COUNTRY REPORT: NEW ZEALAND

The Role of Sustainable Management in the Coastal Environment: *King Salmon* in the Supreme Court

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Introduction

This Country Report focuses on the developing jurisprudence regarding the role of sustainable management in relation to the New Zealand coastal environment in light of the Supreme Court decision in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*.[1]

The case concerned applications made by King Salmon under *the Resource Management Act 1991 (RMA)* for changes to the Marlborough Sounds Resource Management Plan (MSRMP)[2] to classify salmon farming as a discretionary activity at eight locations in the coastal marine area, and for the grant of coastal permits to expressly allow salmon farming at these locations for a term of 35 years. The applications were referred, by the Minister of Conservation, to a Board of Inquiry for determination.

The Board granted the applications regarding four of the proposed locations, including Papatua at Port Gore. The Board found that Papatua was an area of outstanding natural character and outstanding natural landscape, and that establishing the proposed salmon farm in that location would give rise to significant adverse effects on both natural character and landscape. Notwithstanding these findings, the Board adopted an "overall broad judgment" approach to balancing the positive and adverse effects of the proposed activity on the environment. In approaching matters in this way, the Board accepted that Policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement (NZCPS) would not be

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[1] [2014] NZSC 38.

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

complied with, but it considered that these policies were not "determinative" despite the "considerable" weight that should be given to them.[3]

The Environmental Defence Society appealed the Board's decision to the High Court on questions of law regarding the proposed salmon farm at Papatua. The Society contended that the Board's analyis was wrong and that it had "erred in law". The appeal was dismissed,[4] and the Society was given leave to appeal directly to the Supreme Court,[5] leapfrogging the Court of Appeal.

Absent the plan change, salmon farming was classified as a prohibited activity under the operative MSRMP and no application could be made for salmon farming at Papatua, and the consent authority was precluded from granting consent for the activity.[6] The issue was therefore whether the plan change could be approved to allow the concurrent application to be granted.[7]

Previous Approach by the Courts and Background Context

The statutory purpose of the RMA is to promote the sustainable management of natural and physical resources.[8] The extended meaning of "sustainable management" in s 5(2) of the RMA includes a number of competing considerations. First, it seeks to enable people and communities to provide for their own wellbeing. Second, it seeks to provide for inter-generational equity, safeguard the "life-supporting capacity" of environmental media,[9] and address adverse environmental effects. These two broad themes, the liberal enabling

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[3] [2014] NZSC 38 at [5].

[4] *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2013] NZHC 1992, [2013] NZRMA 371. For commentary on the Board of Inquiry and High Court decisions see: Warren Bangma "The Board of Inquiry decision on the New Zealand King Salmon application" Resource Management Bulletin (March 2013) 2; and Vernon Rive "Salmon run: the final hurdle for aquaculture plan change and consents" Resource Management Bulletin (November 2013) 73.

[5] Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd [2013] NZSC 101.

[6] RMA, s 87A(6).

[7] RMA, s 87A(7); and Part 7A, subpart 4.

[8] RMA, s 5(1).

[9] Air, water, soil, and ecosystems.

theme, and the three "environmental bottom lines", are separated by the word "while". The semantic difficulty arising from whether "while" should be interpreted conjunctively or disjunctively generated an intense philosophical debate during the period 1995-1997. Commentators put forward competing interpretations of the statutory purpose advocating for a fixed, non-negotiable, bottom line approach, on the one hand; and a balanced approach on the other hand that recognises the need for "trade-offs" between competing values.[10]

This debate was resolved by the courts who applied an "overall broad judgment"[11] or "balanced judgment"[12] approach to the weighing of competing values in resource consent decision-making. For example, in *North Shore City Council v Auckland Regioanl Council*, the Environment Court held in the context of district plan zoning that the:

> *Application of s 5 … involves consideration of both main elements of s 5. The method calls for consideration of the aspects in which a proposal would represent management 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 wellbeing, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paras (a), (b) and (c).*
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> *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 Act 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.[13] (Emphasis added)*
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> *This conclusion was based on a marine farming decision for mussell and sponge farming in the Marlborough Sounds, where the Court had found that the general scheme of the RMA*

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[10] See: The Rt. Hon. Simon Upton "The meaning and role of Section 5 of the Resource Management Act 1991" in T Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (2012), 29-39; Malcolm Grant, "Sustainable management: A sustainable ethic?", in T Daya-Winterbottom, (ed) *Frontiers of Resource Management Law* (2012), 40-60; K J Grundy, "In search of logic: s 5 of the Resource Management Act", *New Zealand Law Journal*, February 1995, 40-44; The Rt. Hon. Simon Upton, *Purpose and principle in the Resource Management Act*, The Stace Hammond Grace Lecture 1995, University of Waikato, 26 May 1995, 1-21; The Rt. Hon. Simon Upton "In search of the truth", *Planning Quarterly*, March 1996, 2-3; Bruce Pardy, "Planning for serfdom: Resource management and the rule of law", [1997] *New Zealand Law Journal*, 69-72.

[11] North Shore City Council v Auckland Regional Council [1997] NZRMA 59.

[12] *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113 at 124-125 per Tipping J.

[13] [1997] NZRMA 59 at 94.

> *"contemplates that some adverse effects from developments … may be considered acceptable, no matter what attributes the site may have".*[14]

Section 5 of the RMA is supported by a series "accessory" principles in ss 6-8 that are "subordinate" to the statutory purpose and provide non-exclusive examples of how sustainable development can be achieved.[15] In the context of the coastal environment they include preserving the natural character of the coastal environment, and protecting outstanding natural landscapes, from inappropriate use and development.[16] The provisions in Part 2 of the RMA are central to the working of the statute and underpin the preparation of policy statements and plans, and the determination of resource consent applications. The RMA provides for an elaborate hierarchy of policy statements and plans including the preparation of national policy statements by the responsible ministers, and the preparation of policy statements and plans by local authorities. The RMA also provides functionaries with a policy choice as to how adverse environmental effects should be addressed, and requires that they should be avoided, remedied, or mitigated.[17] Thus policy statements and plans can direct which approach should be adopted to addressing adverse environemtal effects, or they can leave the choice open to consent authorities when deciding resource consent applications (e.g. coastal permits). The overall broad judgment, or balanced judgment, approach has been applied consistently by the courts until challehged by the *King Salmon* appeals.

King Salmon

The Supreme Court returned to the debate between "bottom lines" and "trade-offs" in *King Salmon*.[18] In particular, the Society challenged the decisions on the basis that Policies 13 and 15 of the NZCPS require outstanding natural landscapes to be "avoided", and that this policy directive established a clear environmental bottom line. Two questions of law were put before the Court regarding Papatua, namely:

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[14] Trio Holdings Ltd v Marlborough District Council [1997] NZRMA 97.

[15] New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 at 85 per Greig J.

[16] RMA, s 6(a) and (b).

[17] RMA, s 5(2)(c).

[18] [2014] NZSC 38.

- The interpretation of s 67(3)(b) of the RMA and NZCPS Policies 13 and 15, namely:
    - Whether the NZCPS contains standards that must be complied with regarding outstanding natural landscapes; and
    - Whether the Board of Inquiry properly applied these provisions in coming to a balanced judgment; and
- Whether the Board of Inquiry was obliged to consider alternatives in cases where the subject site is located in, or gives rise to, adverse effects on, an outstanding natural landscape in the coastal environment.
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The Supreme Court noted the overall purpose of Policies 13 and 15 is directed to preserving the natural character of the coastal environment and protecting it from inappropriate subdivision, use, and development,[19] and protecting natural features and landscapes in particular. It also noted the differing levels of statutory protection offered by the NZCPS depending upon the site specific considerations of the "nature of the areas at issue" and the interplay of relevant NZCPS policies. It found that:[20]

> *… 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. In this context, "avoid" appears to means "not allow" or "prevent the occurrence of" …*

Turning to the relationship between NZCPS policies and Part 2 of the RMA, the Court observed that:[21]

> *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 focused objectives and policies. … 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*

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[19] RMA, s 67(3)(b) provides that a regional plan **must** give effect to any NZCPS (emphasis added).

[20] [2014] NZSC 38 at [62].

[21] Ibid at [90].

> *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.*

However, the Supreme Court noted the danger inherent in an overall judgment approach when reconciling the competing considerations of promoting salmon farming and protecting outstanding landscapes in the coastal environment, and the obvious point that only some areas will be "outstanding". The Court therefore stated that:[22]

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

In the context of the NZCPS the Court was able to reconcile Policies 13 and 15, which are aimed at protecting "outstanding" natural features and landscape, with Policy 8, which recognizes the need to make provision for salmon farming in suitable areas. The Court observed 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", and if interpreted in this way the Policies were not in conflict.[23]

The Court considered the framework of s 5 of the RMA in the context of its interpretation and application by the statutory planning instruments in the policy statement and plan hierarchy, and the increasingly specific scrutiny that proposed activities are subject to as they are examined through the lens of the RMA decision-making microscope. It observed that s 5, RMA, "was not intended to be an operative provision" but "rather … sets out the RMA's overall objective".[24] The hierarchy of policy and planning documents "flesh out the principles in s 5" and the ancillary ss 6-8 of the RMA, in an increasingly detailed manner.[25] Such documents give practical effect to s 5 as they form the basis for decision-making. Some of

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[22] Ibid at [131].

[23] Ibid.

[24] Ibid at [151].

[25] Ibid.

the documents may contain elements that are quite specific and not open-textured, and thus will not be subject to a "balanced judgment" re-interpretation under s 5.[26]

As a result, the Court concluded (regarding question 1) that a balanced judgement approach was not appropriate in relation to Papatua when viewed against the backdrop of site specific facts and the relevant NZCPS policies. It found that:[27]

> *The Board accepted that the proposed plan change … would have significant adverse effects on an area of outstanding natural character and landscape … 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.*

Separately, regarding the question of alternatives sites and methods (question 2) the Court found that:[28]

> *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, … 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 …*

Subsequently, there has been a range of commentary about the judgment. For example, the

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[26] Ibid.

[27] Ibid at [153].

[28] Ibid at [170].

likely effect of the landmark judgment was neatly summarised by Peart who observed:[29]

> *This is arguably the most important decision on the Resource Management Act (RMA) that has been given by our courts to date and it establishes new jurisprudence in this area. EDS has always believed that the overall broad judgment approach was wrong and that the RMA contains environmental bottom lines.*

Williams on the other hand expressed a more conservative view of the judgment and considered that it may be limited only to cases regarding the NZCPS. He drew attention to the Court's reliance on the statutory provisions in the RMA that underpin the NZCPS and the pragmatic nature of the "overall judgment" approach and its utility in resource consent decision-making. For example, he observed that:[30]

> *… Any development proposal with material benefits is likely to have some effect on the environment. Absolutes of any kind cannot be reconciled. Complete avoidance is obviously not required, as the words "remedied or mitigated" in s 5(2)(c) themselves confirm.*

However, Williams accepted that while the RMA does not establish a "mandatory 'bottom line' approach … across the board", the scheme of the statute does allow local authorities to set "environmental bottom lines through planning instruments".[31] Additionally, the editorial note to Williams' opinion piece observes that the policy statement and plan hierarchy under the RMA will be "material" to statutory interpretation, and that a proposed activity seeking to achieve something that the NZCPS seeks to avoid "is going to face 'something approaching an environmental bottom line'".[32]

Conclusion

This decision has again brought to the fore what is an interesting and ongoing debate regarding the meaning and effect of Part 2 of the RMA. While Williams' analysis is acknowledged, the potential effect of the *King Salmon* judgment is likely to occur in cases

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[29] Raewyn Peart, Environmental Defence Society, Media Release (17 April 2014).

[30] Martin Williams, *Supreme Court's decision in Environmental Defence Society v King Salmon* Obiter (Resourc Management Law Association 9 June 2014): www.rmla.org.nz: accessed 9 June 2014.

[31] Ibid.

[32] Ibid.

where a proposed activity (based on an effects assessment) conflicts with a relevant policy statement or plan provision that is found to have set one or more environmental bottom lines. This may be limited to cases regarding the matters of national importance under s 6 of the RMA, or may include the other principles in ss 7 and 8 of the RMA. It could, however, have a wider ambit as these provisions are given as non-exclusive examples of what may constitute sustainable management and it remains open to decision-makers to identify other examples of what may be considered to be matters of national importance under the RMA.[33] As a result, the impact of the judgment is potentially wider than contended by Williams, but probably narrower than that anticipated by Peart. Finally, the judgment confirms the strong potential regulatory effect of policy statements under the RMA.[34]

[33] Auckland Volcanic Cones Society Inc v Transit New Zealand (A203/2002) NZEnvC.

[34] [2014] NZSC 38 at [112]-[116] citing *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 23 per Cooke P with approval.