

21 December 2020

The Chairperson  
Hearing Panel Proposed Waikato District Plan  
C/- Waikato District Council  
Private Bag 544  
NGARUAWAHIA 3742

Partner: Bridget Parham

File Ref: 204622-799

**For: Dr Phil Mitchell**

## Hearing 21A : SNA's - Application of Policy 11 NZCPS

### Legal Advice Sought

1. The Hearing Panel have requested a legal opinion on the interpretation and application of Policy 11(a) of the New Zealand Coastal Policy Statement (NZCPS) in the context of manuka and kanuka in the coastal environment within the Waikato District. In particular, the panel seek advice on:
  - (a) Whether Policy 11(a) is an absolute policy requiring even minor adverse effects to be avoided;
  - (b) Whether Policy 11(a) applies at the individual tree level, taxa level, district or regional level; and
  - (c) What adverse effects (at the appropriate scale) must be avoided to give effect to Policy 11(a)(i) NZCPS?

### Executive Summary

2. The High Court has stated that the Supreme Court's observations in *Environmental Defence Society Inc. v the New Zealand King Salmon Company Ltd*<sup>1</sup> ("*King Salmon*") relating to Policies 13 and 15 of the NZCPS are equally applicable to Policy 11. Having analysed the *King Salmon* decision and its approach to the interpretation of the NZCPS, and the application of that decision by subsequent courts, my conclusions in relation to the three questions set out above are as follows.
3. Policy 11(a)(i) does not require all adverse effects to be avoided. It may be acceptable to allow activities that have minor or transitory adverse effects and still give effect to the policy where

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<sup>1</sup> [2014] NZSC 38.

the avoidance is not necessary or relevant to protect the indigenous biological diversity in the coastal environment.

4. The scale at which Policy 11(a)(i) applies depends on the circumstances of the particular threatened or at risk species. Manuka and kanuka are only classified as threatened or at risk as a precaution against the risk of myrtle rust. However, there is no evidence of the disease in any manuka or kanuka species in the Waikato District. The populations of both species remain large and stable, as they were before their status was elevated. They are common and wide spread throughout the district. In the circumstances, Policy 11(a)(i) should apply at the district level in relation to the management of manuka and kanuka. In my view, the policy would only apply at the individual tree level or property level if either species was at risk of extinction or irreversible loss. That is not the case here.
5. Context is also relevant to identify the nature of the adverse effects to be avoided to ensure protection under Policy 11. It is appropriate to look at the reason why the taxa has been classified as threatened or at risk in the first place. In the case of manuka and kanuka, the only adverse effects to be avoided are those that pose a risk of contaminating manuka and kanuka with myrtle rust. Activities with the potential to cause such adverse effects are when people and/or machinery come into contact with manuka and kanuka, such as clearance activities or cutting firewood.
6. Council's ecologist has assessed the likely risk of myrtle rust being spread by such activities as negligible. He concludes that because the effect at the population level of the species is negligible, making provision for the removal of manuka and kanuka in the PDP for the purpose of maintaining or reinstating productive pasture meets the requirement of Policy 11(a)(i) and therefore the avoidance of such negligible effects is not necessary.

### **Background**

7. In response to submissions from Waikato Regional Council (WRC) and Department of Conservation (DoC), the section 42A report author has recommended in her rebuttal evidence a new rule requiring a discretionary activity status for indigenous vegetation clearance in a significant natural area (SNA) within the coastal environment. The new rule seeks to give effect to Policy 11(a) of the NZCPS.
8. Two species that are very common in the Waikato District, manuka (*leptospermum*) and kanuka (*kunzea*) meet the criteria for an SNA in Appendix 2 of the Proposed Waikato District Plan: Stage 1 ("PDP") as a result of the species being listed as threatened or at risk in the New Zealand Threat Classification System, 2017.
9. The consequence of this classification is that Policy 11(a)(i) of the NZCPS applies to manuka and kanuka within the coastal environment and, based on the report author's recommendation in the rebuttal evidence, any removal of the species within the coastal environment would require a discretionary land use consent. This has caused concern amongst the farming industry who gave evidence at the hearing that manuka and kanuka is considered to be a pasture weed.

### **Policy 11 NZCPS**

10. Policy 11(a) of the NZCPS seeks to protect indigenous biological diversity in the coastal environment by avoiding adverse effects on indigenous taxa, amongst other matters listed in

clause (a). Clause (b) seeks to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on areas of predominantly indigenous vegetation in the coastal environment.

11. Policy 11 of the NZCPS provides:

**Indigenous biological diversity (biodiversity)**

To protect indigenous biological diversity in the coastal environment;

- a. avoid adverse effects of activities on:
  - i. indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
  - ii. ....
- b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
  - i. ...
  - ii. ...

12. Pursuant to section 75(3)(b) RMA, a district plan must give effect to the NZCPS. The Supreme Court in *King Salmon* did not comprehensively consider Policy 11 NZCPS. However, in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council*<sup>2</sup>, the High Court stated that the Supreme Court's observations in *King Salmon* relating to Policies 13 and 15 of the NZCPS are equally applicable to Policy 11. The formulation of that policy is identical to the formulation of Policies 13 and 15 - all three policies use the phrase "avoid adverse effects of activities on."

13. Accordingly, it is necessary to analyse the Supreme Court's decision in *King Salmon* and its approach to the interpretation of the NZCPS, particularly Policies 13 and 15.

**King Salmon decision: overview**

14. The Hearing Panel will be familiar with the *King Salmon* decision but it is useful to briefly summarise the factual situation before the Supreme Court. *King Salmon* applied for changes to the Marlborough Sounds Resource Management Plan, to change salmon farming from a prohibited activity to a discretionary activity in eight locations. It also applied for resource consent to undertake salmon farming at those locations, and at one other location, for a term of 35 years. The applications were decided by a Ministerial appointed Board of Inquiry ("Board").

15. The Board found that the proposal would have high to very high adverse effects on areas with outstanding natural character and landscape and therefore would not give effect to Policies 13(1)(a) and 15(a) of the NZCPS. However, the Board applied an overall broad judgment under Part 2 RMA and approved the plan change and resource consents in respect of four sites. The Environmental Defence Society and others appealed on the grounds the Board had misapplied

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<sup>2</sup> [2017] NZHC 3080 at para [119]

the NZCPS. The appeal was unsuccessful in the High Court. The appeal from the High Court then went directly to the Supreme Court.

16. The Supreme Court considered the following matters which are relevant to the scope of this legal advice:
  - (a) What the requirement to give effect to the NZCPS means?
  - (b) What giving effect to Policies 13 and 15 means?
  - (c) The meaning of “avoiding” (and “inappropriate”).
  - (d) Whether the Board was correct to apply the “overall judgment” approach.
17. The majority allowed the appeal. The ratio of the majority decision is relatively narrow. It found that the proposed plan change would have significant adverse effects on an area of outstanding natural character and the directions in Policies 13(1)(a) and 15(a) NZCPS would not be given effect to if the applications were to be granted. It held the Board was obliged to give effect to the NZCPS. It had failed to do so and the plan change did not therefore comply with section 67(3)(b) RMA. It rejected the “overall broad judgment approach” taken by the Board.
18. The dissenting judgment was delivered by Justice William Young. We will return to his dissenting judgment later.

#### **Policies 13 and 15 NZCPS**

19. It is convenient here to set out the requirements contained in Policies 13 and 15 which are to similar effect.
20. Policy 13 provides:

##### **Preservation of natural character**

- (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....

21. Policy 15 provides:

##### **Natural features and natural landscapes**

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

- a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

- b. avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;  
...
22. As can be seen above, the formulation of Policies 13 and 15 are identical to Policy 11. Each policy adopts a tiered approach. At the first tier, all adverse effects must be avoided on the elements identified (clause a in all three policies). The second tier has two levels. The first level is the avoidance of significant adverse effects on defined categories. At the second level, where adverse effects are not significant, all other effects on the defined categories are required to be avoided, remedied or mitigated.

### **What does the requirement to *give effect to* the NZCPS mean?**

23. Section 75(3)(b) RMA provides that a district plan must “give effect to” any national policy statement, any New Zealand coastal policy statement and any regional policy statement. In considering the requirement to “give effect to”, the Supreme Court in *King Salmon* stated:

[77] The Board was required to “give effect to” the NZCPS in considering King Salmon’s plan change applications. “Give effect to” simply means “implement”. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.

24. However, the Supreme Court also acknowledged a caveat to the directive:

[80] We have said that the “give effect to” requirement is a strong directive... There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

25. The Supreme Court went on to say the notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they considered that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA<sup>3</sup>. Furthermore, the Court acknowledged the requirement to “give effect to” the NZCPS is intended to constrain decision-makers.<sup>4</sup>

### **Meaning of “Avoid”**

26. The Supreme Court then considered the meaning of “avoid” in the context of section 5(c) RMA and the relevant provisions of the NZCPS<sup>5</sup>. It stated avoid means “not allow” or “prevent the occurrence of”.<sup>6</sup>
27. The majority considered the argument by King Salmon that because the word “effect” is widely defined in section 3 RMA and that definition carries over to the NZCPS, any activity that has an adverse effect, no matter how minor or transitory, will have to be avoided in an

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<sup>3</sup> King Salmon at para [90].

<sup>4</sup> Ibid at para [91].

<sup>5</sup> Ibid at para [96].

<sup>6</sup> Ibid at para [93] and [96].

outstanding area falling within Policies 13 and 15. The majority did not however accept that argument:

[145] The definition of “effect” in s 3 is broad... So the question becomes, **what is meant by the words “avoid adverse effects” in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy.** Taking policy 13 by way of example, its opening words are: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development”. Policy 13(1)(a) (“avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character”) relates back to the overall policy stated in the opening words. **It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.** Moreover, some uses or developments may enhance the natural character of an area. [emphasis added]

28. It is clear from the above passage that what adverse effects are to be avoided (and what is inappropriate) should be assessed by reference to what is being protected – being the opening statement in the relevant policy. Furthermore, it may be acceptable to allow activities that have minor or transitory adverse effects in outstanding areas and still give effect to Policies 13 and 15 NZCPS where the avoidance of such effects it not necessary to preserve the natural character of the coastal environment or protect natural features and natural landscapes.
29. In his dissenting judgment, Justice Young notes that the majority decision suggests:
- (a) That the literal words in which the policies are expressed can be read down in light of the purpose stated in each policy; and
  - (b) A de minimis approach to adverse effects can be taken.

#### **What does giving effect to Policies 13 and 15 NZCPS mean?**

30. The Supreme Court stated that the overall purpose of the directions in Policies 13 and 15 is to preserve the natural character of the costal environment and to protect it from inappropriate subdivision, use and development (Policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (Policy 15).<sup>7</sup> Accordingly, it went on to say that the local authority’s obligations vary depending on the nature of the area at issue. Areas which are “outstanding” receive the greatest protection: the requirement is to avoid adverse effects. Areas that are not “outstanding” receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects. In this context, “avoid” appears to mean “not allow” or “prevent the appearance of”.<sup>8</sup>
31. The Supreme Court said Policies 13(1)(a) and (b) and 15(a) and (b) are in the nature of a bottom line<sup>9</sup> and to apply the overall judgment approach to their implementation would:

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<sup>7</sup> King Salman at para [62].

<sup>8</sup> Ibid at para [62].

<sup>9</sup> Ibid at para [132].

- (a) Undermine the strategic region-wide approach that the NZCPS requires regional councils to take to planning.<sup>10</sup>
- (b) Be inconsistent with the elaborate process required before a national coastal policy statement can be issued (preparation of an evaluation, public consultation, requirement for a board of inquiry process).<sup>11</sup>
- (c) Create uncertainty. The notion of giving effect to the NZCPS “in the round” or “as a whole” is not one that is easy either to understand or to apply.<sup>12</sup>

#### **Giving effect to Policy 11(a)(i)**

32. Giving effect to Policy 11(a)(i) of the NZCPS requires a four-step process:

- (a) The first step is to identify the relevant threatened or at risk taxa (in this case manuka and kanuka);
- (b) The second step is to consider what the actual and potential adverse effects are on that species;
- (c) The third step is to identify which activities may cause those adverse effects for that species;
- (d) The fourth step is to identify how those effects can be avoided.

#### **At what scale does Policy 11(a)(i) apply?**

- 33. The panel has queried whether the avoidance Policy 11(a)(i) applies at the individual tree level, taxa level or at the district or regional level. That is, when implementing the four-step process above, at what scale does Policy 11(a)(i) apply?
- 34. The Supreme Court in *King Salmon* stated that the NZCPS requires a region-wide approach<sup>13</sup>. Most decisions concerning the NZCPS relate to regional plans or regional resource consents. A district council’s functions under section 31 RMA are limited to the jurisdictional boundaries of its own district, as is the reach of any operative or proposed district plan (in the absence of any transfer of functions by the regional council under s33 RMA). This is notwithstanding that Policies 4 and 5 of the NZCPS requires that planning documents and decision-makers consider effects across land/water interface, irrespective of jurisdictional boundaries and responsibilities. The intent of these policies is that councils and agencies co-ordinate their management of activities within the coastal environment and work collaboratively.
- 35. The NZCPS 2010 Implementation Guidance Introductory note<sup>14</sup> (“Guidance Note 2018”) states that “As with all management of natural and physical resources, particular situations must be looked at in context.”<sup>15</sup> It goes onto state “The context in which words such as ‘avoid’... are

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<sup>10</sup> Ibid at para [135(a)], [139] and [153].

<sup>11</sup> Ibid at para [136].

<sup>12</sup> Ibid at para [137].

<sup>13</sup> *King Salmon* at para [153].

<sup>14</sup> NZCPS 2010 Implementation Guidance Introductory note, published by the Department of Conservation, updated May 2018.

<sup>15</sup> Ibid, page 4.

important and requires the policy to be read as a whole and **applied in relation to the facts of a situation.**<sup>16</sup> Significantly, the NZCPS Guidance Note Policy 11: Indigenous biological diversity (biodiversity): May 2019 (“Guidance Note 2019”) states that:<sup>17</sup>

*The avoidance of adverse effects will be specific to each species and type of adverse effect.*

36. Therefore, the scale at which Policy 11(a)(i) applies depends on the circumstances of the particular threatened or at risk species. If a species is at risk of extinction or irreversible loss, then it may be necessary to avoid adverse effects at the individual level (for example on each individual tree, bird or mammal).
37. The Environment Court’s decision in *RJ Davidson Family Trust v Marlborough District Council*<sup>18</sup> considered the adverse effects on a threatened indigenous taxon. The Court considered an appeal against the decision of the Marlborough District Council to decline consent to establish a mussel farm in the Marlborough Sounds. The majority of the Environment Court refused consent, while the minority held that the application should be granted.
38. The Environment Court considered the adverse effects of the proposed mussel farm on the New Zealand King Shag, an indigenous taxon which is listed as threatened in both the New Zealand Threat Classification and in the IUC Red List, and its habitat. The Court did not focus on the effects on each individual King Shag but rather on the adverse effects of the proposal on the King species (the taxa level), the King Shag habitat and the consequential effect this would have the population in the vicinity of the subject site.
39. In discussing adverse effects in the context of Policy 11, the Environment Court stated:
- [162] The first aspect of Policy 11 is that certain adverse effects are simply to be avoided: the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous flora. We note that categories in (a)(i) and (ii) are not mutually exclusive. **Adverse effects of activities on a taxon obviously include injury to or death of individuals and reduction in population**, but they may also include reductions in EOO or AOO, and reduction in habitat area or quality. **This results from the reasons (e.g. very small populations) why they have been classified as threatened or at risk in the first place.** [Emphasis added]
40. In relation to the adverse effects, the majority concluded:
- [210] Given the scale of the proposal these will be minor (but not minimal) effects by themselves, but they are, with the accumulated and accumulative effects of existing farms, adverse to King Shag habitat (NZCPS Policy 11(a)(iv)) and to King Shags (NZCPS Policy 11(a)(i) and (ii)).
- [275] We recognise that mussel farms such as the application can only be located in the coastal marine area. We also take into account the (social and) economic benefits of the proposed farm. However, we consider the site is not an appropriate area for the reasons identified by the Council and the Societies: the change in benthic conditions within the direct footprint of the farm and nearby, particularly

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<sup>16</sup> Ibid

<sup>17</sup> NZCPS Guidance Note Policy 11: Indigenous biological diversity (biodiversity), published by the Department of Conservation, updated May 2019, page 9

<sup>18</sup> [2016] NZEnvC 81

alternations to seabed morphology from shell drop, faeces and pseudo faeces represented an **adverse effect on the foraging and feeding habitat of King Shag. Those adverse effects on King Shag habitat cannot be avoided as directed by Policy 11 of the NZCPS.**

41. While the Environment Court decision was appealed to both the High Court and Court of Appeal, the decision of the majority was upheld. Neither appeal changed the Environment Court's conclusion regarding effects (being a factual matter, not a question of law).
42. The scale at which Policy 11(a)(i) applies is dependent on the factual situation of the particular threatened or at risk species. As discussed further below, manuka and kanuka are only classified as threatened or at risk a precaution against the risk of myrtle rust. However, there is no evidence of the disease in either species in the Waikato and both species remain common and widespread throughout the district. For these reasons, I conclude it is appropriate to apply Policy 11(a)(i) at the district level in relation to the management of kanuka and manuka. It would be appropriate to apply the policy at the individual level or property level if either species was at risk of extension or irreversible loss, however, this is not the case.

#### **Application of the King Salmon decision by subsequent Courts**

43. In *Man O' War Station Limited v Auckland Council*<sup>19</sup>, the Court of Appeal considered the interpretation and application of the same NZCPS provisions that were engaged in *King Salmon*. The appellant contended that the *King Salmon* decision involved a significant change to the approach previously taken to the protection of ONL's in the coastal environment, so that all adverse effects within them will now have to be avoided. This was said to flow from the Supreme Court's interpretation of Policy 15 NZCPS creating an environmental bottom line.
44. The Court of Appeal in *Man O' War* referred to Justice Young's dissenting judgment where he considered the effect of the majority's judgment was that regional councils (and district) would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character."<sup>20</sup>
45. However, the Court of Appeal responded by stating:

[65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.
46. In that case, the Court noted that the ONL included areas of significant native vegetation and pastoral land together with buildings, vineyard and olive grove activities. Although natural, it was not pristine or remote. The Court agreed with the Council that it is in that setting the question on whether any new activity or development would amount to an adverse effect would need to be assessed.<sup>21</sup>

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<sup>19</sup> [2017] NZCA 24.

<sup>20</sup> Ibid at para [64].

<sup>21</sup> *Man o' War* at para [66].

47. Recently the Supreme Court’s approach to the interpretation of the NZCPS policies was applied by the High Court in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council*.<sup>22</sup>
48. Here the High Court considered an appeal against the Environment Court’s decision concerning the wording in policies in the proposed regional coastal environmental plan relating to the location of regionally significant infrastructure in areas identified as being indigenous biological diversity Areas A. The policy framework in the plan did not require adverse effects of regionally significant infrastructure in such areas to be avoided but rather allowed for them to be avoided, remedied or mitigated.
49. The High Court held that by finding that the word “avoid” is contextual (i.e. considering context in the round as a part of its proportionate response)<sup>23</sup> and that it is necessary to go further than simply the wording of the plan, the Environment Court had failed to properly apply the directive provisions in the NZCPS and the majority’s observations in *King Salmon*.<sup>24</sup>
50. Whilst the High Court said the Supreme Court’s decision in *King Salmon* does not permit a proportionate or contextual approach, (which it said was an overall judgment approach albeit by a different name), **context may be relevant in considering whether an activity will have adverse effects. This could depend both on the activity itself and on the values and characters of the natural area in issue.**<sup>25</sup>
51. At paragraph [105] the High Court stated:
- [105] While the requirement to avoid adverse effects on high value areas pursuant to Policies 13 and 15 in the NZCPS is not contextual, **the factual question, whether any activity seeking to locate or operate in a high value area will have an adverse effect, may be contextual.** [emphasis added]
52. Of relevance to Policy 11(a) NZCPS, the High Court noted the Environment Court concluded that Policy 11(a) is “not absolute or binary”. The High Court did not dispute that conclusion but said the Environment Court did not attempt to reconcile Policies 11, 13 and 15 with those policies which recognise regionally significant infrastructure and development in the coastal marine area.<sup>26</sup>

#### **Application of the King Salmon principles to the management of manuka and kanuka in the PDP**

53. It is important to point out that some commentators are of the view that the *King Salmon* decision is largely based on the factual situation the Supreme Court was dealing with. This factual situation of course included the finding of the Board that salmon farming at one of the locations would have high to very high adverse effects on natural character and outstanding natural landscapes. This factual situation is alluded to by the Court of Appeal in paragraph 45 above. However, it is important to bear in mind the High Court in the *Bay of Plenty Regional Council* decision stated that while strictly obiter, all of the majority’s observations in *King Salmon* are highly persuasive and are observations made by our highest Court. They cannot

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<sup>22</sup> *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] at NZHC 3080, Justice Wylie.

<sup>23</sup> *Ibid* at para [106].

<sup>24</sup> *Ibid* at para [102].

<sup>25</sup> *Ibid* at para [104].

<sup>26</sup> *Ibid* at para [122].

be ignored or glossed over.<sup>27</sup> Wylie J said he did not consider King Salmon can be distinguished, or that it is of limited assistance only.

54. Accordingly, the observations from the Supreme Court are important. The Supreme Court stated the correct approach when giving effect to the NZCPS is to look at the language and how prescriptively or flexibly the words are expressed.
55. The language in Policy 11 (and 13 and 15) requires “avoidance of adverse effects” on the elements identified in Policy 11(a). Avoidance of significant adverse effects is required on the elements set out in Policy 11(b).
56. “Avoid” in the context of Policies 11, 13 and 15 means “not allow” or “prevent the occurrence of”. The word “avoid” is specific and directive. It is intended to constrain decision-makers.
57. “Give effect to” means “to implement”. The implementation of Policy 11 NZCPS depends on what is given effect to. A requirement to give effect to a specific and unqualified policy is prescriptive and binding on decision-makers. The avoidance Policies 11, 13 and 15 are prescriptive. This means that the PDP must require activities to avoid adverse effects on indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System. Manuka and kanuka are included on the classification system. As such, activities involving the clearance of manuka and kanuka within the coastal environment are subject to Policy 11(a)(i) NZCPS.
58. However, the Supreme Court held that it may be acceptable to allow activities that have minor or transitory adverse effects and still give effect to Policy 11(a)(i) where the avoidance is not necessary or relevant to protect indigenous biological diversity in the coastal environment.
59. Furthermore, as noted above, the Supreme Court said context may be relevant in considering the factual question of whether an activity will have adverse effects. This could depend on both the activity itself and on the values of what is sought to be protected.<sup>28</sup> It is therefore important to consider what adverse effects are of concern for manuka and kanuka and what activities may cause those adverse effects. Such adverse effects must be avoided to protect indigenous biological diversity in the coastal environment in order to implement Policy 11(a)(i) NZCPS.
60. As explained in John Turner’s technical response dated 14 October 2020 (attached as Appendix 4 to the section 42A Report), following the discovery of myrtle rust on Raoul Island and northern New Zealand in 2017, all New Zealand myrtaceae were upgraded from “not threatened” to “threatened” as a precautionary measure. This includes manuka and kanuka, thus triggering the application of Policy 11(a)(i) NZCPS.
61. Mr Turner notes that manuka and kanuka are both very common to the Waikato District and there is little evidence of manuka and kanuka populations being adversely affected by infection of myrtle rust within the Waikato and New Zealand.
62. The Supreme Court held the adverse effects to be avoided should be assessed by reference to what is being protected. Further, the Guidance Note 2019 states the avoidance of adverse effects will be specific to each species and type of adverse effect<sup>29</sup> Given manuka and kanuka

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<sup>27</sup> Ibid at para [80].

<sup>28</sup> Ibid at para [104].

<sup>29</sup> See paragraph 35 above.

are only classified as threatened as a precaution against the risk of myrtle rust, not because of any ecological reason, I consider this context is highly relevant to the question of what is being protected and identifying the adverse effects that must be avoided to ensure that protection.

63. In this context, manuka and kanuka are required to be protected from the threat of myrtle rust. Therefore, the *only* adverse effects to be avoided are those that pose a risk of myrtle rust on manuka and kanuka. But for the risk of myrtle rust to these species, manuka and kanuka would not be listed as threatened or at risk, would not qualify as an SNA, would not trigger the application of Policy 11(a)(i) of the NZCPS and would not be subject to controls, or at least restrictive controls, in the PDP. This approach is consistent with the approach taken by the Environment Court in *RJ Davidson Family Trust* where, in identifying the adverse effects of a mussel farm on the threatened King Shag, the Court looked at the reasons why the taxa had been classified as threatened or at risk in the first place – being very small populations.<sup>30</sup>
64. I consider context is also relevant to scale. As mentioned above, the scale at which Policy 11(a)(i) applies is dependent on the circumstances of the particular threatened or at risk species. Given the very small population of the King Shag, the Court identified adverse effects as including injury or death of individual birds as this could result in a reduction in an already small population. By contrast, both manuka and kanuka are very common and widespread species in the Waikato and there is no evidence of myrtle rust infecting these species. The population of both species remain large and stable, as they were before their conservation status was elevated. In the circumstances, it is appropriate to apply Policy 11(a)(i) at the district level in relation to the management of manuka and kanuka.
65. Since the hearing, Mr Turner has considered the activities that may pose an actual or potential risk of contaminating manuka and kanuka with myrtle rust spores. In section 7 of his memorandum to Susan Chibnall dated 15 December 2020 (“Memorandum”), he identifies that activities where people or machinery/equipment come into contact with manuka or kanuka have the potential to spread myrtle rust. Such activities may include clearance activities and cutting for firewood. He explains however, that such activities are not the primary mechanism causing the spread of myrtle rust. He states it is far more likely that manuka and kanuka will be exposed to myrtle rust spores due to wind, birds or insect movements than by people and machinery. He assesses the likely risk of myrtle rust being spread from people and machinery as being minimal. This is due to the absence of any evidence of the disease in manuka and kanuka in the Waikato and given the predominance of wind as the primary vector for the spores.
66. Similarly, Mr Turner considers the removal of manuka and kanuka for the purposes of maintaining and reinstating productive pasture is likely to have negligible effects on both the spread of the disease and on the populations of either species. This is because the populations of both species remain large and stable. It is Mr Turner’s expert opinion that making provision in the PDP for the removal of manuka and kanuka for maintaining and reinstating productive pasture implements Policy 11(a)(i) of the NZCPS because of the negligible effect at the population level.
67. Mr Turner’s assessment of a “negligible” risk of myrtle being spread by people and machinery, including from the clearance of manuka and kanuka, is below the threshold of “minor” adverse effects considered acceptable by the Supreme Court in *King Salmon*. It is Mr Turner’s expert

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<sup>30</sup> See paragraph 39 above.

opinion that avoiding such negligible effects is not necessary to protect the indigenous biological diversity in the coastal environment as the effect at the population level of the species in the district is negligible. Both species continue to be common and widespread throughout the district despite the elevated conservation status.

### **Conclusion**

68. Council's ecologist, Mr Turner, has assessed the likely risk of myrtle rust contaminating manuka and kanuka as a result of clearance and other activities to be negligible. He concludes that making provision in the PDP for the removal of manuka and kanuka for the purpose of maintaining and reinstating productive pasture meets the protection requirement of Policy 11(a)(i) of the NZCPS. In his view, such effects are not required to be avoided to satisfy the policy because the effects at the population level of both species is negligible.
69. As Mr Turner notes in both his evidence and Memorandum, the draft National Policy Statement for Indigenous Biodiversity ("draft NPSIB") proposes to exempt manuka and kanuka from management requirements for development or land use if an area comprising manuka and kanuka is identified as an SNA solely because it is at risk of myrtle rust. The draft NPSIB is expected to be gazetted in the first quarter of next year. It is therefore most likely to be in force prior to the release of the Hearing Panel's decisions on the PDP. If the proposed exemption for manuka and kanuka comes into force, I expect there to be central government guidance on how to reconcile Policy 11(a)(i) of the NZCPS with the exemption in the gazetted NPSIB (if this is not expressly resolved in the national policy statements).

Yours faithfully

**TOMPKINS WAKE**



**Bridget Parham**

Partner