IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 6/2022
[2023] NZSC 112

BETWEEN	PORT OTAGO LIMITED Appellant
AND	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED First Respondent
	OTAGO REGIONAL COUNCIL Second Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Third Respondent
	MARLBOROUGH DISTRICT COUNCIL Fourth Respondent

Hearing:	11–12 May 2022
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and William Young JJ
Counsel:	L A Andersen KC and S M Chadwick for Appellant D A Allan, M C Wright and C S S Woodhouse for First Respondent S J Anderson and T M Sefton for Second Respondent M C Smith, S T Shaw and M Downing for Third Respondent J W Maassen and B D Mead for Fourth Respondent V E Casey KC, V S Evitt and J W E Parker for Waka Kotahi | New Zealand Transport Agency R B Enright for Ngāti Whātua Ōrākei Whai Maia Limited P F Majurey and K Ketu for Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust G C Lanning and C J Ryan for Auckland Council
Judgment:	24 August 2023

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The order remitting the matter to the Environment Court is set aside.**

C **The Otago Regional Council is directed to consult the parties and any other persons it considers appropriate on a redrafted policy 4.3.7(d)–(e) in the proposed Otago Regional Policy Statement either:**

(a) **along the lines in paragraph [87] of this judgment or to similar effect; or**

(b) **otherwise to give appropriate effect to the policies of the NZCPS and their inter-relationships.**

D **Costs are reserved.**

REASONS
(Given by Glazebrook J)

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Introduction

[1] This appeal raises important issues about the relationship between the policies in the New Zealand Coastal Policy Statement (NZCPS) and how such policies should be reflected in lower-order planning documents.[1] Resolving these issues requires us to address the principles established by this Court in *Environmental Defence Society v The New Zealand King Salmon Co Ltd* (*King Salmon*)[2] and *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* (*Sustain Our Sounds*)[3] in a different context. At issue in *King Salmon* and *Sustain Our Sounds* was the effect of the NZCPS on proposed plan changes to enable the establishment of salmon farms in particular locations. This appeal concerns the relationship between the policies in the NZCPS requiring aspects of the natural environment to be protected and the NZCPS policy on ports as it relates to Port Otago, which is critical existing infrastructure.

[2] In particular, the appeal relates to the validity of a policy relating to ports contained in a proposed Otago Regional Policy Statement (proposed regional ports policy) and the suggested modification by the Environment Court.[4] This requires a consideration of the following issues:

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1 "New Zealand Coastal Policy Statement 2010" (4 November 2010) 148 *New Zealand Gazette* 3710.

2 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

3 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 [*Sustain Our Sounds*].

4 For the original proposed regional ports policy, see below at [14]. For the suggested wording of the Environment Court, see below at [32].

(a) the relationship between policy 9 of the NZCPS relating to ports (the NZCPS ports policy) and a number of other policies that require adverse effects of activities to be avoided (the NZCPS avoidance policies): policy 11 (indigenous biological diversity (biodiversity)), policy 13 (preservation of natural character), policy 15 (natural features and natural landscapes) and policy 16 (surf breaks of national significance);[5]

(b) whether any potential conflicts between the NZCPS ports policy and the NZCPS avoidance policies should be addressed in regional policy statements and plans or at the consent level under ss 104 or 104D of the Resource Management Act 1991 (RMA); and

(c) how any conflicts between those policies should be addressed.

[3] Before considering the above issues, we first give a brief factual background and set out the relevant parts of the NZCPS and the proposed regional ports policy. We then summarise the decisions in the courts below and the submissions in this Court.

Factual background[6]

[4] The Otago | Ōtākou Harbour is the only significant natural port location between Timaru | Te Tihi-o-Maru and Bluff | Motupōhue. Port Otago Ltd operates two ports: at Port Chalmers | Kōpūtai and Dunedin | Ōtepoti. Port Chalmers is now one of New Zealand's two deepest container ports and the country's third largest port by product value. Port Otago employs over 300 staff.

[5] Harbour dredging in Port Chalmers began in 1865 and in Dunedin in 1881. Dredging with regard to both ports still remains necessary to remove sediment as the

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5 We have assumed for these purposes that there will be no conflict among the various avoidance policies.

6 A fuller factual background is provided in the Environment Court's decision *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 [EnvC interim judgment] at [8]–[21]; the High Court decision in *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278, (2019) 21 ELRNZ 252 [HC judgment] at [6]–[17]; and the Court of Appeal decision in *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638, [2022] NZRMA 165 [CA judgment] at [2]–[15].

channel fills in. A sand bar at the entrance of the harbour initially restricted the size of vessels that could enter. In the late 1880s, this was rectified by the building of the mole at Aramoana.

[6] The proposed Regional Policy Statement does not itself identify natural landscapes of high or outstanding natural character within the harbour. Such classifications are contained in derivative plans, not yet completed. Two relevant places where the ports operate were identified in evidence by Port Otago before the Environment Court as potentially being within areas of high or outstanding natural character or features.[7]

[7] There are also key habitats in the harbour that could potentially be affected by works related to the ports. For example, seagrass beds in the lower Otago Harbour provide nursery grounds for inter-tidal invertebrates and fish, as well as feeding areas for fish and birds. Part of the seagrass beds off Harwood (on the south side of the lower harbour) fall within a coastal protected area in the Otago Regional Plan. The salt marsh at Aramoana, adjacent to The Spit,[8] is another coastal protection area in the Otago Regional Plan and classified as an area of significant conservation value in the Dunedin City District Plan. There are also important rocky shore habitats, cockle beds and shell banks. The last of these were described in the Environment Court decision as "unique within Otago Harbour and very rare locally, nationally and internationally with birds using the banks in the harbour for roosting".[9]

[8] Finally, there are nationally significant surf breaks at The Spit, Aramoana and at Whareakeake, the latter outside the harbour to the west of Heyward Point. The Environment Court noted that the surf break of The Spit is maintained in part by managed disposal of dredged sediment from the main harbour channel and that there was some evidence that this also applies to the break at Whareakeake.[10]

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7 Namely, the Heyward Point dredging disposal site and the shipping channel: see EnvC interim judgment, above n 6, at [13].

8 The Spit is another stretch of land extending into the harbour, almost perpendicular to the Aramoana mole.

9 EnvC interim judgment, above n 6, at [11(f)].

10 At [14].

The NZCPS

[9] The NZCPS ports policy reads:[11]

> Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by:
>
> (a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and
>
> (b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes.

[10] Turning to the relevant NZCPS avoidance policies, policies 11, 13 and 15 have a similar structure. First, they define the circumstances in which adverse effects must be avoided. In the case of policy 13, this covers areas of the coastal environment with outstanding natural character. In policy 15, this is with regard to outstanding natural features and outstanding natural landscapes in the coastal environment. In policy 11, this relates to certain species and areas listed, for example indigenous ecosystems and vegetation types that are threatened in the coastal environment or are naturally rare, as well as areas containing nationally significant examples of indigenous community types. Moving one step down on the hierarchy of protection, the policies then provide that, in other cases, significant adverse effects must be avoided and other adverse effects avoided, remedied or mitigated.

[11] As an example of these two levels of protection we set out policy 13(1)(a) and (b):

> (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;

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11 "New Zealand Coastal Policy Statement 2010", above n 1, policy 9.

[12] Policy 16, relating to surf breaks of national significance, provides:[12]

> Protect the surf breaks of national significance for surfing listed in Schedule 1, by:
>
> (a) ensuring that activities in the coastal environment do not adversely affect the surf breaks; and
>
> (b) avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.

[13] Policy 7, relating to strategic planning, was referred to by the Environment Court. It provides:

> (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 Act 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.

Proposed Regional Policy Statement

[14] A proposed Otago Regional Policy Statement was prepared by the Otago Regional Council (the Council) and publicly notified on 23 May 2015. The proposed regional ports policy was:

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[12] Footnote omitted.

Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin

Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage their effects by:

(a) Ensuring that other activities in the coastal environment do not adversely affect port activities;

(b) Providing for the efficient and safe operation of these ports and effective connections with other transport modes;

(c) Providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;

(d) Providing for those ports by:

(i) Recognising their existing nature when identifying outstanding or significant areas in the coastal environment;

(ii) Having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;

(iii) Considering the use of adaptive management as a tool to avoid adverse effects;

(e) Where the efficient and safe operation of port activities cannot be provided for while achieving the policies under Objective 3.1 and 3.2 avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area; and

(f) Otherwise managing effects by applying policy 4.3.4.

[15] The proposed regional ports policy refers to objectives in the proposed Regional Policy Statement. Objectives 3.1 and 3.2 in the proposed Otago Regional Policy Statement are:

Objective 3.1 The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained, or enhanced where degraded

…

Objective 3.2 Otago's significant and highly-valued natural resources are identified and protected, or enhanced where degraded

[16] Proposed policy 4.3.4 is also referred to. It provides:

Policy 4.3.4 Adverse effects of nationally and regionally significant infrastructure

Manage adverse effects of infrastructure that has national or regional significance, by:

(a) Giving preference to avoiding its location in all of the following:

(i) Areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal environment;

(ii) Outstanding natural character in the coastal environment;

(iii) Outstanding natural features and natural landscapes, including seascapes, in the coastal environment;

(iv) Areas of significant indigenous vegetation and significant habitats of indigenous fauna beyond the coastal environment;

(v) Outstanding natural character in areas beyond the coastal environment;

(vi) Outstanding natural features and landscapes beyond the coastal environment;

(vii) Outstanding water bodies or wetlands;

(viii) Places or areas containing historic heritage of regional or national significance;

(b) Where it is not practicable to avoid locating in the areas listed in (a) above because of the functional needs of that infrastructure:

(i) Avoid adverse effects on the values that contribute to the significant or outstanding nature of (a)(i)–(iii);

(ii) Avoid significant adverse effects on natural character in all other areas of the coastal environment;

(iii) Avoid, remedy or mitigate, as necessary, adverse effects in order to maintain the outstanding or significant nature of (a)(iv)–(viii);

(c) Avoid, remedy or mitigate, as necessary, adverse effects on highly valued natural features, landscapes and seascapes in order to maintain their high values;

(d) Avoiding, remedying or mitigating other adverse effects;

(e) Considering offsetting for residual adverse effects on indigenous biological diversity.

Where there is a conflict, Policy 4.3.4 prevails over the policies under Objectives 3.2 (except for policy 3.2.12), 5.2 and Policy 4.3.1.

[17] In relation to surf breaks, there are two particularly relevant proposed policies. The first repeats the NZCPS in recognising surf breaks of national importance including The Spit and Wharekeake.[13] The second policy provides:

> **Policy 3.2.12 Managing surf breaks of national importance**
>
> Protect surf breaks of national importance, by all of the following:
>
> (a) Avoiding adverse effects on the natural and physical processes contributing to their existence;
>
> (b) Avoiding adverse effects of other activities on access to, and use and enjoyment of, those surf breaks.

Decisions of the Courts below

Environment Court decision

[18] The Environmental Defence Society Incorporated (EDS) and 24 others appealed the decision of the Council regarding the proposed Regional Policy Statement to the Environment Court. They said that the proposed regional ports policy in (e) with its options to "avoid, remedy or mitigate adverse effects as necessary" failed to give effect to the NZCPS and in particular policies 11(a), 13(1), 15(a) and (b), and 16.[14]

[19] Mediation did not resolve the issue and the appeal was heard by the Environment Court in 2018. In September of that year, the Environment Court issued an interim decision.

[20] The Environment Court took the view that there was a potential conflict between the ports policy and the avoidance policies in the NZCPS. The Court noted the use of the prescriptive verb "requires" in the ports policy and considered that this was used to ensure that there would be an efficient network of safe ports. It said:[15]

> These must be able to service both national and international shipping, with the implication that even large ships need to be catered for if not necessarily the very largest supertankers or container ships. The core of policy 9 is accordingly strongly prescriptive even if there is some discretion as to where, when and how ports are to be located and developed.

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13 Proposed policy 3.2.11.
14 EnvC interim judgment, above n 6, at [5].
15 At [114].

[21] The Court considered that policy 7 (strategic planning) could be used to resolve the conflict between the ports policy and the avoidance policies. It said that some activities that have the potential to cause adverse effects (and therefore breach the avoidance policies) may need to be "considered on a case by case basis so that the potential adverse effects can be considered in the context of a specific factual and predictive situation".[16] Policy 7 suggests that subordinate plans can provide the method for resolving such conflicts by "requiring a resource consent be applied for and determined having regard to purposively framed objectives and policies".[17] In short, the Court held "that reference to policy 7(1)(b)(ii) may be used to resolve any conflict between the directory provisions of policy 9 (Ports) and the even more directory avoidance policies of the NZCPS".[18]

[22] Various parties in the Environment Court had put forward suggested wording to replace the wording in the regional ports policy.[19] The Court went on to evaluate these suggestions.

[23] In terms of efficiency considerations,[20] the Court noted that any analysis of efficiency had to compare the status quo against the other policy options, having particular regard to the efficient use and development of the resources.[21] The parties had, however, not attempted to quantify the net benefits of the options.[22] The Court held that there was no jurisdictional bar to considering the express costs of environmental protection but held that:[23]

> …equally the analysis needs to make an – in this case unquantified – value judgment about the benefits of protecting the life-supporting capacity of the biodiversity estuarine and near-shore (neritic) ecosystems, and of protecting the natural character of the coastal environment.

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16 At [91].
17 At [91].
18 At [92].
19 Set out at [94]–[95].
20 The Environment Court considered efficiency due to the effect of s 32AA of the Resource Management Act 1991 [RMA] which requires an assessment under s 32 and is complemented by s 7(b). Section 7(b) requires decision-makers to have particular regard to "the efficient use and development of natural and physical resources".
21 EnvC interim judgment, above n 3, at [96].
22 At [97].
23 At [100].

[24] The Environment Court identified the safe operation of the ports as a matter of national importance.[24] We comment that this highlights the importance the Court placed on safety considerations.

[25] The Environment Court then made some comments on the relevant policies in the NZCPS and proposed Otago Regional Policy Statement and provided some considerations that could be taken into account when reconciling them.

[26] The Court noted that the NZCPS ports policy contemplated not only existing ports in their current state but the potential development of new ones and the development and improvement of existing ports.[25] It considered that the most relevant and detailed part of policy 9 is sub-policy (b) which it viewed as requiring local authorities (and the court on appeal) to consider where, when and how to provide for three matters:[26]

(a) the efficient and safe operation of existing and future ports;

(b) the development of their capacity for shipping; and

(c) connecting shipping with other transport modes.

[27] The Court commented that, while there are choices to be made as to where, when and how port facilities are to be provided, they must be put in place to ensure New Zealand shipping services can continue. Policy 9(b) also contemplates the development of ports beyond their existing characteristics.[27] The Court nevertheless commented that policy 9 is not wholly prescriptive:[28]

> New ports need to be supplied but not in any particular place or at a particular time; and even existing ports cannot necessarily expand indefinitely and whenever their operators want. All these are part of the questions "where, when and how"?

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24 At [107].
25 At [118].
26 At [119].
27 At [120].
28 At [121].

[28] In terms of the avoidance policies, the Court referred to Part 2 of the RMA and s 6 in particular. It pointed out that, unlike s 6(a) and (b) of the RMA which only protect the coastal environment and outstanding natural landscapes from inappropriate development and use, s 6(c) of the RMA (protection of areas of significant indigenous vegetation and habitats of indigenous fauna) is more absolute in its terms. In the Court's view, this reinforces the strength of the avoidance aspect of policy 11(a) of the NZCPS.[29] The Court considered that the effects of port activities on natural character and natural landscapes (policies 13 and 15) might have a (slightly) lower standard applied with regard to conflicts between directive policies and the assessment as to whether a resource consent should be granted in a particular case.[30] We agree that this may be the case, but it would depend on the circumstances.

[29] Moving on to surf breaks, the Court noted the complex relationship between port operations and the surf breaks in that dredging was related, at least partly, to the creation and shape of the surf breaks.[31] The Court considered that the straight avoidance provision in the proposed Regional Policy Statement would not only cause problems of proof as to causation, but also cause practical problems in deciding whether port activities were improving or harming the surf breaks. In light of those practical difficulties the Court found it difficult to understand why policy 3.2.12 of the proposed Regional Policy Statement contains an avoidance policy when policy 16(a) of the NZCPS does not. In terms of that latter point, we comment that, while policy 16(a) does not contain the word "avoid", it does have the directive term "ensuring". Otherwise, we have some sympathy for the view that natural surf breaks may be more worthy of protection than ones created artificially and we agree that there are problems with proof of effects and also practical problems in ascertaining the effect of port activities on surf breaks.

[30] The Environment Court considered that 4.3.7(d) to (f) of the proposed regional ports policy should be amended to make their place in the overall policy statement easier to understand and to make a distinction between management of the effects of

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29 At [128].

30 At [129]. We comment that, if this lower standard did apply, it would apply to determining whether an effect was sufficiently harmful to breach an avoidance policy not to the strength of the operative verb "avoid" (which would be equivalent in both cases).

31 At [130].

ensuring safety and the effects of transport efficiency.[32] It also considered that it might be useful if the policy were to give "some guidance as to the different standards that might be expected of port activities in relation to different resources".[33] The hierarchy the Court proposed in terms of protection started with surf breaks, then increased in seriousness to effects on outstanding natural character or landscapes and finally effects on biodiversity. It said:[34]

> The reasons for that view are that the effects on human enjoyment of surfing and landscapes, while very important – and in the latter case, are of national importance – are largely reversible and potentially amenable to mitigation. Effects on biodiversity values may be irreversible.

[31] As an aside, we agree that the question of whether effects may be irreversible is an important consideration but question the view that the provisions related to outstanding natural character and landscapes are related to human enjoyment only. These values are subject to the protections in the NZCPS for their own sake also. The same may apply to surf breaks. It is difficult, in any event, to separate out the policies in this way as they will often be inter-dependent. For example, some outstanding natural landscapes, such as pristine indigenous forests, are outstanding in part because of their biodiversity.

[32] In light of its analysis summarised above, the Environment Court proposed the following wording to be inserted after 4.3.7(c) of the proposed regional ports policy:[35]

> (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to nationally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;
>
> (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;

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32 At [134].
33 At [134].
34 At [134].
35 At [135]. Compare the wording of the original proposed regional ports policy: above at [14].

(f) in respect of [nationally][36] significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.

[33] The wording suggested was provisional because it is for the Council and not the Court to set the wording. The Court commented that, to save time, it may be appropriate for the parties to agree on the above version of policy 4.3.7 or similar and to leave the suggested different management of the harbour's different resources to the regional plan. If that occurred, the Court considered that the Council may not have to do more than consult with the parties, and anyone else thought appropriate, before reporting back to the Court. It said that, if more detail were added to the policies, for example distinguishing further between safety and transport efficiency or between the types of resources affected, then this might require wider consultation and public notification.[37]

[34] In the formal orders of the Court, the Council was directed:

(a) to redraft proposed policy 4.3.7 to correct concerns expressed by the Court about the versions put forward by the parties;

(b) consult the parties and any other persons it considers appropriate on a redrafted policy 4.3.7(d) to (e) of the proposed Regional Policy Statement either

(i) along the lines of the Environment Court draft set out above; or

(ii) otherwise to give effect to the policies of the NZCPS and their inter-relationships as explained by the Court in its judgment.

High Court decision

[35] An appeal to the High Court by EDS was heard in June 2019. In September of the same year, Gendall J allowed EDS's appeal.[38] He held that, among other things,

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36 The Environment Court decision refers to "naturally" but, in-line with policy 16, we consider this was likely a typographical error.

37 At [137].

38 HC judgment, above n 6.

the Environment Court erred in recommending wording that did not give effect to the prescriptive NZCPS avoidance policies, contrary to s 62(3) of the RMA.[39] As a result he set aside the interim decision of the Environment Court and remitted the matter to the Environment Court to reconsider in light of his judgment.[40]

Court of Appeal decision

[36] The Court of Appeal dismissed the appeal against the High Court decision.[41] Kós P and Gilbert J held:[42]

> [87] At the end of the day, the short answer in this appeal is that a regional policy statement fails to give effect to an NZCPS policy requiring adverse effects in an area of outstanding natural character to be avoided, by instead providing for adverse effects in such areas to be avoided, remedied or mitigated. Correct application of the principles laid down in *King Salmon* compel that conclusion.

[37] Kós P and Gilbert J did not consider that the NZCPS ports policy is sufficiently textually or contextually different from the aquaculture policy in *King Salmon* so as to enable a different outcome from that case.[43] Both policies require recognition of the importance of port and aquaculture activities respectively. They did not accept that the operative verb in the ports policy is "requires". In their view, policy 9(b) is distinctive in providing a far lower level of direction than policy 9(a) and is broadly consistent with the provision for strategic planning in policy 7.[44]

[38] Kós P and Gilbert J did not see policies 7 and 9 as in conflict with the avoidance policies. They held that policy 7 directs, in an entirely generalised sense, the consideration of providing for future development and identification of where development is, or may be, inappropriate, accepting the submission that policy 7 is "essentially process-driven".[45] They said:[46]

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39 At [72], [104] and [113].
40 At [116].
41 CA judgment, above n 6.
42 They identified two errors in the High Court decision relating to adaptive management and prohibited activities but said they were immaterial to the result: at [88]–[91].
43 At [81] discussing *King Salmon,* above n 2.
44 At [81].
45 At [82].
46 At [82].

> The avoidance policies contain relatively clear environmental bottom lines; policies 7 and 9 contain lower level degrees of direction as to development and other activities in the coastal environment. To describe these policies as equally directive would be incorrect. Reconciliation is not a complex task because the NZCPS contains a clearly discernible prioritisation of values within its text.

[39] Miller J agreed that the appeal should be dismissed but partially dissented from some of the reasoning of the majority.[47] As a matter of construction, he did not agree that the NZCPS ports policy was subject to the NZCPS avoidance policies in this setting.[48] He considered the key verb in the NZCPS ports policy in this case is not "recognise" but "requires". The provision for ports is not optional for the Council, with a port already existing at Port Chalmers, and the Regional Council has no choice as to where the port is situated. Consequently, the ports policy requires the Council to provide for the existing port's safe and efficient operation. This distinguished it from the aquaculture policy at issue in *King Salmon*.[49]

[40] Miller J held that "it is both lawful and prudent to provide for the possibility that [the policies] cannot be fully reconciled".[50] Nevertheless, he said that the Environment Court erred by deciding that the NZCPS ports policy would ultimately prevail should it prove irreconcilable with the NZCPS avoidance policies. The Environment Court envisaged a resource consent process whereby adverse effects would be avoided, remedied or mitigated.[51]

[41] In Miller J's view, the possibility that the NZCPS avoidance policies will preclude any development of port facilities by Port Otago should remain open until Port Otago's needs and the existence, nature and extent of any adverse effects are better known. The Judge said that, in his view, "the Regional Council should return to the drawing board".[52]

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47 At [97] and [113].
48 At [112].
49 At [111].
50 At [112].
51 At [113].
52 At [115].

The submissions of the parties

Port Otago

[42] Port Otago's position is that the decision of the Court of Appeal majority incorrectly creates an absolute prohibition on Port Otago breaching the values protected by the NZCPS avoidance policies, including not permitting Port Otago to avoid potential adverse effects on the protected values by the use of adaptive management. Port Otago supports the dissenting judgment of Miller J.

[43] The potential problems for Port Otago arise from its location and the likelihood that some activity will be required in the future that is necessary for the safe and efficient operation of the ports that may have effects that breach the values protected by the NZCPS avoidance policies. One example given is the possibility that the shipping channel may need to be widened to accommodate large ships with the result that it would further encroach into the Aramoana salt marsh.

[44] Port Otago submits that reading the NZCPS avoidance policies and the NZCPS ports policy together requires the ports to operate safely and efficiently while avoiding the effects protected by the NZCPS avoidance policies. It is only where that cannot happen that there is a conflict that needs to be resolved. This conflict is not reconciled by making the ports policy subject to the avoidance policies but rather through an activity specific evaluation.

[45] Port Otago proposes instead that the following replace paragraphs (e) and (f) of the Environment Court's draft:

> (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in Policy 4.3.4(1)(a)(i) to (iii) *or to surf breaks identified as being nationally significant, Port Otago may apply for* a resource consent *for the operation or development which cannot be granted unless Port Otago establishes the adverse effects from the operation or development are the minimum necessary in order to achieve the efficient and safe operation of its ports*

[46] Port Otago submits that the issue of reconciliation should be dealt with at the regional policy statement level so that the principles are set. It is not satisfactory to

leave this solely to the resource consent stage as this would create major uncertainty and have a stultifying effect.

Marlborough District Council

[47] Marlborough District Council (MDC) supports Port Otago's appeal.[53] It submits that the Court of Appeal majority erroneously interpreted *King Salmon* to mean that the NZCPS avoidance policies are akin to regulation. The majority's approach would, in MDC's submission, unlawfully fetter the evaluative task of regional councils in developing regional policy statements under ss 61–62 of the RMA.

[48] It is submitted that it is inappropriate for objectives and policies in the NZCPS to be subjected to the rigid textual analysis applied by the Court of Appeal majority without regard to the nature of the policies and objectives, the NZCPS as a whole and a consideration of the potential environmental consequences at the regional level.

Environmental Defence Society

[49] EDS supports the approach of the Court of Appeal majority. EDS submits that the proposed Regional Policy Statement must "give effect to" the NZCPS.[54] This is a strong directive intended to constrain decision-makers. On the specific NZCPS policies in question, EDS describes the "avoid" requirements under the NZCPS avoidance policies as "a strong and specific direction". The NZCPS ports policy requires subordinate planning documents to consider "where, when and how" to provide for the safe and efficient operation of ports but does not alter the approach to managing the adverse effects of port activities as provided for under the NZCPS avoidance policies.

[50] EDS submits therefore that the NZCPS avoidance and ports policies do not conflict with each other and are reconcilable. The NZCPS ports policy can be applied according to its terms, within the bounds of the NZCPS avoidance policies. It is at the

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53 Note that the Marlborough District Council does not, however, support all of Port Otago's submissions.

54 RMA, s 62(3).

level at which consent is granted where possible residual conflict between the relevant policies can be resolved.

Otago Regional Council

[51] The Council's position is that the Court of Appeal was correct to dismiss the appeal. It takes essentially the same approach as EDS, although the Council accepts that any apparent conflict between the relevant policies can be resolved at both the consent stage and the regional policy planning stage.

Royal Forest and Bird

[52] Royal Forest and Bird (RFB) submits that the proposed formulation by Port Otago still allows for adverse effects in areas of significant biodiversity, outstanding natural character or significant surf breaks, where they are "the minimum necessary in order to achieve the efficient and safe operation of its ports". RFB says that this does not give effect to the NZCPS avoidance policies which require such effects to be avoided.

[53] RFB submits that the Court of Appeal majority decision in this case is an orthodox application of *King Salmon*. In its submission, there is no material difference between the NZCPS ports and the aquaculture policies at issue in *King Salmon* which could warrant a different outcome from the one reached in that case. The policies can be properly reconciled without conflict. The NZCPS ports policy is applicable but within the bounds set by the more directive NZCPS avoidance policies which provide something in the nature of a bottom line.

[54] Alternatively, if it is considered that there is an irreconcilable conflict, RFB submits that the conflict must be resolved in favour of the NZCPS avoidance policies.

Other submissions

[55] We heard submissions not only from the parties in this case but also from the parties and interested parties in *Royal Forest and Bird Protection Society of*

New Zealand Inc v New Zealand Transport Agency (the East-West Link appeal).[55] The Court of Appeal decision in this case was not available when we heard the East-West Link appeal and some similar issues arise.

[56] In brief, Waka Kotahi | New Zealand Transport Agency submits that the issues should be resolved at the consent level where "avoid" would be a strong policy directive and weighty consideration, but would not operate as an absolute veto. The Auckland Council takes a similar position, as do Ngāti Maru Rūnanga Trust, Te Ākitai Waiohua Waka Taua Inc, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust.

[57] Ngāti Whātua Ōrākei Whai Maia Ltd submits that any conflicts between the different NZCPS policies can be resolved at both the level of regional policy statements and at the consent level. It largely takes the same position as RFB in terms of reconciling any such conflict.

Issues

[58] As noted above at [2], the issues in this appeal are:

(a) the relationship between the NZCPS avoidance policies and the ports policy;

(b) whether conflicts should be addressed in regional policy statements and plans or at the consent level; and

(c) how any conflicts between those policies should be addressed.

Relationship between the NZCPS avoidance policies and the ports policy

[59] We begin our discussion on this issue with some comments on how the NZCPS should be interpreted and on the meaning of "avoid" as used in the avoidance policies. We then consider whether the ports policy is directive — in essence, whether the Court of Appeal majority or minority view of the ports policy in the NZCPS is correct.

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[55] Our decision on the appeal from *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 [East-West Link HC judgment] is currently reserved in this Court.

Finally, we assess whether there is a conflict between the ports and the avoidance policies.

Interpretation of the NZCPS

[60] The meaning to be accorded to the NZCPS should be ascertained from the text and in light of its purpose and its context.[56] This means that close attention to the context within which the policies operate, or are intended to operate, and their purpose will be important in interpreting the policies. This includes the context of the instrument as a whole, including the objectives of the NZCPS, but also the wider context whereby the policies are considered against the background of the relevant circumstances in which they are intended to and will operate. National directives like the NZCPS are by their nature expressed as broad principles.

[61] The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in *King Salmon*, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter.[57]

[62] A policy might be expressed in such directive terms, for example, that a decision-maker has no choice but to follow it, assuming no other conflicting directive policy. As this Court said in *King Salmon*:[58]

> … 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.

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56 Legislation Act 2019, s 10(1) which applies to both Acts of Parliament and to secondary legislation: s 5 definition of "legislation". A national policy statement is secondary legislation: RMA, s 52(4). See also RI Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 206.

57 *King Salmon*, above n 2, at [127].

58 At [116]. See also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 [*Trans-Tasman*] at [242] per Glazebrook and [292] per Williams J.

[63] Conflicts between policies are likely to be rare if those policies are properly construed, even where they appear to be pulling in different directions.[59] Any apparent conflict between policies may dissolve if "close attention is paid to the way in which the policies are expressed".[60] Those policies expressed in more directive terms will have greater weight than those allowing more flexibility.[61] Where conflict between policies does exist the area of conflict should be kept as narrow as possible.[62]

NZCPS avoidance policies

[64] It is clear from this Court's decision in *King Salmon* that the NZCPS avoidance policies have a directive character. This Court said that the term "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of",[63] meaning that the policies at issue in that appeal provided "something in the nature of a bottom line".[64] The Court noted, however, that what was to be avoided with regard to those policies was, in that case, the adverse effects on natural character and that prohibition of minor or transitory effects would not likely be necessary to preserve the natural character of coastal environments.[65]

[65] This Court in *Trans-Tasman* said that the standard was protection from material harm, albeit recognising that temporary harm can be material.[66] Although in a different context, the comments are nonetheless applicable to the NZCPS.[67] It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided.

[66] In summary, the Court in *Trans-Tasman* said that decision-makers must either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean:[68]

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59 *King Salmon*, above n 2, at [129].
60 At [129].
61 At [129]. See also at [152].
62 At [130].
63 At [96].
64 At [132].
65 At [145].
66 *Trans-Tasman*, above n 58, at [252] per Glazebrook J, [292]–[293] per Williams J and [309]–[311] per Winkelmann CJ. See also at [5]–[6] of the summary.
67 *Trans-Tasman* concerned the assessment of applications for marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
68 *Trans-Tasman*, above n 58, at [261] per Glazebrook J, [292] per Williams J and [318]–[319] per

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material…

[67] Adaptive management may also have a role to play, again if the effect is to avoid material harm.[69] In *Sustain Our Sounds*, this Court held that, before an adaptive management regime can be considered, there must first be an adequate evidential foundation to provide reasonable assurances that an adaptive management approach will achieve the goals of "sufficiently reducing uncertainty and adequately managing any remaining risk".[70] If that threshold question is answered in the affirmative, the overall question is whether any adaptive management regime can be considered consistent with a precautionary approach and this depends on:[71]

… an assessment of a combination of factors:

(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.

[68] All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.[72]

Winkelmann CJ. See also at [5] of the summary.

69 *Trans-Tasman* did not discuss whether adaptive management could be used to bring harm under the material threshold because adaptive management is not permitted in the context of marine dumping and discharge consents: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act, s 64(1AA).

70 *Sustain Our Sounds* above n 3, at [125].

71 At [129] (footnote omitted). The Court at [133] noted that factor (d) was the "vital part of the test" dealing with "the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty" and noted four factors appropriate to assess the issue, at least in that particular case.

72 The position is summarised in Trevor Daya-Winterbottom "The meaning of sustainable management: applying *King Salmon*" [2020] NZLJ 52 at 54.

NZCPS ports policy

[69] Turning to the NZCPS ports policy, we broadly agree with the Environment Court and Miller J that "requires" is a key verb in the policy.[73] We accept that "recognise" is also an operative verb and that the clause begins with it. However, the verb "requires" colours what the decision-maker is being asked to "recognise". In other words, the decision-maker is being directed to recognise that a port network is required. To recognise that something is required is to accept that it is mandatory. So, the directive nature of the ports policy arises from the two verbs taken together.

[70] The ports policy in the NZCPS must also be interpreted in light of the existence of an already established ports network, including those operated by Port Otago, and the need to maintain the safe and efficient operation of the ports in that network. As Miller J says:[74]

> For the Regional Council, provision for ports is not optional. There already exists a port at Port Chalmers which is essential infrastructure, forming part of a national ports network and servicing national and international shipping. The NZCPS deems such infrastructure important to community wellbeing. The Regional Council has no choice about deciding whether to provide for the port, and no choice about where to situate it. It follows that what policy 9 requires of the Regional Council is that it consider how and when to provide in its plans for the port's efficient and safe operation, the development of its capacity for shipping, and its connection with other transport modes. In my opinion these requirements are imperative, which sufficiently distinguishes them from the aquaculture policy at issue in *King Salmon*.

Potential for conflict

[71] It follows from what we say above that the NZCPS avoidance policies and the ports policy all have a directive character. Port Otago is responsible for the safe and efficient operation of ports that are part of an established national network operating necessarily in the coastal environment. There is a potential therefore for the ports policy to conflict with the avoidance policies where measures may be needed for the

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73 See above at [20] and [39].

74 CA judgment, above n 6, at [111] per Miller J (footnotes omitted). Contrast the view of the majority at [81].

safe and efficient operation of a particular established port.[75] The next issues therefore are where and how such conflicts should be addressed.

Where conflicts should be addressed

[72] We accept Port Otago's submission that reconciliation of any conflict between the NZCPS avoidance policies and the ports policy should be dealt with at the regional policy statement and plan level as far as possible. This means those considering particular projects will have as much information as possible to allow them to assess whether it may be worth applying for consent and, if so, what matters should be the subject of focus in any application. Equally, decision-makers at the consent level will have as much guidance as possible on methods for addressing conflicts between policies.

[73] Leaving resolution of all possible conflicts to the consent stage would be unsatisfactory, given the large degree of uncertainty (and possible inconsistencies of methodology and results) that would ensue. Having said that, the extent to which a plan can anticipate conflicts and the means of resolving them may be limited by the amount of information available to the drafters of a regional planning instrument. It might not be possible or desirable for a regional planning instrument to do more than identify, where it can, the location and activities that may generate conflicts in the region and set out general principles for addressing the conflict, leaving particular cases to be dealt with at resource consent level.

[74] Dealing with conflicts, as far as possible, in regional planning instruments is consistent with this Court's decision in *Sustain Our Sounds*. That decision largely related to adaptive management, but an issue also arose as to whether a decision-maker considering a proposed plan change could take proposed consent conditions into account. The Court noted that it was common practice, albeit not mandatory in all circumstances, for regional plans to include assessment criteria for determining

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[75] We do not disagree with the Environment Court when it says that policy 9 of the NZCPS also applies to new ports and we also agree with its comment that this directive does not apply in any particular place or at a particular time: EnvC interim judgment, above n 6, at [118] and [120]–[121]; and see above at [27]. No issue relating to new ports is, however, before us in this appeal and the judgment is not therefore to be understood as dealing with new ports.

whether a discretionary activity should be granted a resource consent.[76] The Court commented that:[77]

> [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.
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> [154] … 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. They also give the community information on how such consents will be assessed. …

How any conflicts should be addressed

[75] As there is not sufficient information before us to attempt any detailed reconciliation between the ports policy and the avoidance policies, we provide only general guidance as to how a decision-maker at the resource consent level might approach the reconciliation between the ports policy and the avoidance policies.

[76] If there is a potential for conflict between the ports policy and the avoidance policies with regard to any particular project, the decision-maker would have to be satisfied that:

(a) the project is required to ensure the safe and efficient operation of the ports in question (and not merely desirable);[78]

(b) assuming the project is required, all options to deal with the safety or efficiency needs of the ports have been considered and evaluated. Where possible, the option chosen should be one that will not breach the relevant avoidance policies. Whether the avoidance policies will be breached must be considered in light of the discussion above on what

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76 *Sustain Our Sounds*, above n 3, at [151].

77 Footnote omitted.

78 Our comments are limited to the efficient and safe operation of existing ports. Because it is not before us, we do not deal with expansion of the operations of the ports, although the line between expansion and efficiency will not necessarily be fixed. As the Environment Court remarked, "even existing ports cannot necessarily expand indefinitely and whenever their operators want": EnvC interim judgment, above n 6, at [121] (see also above at [27]).

is meant by "avoidance";[79] including whether conditions can be imposed that avoid material harm; and

(c) if a breach of the avoidance policies cannot be averted, any conflict between the policies has been kept as narrow as possible so that any breach of any of the avoidance policies is only to the extent required to provide for the safe and efficient operation of the ports.

[77] Even where the decision-maker is satisfied of the above, this does not mean that a resource consent will necessarily be granted. There can be no presumption that one directive policy will always prevail over another. In this case, for example, always favouring the ports policy over the avoidance policies or vice versa would not align with the fact that both the ports policy and the avoidance policies are directive.

[78] The appropriate balance between the avoidance policies and the ports policy must depend on the particular circumstances, considered against the values inherent in the various policies and objectives in the NZCPS (and any other relevant plans or statements).[80] All relevant factors must be considered in a structured analysis to decide whether, in the particular factual circumstances, the resource consent should be granted. This means assessing which of the conflicting directive policies should prevail, or the extent to which a policy should prevail, in the particular circumstances of the case.

[79] In the course of the structured analysis, decision-makers will of course assess the nature and importance of the particular safety or efficiency requirements the project addresses. In this regard, we comment that safety issues may have greater weight than efficiency requirements.[81] Decision-makers will also identify the importance and rarity of the environmental values at issue in the particular circumstances and consider these against the background of the NZCPS's recognition of the intrinsic worth of the protected environmental values. As this Court said in

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79 See above at [64]–[66].

80 Reference to Part 2 of the RMA may also assist.

81 This was the view of the Environment Court: see above at [24], the draft policy set out above at [32] and the remarks summarised above at [33].

King Salmon, protection of environmental values is an element of sustainable management.[82]

[80] We comment that port safety and efficiency are largely instrumental considerations more capable of measurement, while preservation of the environment largely involves value judgments which are often not measurable in concrete terms.[83]

[81] We also comment that the structured analysis is not the same as the "overall judgment" approach rejected by this Court in *King Salmon*. This involved "an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources" under s 5 of the RMA.[84] The "overall judgment" approach tended to subordinate the preservation and protection of the environment to the promotion of sustainable management.[85] It did not give full recognition to the fact that protection of the environment is an element of sustainable management and therefore it did not reflect the proper relationship between ss 5 and 6 of the RMA. Nor did it reflect the approach of the NZCPS.[86] Of course, judgments must still be made by consent authorities in accordance with the purpose of the Act, but they are not loose "overall" evaluations. Rather they are disciplined, through the analytical framework we have provided, to focus on how to identify and resolve potential conflicts among the NZCPS directive policies.

[82] The proposed regional ports policy, even as modified by the Environment Court, does not reflect all of the considerations identified above at [76]. Further, the Environment Court's proposed para (e) could well be interpreted as favouring the ports policy over the avoidance policies in the event of any remaining conflict.[87] We recognise that, in some cases, there may be enough information

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82 *King Salmon,* above n 2, at [24(d)], [132], [146] and [148]–[150]; and RMA, ss 5(2) and 6.

83 See the comment in the EnvC interim judgment, above n 6, at [100], quoted above at [23].

84 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 347 cited in *King Salmon,* above n 2, at [41]. See more generally discussion in *King Salmon* at [39]–[42] of the overall judgment approach.

85 See, for example, *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 85 cited in *King Salmon,* above n 2, at [147].

86 *King Salmon,* above n 2, at [147]–[149].

87 This was Miller J's view: CA judgment, above n 6, at [113]. But [121] of the EnvC interim judgment, above n 6, may suggest otherwise: see the earlier discussion in this judgment above at [27]. It may be therefore that the Environment Court envisaged a structured analysis to occur at the resource consent level similar to the analysis we have outlined above.

available as to possible conflicts that may arise in future to be able to give, at the regional plan level, more guidance on the likely outcome of the structured analysis in particular factual circumstances. There was, however, not sufficient information before the Environment Court to allow a conclusion favouring the ports policy to be drawn on a global basis (if indeed that is what the Environment Court intended). Resolution of any conflict, through a structured analysis, will have to occur at resource consent level with regard to particular projects.

Summary of decision

[83] We now summarise our conclusions on the issues identified above at [2] and [58]:[88]

(a) The relationship between the NZCPS ports policy and the NZCPS avoidance policies

We conclude that the avoidance policies and the ports policy are all directive.[89] Further, the ports are part of an existing network necessarily operating in the coastal environment. There is thus potential for conflict between the ports policy and the avoidance policies.[90]

(b) *Whether any potential conflicts between the NZCPS ports policy and the NZCPS avoidance policies should be addressed in regional policy statements and plans or at the consent level under ss 104 or 104D of the RMA*

We conclude that the issue of the reconciliation of any potential conflict between the NZCPS avoidance policies and ports policy should be addressed at the regional policy statement and plan level as far as possible.[91]

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88 This is a summary only and the judgment must be read in full.
89 Above at [64]–[69].
90 Above at [71].
91 Above at [72]–[74].

(c) How any conflicts between those policies should be addressed

Where there is a potential conflict between the avoidance policies and the ports policy with regard to a particular project, the decision-maker would have to be satisfied that:[92]

(i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;

(ii) if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;

(iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

[84] Even where the option chosen encroaches on the avoidance policies only to the extent necessary for the safe and efficient operation of the ports, this does not mean that a resource consent would necessarily be granted.[93] In deciding whether to grant a resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.[94]

Suggested policy amendment

[85] In this case there could be a continuum of legally acceptable versions of a policy providing guidance on the reconciling of the ports and avoidance policies in a regional planning instrument. These would differ primarily as to their specificity. As noted above, a non-specific policy may be necessary where the evidence is limited or non-existent.[95] In this case there are two ports in a particular harbour, a factual situation which provides a reasonable basis for assumptions as to the likely future

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92 Above at [76].
93 Above at [77].
94 Above at [78]–[81].
95 Above at [73].

needs of the ports and the potential impacts on the environment of meeting those needs. A completely non-specific policy would probably be legal (in the sense of not being ultra vires) but would not be particularly consistent with the general scheme of the RMA (in terms of a downwards cascade, with increasing specificity, of national, regional and district planning instruments). More importantly perhaps, such a non-specific policy would not be very helpful. An example of a non-specific policy might be one that simply provided that, in the event of conflict between the ports and avoidance policies, the issue should be determined in accordance with the NZCPS (presumably via the resource consent process).

[86] On the other hand, it will usually not be possible to predict with precision what the future needs of ports will be and how they can be met and the extent to which meeting those needs will cause effects which are to be avoided under the avoidance policies. That being the situation here, it will not be possible for regional planning documents to be expressed with a level of specificity that obviates the need for future factual inquiry (through a structured analysis during the resource consent process) as to how best to reconcile the ports and avoidance policies in respect of the two ports in Otago Harbour in the particular circumstances.

[87] In light of this and our analysis of the required steps above, we provide suggested wording to be inserted after para (c), replacing (d)–(f), of the proposed ports policy (4.3.7):

> (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to nationally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;
>
> (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in Policy 4.3.4(1)(a)(i) to (iii) or to surf breaks identified as being nationally significant, Port Otago may apply for a resource consent for the operation or development where:
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> (i) the proposed work is required for the safe and efficient operation of its port or ports; and

(ii) Port Otago establishes that the adverse effects from the operation or development are the minimum necessary in order to achieve the efficient and safe operation of its port or ports.

[88] As noted above, even when para (e) is satisfied, whether or not a resource consent will be granted will depend on the outcome of the structured analysis in the particular case.[96]

[89] We have taken (d) above from the Environment Court draft.[97] We have largely taken (e) from the draft in the submissions of Port Otago but have added that the work must be required.[98] We have not included the Environment Court's wording about safety being paramount because, while we consider safety very important, we do not consider safety considerations will always prevail over the avoidance provisions as the use of the word paramount might imply. That will depend on the particular circumstances which would be assessed at the resource consent level in the structured analysis.[99] We have included surf breaks as in Port Otago's draft but note that we agree with most of the Environment Court's comments about these, as explained above at [29].

Disposition

[90] As will be clear, we are in general agreement with the Environment Court's reasons, except where we have signalled otherwise. Therefore we do not consider it necessary to send the matter back to the Environment Court for further consideration. Instead, we would make similar orders to those made in the Environment Court but substitute a reference to our suggested draft.

[91] We stress that our wording set out at [87] above is a suggestion only and that it is for the Council to decide on the appropriate wording taking into account the policies in the NZCPS and their inter-relationships as outlined in this judgment.

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96 Above at [77]–[78].
97 EnvC interim judgment, above n 6, at [135] and set out above at [32].
98 See above at [45] and [76].
99 Above at [78]–[81].

Result and costs

[92] The appeal is allowed.

[93] The order remitting the matter to the Environment Court is set aside.

[94] The Council is directed to consult the parties and any other persons it considers appropriate on a redrafted policy 4.3.7(d)–(e) in the proposed Otago Regional Policy Statement either:

(a) along the lines in paragraph [87] of this judgment or to similar effect; or

(b) otherwise to give appropriate effect to the policies of the NZCPS and their inter-relationships.

[95] Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before 21 September 2023.

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