BUDDLEFINDLAY

Implications of the New Zealand King Salmon Supreme Court decision

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30 July 2014

This article addresses the implications of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 (the NZKS decision).[1]

Executive summary

The NZKS decision is significant for RMA law and practice. In its leave decision[2] the Supreme Court commented that the issues "*have not previously been considered by this Court and [the decision] has the potential to affect all decisions under the RMA*." While there is no doubt that the NZKS decision will have a fundamental effect on plan change processes under the RMA, the decision also has ramifications for resource consents and designations. The decisions following the release of the NZKS decision have given it significant weight and broad application. While recent decisions maintain the "*overall broad judgment*" approach for resource consents and notices of requirement, the general comments of the Supreme Court on Part 2 of the RMA have been applied in those contexts and the directive policies of the NZCPS have been given "*very significant weight*".

Background to the NZKS decision

In 2011 Parliament passed substantial aquaculture legislative reforms. Upon the enactment of these reforms New Zealand King Salmon (NZKS) sought a private plan change to the Marlborough Sounds Resource Management Plan. NZKS also sought to rezone eight sites to allow for salmon farming as a discretionary activity, concurrently seeking resource consents for salmon farms within those new zones and one within an already existing aquaculture zone.

The Board of Inquiry's decision

The matters were referred by the Minister of Conservation to a Board of Inquiry for consideration. The Board of Inquiry approved the plan changes and resource consents for four sites, and declined five sites. In approving the plan change and consents for the Papatua site in Port Gore, the Board held that the proposal would have "*high*" to "*very high*" effects on an adjacent area of outstanding natural landscape and outstanding natural character such that it would not "*give effect to*" Policies 13(1)(a) and 15(1)(a) of the New Zealand Coastal Policy Statement (NZCPS), as required by section 67(3) of the RMA. The Board held that this weighed "*heavily against*" the proposed plan change. However, due to the "*compelling*" benefits the site provided for aquaculture (in particular it enabled NZKS to adopt a bio-secure approach to its operations) overall, taking a "*balanced*" approach to the NZCPS and Part 2, the Board approved the plan change for the Papatua site and granted the consents.

Following an unsuccessful appeal to the High Court, the Environmental Defence Society (EDS) appealed to the Supreme Court.[3]

The Supreme Court's decision

The key findings of the Supreme Court were that:

- "G*ive effect to*" means "*implement*"
- The scheme of the RMA is that the "*Minister sets objectives and policies in the NZCPS and relevant authorities are obliged to implement those objectives and policies*"
- Within Policies 13(1)(a) and 15(1)(a) of the NZCPS "*avoid*" means "*not allowing*" and "*inappropriateness*" is interpreted "*by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*"
- On their proper interpretation Policies 13(1)(a) and 15(1)(a) are directive and the NZCPS contains policies that "*are intended to, and do, have binding effect*"
- As the NZCPS gives substance to Part 2 of the RMA within the coastal environment there is no need to refer back to Part 2 unless:

- the NZCPS is invalid;
- the NZCPS does not "*cover the field*" (ie address the relevant issues); or
- after careful reading there is uncertainty or conflict (which the Supreme Court considers will be infrequent, at least for the NZCPS)

- None of the above exceptions applied in this case so the Papatua plan change had to implement the NZCPS
- The Board of Inquiry was wrong in law to make a "*balanced judgment*" or assessment "*in the round*" when considering whether the Papatua plan change gave effect to the NZCPS policies.

The Supreme Court sought to temper some of the more potentially drastic implications of its strict reading of the policy wording by not requiring that all adverse effects be avoided. The Court held that 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.*"[4]

The Supreme Court also provided significant guidance on the interpretation of Part 2 of the RMA, in particular that:

- Section 5 is broadly framed, and states a "*guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more to aid interpretation*"
- "*Avoiding*" in section 5(2)(c) has its "*ordinary meaning of "not allowing" or "preventing the occurrence of*""
- Section 5 be read as a whole, with "*while*" meaning "*at the same time as*"
- While environmental protection is a core element of sustainable management, no one factor of "*the use, development and protection*" of natural and physical resources in section 5 creates a general veto
- Therefore, while environmental bottom lines may be set to protect particular environments from adverse effects, that will depend on a case by case assessment as to what achieves the sustainable management purpose of the RMA
- Sections 6, 7 and 8 "*supplement*" section 5 by further elaborating on particular obligations on those administering the RMA
- "*Inappropriateness*" in sections 6(a) and (b) should be assessed by reference to what it is that is sought to be protected or preserved (we also consider this same reasoning applies to section 6(f) regarding historic heritage[5]).

Implications of the NZKS decision for plan changes

The NZKS decision

The key implications of the NZKS decision for decision-makers on, and drafters of, plan changes are:

- Pay careful attention to the way in which objectives and policies are expressed in all planning documents (the words mean what they say)
- More directive objectives and policies carry greater weight than those expressed in less directive terms
- Directive objectives and policies to avoid adverse effects should usually be accompanied by a restrictive activity status, such as non-complying or prohibited
- There is a hierarchy of planning documents and subordinate plans that must implement the objectives and policies of the NZCPS and an NPS (and arguably a RPS[6]) and, if they are directive, must do so as an "*obligation*"
- When considering the NZCPS and an NPS (and arguably a RPS, and a regional or district plan[7]), do not refer to Part 2 or undertake a "*balancing*" interpretation unless the policy statement does not "*cover the field*" in relation to the issues being addressed, or the wording is uncertain or conflicting.

Judicial interpretation of the NZKS decision

The application of the Supreme Court's reasoning to decisions on plan changes was considered by the Environment Court in *Cook Adam Trustees Limited v Queenstown Lakes District Council* [2014] NZEnvC 117. The Environment Court amended the established[8] legal framework for district plan changes so that *"resort should be had to Part 2 of the Act only if there is a problem with any of the statutory documents we have to consider*." While this matter was not considered by the Supreme Court it is a logical extension of the Supreme Court's reasoning. It will be interesting to see if this interpretation is applied by other divisions of the Environment Court.[9]

On 26 June 2014 the Board of Inquiry into the Tukituki Catchment Proposal[10] released its final report and decisions (the Tukituki decision). The key findings of the Board of Inquiry[11] in relation to the NZKS decision were that:

- The Board applied the NZKS decision to the National Policy Statement for Freshwater Management 2011 (NPSFM), but

noted the different construction of the two policy statements and the focus in the NPSFM on integrated management

- The Board recognised that to the extent policies within the NPSFM are directive they must be given effect to within a plan change unless there is a conflict, and only then can a decision-maker refer back to Part 2
- Despite the "*avoid*" objective and policy wording in the NPSFM, allocation above the water quantity limits in the plan change as set by the Board was classified as a non-complying activity rather than a prohibited activity, on the basis that a prohibited activity status would prevent activities with minor or transitory effects contrary to the intent "*inherent*" in the NZKS decision.

Implications for resource consents and designations

Overall broad judgment approach

The Supreme Court's key finding in the NZKS decision was that the Board's overall broad judgement approach in relation to plan changes was wrong in law. However, the equivalent provisions for the resource consent and designation framework have significantly different wording in that decisions for both resource consents and designations are "*subject to Part 2*" and decision-makers are only required to "*have regard*" to the NZCPS, any NPS and the RPS for resource consents, or have "*particular regard*" to them for a notice of requirement.

Recent decisions support the argument that, because of this difference in wording, the overall broad judgment approach still applies in the context of resource consents and notices of requirement. For example:

- In the Tukituki decision the Board applied an overall broad judgment approach to the consents and designation for the Ruataniwha dam and irrigation scheme without reference to the NZKS decision
- In the Environment Court's decision in *KPF Investments Limited v Marlborough District Council* [2014] NZEnvC 152 (the KPF decision) the Court held, because of the words "*subject to Part 2*" in section 104, that there are "*no absolute bottom lines*" when considering resource consents and, in the event of conflict, an overall broad judgment approach still applies for resource consents provided that:

"*it is recognised that the weight to be given to the relevant considerations must be carefully allocated by reference to both the strong directions in sections 6 to 8 and to any particularisation of those in the statutory instruments from national policy statements down to district plans*"

- The Draft Report and Decision of the Board of Inquiry into the Basin Bridge Proposal (the "Basin decision") released on 22 July 2014 relied on the difference in statutory wording to hold that for notices of requirement the overall broad judgment approach should continue to be applied
- In the Draft Report and Decision of the Board of Inquiry into Ara Tūhono – Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth Section (the Pūhoi decision) released on 25 July 2014, the Board recognised the different statutory wording commenting "*consideration of resource consent applications must include a balanced regard of the NZCPS, rather than being required to give effect to that policy statement.*"

General findings of the Supreme Court

While the Supreme Court's findings in relation to the overall broad judgment approach may be confined to plan changes, a number of its general findings in the NZKS decision are likely to apply equally to resource consent and designation decisions, such as:

- The interpretation of section 5 and Part 2[12]
- The need to interpret individual objectives and policies carefully and those that are directive and specific have greater weight than those that are less directive and more general[13]
- That planning documents, in particular at a national level, can give substance to Part 2.

The above matters are illustrated in the KPF decision in which the NZKS decision was a significant factor in the Court's decision to decline discretionary activity consents for a salmon farm. In that case the site was within an area of outstanding landscape value identified in the Marlborough Sounds Resource Management Plan. The Court:

- Held the proposal had a high effect on natural character and a significant (at the low end) effect on landscape values
- Held the meaning of natural character in section 6(a) of the RMA needs to be read in the light of Policy 13 of the NZCPS
- Rejected the argument that Policies 13 and 15 only applied if there were significant effects stating that if there are "*merely*" adverse effects on outstanding areas they should be avoided under 13(1)(a) and 15(1)(a), although on the facts of the case the adverse effects were significant

- Held that the NZKS decision has particularised section 6(b) "*in a clear-cut way, so that adverse effects are not to be avoided, remedied or mitigated, but simply avoided*"
- Applied section 6(b) and Policy 15 of the NZCPS, recognising the difference between "*have regard to*" (under section 104) as opposed to "*giving effect to*" (under section 67(3)), such that the Court found they weighed heavily against granting consent.

Consistent with the KPF decision, in the Pūhoi decision (which related to both resource consents and designations) the Board recognises the difference in statutory wording and still stated that in doing so it is not "*appropriate to diminish the Supreme Court's decision, particularly as regards the importance of the NZCPS and the directive policies it contains.*" Out of "*deference to the Supreme Court's decision*" the Board gave "*very significant weight*" to the directive policies in the NZCPS, such as policies 13(1)(a) and 15(1)(a), even though it was only required to have regard (or particular regard) to them.

Potential effects for non-complying activities

The Supreme Court's strict interpretation of individual policies, especially directive ones, may influence the application of the section 104D(1)(b) gateway for non-complying activities. Established case law is that when considering whether a proposal is "*contrary to the objectives and policies*" of a relevant plan, the objectives and policies of the plan as a whole are considered, although individual objectives and policies can have significant weight (such as a restriction on urban activities in a rural zone). The Supreme Court decision may expand the circumstances when a proposal is considered to be contrary to the objectives and policies of the plan if it is clearly contrary to a specific and directive objective or policy.[14]

[1] Paul Beverley and David Allen acted as counsel for the Board of Inquiry into the New Zealand King Salmon Proposal.

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

[3] Sustain our Sounds also appealed to the Supreme Court and in that decision the Supreme Court sets out the legal framework for, and application of, the precautionary approach and adaptive management: see *Sustain our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

[4] With respect, while appearing to be a deliberate carve-out, this attempt to temper the implications of its decision appears at odds with both the Supreme Court's strict reading of the wording of the policies in issue and its interpretation of the word "*inappropriate*". It was done to respond to practical arguments as to the chilling effect of the Supreme Court's interpretation on development within such areas, for example the development of navigational safety aids within, or adjacent to, an outstanding natural landscape or area of outstanding natural character.

[5] Our position is supported by the Board of Inquiry in the Basin decision which applied the Supreme Court's interpretation of inappropriateness to section 6(f).

[6] While the Supreme Court did not comment on whether a RPS must be strictly implemented in lower order documents, or whether reference to Part 2 is allowed, such an approach would be consistent with the Court's interpretation of "*give effect to*". Irrespective, the Supreme Court emphasised that it is good integrated plan making for lower order documents to follow higher order documents.

[7] See footnote 6 above.

[8] As stated by the Environment Court in numerous cases including *Long Bay-Okura Great Park Society Inc v North Shore City Council* (A78/2008) at paragraph [34] and *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at paragraph [19].

[9] Footnote 13 below gives support to this interpretation being more broadly accepted.

[10] Paul Beverley and David Allen acted as counsel for the Tukituki Catchment Proposal Board of Inquiry.

[11] Various aspects of the Board's decision, including giving effect to the NPSFM, are under appeal to the High Court.

[12] Applied by the Board of Inquiry in the Basin decision.

[13] Applied by the Board of Inquiry in the Basin decision, including with the comment that where policies in any planning document relevant under section 171(1)(a) pull in different directions then there may be a justification to determine which policy prevails.

[14] In *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 the High Court overturned the Environment Court's reading of the plan as a whole when there were was a directly relevant and specific objective (with policies) related to the proposal. In such circumstances the High Court commented: "*It is not an overall judgement of some degree of the adverse effects of the proposal. The test is tougher. The activity must not be contrary to any of the*

objectives and policies."

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