

**Before the Wellington Regional Council and Hutt City Council Hearing Panel
At Lower Hutt**

Under the Resource Management Act 1991

In the matter of applications for resource consents by Hutt City Council
under section 88 of the RMA, to carry out the Eastern Bays
Shared Path Project (WGN190301 & RM190194)

**Response to Minute 1: interpretation of the New Zealand Coastal Policy
Statement and 'avoid'**

Date: 23 December 2020



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MAY IT PLEASE THE PANEL:

1 The purpose of this memorandum is to respond to the questions posed in paragraph 2 of the Panel's Minute 1. Those questions are:

- a) In relation to Policy 11a of the NZCPS, is there case law that distinguishes it from the *King Salmon* application of policies 13 and 15 of the NZCPS?
- b) If not, does the King Salmon decision (or any other case law) provide guidance on how Policy 11a is to be applied: that is, what does “avoid” mean? Specifically, does King Salmon (or any other subsequent case law) provide a gateway to considering whether “avoid” adverse effects can enable us to consider accepting “minor”, “less than minor” or “transitory” effects in relation to the application of Policy 11(a) NZCPS, as well as Policy 39A(a) PNRP?
- c) Further, can minor or less than minor adverse effects be balanced against the positive effects of a proposal under Policy 11(a) NZCPS, as well as Policy 39A(a) PNRP?
- d) Can we be satisfied that the planning policy framework of the current NZCPS (now 10 years old) and the PNRP is such that it is not necessary for us to revert to Part 2 RMA in our consideration? In other words, can we reconcile the adverse effects of a proposal with its positive effects under Part 2 of RMA?

2 We provide our response to those questions in order below.

Case law on NZCPS policy 11(a)

3 The Panel should take a consistent approach to the interpretation of the words of Policy 11(a) in the New Zealand Coastal Policy Statement (NZCPS) to that taken by the Supreme Court in the *New Zealand King Salmon* case in respect of Policies 13 and 15. This approach is supported by case law, as set out below. We are not aware of any case law that distinguishes the relevant parts of policies 11, 13 and 15 of the NZCPS.

4 The policies are structured the same, with an avoidance requirement for certain matters, then avoidance of significant adverse effects for other matters. Policies 11 and 15 include the same initial direction as well, which is one of protection, as opposed to policy 13 which directs

preservation and protection. The direction in policy 11 is slightly more directive than the others, as it is not qualified by reference to 'inappropriate' development:

To protect indigenous biological diversity in the coastal environment...

- 5 Both policy 13 and 15 refer to protection from inappropriate subdivision, use and development. For example, policy 15 states:

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

- 6 We do not consider this difference to be material to the questions asked by the Panel.

- 7 As summarised by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, the Supreme Court in *King Salmon*:¹

Addressed the word "avoid", used in the Act and in various policies in the NZCPS, holding that it has its ordinary meaning of "not allow", or "prevent the occurrence off".

- 8 The Supreme Court's finding on the meaning of avoid needs to be applied broadly. While the High Court did not make an express statement that 'avoid' in NZCPS 11(a) has the same meaning as 'avoid' in NZCPS policies 13 and 15, it is implied in the following statements:²

...in my judgment the Environment Court should have considered the relevant avoidance or environmental bottom line policies - policies 11, 13 and 15, in the NZCPS...

By finding that the word 'avoid' is contextual, and that it is necessary to go further than simply the wording of the plan, the Environment Court has, in my judgment, failed to properly apply the directive provisions contained in the NZCPS and the majority's observations in *King Salmon*.

¹ *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [54] (**Forest and Bird v BPRC**) referring to *King Salmon* at [24(b)], [62], [92]-[96]

² *Forest and Bird v BPRC* at [101]-[102].

9 Further, the High Court also cited the Environment Court decision in *RJ Davidson Family Trust v Marlborough District Council*,³ as accepting that the Supreme Court's approach to policies 13 and 15 is equally applicable to policy 11.⁴

10 As a result, the Panel should interpret policy 11(a) of the NZCPS and policy P39A(a) of the Proposed Natural Resources Plan (**PNRP**) in a manner consistent with the Supreme Court's approach to the word 'avoid' in policies 13 and 15 in the NZCPS. That is, 'avoid' in both policy 11(a) of the NZCPS and policy P39A(a) in the PNRP means 'do not allow' or 'prevent the occurrence of' the effect.

11 In making a substantive assessment under these policies, it is possible for the Panel to consider that minor and transitory effects may be acceptable. The significance of those effects needs to be considered on a case by case basis. Although the Supreme Court in *King Salmon* considered that 'avoid' means 'do not allow', it considered that it was possible for minor and transitory effects to be acceptable even where the avoid language was used:⁵

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.

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

³ [2016] NZEnvC 81.

⁴ *Forest and Bird v BPRC* at [119].

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [144] and [145].

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

- 12 This approach, was adopted by *Man O'War Station Ltd v Auckland Council*,⁶ where it reassessed its interim decision under section 104 following the release of the *King Salmon* decision to:⁷

...see whether they might fit within the evidently narrow compass of "minor or transitory adverse effects".

- 13 Following the approach taken in *King Salmon* may enable an activity to have some minor or transitory adverse effects whilst complying with the policy direction to avoid effects. This is also considered to be consistent with long standing and often cited case law stating that adverse effects which are *de minimis* (trivial or a remote possibility) may be disregarded,⁸ although it is a step beyond *de minimis* to enable minor or transitory effects.

Balancing of effects

- 14 In respect of both policy 11(a) of the NZCPS, and policy P39A(a) of the Proposed Plan (which is the policy that seeks to give effect to policy 11(a) of the NZCPS), consideration is given to avoiding adverse effects, not *net* adverse effects.
- 15 As such, when assessing the proposal against those provisions under section 104 of the Resource Management Act 1991 (RMA), or assessing whether the proposal is contrary to policy P39A(a) in respect of the section 104D gateway test, it would be inappropriate for the Panel to

⁶ [2014] NZEnvC 260.

⁷ At [17].

⁸ *Bayley v Manukau City Council* [1999] 1 NZLR 568, 576; [1998] NZRMA 513, 521; *Westfield (NZ) Ltd and Northcote Mainstreet Inc v North Shore City Council and Discount Brands Ltd* [2005] NZSC 17; [2005] NZRMA 337. Both are relatively recently referenced in *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [61].

weigh or balance the adverse effects of the proposal with the positive effects to reach a conclusion that the net result is an avoidance of effects. If that was the intention, there would have been less directive language which would enable an applicant to avoid, remedy or mitigate an adverse effect. Logically, you cannot prevent the occurrence of an effect by remedying or offsetting that effect.

- 16 That does not, however, prevent the Panel from taking into account the positive effects of the application under other provisions of the PNRP or NZCPS, or when assessing the effects of the proposal more generally under section 104(1)(a) of the RMA. Specifically, where those positive effects come about as a result of a measure proposed or agreed to by the applicant to offset or compensate from any adverse effect, the Panel is required to consider those effects under section 104(1)(ab) of the RMA.

Part 2

- 17 Consistent with the Court of Appeal's decision in *R J Davidson Family Trust v Marlborough District Council (Davidson)*,⁹ the Panel must have regard to Part 2 where it is appropriate to do so.¹⁰ It is appropriate to have consideration to Part 2 when considering a resource consent application where:¹¹

17.1 the relevant plan has not been prepared in a manner that appropriately reflects the provisions of Part 2,¹² or

17.2 the relevant plan has not been completely prepared.¹³

- 18 As summarised by the Court of Appeal, it would be inconsistent with the scheme of the RMA to allow a regional plan to be 'rendered ineffective'

⁹ [2018] NZCA 3016.

¹⁰ *Davidson* at [47].

¹¹ Noting this is different to the decision-making requirements for a plan change.

¹² *Davidson*, at [74].

¹³ *Davidson*, at [75].

by general recourse to Part 2, provided the Plan has been properly prepared in accordance with Part 2.¹⁴ The Panel must determine whether 'genuine consideration and application of the [PNRP] considerations' leaves any room for Part 2 to influence the outcome and if it 'will not add anything to the evaluative exercise', it is not required.¹⁵ However, undertaking a Part 2 assessment where one is not strictly required is not considered to invalidate the decision, unless as cautioned by the Court of Appeal it is used to circumvent the provisions of the NZCPS and the PNRP.

- 19 While the NZCPS is now 10 years old, there has been very little change to Part 2 since it came into effect. Further the Supreme Court considered that the NZCPS gives substance to Part 2 and this has been endorsed by decisions that follow.¹⁶ The Panel can be satisfied that, in respect of the coastal environment, the NZCPS gives effect to Part 2.
- 20 Regarding the PNRP, Policy P39A(a) was included in the PNRP to give effect to the direction in NZCPS 11(a). It mirrors its language. Other provisions of the Plan give effect to other parts of the NZCPS and other national direction. The PNRP has been competently prepared in a manner that reflects Part 2 of the RMA. In our view, there is no need to revert to Part 2 when considering the resource consent application on the basis the Plan is inconsistent with Part 2 or not competently prepared.
- 21 Several higher order documents have been promulgated post its notification in 2015, and the PNRP may not give effect to those documents as they were not contemplated at the time it was drafted/determined. The Panel may therefore consider that it needs to look beyond the PNRP in those areas. Specifically, the National Policy Statement for Urban Development 2020 (**NPS-UD**) and the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) only came into effect this year. If there is an irreconcilable conflict between

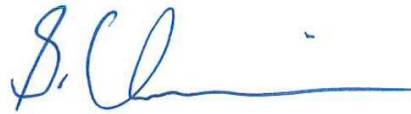
¹⁴ *Davidson*, at [82].

¹⁵ *Davidson*, at [82].

¹⁶ *King Salmon* at [85].

the PNRP and the NPS-UD or the NPS-FM, that cannot be reconciled through consideration of the NZCPS, and those parts of the PNRP are relevant to the current application, the Panel should look to Part 2 to resolve that conflict.

Date: 23 December 2021

A handwritten signature in blue ink, consisting of stylized initials 'S.F.' followed by a long horizontal line.

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S F Quinn and E Manohar
Counsel for Wellington Regional
Council