant criteria. If stygofauna were to be listed in NSW it would be under the threatened species provisions of the *Fisheries Management Act* 1994 as the aquatic nature of the species renders them illegible from consideration under the TSC Act.

162 A number of stygobites have been described as new species from Moore's Lake Cave, whether these are locally restricted endemics or are more widely distributed but under sampled is currently unknown.

163 NHVSS argued for the likely presence of stygofauna in aquifers which would be affected directly or indirectly by the proposal. Stoneco argued that there are no data to suggest the presence of stygofauna within the project site and that there is no basis for extrapolation from Moore's Lake Cave or any other location.

164 Stoneco did accept, however, that "[s]mall fractures, cracks, bedding planes and other discrete voids of this nature are present in the limestone at the Project Site and at other locations in the Isis River Valley, providing pathways through which troglofauna may pass" and "It is therefore likely that any troglofauna present within the site are not unique to it, and that they will, be found elsewhere in the Timor limestone" (in response to the Court's Inquiry (No 5) at 7.8).

165 Stoneco argued (Response No 5 Section 8) that there is unlikely to be groundwater (and, hence, no stygofauna) within the volume of limestone to be extracted, and proposed a revised condition (in proposed condition S1.12) to monitor any impacts on groundwater below the level of the extraction zone.

166 NHVSS (in their further submissions in response to Stoneco) rejected Stoneco's conclusions. NHVSS pointed out that Stoneco regards groundwater as being within fully saturated rock, disregarding the internal drainage system within the karst, and also pointed out that the lack of evidence is not evidence of absence but may be due to the paucity of investigations.

167 There are limited data on either karst or fauna from the site so that the debate between the parties was necessarily at a high level of generality invoking possibilities rather than probabilities. Adopting the taxonomy of Regan *et al.* (Regan, H.M., Colyvan, M. and Burgman, M.A, "A taxonomy and treatment of uncertainty for ecology and conservation biology", (2002) 12 *Ecological Applications* 618 at 619-622), the Court is faced with both epistematic uncertainty (uncertainty associated with knowledge of the state of a system) and linguistic uncertainty which arises from properties of the scientific vocabulary (for example, one of the elements of linguistic uncertainty in this matter is associated with the different definition of "cave" argued for by NHVSS's and Stoneco's experts). Both forms of uncertainty are inherent in discussion of many environmental issues.

168 'Possibility' and 'probability' are used in Stoneco's submissions in a general sense rather than statistically. Probability can be considered as a continuum and "possibility" in this context implies likelihoods toward the low probability end of the continuum. In the present matter, no numerical values can be assigned to probabilities of occurrence of either particular karst features or biota. However, this is not necessarily because the probabilities are very low, but may simple reflect the lack of appropriate investigation.

169 There was agreement (see [164]) that there are voids and conduits through the limestone. Even if they are above the saturated zone they will permit the movement of water. On the view the Court was shown the site of a spring emerging from the limestone. At the time of the view there was no water flowing, but it was agreed that flow occurred following sufficient rainfall. On the view the Court was also taken to a locality north of the project site where an active spring was situated. Rain falling on the surface would percolate into the underlying limestone where it would be able to move through cracks and fissures both vertically and laterally, and some of this water might emerge in springs.

170 Water flowing through the cracks, which when dry may provide habitat for troglofauna, would provide conditions appropriate for micro-organisms and larger members of a stygofauna, even if intermittently. On the basis of studies elsewhere referred to in the literature mentioned in [154], it is likely that there is a biota

associated with wet phase conditions in the voids and fissures.

171 The composition, spatial extent and conservation significance of any such biota is currently unknown. It is not known whether any of the species would be capable of being determined to be threatened, or whether the assemblages(s) of species could constitute threatened ecological communities. However, they would certainly be a component of indigenous biodiversity and one of the ESD principles in s 6(2)(c) of the *Protection of the Environment Administration Act* 1991 requires "that conservation of biological diversity and ecological integrity should be a fundamental consideration".

172 Stoneco pointed out that there is no statutory requirement in NSW to consider either troglofauna or stygofauna. The Director General's requirements did not specify the need for any study or discussion on of either such fauna or its habitat. Nevertheless, if there is biota within the limestone, it becomes a biodiversity consideration. The absence of any specific requirements from the Director General does not mean that the potential for occurrence of biota can be ignored, and having been alerted by Dr Smith's evidence as to the potential for biota to be present in the limestone to be quarried, the Court, exercising the functions of the consent authority on the appeal, can seek to inform itself further about relevant matters.

173 It may be that in the past, consent authorities, including the Court exercising the functions of consent authorities on appeal, may have granted consent to limestone quarries without any consideration of biota within the limestone. This reflected the understanding of the issues at the time. With increased knowledge comes increased likelihood that some form of biota will be found to be present; the relevant matters to be considered evolve over time: see *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [56].

174 Stoneco (Submissions 28(b)(i)) argued that there is merely a possibility of the presence of biota, and a possibility is insufficient to engage the precautionary principle. I do not agree.

175 In *Hoffman Homes v Administrator,* 961 F2d 1310 (7th Circuit 1992), the US Court of Appeals (7th Circuit) vacated an administrative penalty the US Environment Protection Authority ("EPA") had imposed on Hoffman Homes for filling an isolated wetland that the EPA found provided suitable habitat for migratory birds but for which there was no documented evidence of actual usage by migratory birds. The Court of Appeals held that the EPA did not have jurisdiction under the *Clean Water Act* over intrastate, isolated wetlands or under the commerce clause to regulate filling of such wetlands. Manion CJ held that mere potential use by migratory birds of the wetland was insufficient to ignite the commerce clause: at 1320.

176 However, on a rehearing by the same Court (*Hoffman Homes v Administrator*, 999 F2d 256 (7th Circuit 1993)), the Court altered the aspect of its reasoning relating to whether the commerce clause could be invoked by potential use of the wetland by migratory birds. Wood SCJ held that the EPA regulation of wetlands whose use, degradation or destruction could affect interstate commerce, covered waters whose connection to interstate commerce was potential rather than actual, and minimal rather than substantial: at 261. It was also reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce. Throughout the US, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap and observe those birds: at 261. Notwithstanding this potential for the commerce clause to be invoked, however, on the facts of that case, there was no substantial evidence supporting the decision of the EPA that the particular isolated wetland was suitable migratory bird habitat and hence that the filling in of the wetland had even a potential effect on interstate commerce. The EPA's penalty was therefore vacated: at 262.

177 In the present matter, although there is an absence of site-specific information on biota in the limestone, the presence of biota in caves and groundwater in the near vicinity of the site and the increasing number of studies elsewhere that establish the presence of biota in limestone, make it scientifically likely that some form of biota will be found within the limestone on the site. Without being able to predict the particular species which would be present, it is beyond a mere possibility that biota will be present. This scientific likelihood is sufficient to engage the precautionary principle.

Precautionary principle applies

178 If there is biota present then, at least within the extraction area, the biota will be harmed by quarrying. Such harm would constitute serious and irreversible environmental damage. There is uncertainty as to the threat of environmental damage flowing from the uncertainty as to the presence of voids and fissures, with available water, to support biota. However, the threat of environmental damage is scientifically likely; there is reasonable scientific plausibility that there are voids and fissures, with available water, to support biota, which would be damaged by quarrying: *Telstra Corporation Ltd v Hornsby Shire Council*[2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10 at [148].

179 The precautionary principle is therefore activated. The Court should assume that there will be a serious or irreversible threat of environmental damage and take this into account, notwithstanding there is a degree of scientific uncertainty about whether the threat really exists: *Telstra Corporation Ltd v Hornsby Shire Council* at [150], [152]. Lack of full scientific uncertainly is not to be used as a reason to postpone taking measures to

prevent environmental damage.

Precautionary measures to be taken to prevent environmental damage

180 The type and level of measures to prevent environmental damage, which will be appropriate will depend on the combined effect of the degree of seriousness and irreversibility of the threat of environmental damage and the degree of uncertainty. This involves assessing risk in its usual formulation, namely the probability of the event occurring and the seriousness of the consequences should it occur. The more significant and the more uncertain the threat, the greater the degree of precaution required: *Telstra Corporation Ltd v Hornsby Shire Council* at [161].

181 As I noted in *Telstra Corporation Ltd v Hornsby Shire Council* at [162]-[164]:

> "162 Prudence would also suggest that some margin for error should be retained until all the consequences of the decision to proceed with the development plan, programme or project are known. This allows for potential errors in risk assessment and cost-benefit analysis. Potential errors are weighted in favour of environmental protection. Weighting the risk of error in favour of the environment is to safeguard ecological space or environmental room for manoeuvre: T O'Riordan and J Cameron, "The History and Contemporary Significance of the Precautionary Principle" in T O'Riordan and J Cameron (eds), *Interpreting the Precautionary Principle* , Earthscan Publications, 1994, p. 12 at p. 17; and C Barton, "The status of the precautionary principle in Australia: Its emergence in legislation and as a common law doctrine" (1998) 22 *Harvard Environmental Law Review* 509 at 520.
>
> 163 One means of retaining a margin for error is to implement a step-wise or adaptive management approach, whereby uncertainties are acknowledged and the area affected by the development plan, programme or project is expanded as the extent of uncertainty is reduced: M D Young, "The precautionary principle as a key element of ecologically sustainable development" in R Harding and E Fisher, *Perspectives on the Precautionary Principle* , Federation Press, 1999, 127 at 140.
>
> 164 An adaptive management approach might involve the following core elements:
>
> - monitoring of impacts of management or decisions based on agreed indicators;
> - promoting research, to reduce key uncertainties;
> - ensuring periodic evaluation of the outcomes of implementation, drawing of lessons, and review of adjustment, as necessary of the measures or decisions adopted; and
> - establishing an efficient and effective compliance system": see "Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management" in Appendix A to R Cooney and B Dickson (eds), *Biodiversity and the Precautionary Principle, Risk and Uncertainty in Conservation and Sustainable Use*, Earthscan, 2005 p. 304, Guideline 12."

182 The measures adopted should also be proportionate to the threat of environmental damage. A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs, and the seriousness and irreversibility of the threat: *Telstra Corporation Ltd v Hornsby Shire Council* at [167]. Considerations of practicability must be taken into account: at [169]. The cost consequences of increasing levels of precaution must be evaluated: at [171]. There should be an assessment of the risk-weighted consequences of various options: at [172] and [173].

183 In the circumstances of this case, I consider that the appropriate and proportionate response to the threat of environmental damage to biota within the limestone is to implement a step-wise or adaptive management approach. This would involve imposition of conditions of consent requiring monitoring linked to adaptive management.

184 Adaptive management is a concept which is frequently invoked but less often implemented in practice.

Adaptive management is not a “suck it and see”, trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained. The monitoring program has to be designed so that there is statistical confidence in the outcome. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty, but rather they establish a regime which would permit changes, within defined parameters, to the way the outcome is achieved.

185 The imposition of regimes for monitoring and adaptive management as an application of the precautionary principle was accepted as appropriate in *Tuna Boat Owners Association of SA Inc v Development Assessment Commission* (2000) 77 SASR 369; 110 LGERA 1 at [35] and *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 at [58] and discussed in *Telstra Corporation Ltd v Hornsby Shire Council* at [163]-[165] .

186 In *Zia v WAPDA PLD* 1994 SC 693 the Supreme Court of Pakistan was considering a proposal for construction of an electricity grid station where the latest research into the potential hazards of electromagnetic field had not been taken into account. The Supreme Court adopted as a precautionary measure the appointment of an expert commissioner to report on the likelihood of threats and to suggest variations to minimise any danger in *Zia* at pp 325, 334. Adoption of adaptive management for the life of a project represents an extension of the approach adopted in *Zia.*

187 The conditions of consent requiring monitoring and adaptive management would operate over the life of a project (and, in the case of rehabilitation, beyond it). Over this period there are likely to be changes in technology, understanding of issues and the environment (for example in 30 years time climatic conditions might be different from those currently prevailing). An adaptive management regime provides the potential for addressing changes without creating a requirement to seek formal amendment of conditions.

188 A draft cave discovery protocol has been developed by the experts for NHVSS and Stoneco to address management issues if caves (in the broad sense) are discovered during extraction (see Schedule 3 of the proposed conditions). However, this protocol would only operate after some damage had already occurred. Given that there will not be absolute certainty as to what might be revealed by blasting and quarrying, there is a need also to develop and implement measures to assess the limestone for caves, voids and fissures, and any biota in them, in advance of blasting.

189 The detail of the pre-blasting assessment protocol will need to be developed. The parties should be given an opportunity to address the Court on the protocol and the conditions to be imposed requiring implementation of the protocol. In basic terms, the protocol will need to identify the process for successive investigation of areas to be quarried, probably by drilled cores. The core holes will need to be examined for presences of cracks, fissures, large voids and water and sampled for biota, both stygofauna and troglofauna. The protocol may need to address frequencies of sampling and the criteria for implementation of measures up to and including closing the operation. There will need to be agreed courses of action depending on the findings from sampling. It may be economic, efficient and effective for certain aspects of the pre-blasting assessment protocol to be integrated with, or to use mechanisms or personnel proposed in, the cave discovery protocol.

Other issues

Consistency with zone objectives

190 Exercising the functions of the Council as consent authority on the appeal, the Court must be satisfied that the proposal is consistent with the relevant zone objectives of the Rural “A” zone laid down in the LEP applicable to the Project Site (cl 9(3)). The proposal is for the quarrying of the natural resource of limestone on the Project Site. The development is permissible with consent in the Rural “A” zone. The proper development of the natural resources, including minerals (which includes limestone) is a general aim of the LEP. Where by its zoning land has been identified as generally suitable for a particular purpose, weight should be given to that zoning in the resolution of a dispute as to the appropriate development of a site: *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399; (2004) 138 LGERA 237 at [117].

191 The Project Site is used for grazing, but its productivity is low having regard to its physiographic and edaphic features and native vegetation cover. For the operating life of the quarry, the extraction area of the Project Site would not be able to be used for grazing. However, after rehabilitation and revegetation, that area would be able to be used for grazing again. In a broader context, the proposal will not affect to a material extent the productive and efficient use of rural land in the zone for agricultural purposes. I am satisfied that the carrying out of the development is consistent with objectives (a) and (b) of the Rural “A” zone.

192 The type of development proposed, and its intensity, is a permissible development in the Rural “A” zone and is appropriate having regard to the characteristics of the land and the rural environment. The development does generate the demand for upgrading of the Timor-Crawney Road and the bridges and culverts on the road. However, the Council states that it has made provision for the cost of providing these public amenities and conditions of consent are proposed for developer contributions to recoup the cost. I am satisfied that the

carrying out of the development is consistent with objective (c) of the Rural “A” zone.

193 In relation to objective (d) of the Rural “A” zone concerning the natural resources of the Shire, the Project Site comprises the White Box EEC and habitat of the Squirrel Glider, as well as possible subterranean caves, biota and a groundwater dependent ecosystem. The proposal as modified, minimises and mitigates the adverse impacts on these components of the natural resources of the Shire. Viewed in a spatial and temporal context, I consider that the development is consistent with objective (d) of the Rural “A” zone. Objective (d) cannot be read too literally, otherwise no development permissible in the Rural “A” zone would be approved. All development would have some degree of adverse impact on the natural and scenic resources of the Shire. A common sense approach needs to be adopted. In this case, having regard to the particular features of the development as modified, the proposed conditions on which it would be carried out and the proposed ameliorative measures, the natural resources of the Shire that comprise the White Box EEC, the Squirrel Glider and their habitat, and any possible caves, biota and groundwater dependent ecosystems, will be conserved for the Shire, notwithstanding the potential loss in the particular area of extraction for the period of the operating life of the quarry.

Development principles in rural zones

194 Clause 10 of the LEP establishes general principles to apply to development applications in rural zones. Clause 10(1)(a) and (b) refer to the agricultural uses of land. Although no maps of land suitability and capability were shown to the Court, no suggestion was made by any party or the resident objectors that the land has such high agricultural capability that it should not be developed.

195 Clause 10(1)(c) addresses the existing rural and scenic character of the Shire. While a quarry will change landforms, the topography and location of the quarry and surrounding features are such that the quarry will not cause an unacceptable visual impact from the road or indeed any dwelling. The existing rural and scenic character will be unaffected.

196 Clause 10(1)(d) is not applicable as the proposal is to allow the proper recovery of a valuable deposit of extractive material.

197 Clause 10(1)(e) and (f) require the consent authority to consider traffic issues and the cost to the Council of providing and maintaining public amenities and services. The Council has indicated commitments to upgrading the road infrastructure so as to provide for the transportation of limestone product from the site. Provided these commitments, which are specified in the proposed conditions, are met then the Court is satisfied that the proposal is consistent with the zone objectives.

Compatibility of proposal with other land uses

198 Clause 12 of the Mining SEPP requires consideration of the compatibility of the proposal as an extractive industry with other land uses in the vicinity. The development will not have any significant impact on the uses of land outside of the Project Site. Proposed conditions will ensure that off-site impacts, such as noise, vibration and dust, will be regulated to acceptable standards. Traffic and road safety issues are also able to be satisfactorily addressed. The evaluation and comparison required by cl 12 between conflicting uses does not arise.

Conditions ensuring natural resource management and environmental management

199 Clause 14 of the Mining SEPP requires a consent authority to consider conditions that would be appropriate to ensure that the development is undertaken in an environmentally responsible manner, including conditions to ensure minimisation of impacts on surface water and groundwater resources and on threatened species and biodiversity and minimisation of greenhouse gas emissions. The conditions proposed by Stoneco and the Council go a long way towards meeting this aim. However, further conditions are needed, for the reasons given earlier, to minimise the impacts on groundwater resources and biota and the proposed conditions also will need modification as discussed below. If these steps are taken, the conditions of consent will achieve the aim in cl 14 of the Mining SEPP.

Residents’ concerns

200 The resident objectors raised a number of concerns. Concerns about adequacy of the road and road safety have been addressed by the Council and the proposed conditions provide for both upgrading the infrastructure and implementation of a traffic management plan.

201 Effects on water supplies will be monitored through proposed condition 1.12. Dust and blasting issues are proposed to be addressed by monitoring and the operational plan for the quarry. The Court was provided with advice indicating that concerns about potential risks from the release of fine particles of silica into the air were allayed.

202 The quarry site will be rehabilitated. While the rehabilitation plan is yet to be developed, conditions should be imposed to require a rehabilitation plan which will address the concerns of residents.

203 Questions about the socio-justification for the quarry, and the effects on property values were raised, but no evidence was presented. While the residents may have legitimate concerns, in the absence of testable information, they cannot be taken in account.

204 Mr McIntyre's specific concerns about proximity to his dwelling house will be addressed at the stage when the grant of a Mining Lease is being considered by the Minister. This may result in a redrawing of the Mining Lease boundary so as to exclude the access road adjacent to the Timor Crawney Road, thereby complying with s 62 of the Mining Act which requires a setback of 200 m from Mr McIntyre's dwelling house. The location of the quarry itself would not alter, so the basis for his concerns might remain, but technically the problem will have been solved. The access from the quarry to the Timor Crawney road was also of concern to Mr McIntyre. The EIS's description of the access road was more of the nature of a concept plan and more detail would be needed before construction. A condition of consent should require submission and approval by the Council of detailed plans showing the access road and its intersection with the Timor Crawney Road.

Conditions of consent

205 During the course of the proceedings, Stoneco and the Council have prepared revised draft conditions of consent and NHVSS has suggested modifications to a number of these. The conditions are grouped in six schedules: Schedule 1 deals with the development approved and general conditions; Schedule 2 contains the general terms of approval of DECCW; Schedule 3 contains the cave discovery protocol; Schedule 4 contains the requirements for planning, assessment and project site management; Schedule 5 involves environmental management, reporting and auditing; and Schedule 6 involves landscape management and rehabilitation. I will deal with the disputed conditions in each of the Schedules and other conditions I consider should be modified.

Schedule 1: Approval and general conditions

206 NHVSS propose two sets of conditions for deferred commencement of the consent. Condition S1.1A proposes deferring commencement until Stoneco submits plans to the satisfaction of the Council demonstrating that:

> "(a) No road will pass within 5 metres of the outer edge of any stand of *Xanthorrhoea glauca* or *Ficus rubiginosa* ;
>
> (b) No extraction of rock or alteration of the surface landform will take place within 15 metres in any direction of the outer edge of any stand of *Xanthorrhoea glauca* or *Ficus rubiginosa* ;
>
> (c) The quarry pit will drain outwards and will not collect water."

207 The stands of *Xanthorrhoea glauca* and specimens of *Ficus rubiginosa* on the Project Site are distinctive and valuable features and ought where practicable be conserved. To a large extent the extraction area avoids the stands of *Xanthorrhoea glauca* and it should be possible for internal roads to avoid the stands. Some specimens of *Ficus rubiginosa* may occur in the extraction area and it is not practicable to conserve these on pillars of rock surrounded by a quarry. I consider it will be sufficient for a provision to the effect of subpara (a), but not (b), to be included as an operative general condition, perhaps after condition S1.24. The parties can address the Court on the precise wording, if contested.

208 The outwards drainage of the quarry pit was recommended in the evidence by Dr Swabey, Stoneco's cave expert, in order to prevent pollution of subterranean aquifers. DECC, in its response to the EIS (Ex C1, tab 28, p 9), recommended that management practices, risk assessment and pollution mitigation should be undertaken on the assumption that a groundwater dependent ecosystem is present in the karst aquifer below the proposed site. Requiring outward drainage of the quarry pit is consistent with this recommendation. I do not consider it is necessary to make this a deferred commencement condition but rather it can be included as a requirement in the operational conditions. I note that NHVSS propose a new condition S1.12B to this effect as well as modifications to condition S1.39 proposed by Stoneco and the Council. NHVSS's proposals are appropriate. In addition, the conditions for a soil and water management plan ("SWMP") in Schedule 4, such as an additional requirement of the SWMP in condition S4.3, should be amended to require outward drainage of the quarry pit.

209 The other set of deferred commencement conditions proposed by NHVSS is in condition S1.1B requiring Stoneco to submit to the Council a mining operations plan and various management plans. The requirement for submission of such plans is appropriate but I consider it need not be a deferred commencement condition but can be instead an operational condition.

210 Accordingly, I do not consider NHVSS's proposed deferred commencement conditions should be imposed, although aspects of them can be made part of the operational conditions as discussed above.

211 General condition S1.2 specifies the documents in accordance with which the development is to be carried out. NHVSS proposed adding to the list three documents: the plan identifying the revised location of the stockpile and handling area; Stoneco's response to the RTA information request dated 30 January 2009; and Stoneco's response to DECC's submission dated 6 February 2009. NHVSS also adds these documents to the

paramountcy provision in condition S1.2.2. I consider it is appropriate to add these documents to the condition. I accept NHVSS's proposed condition S1.2.

212 Conditions S1.3 to S1.6 are agreed between the parties.

213 Condition S1.7 is appropriate, however, it would benefit from being linked to condition S1.33. The latter condition proposes upgrading of bridges and roads before quarrying, and hence haulage of product, can commence.

214 Condition S1.8 is agreed. NHVSS proposes minor wording changes to condition S1.9.1 which should be accepted.

215 Conditions S1.10 and S1.11 are agreed by the parties but could be improved by being linked to the conditions requiring preparation and implementation of a soil and water management plan. These latter conditions in Schedule 4 require periodic review of management plans and adaptive management. This process may result in the need for stricter erosion and sediment controls and surface water criteria. Conditions S1.10 and S1.11 should be modified to require implementation of any improvements in controls and criteria over the life of the project.

216 Condition S1.12 deals with groundwater monitoring. Stoneco and the Council have suggested an improved condition requiring three groundwater monitoring bores in response to the Court's concern as to the inadequacy of the previously proposed condition that had only one monitoring bore. The Council suggests that any recommendations arising out of the groundwater monitoring protocol required by the condition be incorporated into the Mining Operations Plan and Soil and Water Management Plan. This is appropriate. However, NHVSS submit that even the improved condition is still inadequate.

217 The intent of condition S1.12 is to monitor and manage conditions below the lower chert band. There is no proposal to excavate or impact directly, the geological strata of the lower chert band or below. Indeed, condition S1.37 prohibits excavation of the lower chert band. However, there was concern that quarrying operations above the lower chert band potentially might impact on groundwater below the lower chert band and any groundwater dependent ecosystem (GDE) biota that might there exist. Condition S1.12 establishes a procedure for monitoring of any impact of the proposed quarry on the groundwater and GDE biota.

218 The condition first specifies the process for selecting the location of the three monitoring bores. This includes a qualified hydrologist and GDE expert selecting and reporting to the Council on the location of the monitoring bores (S1.12.3) having regard to the purposes for which the monitoring bores are to be used (S1.12.1) and the criteria for selection of the location of the monitoring bores (S1.12.2). The Council must approve the proposed location (S1.12.4).

219 Stoneco is to develop and have approved by the Council a protocol for sampling GDE fauna (S1.12.5). The condition currently refers to GDE fauna only. I consider that the sampling should be extended to GDE biota and the condition should be amended accordingly. Similar changes should be made to other references to GDE fauna elsewhere in condition S1.12. The sampling protocol for fauna can be developed in accordance with the principles referred to in Hancock and Boulton but consideration will need to be given to whether different procedures should be followed for other GDE biota. Any variations to the sampling protocol approved by the Council must be justified and approved by the Council (S1.12.6).

220 Monitoring and sampling is required to commence no later than 3 months before quarrying operations commence (S1.12.7). I consider this period is too short to allow for seasonal variations in groundwater levels or quality or in GDE biota. Unless an adequate period is allowed, the historic, baseline data will be incomplete and meaningful comparison with data collected after quarrying operations commence may not be possible. My initial view is that a period of at least 12 months should be provided for so as to cover all of the seasons. However, I will allow the parties to address on the precise period that should be selected.

221 The condition specifies the mechanisms and intervals for monitoring (S1.12.7A and S1.12.7B).

222 The results of the monitoring and sampling of groundwater and GDE biota are to be reported in writing to the Council at quarterly intervals (S1.12.8). For the first 2 years of testing, each quarterly test report is to be accompanied by a statement from a GDE expert detailing the results and their significance and recording the expert's concerns, if any, arising from the monitoring and sampling, including any apparent, actual or potential impact of any reduction in water quality on GDE biota (S1.12.8). If the GDE expert reports concerns, Stoneco is to engage a qualified hydrologist to review the concerns and make recommendations about the manner in which quarrying operations should continue so as to address the concerns (S1.12.9).

223 After 2 years of monitoring and sampling, Stoneco may (but is not required to) engage a GDE expert to review the sampling data set and make recommendations about whether the sampling frequency may be reduced or should be increased and whether the sampling parameters should be varied. The GDE expert's report is to be submitted to the Council for determination on the recommendations (S1.12.10).

224 The cumulative results/data of the monitoring and sampling is to be reported in the Annual Environmental Management Report (AEMR) (S1.12.11). This is to be repeated in each AEMR for each year of the operating life

of the quarry. The AEMR is to include statements from a qualified GDE expert and hydrologist. The GDE expert is to review the annual data set from the three monitoring bores and make relevant comparisons with the historical data taken from those bores and make findings. The hydrologist is to review the GDE expert's findings and make recommendations about the manner in which the quarrying operations should continue on the site, including recommendations about the way in which any impacts on water quality and on GDE biota should be addressed (S1.12.12).

225 There is no formal mechanism for the approval and implementation of the findings of the GDE expert recommendations of the hydrologist AEMR, that is to say, for adaptive management. This deficiency needs to be addressed in condition S1.12, and confirmed in condition S5.2 dealing with the AEMR.

226 Providing the modifications I have noted are made, I consider this condition S1.12 will be adequate.

227 NHVSS proposes two new conditions. Condition S1.12A proposes a regime for storage of fuels to prevent pollution on site and of any karst aquifer below the Project Site and a prohibition on storage of explosives on site. These would seem to be appropriate precautionary approaches consistent with the recommendation of DECC. However, Stoneco and the Council can address the Court if they wish to propose an alternative approach.

228 Condition S1.12B expands on NHVSS's proposed condition S1.1A(c) for outward drainage of the quarry pit. I have already found this approach is appropriate. The condition should be accepted as well as including the proposal for outward drainage in the soil and water management plan conditions.

229 Conditions S1.13 to S1.19 are agreed between the parties.

230 NHVSS proposed amending condition S1.20 to require the sealing of all roads inside the Project Site and not just the intersection of the site access road with Timor-Crawney Road for a distance of 20m and the covering of trucks transporting material both within the quarry site and from the premises. In the absence of evidence supporting the more onerous and costly condition proposed by NHVSS, the condition should remain in the form proposed by NHVSS and the Council.

231 Condition S1.21 proposes a biodiversity offset for the loss of White Box EEC. Originally this was assessed to be 0.2 ha but would need to be revised to 6 ha in accordance with my findings earlier in the judgment. Condition S1.21 therefore needs amendment as proposed by NHVSS. The process for proposing and securing the offsets is set out in conditions S1.21.1 to S1.21.4. NHVSS express concern as to the uncertainty of the process. Having regard to the fact that the area of the biodiversity offset will need to be increased significantly from 0.2 ha to 6 ha, and this may raise the issue of the availability of suitable land, Stoneco should have an opportunity to address the Court on the certainty and implementation of this process for a biodiversity offset. In addition, as the proposal for a biodiversity offset included in conditions S1.21.1 to S1.21.4 was settled in consultation with DECC, and under condition S1.21.3 DECC must consider and accept the proposed biodiversity offset prior to Stoneco clearing any vegetation, Stoneco should also refer the issue to DECC to give it an opportunity to provide further comment if it chooses.

232 NHVSS also propose additional requirements dealing with loss of hollow bearing trees and replacement of habitat (proposed condition S1.21.5- S1.21.6), care of fauna during clearing (proposed conditions S1.21.7-S1.21.8), replacement of Yellow Box, White Box and Blakely's Red Gum trees removed (proposed conditions S1.21.9-S1.21.10) and the washing of vehicles and machinery to prevent import of weeds and pest species (condition S1.21.11). NHVSS based these additional requirements on the Council's initial conditions before they were subsequently amended. I consider proposed conditions S1.21.5 to S1.21.8 and S1.21.11 are appropriate. Condition S1.21.9 and S1.21.10 are unnecessary if appropriate rehabilitation of the quarry site is undertaken in accordance with other conditions of the consent. NHVSS appropriately corrected a typographical error in condition S1.21.12.

233 Conditions S1.22 to S1.24 are agreed.

234 Condition S1.25 concerns the cave discovery protocol and implements Schedule 3. I will comment on this protocol in the section on Schedule 3.

235 Conditions S1.26 to S1.31 are agreed. NHVSS proposes an appropriate correction of S1.32.1.

236 Condition S1.33.1 deals with the works to upgrade bridges on the Timor-Crawney Road. NHVSS proposes that additional bridges be referred to in the condition. This is appropriate. However, I would not necessarily require replacement bridges to be installed; rather, it would be sufficient to specify that quarrying work not commence operation until the specified bridges are repaired or replaced or otherwise modified so as to meet the prescribed structural capacity. This would leave the means by which the bridges are brought up to that standard to the Council to determine. The appropriateness of imposing such a condition was recognized in *McCarthy v Mulwaree Shire Council* (1992) 78 LGERA 158 at 171 and *Grampian Regional Council v City of Aberdeen District Council* (1984) 47 P&CR 633.

237 Condition S1.34 is agreed but the name of the department should be amended to reflect current names.

238 Conditions S1.35 to S1.37 are agreed. NHVSS suggests appropriate typographical corrections in S1.36.2

and S1.36.3.

239 Condition S1.38 is agreed. NHVSS proposes a minor clarification to S1.38.1 that seems appropriate.

240 Condition S1.39 deals with drainage of the quarry. NHVSS's proposed amendment is appropriate and accords with other conditions proposed to meet the goal of preventing pollution of the karst aquifer under the quarry site. The mechanisms for avoiding drainage into the karst and for filtering water with potential to drain into the karst should be addressed in the soil and water management plan required to be prepared under the conditions in Schedule 4.

241 Conditions S1.40 and S1.41 are agreed.

Schedule 2: DECC General Terms of Approval

242 Schedule 2 sets out DECC's general terms of approval and they are agreed between the parties.

Schedule 3: Cave Discovery Protocol

243 Schedule 3 deals with the cave discovery protocol drafted in response to the expert evidence of Drs Swabey and Osborne. As noted earlier in the judgment, a fundamental weakness of the cave discovery protocol is that it operates only if a cave is discovered during quarrying activities; it does not require investigation before quarrying activities. For this reason, I consider that it is insufficient and needs to be supplemented by a process of investigation for caves, biota and groundwater dependent ecosystems before blasting and quarrying.

244 As far as the cave discovery protocol is concerned, NHVSS suggested a number of amendments. These are generally directed to tightening the condition's enforceability and objectivity and eliminating discretion of the quarry owner and/or manager. As a general proposition, I consider the suggestions are improvements and NHVSS's proposed conditions ought to be accepted. However, I would allow Stoneco to address on the particular wording.

245 One key point of difference between NHVSS and Stoneco is that Stoneco sought compensatory expansion of the quarry laterally or in depth to provide an equivalent tonnage and grade to the material sterilised by protecting a cave, whilst NHVSS opposed this course and submitted that a s 96 modification application should be required before any compensatory expansion of the quarry is permitted. I agree with NHVSS and accept its proposed condition.

Schedule 4: Planning, Assessment and Project Site Management

246 Schedule 4 requires a mining operations plan and various management plans. The parties agree on the need for these plans. NHVSS proposed they be prepared and approved prior to the consent commencing operation (as a deferred commencement condition). I have held above that a deferred commencement condition is not required and the conditions in Schedule 4 can be operational conditions.

247 The only other point of disagreement between the parties concerned the requirement for a conservation agreement or public positive covenant with respect to the requirements under condition S4.5 concerning the Biodiversity Management Plan. NHVSS submits that there should be a registered conservation agreement under Div 12 of Pt 4 of the *National Parks and Wildlife Act* 1974 ("NPW Act") and that DECC is the appropriate body to supervise rather than the Council. Stoneco and the Council proposed leaving the alternatives of either a conservation agreement or a public positive covenant in favour of the Council. I consider an alternative should be provided for in the condition. If DECC does not agree to a conservation agreement under the NPW Act then there would be no securing of performance of the requirements under Biodiversity Management Plan. Under the proposal of Stoneco and the Council, however, if a conservation agreement were not possible, a public positive covenant could be registered. I find, therefore, that condition S4.5(f) should retain the alternatives suggested by Stoneco and the Council, however, the first alternative of a conservation agreement should be amended to include the more specific language proposed by NHVSS.

Schedule 5: Environmental Management, Reporting and Auditing

248 Schedule 5 deals with environmental management, reporting and auditing. The conditions are agreed. NHVSS suggests one additional matter for reporting in the Annual Environmental Management Report concerning changes in groundwater quality, potential impacts on groundwater dependent ecosystems and measures to avoid such impacts. This is now required by the revised condition S1.12 (see S1.12.11 and S1.12.12). This is appropriate. As the revised condition S1.12 was drafted after NHVSS commented on condition S5.2, the parties should consider whether condition S5.2(f) should be redrafted to reflect the revised condition S1.12.

Schedule 6: Landscape Management and Rehabilitation

249 Schedule 6 deals with landscape management and rehabilitation. Conditions S6.1 and S6.2 are agreed. Condition S6.3 deals with the rehabilitation management plan. NHVSS suggested some additional requirements.

In principle these seem appropriate but I will give Stoneco and the Council an opportunity to address on the wording.

250 NHVSS suggests deletion from condition S6.6 of the option of the Council approving alternative species for short-term soil stabilisation. I agree. The list of species has been subject to scrutiny by the parties' ecologists and agreement reached that the species listed in the table to the condition to be used in short-term soil stabilisation will not remain in the environment as weeds. There is a sufficient number of species in the table so as to retain flexibility.

Conclusion

251 I consider that if appropriate conditions can be drafted to address the matters raised in the judgment, the proposal is appropriate to be approved. I propose the following directions for the parties to address the outstanding matters and propose further and amended conditions:

1. Stoneco is to file and serve by 16 April 2010 any evidence and submissions on a pre-blasting assessment protocol and amended conditions.

2. The Council and NHVSS are to file and serve by 30 April 2010 any evidence and submissions on a pre-blasting assessment protocol and amended conditions.

3. Stoneco is to file and serve any reply by 7 May 2010.

4. Leave is granted for any party to restore the matter on 2 days' notice if there is disagreement on compliance in these directions.

5. The parties are to approach the Registrar by 9 April 2010, to list the matter for hearing and submissions on the outstanding matters.