BUDDLE FINDLAY

The perils of policy statements

Jennifer Caldwell

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A recent High Court decision provides the latest in a series of salutary lessons for those who may think national policy statements present a helpful shortcut to 'getting things done' while we wait for comprehensive RMA reform.

A national policy statement (NPS) is a strategic instrument that sit at the apex of the statutory planning hierarchy under the Resource Management Act 1991. Issued by central government to support implementation of the Act, with limited public participation and not subject to appeal, they've been few and far between since 1991. Arguably the lack of adequate national policy direction has been a root cause of the RMA's perceived under-performance, and it's curious that the Government's recent announcement of major reform to the Act occurred at the same time as a flurry of draft national policy statements on urban development, highly productive land and freshwater. After a long wait, an indigenous biodiversity NPS is expected shortly.

The New Zealand Coastal Policy Statement (NZCPS) is the oldest, and was for many years the only, NPS. The RMA requires lower order planning documents (such as regional and district plans) to implement it. It contains explicit and directive policies requiring protection of the coastal environment, as well as policies acknowledging the need to provide for appropriate development within that environment. The tension between these matters, particularly in the case of significant infrastructure that has a functional need to locate on or near the coast, has escalated in recent years following the Supreme Court's *King Salmon* decision.

King Salmon involved the policy framework in the Marlborough Sounds and whether it could provide for marine farming having regard to NZCPS policies that require the complete avoidance of adverse effects. The Supreme Court decided that those avoidance policies have primacy over those enabling development in the coastal environment (notably an aquaculture policy), essentially rendering the "avoid" policies environmental bottom lines. Subsequent decisions have grappled with the implications of *King Salmon* for infrastructure, but *Port Otago* provides a stark reminder of the difficulties it presents.

The Otago Harbour is relatively shallow and narrow and is surrounded by areas of significant indigenous biodiversity, including seagrass beds, a kelp forest, shell islands, as well as landscapes which have high values and may be outstanding. The harbour is also home to two well-established ports, Port Chalmers and Port Dunedin, which provide significant benefits to the local and regional economy.

When issuing a new regional policy *statement* in 2016 (following submissions and a hearing process) the Otago Regional Council elected not to make express provision for port activities, but rather to make general provision for infrastructure. In determining the port operator's subsequent appeal, the Environment Court held that the NZCPS "contemplates that adverse effects of port structures on certain landscapes or ecosystems are to be avoided in almost all circumstances but not in all", essentially reading the "port policy" (Policy 9) as being equally prescriptive as the "avoid effects" policies (Policies 13 and 15) and attempting to reconcile the two. The Environment Court proposed wording for the regional policy framework that would enable consents for port activities to be considered on a case by case basis, even where the proposed activities could not avoid all adverse effects on areas with outstanding or significant values.

That decision was appealed to the High Court by two environmental groups (*Environmental Defence Society v Otago Regional Council* [2019] NZHC 2278), on the basis that the Environment Court had not given effect to the directive NZCPS policies or to the *King Salmon* decision. The High Court agreed, determining that the regional policy framework must "require port activities [including activities associated with safety and efficiency] to 'avoid adverse effects' on Outstanding Coastal Sites".

Consistent with an earlier High Court decision on infrastructure in the coastal environment in the Bay of Plenty region, the Court's decision in *Port Otago* appears to confirm that those NZCPS policies that apparently provide for development in the coastal environment in fact do not. The aquaculture, infrastructure and port policies have all been held to be subservient to the avoidance policies.

This is not good news for infrastructure operators. Infrastructure projects – whether new construction, upgrades or expansions – are becoming progressively more difficult to consent in the coastal environment, even where they can demonstrate a functional need to be there.

As things stand, this line of cases will likely hinder new port developments and expansions throughout New Zealand. If *Port Otago* goes to the Supreme Court, watch this space. In the meantime, let's hope any directive policies in the latest round of national

policy statements have been drafted with care and with sufficient regard to their impact.

This article was written by Jennifer Caldwell and Kathy Wilson for the NBR (November 2019).

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659