Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council

[2017] NZHC 3080

High Court, Tauranga (CIV-2017-470-57)
Wylie J

31 October, 1 November; 12 December 2017

Appeals — Regional plan — Coastal plan — Interpretation — Natural character — Wording of certain policies in Proposed Regional Coastal Environment Plan concerning location of regionally significant infrastructure in Indigenous Biological Diversity Areas A — Whether Environment Court erred in its interpretation and application of Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442 — Hierarchy of planning documents — Whether Environment Court should have attempted to resolve tension between various policies — Avoidance — Whether a proportionate response — Whether Environment Court erred in interpreting and implementing New Zealand Coastal Policy Statement, Regional Policy Statement and relevant Proposed Regional Coastal Environment Plan objectives — Whether Environment Court had misinterpreted ss 87A, 104 and 104D of the Resource Management Act 1991 — Resource Management Act 1991, ss 87A, 104, 104D.

The Royal Forest & Bird Protection Society of New Zealand Inc (Royal Forest & Bird) appealed against the *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZEnvC 45 decision.

The appeal concerned the wording of certain policies in the Bay of Plenty Regional Council's *Proposed Regional Coastal Environment Plan* (the RCEP) relating to the location of regionally significant infrastructure in Indigenous Biological Diversity Areas A (IBDAA). The basis of the appeal was whether the Environment Court had erred in its consideration and application of *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442 (*King Salmon*) when considering policies in the New Zealand Coastal Policy Statement (the NZCPS) and other national policy statements, the Bay of Plenty Regional Policy Statement (the RPS) and the unchallenged objectives in the RCEP.

The High Court considered the RCEP policies in dispute, and the relief sought by Royal Forest & Bird. It noted that Natural Heritage Policy 1 (NH 1) provided that certain activities might be appropriate in the natural heritage areas of the coastal environment in certain circumstances. However, Policy NH 4 provided that adverse effects must be avoided in any IBDAA. Further, Policy NH 5 provided that for consideration to be given to a development proposal which would adversely affect areas listed in NH 4, the proposal must have transient or minor effects or relate to regionally significant infrastructure. For a proposal to be appropriate under NH 5, it had to be demonstrated that there were no practical alternative locations and that the avoidance of adverse effects was not possible.

The alleged errors of law in the present appeal were that the Environment Court had: (i) erred in its interpretation and application of *King Salmon*; (ii) in its interpretation and implementation of various provisions in the NZCPS and RPS; (iii) in its interpretation and implementation of relevant RCEP objectives; and (iv) in its interpretation of ss 87A, 104 and 104D of the Resource Management Act 1991 (the RMA).

Held, (1) regarding the first ground of appeal, the Environment Court was not entitled to take the approach it did, in focusing on largely unchallenged provisions of the RCEP and ignoring or glossing over the higher order documents. It erred when it proceeded primarily by reference to the RCEP objectives, with only limited reference to the NZCPS and RPS, so failing to "give effect to" such documents, within the meaning of *King Salmon*. Further, the Environment Court failed to seek to analyse the tensions between various policies in the RCEP, an approach which was in conflict with the Supreme Court's observations in *King Salmon*. This was an error. The Environment Court also erred in its interpretation of the word "avoid". It should have considered the relevant avoidance, or "environmental bottom line", policies in the NZCPS. By finding that the word "avoid" was contextual, the Environment Court erred. The Environment Court's proportionate response was also inconsistent with the Supreme Court's approach in *King Salmon*. The majority roundly rejected the broad overall judgment taken by the Board of Inquiry in that case. The proportionate response adopted by the Environment Court in this case was an overall judgment approach — albeit by a different name. The more restrictive regime flowing from the Supreme Court's decision in *King Salmon* does not permit the proportionate, or contextual, response taken by the Environment Court. Although context might be relevant in considering whether an activity would have adverse effects, the Environment Court had not considered context in that sense, but rather in the round. It's finding that the benefits and costs of regionally significant infrastructure seeking to locate in IBDAA, which might have adverse effects, should be assessed on a case-by-case basis was contrary to the Supreme Court's majority decision. It was an error of law. (paras 89, 92, 93, 97-106)

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442, discussed

(2) The Environment Court referred only to a limited number of specified NZCPS provisions, despite the fact that there were a large number of other more relevant provisions, including policies 6(1)(a), 7, 11, 13 and 15. Further, its consideration of the NZCPS was brief and incomplete. It had erred in approving policies and a rule which did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS. Similarly, the Environment Court did not address the directive nature of specified policies in the RPS. (paras 109, 122, 123, 129)

(3) Regarding the third ground of appeal, relating to the interpretation of the RCEP, the Environment Court had misconstrued the objectives contained in the RCEP. These, following the approach in *King Salmon*, recognised that provision needed to be made for regionally significant infrastructure, but not in all locations in the coastal marine area. (para 135)

(4) With respect to the fourth ground of appeal, relating to the correct interpretation of the relevant RMA provisions, the Environment Court had made no erroneous finding. Each of the errors made by the Environment Court in relation to the first three grounds of appeal was material to the Environment Court decisions. The appropriate course was to remit the matter to the Environment Court for reconsideration in light of the present decision. The appeal was allowed in part. (paras 141-143)

Cases referred to

Appealing Wanaka Inc v Queenstown Lakes District Council [2015] NZEnvC 139
BP Oil NZ Ltd v Waitakere City Council [1996] NZRMA 67 (HC)
Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)
Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442
Man O'War Station Ltd v Auckland Council [2017] NZCA 24, (2017) 19 ELRNZ 662
Moriarty v North Shore City Council [1994] NZRMA 433 (HC)
Opoutere Ratepayers and Residents' Association v Waikato Regional Council [2015] NZEnvC 105, (2015) 19 ELRNZ 254
R J Davidson Family Trust v Marlborough District Council [2016] NZEnvC 81
R J Davidson Family Trust v Marlborough District Council [2017] NZHC 52, (2017) 19 ELRNZ 628
Royal Forest & Bird Protection Society Inc v W A Habgood Ltd (1987) 12 NZTPA 76 (HC)
Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council [2017] NZHC 980, (2017) 20 ELRNZ 390
Smith v Takapuna City Council (1988) 13 NZTPA 156 (HC)
Thumb Point Station Ltd v Auckland Council [2015] NZHC 1035, [2016] NZRMA 55

Appeal

This was a partly successful appeal against an Environment Court decision concerning the wording in certain policies in the Bay of Plenty Council's *Proposed Regional Coastal Environment Plan*.

S Gepp and *M Wright* for Royal Forest & Bird Protection Society of New Zealand Inc
R B Enright and *J Pou* for Ngati Makino Heritage Trust
M H Hill for Bay of Plenty Regional Council
H A Ash and *T Fischer* for Tauranga City Council
V J Hamm and *K Jordan* for Te Tumu Kaituna 14 Trust, Ford Land Holdings Pty Ltd, Carrus Corp Ltd and PowerCo Ltd
L H Hinchey for Transpower New Zealand Ltd
M Gribben for New Zealand Transport Agency

Cur adv vult

WYLIE J

Introduction

[1] This is an appeal from a decision of the Environment Court, issued on 31 March 2017.[1] It is brought pursuant to s 299 of the Resource Management Act 1991 (the Act).

[2] The appeal relates to the wording of various provisions in the Bay of Plenty Regional Council's proposed Regional Coastal Environment Plan (the RCEP) relating to natural heritage. It involves the wording of policies NH 1, NH 5, NH 11 and rule S 10, all in relation to the location of regionally significant infrastructure in areas identified in the RCEP as being Indigenous Biological Diversity Areas A.

1 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZEnvC 45.

[3] Annexed to this decision is a table showing the RCEP provisions which are in dispute:

(a) The first column shows the wording of the policies as they stood when this matter was before the Environment Court.

(b) The second column shows the relief sought by the appellant, the Royal Forest & Bird Protection Society Inc (Royal Forest & Bird), when the matter was before the Environment Court, and again on this appeal. The relief sought is in bold-italic.[2] New text sought to be interpolated is underlined. Text sought to be deleted is struck through.

(c) The third column shows the wording of the proposed RCEP as approved by the Environment Court in the decision under appeal. Changes from the version which was before the Environment Court at the commencement of the hearing are either underlined or struck through as the circumstances require.

As will be readily apparent, the numbering of some of the subparagraphs in the various policies is confused. I was advised by counsel that this will be tidied up when the RCEP is ultimately finalised.

[4] At issue is whether, in determining the disputed policies and rule in the RCEP, the Environment Court erred in its approach to the consideration of various provisions contained in the New Zealand Coastal Policy Statement (the NZCPS), the National Policy Statement on Electrical Transmission (the NPSET), perhaps the National Policy Statement on Urban Growth (the NPSUG), the respondent's Regional Policy Statement (the RPS), and unchallenged objectives contained in the RCEP.

[5] Much of the discussion before me focussed on the effect of the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*[3] (*King Salmon*).

[6] It is Royal Forest & Bird's argument that the Supreme Court's decision in *King Salmon* represented a sea change in New Zealand resource management law. It submitted that the Supreme Court recognised that higher order planning documents can provide mandatory directions about how the development and protection of natural and physical resources is to be reconciled, and that where this has occurred, subordinate documents must give effect to the higher order documents. It suggested that it is no longer correct to take an overall broad judgment approach to the promulgation of plans, and that it is not open to regional councils proposing regional plans to depart from national instruments or from their own regional policy statements where they recognise the directives contained in the national instruments, on the ground that regional or activity-specific context requires a departure.

The respondent's RCEP — the changes sought by Royal Forest & Bird

[7] The respondent's proposed RCEP is a combined document, incorporating not only the RCEP but also the Regional Coastal Plan required by s 64 of the Act. The plan covers the entire coastal environment, and it seeks to deal with resource management issues that cross the land/water divide.

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2 The only exception appears to be the words "and attributes" in policy NH 5(c).

3 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442.

[8] The RCEP records as an issue for the region that some uses and development, such as regionally significant infrastructure, have significant social and economic benefits, and can either only be located in the coastal environment, or, due to technical and operational reasons, cannot avoid crossing this area.[4]

[9] Part Two contains various objectives including Objective 1, which seeks to achieve integrated management of the coastal environment, and Objective 2, which seeks to protect the attributes and values of outstanding natural features and landscapes in the coastal environment from "inappropriate" subdivision, use, and development. Objective 2A seeks to safeguard the integrity, form, functioning and resilience of the coastal environment and to sustain its ecosystems by "protecting" what are called Indigenous Biological Diversity Areas A, and "maintaining", "promoting", "enhancing or restoring" other areas of indigenous biodiversity (including Indigenous Biological Diversity Areas B) or indigenous biodiversity generally. Objective 3 seeks to prevent the further loss of the quality and extent of rare and threatened habitats in the coastal environment of the region.

[10] There are then various objectives dealing with activities in the coastal marine area. Objective 25 provides that activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or that have a functional need to be located in the coastal marine area, should be recognised and provided for "in appropriate locations", recognising the positional requirements of some activities. Similarly, Objective 25A recognises and enables "in appropriate circumstances" the operation, maintenance and upgrade of existing regionally significant infrastructure and Objective 25B provides for the establishment of new regionally significant infrastructure "in appropriate locations". Objective 26 provides that activities and structures in the coastal marine area should be located, designed and undertaken in a manner that "is appropriate" given the values and existing uses of their location.

[11] The plan then moves to the policies derived from these objectives.

[12] The natural heritage policies appear in Part 3 of the RCEP. They recognise the areas called Indigenous Biological Diversity Areas A; these are areas that meet the criteria contained in policy 11(a) of the NZCPS. The various areas are identified on maps in the RCEP, and summary information detailing why each mapped area is identified as an indigenous biological diversity area A is set out in a schedule to the plan.[5] There are 23 such areas, many of them in Tauranga Harbour. They are said to contain flora, avifauna, fish, or other fauna all under threat and are classified as either regionally significant or nationally significant.

[13] Policy NH 1 is set out in the annexure to this decision. In summary it provides, in relation to the natural heritage of the coastal environment, that activities can be considered appropriate if they contribute to the restoration and rehabilitation of natural heritage or cultural values associated with natural heritage or if they involve the operation, maintenance, upgrading or development of existing regionally significant infrastructure, or have a functional need to be located in or near the coastal environment in general, or in or near a specific part of the coastal environment, and no reasonably practicable alternative locations exist. They must also be compatible with the existing built environment and level of modification to the environment; be compact; be of appropriate form, scale and design; and they should not, either by themselves, or in combination, have significant adverse effects on the natural processes or ecological functioning of the coastal marine area. There is an express

4 Proposed Bay of Plenty Regional Coastal Environment Plan (2015) version 9.1(h) — Part Two, 1.1 Issue 1A at 11.

5 Schedule 2, Table 1.

exception for the national grid, which is provided for in the NPSET. The Environment Court also added an advice note, requiring that particular consideration be given to, inter alia, policies NH 4, 5 and 11 if an activity could have adverse effects on the values and attributes of an Indigenous Biological Diversity Area A.

[14] Royal Forest & Bird seeks to amend policy NH 1 by making it subject to policy NH 4.

[15] Policy NH 4 provides that adverse effects must be avoided on the values and attributes of, inter alia, any Indigenous Biological Diversity Area A, and that adverse effects must be avoided on taxa. It is recorded that the values and attributes of Indigenous Biological Diversity Areas A are those set out in Schedule 2 to the plan, briefly summarised above.

[16] Policy NH 5 is also set out in the annexure to this decision. In summary, it provides for consideration to be given to subdivision, use and development proposals that will adversely affect the values and attributes associated with the areas listed in policy NH 4 (relevantly, Indigenous Biological Diversity Areas A) only where, after an assessment in accordance with policy NH 4A, transient or minor adverse effects are found to be acceptable, or, under para NH 5(a), the proposal relates to the construction, maintenance or upgrading of regionally significant infrastructure; relates to the provision of access to offshore islands; relates to the operation, maintenance and protection of existing river or land drainage schemes; relates to the continuation of a use that was lawfully established on or before 22 June 2014; provides for the restoration or rehabilitation of indigenous biodiversity, or provides for public recreational access to or along the coastal marine area.

[17] Royal Forest & Bird seeks to limit the exceptions to the policy set out in NH 5(a)(i) to the construction, maintenance or upgrading of the national grid but excluding the construction, maintenance or upgrading of other regionally significant infrastructure. It also seeks to add the words "and attributes" in NH 5(c) — presumably to tie in with policy NH 4.

[18] Policy NH 11 — also in the annexure — provides that an application for a proposal listed in policy NH 5(a) must demonstrate that there are no practical alternative locations available outside the areas listed in policy NH 4, that the avoidance of the effects required by policy NH 4 is not possible, that the route or site selection has considered the avoidance of significant natural heritage areas, or, where avoidance is not practicable, has considered utilising the more modified parts of those areas, that adverse effects are avoided to the extent practicable, and that adverse effects which cannot be avoided are remedied or mitigated.

[19] Royal Forest & Bird seeks to amend this policy by reverting to the original version of the rule, but adding a new subparagraph requiring that significant adverse effects must be avoided, other than in relation to the national grid.

[20] Policy NH 11A provides for offsetting. It is also set out in the annexure. It records that the respondent council can consider allowing a biodiversity offset in certain circumstances.

[21] Structures and the occupation of space in the coastal marine area are dealt with in Part 4 of the plan.

[22] Policy SO 1 recognises that some types of structures are appropriate in the coastal marine area, subject to, inter alia, Policies NH 1, 4, 5 and 11. Policy SO 2 requires that structures in the coastal marine area are to be consistent with the requirements of the NZCPS, in particular policies 6(1)(a) and 6(2), and where relevant, consistent with the NPSET and with the requirements of the RPS in relation

to the coastal environment. Policy SO 3 requires that adverse effects from the use of structures in the coastal environment should be controlled to appropriate levels, having regard to the values of the site, or avoided altogether.

[23] The rules are set out in section 1.2 of Part 4 of the plan. Relevantly:

(a) Some activities are permitted — for example occupation of the common marine and coastal area for recreational activities.

(b) Rule SO 11 provides that the occupation of any part of the common marine and coastal area, the erection or removal of structures, and changes in the use of existing structures that are not in an Indigenous Biological Diversity Area A and that are not otherwise controlled, are discretionary activities.

(c) Rule SO 10 provides that the occupation of any part of the common marine and coastal area, the erection of new structures, and the maintenance or removal of existing structures and any change in the use of existing structures in the coastal marine area, in an indigenous Biological Diversity Area A, that is not otherwise permitted, is a discretionary activity where the structure is for one or more of various identified purposes, including:

(i) providing protection, restoration or rehabilitation of biodiversity values;

(ii) improving water quality;

(iii) providing educational, scientific or passive recreational opportunities;

(iv) navigational aids;

(v) structures erected prior to the date when the plan was notified; or

(vi) the operation, maintenance and protection of existing and new regionally significant infrastructure.

Royal Forest & Bird seeks to limit (vi) above to existing regionally significant infrastructure and the national grid.

(d) Rule SO 12 deals with non-complying structures in Indigenous Biological Diversity Areas A. It provides that the use, erection, reconstruction, maintenance, placement, alteration or extension of any structure on the foreshore or seabed in, inter alia, any Indigenous Biological Diversity Area A, is a non-complying activity, provided that the structure has a functional need to be located in the coastal marine area, except where the structure or use is a permitted activity under rules SO 4, 6, 6A, 7 or 8, or a discretionary activity under rule SO 10.

(e) Other new structures proposed in Indigenous Biological Diversity Areas A are prohibited unless the structure is a relevant activity under rules SO 4, 6, 10 or 12 — rule SO 14.

[24] Some of the words used in the plan are defined. Relevantly, I note the very wide definition given to the words "Regionally Significant Infrastructure". The RCEP provides as follows:

(a) Regionally Significant Infrastructure: is infrastructure of regional and/or national significance and includes:

Rotorua International, Whakatane and Tauranga airports.

The regional strategic transport network as defined in the Bay of Plenty Regional Land Transport Strategy or state highways defined in the National State Highway Classification System.

The Bay of Plenty Rail network.

> Commercial port areas including Tauranga Harbour and its channels necessary for the operation of ports and adjoining land and storage tanks for bulk liquids.
>
> The national electricity grid, as defined by the *Electricity Industry Act 2010*.
>
> Facilities for the generation and/or transmission of electricity where it is supplied to the national electricity grid and/or the local electricity distribution network. This includes supply within the local electricity distribution network.
>
> Broadband and strategic telecommunication facilities, as defined in section 5 of the *Telecommunications Act 2001*.
>
> Strategic radio communications facilities, as defined in section 2(1) of the *Radio Communications Act 1989*.
>
> Local authority water supply network and water treatment plants.
>
> Local authority wastewater and stormwater networks, systems and wastewater treatment plants.
>
> Pipelines for the distribution or transmission of natural or manufactured gas or petroleum and other energy sources.
>
> Regional parks.
>
> Tauranga, Rotorua and Whakatāne public hospitals.

The Environment Court's Decision

[25] The Environment Court started by recording that the case raises issues as to how various imperatives from the NZCPS, the RPS, the NPSET, and the objectives of the RCEP are to be incorporated into the RCEP.[6] The Court noted that there was no disagreement between the parties that the respondent's RPS, which was made operative in June 2015, reflects the NZCPS and other national planning documents, and that the RCEP's objectives are in keeping with the superior documents and with pt 2 of the Act.[7] The Court accordingly considered that the question for it was which of the particular words contended for by the parties were most appropriate to give effect to the RCEP's objectives.[8]

[26] Given the agreement between the parties, the Court began its detailed discussion by referring to the relevant objectives in the RCEP. It discussed Objectives 1, 2, 2A, 3, 4, 15 and 25A, 25B and 26. It considered that these objectives point to "the tension between the various elements and interests within the coastal environment and derived from the superior documents".[9]

[27] The Court then turned to consider infrastructure in the coastal marine area by reference to various objectives contained in the RPS. The Court considered that the RPS emphasises the need for integrated management of the coastal environment.[10] It noted that the RPS covers a significant range of issues, broader than those covered by other the NZCPS and the NPSET. The Court opined that it is clear from its "Objective framework" that the RCEP is intended to reflect the RPS as it relates to the coastal environment. It considered that "[t]here is nothing … within the RPS, or in the RCEP, which isolates one issue or objective as being the pre-eminent consideration in

6 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [2].

7 At [3].

8 At [4].

9 At [21].

10 At [22].

creating methods or rules", and that both planning documents seek to integrate the various issues and objectives within the broader context of the other documents relevant to the region.[11]

[28] The Court noted the concerns expressed by Royal Forest & Bird about the provisions for regionally significant infrastructure contained in the draft RCEP. It then referred to the NZCPS, and set out its view that that document also recognises the "distinction and tensions between various elements within the coastal environment".[12] The Court considered that the question for it was whether the requirement to avoid the adverse effects of activities on indigenous biological diversity areas is absolute. It considered this argument was difficult, given Royal Forest & Bird's acceptance that both the RPS and the RCEP give effect to the NZCPS. The Court concluded that, to the extent that there is any doubt as to whether or not the NZCPS addresses tensions between the various elements within it, the RPS and the RCEP give effect to that tension in terms of the recognition contained within those planning documents.[13]

[29] The Court then proceeded to consider what it termed "a proportionate response" by reference to the *King Salmon* decision. The Court quoted from *King Salmon* in relation to the meaning of the words "appropriate" and "inappropriate". It considered whether or not the words "must be avoided" discussed by the Supreme Court in *King Salmon* and used in the RCEP — NH 4 — require "a simple binary calculation as to whether or not all effects are avoided or not".[14] The Court considered that the Supreme Court, in interpreting the word "appropriate", acknowledged that its meaning varies by context. The Court concluded that "even for words such as avoid, the context must go further than simply the wording of the plan, but context of the individual case or application".[15] It considered that the RCEP is "an attempt to take a proportionate response to the actual activity envisaged, and the potential impacts of that activity, within the particular environment".[16] It considered that the plan unequivocally seeks to avoid adverse effects through policy NH 4, but that other policies — in particular policy NH 5 — recognise some circumstances where consent might be appropriate on a full evaluation.[17] It concluded that a proportionate response could be adopted, having regard to the particular activity in question, and all other factors which go to its appropriateness.[18]

[30] It considered the RCEP policies and rules in issue, and concluded that their wording is clear, and that there is no assumption of general appropriateness. The Court agreed that the initial wording in the notified version of the RCEP before it was not as explicit as it should have been in addressing the criteria that would need to be addressed on any resource consent application for regionally significant infrastructure proposing to locate in the coastal marine area. It took into account the core purpose of the Act (the sustainable management of natural and physical resources), as well as Objective 1 of the NZCPS, and various provisions in the RPS. It concluded that these various objectives and policies require an integrated approach to individual consents within high value areas.[19]

11 At [30].
12 At [35].
13 At [38].
14 At [43].
15 At [43].
16 At [46].
17 At [46].
18 At [48].
19 At [51].

[31] It rejected an argument advanced for Royal Forest & Bird that non-complying activity status for such activities would best avoid adverse effects on Indigenous Biological Diversity Areas A, and expressed the view that the status of an activity as non-complying might have less prospect of avoiding adverse effects than according it discretionary activity status.[20]

[32] The Court:

(a) concluded that policy NH 1 should not be made subject to policy NH 4, albeit accepting that policy NH 4 was clearly relevant, and would need to be taken into account on any application for a resource consent for regionally significant infrastructure;[21]

(b) made various amendments to policy NH 5, but rejected Royal Forest & Bird's argument that the exceptions contained in that policy should not apply to regionally significant infrastructure, but only to the national grid recognised by the NPSET. It considered the question of what infrastructure should be addressed, and its relevant importance and impacts, should be best addressed on a case by case basis, through an application for resource consent;[22]

(c) preferred the Regional Council's wording in Policies NH 11 and NH 11A;[23] and

(d) preferred the Regional Council's wording of rule S 10.[24]

[33] The Court considered that the wording accepted by it was the most appropriate option under s 32 of the Act, noting that the option of using non-complying status, as proposed by Royal Forest & Bird, would be a relatively inefficient method, which would create uncertainty, and could lead to agitation for a plan change. The Court concluded that the best way of identifying and assessing the benefits and costs of regionally significant infrastructure locating in the coastal environment, is to require such activities to obtain resource consent, on a fully discretionary activity basis. It considered that the appropriate method to address issues raised by such a proposal is on a case by case basis, given the wide variety of circumstances that could arise, and the wide variety of indigenous biodiversity areas within the region.[25]

[34] The decision is an interim decision, given that the Court has not as yet issued a decision on iwi resource management issues.[26] The Court directed that, following the release of its decision on these issues, the parties would have 20 working days within which to file memoranda as to whether or not they were seeking further changes to the RCEP provisions, in light of whatever decision is given in relation to the iwi resource management chapters of the RCEP.

The Notice of Appeal

[35] Although the Environment Court's decision is an interim decision, it was common ground that it finally determines substantive issues in such a way as to engage the right of appeal created by s 299 of the Act.

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20 At [53].

21 At [58].

22 At [62].

23 At [66].

24 At [67].

25 At [70]-[71].

26 I was advised by counsel that the hearing on iwi resource management issues is to be held in December 2017.

[36] There are four errors of law alleged in the appeal, each of which was advanced by counsel for Royal Forest & Bird. The alleged errors of law are as follows:

(a) the Environment Court erred in its interpretation and application of the *King Salmon* decision;

(b) the Environment Court erred in its interpretation and implementation of, and failed to give effect to, various provisions in the NZCPS and in the RPS;

(c) the Environment Court erred in its interpretation and implementation of relevant RCEP objectives; and

(d) the Environment Court erred in its interpretation of ss 87A, 104 and 104D in the Act.

[37] Royal Forest & Bird was supported on issues 1 and 2 by Ngāti Mākino Heritage Trust.

[38] The respondent council and the s 301 parties (other than Ngāti Mākino) opposed the appeal, either in whole or in part.

Appeals from the Environment Court — errors of law

[39] As noted, the appeal is brought pursuant to s 299 of the Act. Such appeals are limited to questions of law. It was common ground that this Court should only overturn a decision of the Environment Court, if it considers that the Court:[27]

(a) applied the wrong legal test;

(b) came to a conclusion without evidence, or one to which, on the evidence, it could not reasonably have come;

(c) took into account matters which it should not have taken into account;

(d) failed to take into account matters which it should have taken into account.

[40] Here, each of the errors raised by Royal Forest & Bird assert that the Environment Court applied a wrong legal test.

[41] The onus of establishing any error of law rests on the appellant.[28]

[42] The weight to be afforded to relevant considerations is a question for the Environment Court, and is not a matter of law available for reconsideration by this Court as a question of law.[29]

[43] Where there has been an error of law, relief will not necessarily be granted, unless it can be established that the error identified materially affected the result found by the Environment Court.[30]

[44] Against this background, I turn to consider each of the alleged errors of law in turn.

Did the Environment Court err in its interpretation and application of the *King Salmon* decision?

(a) *What did King Salmon decide?*

[45] In *King Salmon*, the respondent had 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. At the same time, it applied for resource consents to undertake salmon farming at those locations, and at one other

27 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).

28 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

29 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

30 *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC); *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

location, for a term of 35 years. The Minister of Conservation decided that the applications involved matters of national importance, and that they should be decided by a Board of Inquiry. The Board appointed by the Minister considered the NZCPS and also pt 2 of the Act. It referred to policy 8 in the NZCPS, and also to Policies 13 and 15. It considered that these policies conflicted, and that it was therefore required to balance their requirements and make a broad overall judgment. It found that there would be adverse effects on areas with outstanding natural attributes, but nonetheless decided to grant the application for a plan change in respect of four of the sites, and to grant the resource consents sought for the same four sites, subject to conditions. The Environmental Defence Society and others appealed. The appeal was unsuccessful in the High Court.[31] The appeal then went directly to the Supreme Court.

[46] The majority judgment was delivered by Arnold J, for himself, and for Elias CJ, McGrath and Glazebrook JJ. William Young J issued a separate decision.

[47] The majority allowed the appeal. It found that the proposed plan change would have significant adverse effects on an area of outstanding natural character, and that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the applications were to be granted. It held that the Board was obliged to give effect to the NZCPS. It had failed to do so and the plan change therefore did not comply with s 67(3)(b) of the Act. It rejected the "overall broad judgment approach" taken by the Board.

[48] Relevantly, the majority noted that, under the Act, there is a three-tiered management system — national, regional and district, and that a hierarchy of planning documents is established. The hierarchy of planning documents is as follows — first those documents which are the responsibility of central government — specifically national environmental standards, national policy statements and New Zealand coastal policy statements. Policy statements of whatever type state objectives and policies, which must be given effect to in lower order planning documents. Secondly, there are those documents which are the responsibility of regional councils — namely regional policy statements and regional plans. Thirdly, there are those documents which are the responsibility of territorial authorities — specifically district plans.[32]

[49] The Court referred to ss 66 and 67 of the Act, and recorded that s 67(3) provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement, and any regional policy statement. The majority considered that the words "give effect to" simply mean to implement, and that, on the face of it, this is a strong directive, creating a firm obligation on the part of those subject to it. The majority considered that there is a caveat however — namely the implementation of the directive will be affected by what it relates to, that is, what must be given effect to. It observed that the 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 that is worded at a higher level of abstraction.[33]

[50] The majority went on to observe that the NZCPS gives substance to the provisions of pt 2 contained in the Act in relation to the coastal environment, and that, in principle, by giving effect to the NZCPS, a regional council is necessarily acting in accordance with pt 2, and that as a result there is no need to refer back to pt 2 when determining a plan change. There were, however, three caveats to this "in principle"

31 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371.

32 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [11].

33 At [75]-[80].

observation. First, where there is a challenge to the validity of the NZCPS or any part of it; if there is such a challenge, it needs to be resolved before it can be determined whether a decision-maker who gives effect to the NZCPS as it stood is necessarily acting in accordance with pt 2. Secondly, there may be instances where the NZCPS does not "cover the field", and the decision-maker will have to consider whether pt 2 provides assistance in dealing with the matters not covered. Thirdly, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation.[34]

[51] The majority considered that there was no conflict between the policies in the NZCPS at issue in the case before it. It discussed the correct approach to be taken to the interpretation of the policies in the NZCPS. It noted that their language is "significant", and that the various policies are not inevitably in conflict or pulling in different directions. Rather it considered that the objectives and policies in the NZCPS are expressed in deliberately different ways, and that some give decision-makers more flexibility, or are less prescriptive. In contrast, other polices are expressed in more specific and directive terms, and these differences in the policies matter. The majority expressed the view that when dealing with a plan change application, the decision-maker must first identify those provisions that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a provision is stated in such directive terms that the decision-maker will have no option but to implement it.[35]

[52] The majority recognised that there may be instances where particular provisions "pull in different directions", but observed that this is likely to occur infrequently. It considered that apparent conflict may dissolve if close attention is paid to the way in which the provisions are expressed.[36] The Court considered that there will only be justification for reaching a determination which has one provision prevailing over another if the conflict remains after the required analysis has been undertaken. It observed that the area of conflict should be kept as narrow as possible, and that the necessary analysis should be undertaken on the basis of the higher order document being considered, albeit informed by s 5 of the Act. Section 5 should not, however, be treated as the primary operative decision-making provision.[37]

[53] The majority observed that policies 13(1)(a) and (b) and 15(a) and (b) in the NZCPS are so directive that they "provide something in the nature of a bottom line".[38] It considered that their most relevant feature is that "they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character".[39]

[54] The majority addressed the word "avoid", used in the Act and in various policies in the NZCPS, holding that it has its ordinary meaning of "not allow", or "prevent the occurrence of".[40]

[55] It also considered the meaning of the words "inappropriate", "appropriate" and "appropriate places" in various places in the Act and in the NZCPS. It observed as follows:

34 At [85] and [88].

35 At [129].

36 At [129].

37 At [130].

38 At [126]-[132].

39 At [58] and [61]-[63].

40 At [24(b)], [62], [92]-[96].

(a) First, in discussing s 6 of the Act:[41]

> … a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows for the possibility that there may be some forms of "appropriate" development.

(b) And a little later:[42]

> The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[56] The majority addressed the reconciliation of those policies that provide for activities in appropriate places and the protective "avoid" type policies:[43]

> We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

And:[44]

> A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region — areas of outstanding natural character, of outstanding natural features and of outstanding natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[57] Clearly the decision of the majority is wide-ranging and detailed. The Court of Appeal has described it as leading to an "inevitably more restrictive regime".[45] The same point was made by William Young J in his dissenting judgment. He drew attention to the potentially wide reach of the restrictions resulting from the majority's

41 At [29(b)].

42 At [100]-[101]; and see generally [100]-[105].

43 At [126].

44 At [131].

45 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662 at [60].

decision having regard to the definition of the word "effect" in s 3 of the Act. He considered that the effect of the majority's judgment is that regional councils will 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".[46]

(b) *How did the Environment Court approach King Salmon?*

[58] The Environment Court made relatively little express reference to *King Salmon*. Nowhere in its decision did it endeavour to analyse in any comprehensive way what the Supreme Court decided.

[59] The Environment Court did note that, although the *King Salmon* decision was at the forefront of much of the discussion before it, what it was required to deal with involved multiple national policy statements — the NZCPS, the NPSET, and arguably the NPSUG, as well as their application to the RPS and the objectives of the RCEP itself.[47] It appears to have considered that, in this situation, *King Salmon* was of limited assistance.

[60] The Environment Court recorded a "concession" made by Royal Forest & Bird, namely that the RPS reflected the current NZCPS, and other national planning documents. It was on this basis that the Court began its discussion with the reference to the unchallenged objectives contained in the RCEP.[48] Although the Court did not say so, it appears that in doing so, it was following a *King Salmon* type approach. *King Salmon* dealt with the interaction between pt 2 of the Act and the NZCPS. The Environment Court appears to have extended the Supreme Court's observations in this regard to all planning documents, regardless of their place in the planning hierarchy. This is consistent with the approach taken by another division of the Environment Court,[49] although this decision was not referred to either.

[61] There was express reference to *King Salmon* when the Court turned to discuss its "proportionate approach". It cited two paragraphs from *King Salmon* and observed as follows:[50]

> Of critical importance in this regard is whether or not the word "must be avoided" used in RCEP Policy NH 4 requires a simple binary calculation as to whether or not all effects are avoided or not. It is clear that the Supreme Court, in interpreting the word "appropriate", acknowledged that its meaning varied by context. We have concluded that even for words such as avoid, the context must go further than simply the wording of the plan, but the context of the individual case or application.

[62] The Court concluded that "the purpose of the resource consenting process and the RCEP is an attempt to take a proportionate response to the actual activity envisaged, and the potential impacts of that activity, within the particular environment".[51] The Environment Court then observed that *King Salmon* was not incompatible with other decisions cited by it, and stated as follows:[52]

> In each a proportional response is adopted, having regard to the particular activity and all of the other factors which go to its appropriateness.

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46 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [201].

47 *Royal Forest & Bird Protection Society New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [2].

48 At [3] and [11].

49 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 at [43]-[45].

50 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [43].

51 At [46].

52 At [48].

(c) *The parties' submissions as to King Salmon*

[63] Royal Forest & Bird argued that the Environment Court failed to follow the Supreme Court's approach in *King Salmon*. It noted that the Environment Court considered that there is a tension between some of the relevant policies in the higher order planning documents, but that it did not attempt to find a way to reconcile that tension. It submitted that the Environment Court erred in holding that the meaning of the word "avoid" is contextual, and submitted that this interpretation is inconsistent with *King Salmon*. It argued that the Environment Court erred when it identified some RCEP objectives which use the word "appropriate", and found that this tells against an avoidance approach. It submitted that this interpretation is at odds with the reconciliation that the majority in the Supreme Court undertook of policies 8, 13, and 15 in the NZCPS. It also argued that, when the Environment Court held that the tensions it considered are apparent in the NZCPS, the RPS and the RECP permit a proportionate response. It pointed out that a broad overall judgment approach was rejected in *King Salmon*.

[64] Ngāti Mākino also took issue with the Environment Court's adoption of the proportionate approach — submitting that it is simply a variant of the overall broad judgment approach rejected by the majority in *King Salmon*. It argued that the requirement to give effect to the NZCPS contained in the Act is intended to constrain decision-makers. It went on to submit that the total avoidance of adverse effects is not required by the relevant directive policies in the NZCPS, and that pursuant to *King Salmon*, there is a requirement to avoid, or prevent, only those adverse effects that are more than minor or transitory. It submitted that this requirement should have been given effect to in the proposed RCEP provisions relevant to regionally significant infrastructure in Indigenous Biodiversity Areas A.

[65] The respondent council submitted that the Environment Court did not adopt an overall judgment approach in the sense discussed by the majority in *King Salmon*, either by reverting to pt 2 of the Act, or by failing to reconcile the various NZCPS provisions. It suggested that Royal Forest & Bird and Ngāti Mākino place an unreasonable gloss on the proportionate concept discussed by the Environment Court. It argued that the Environment Court was entitled to rely on the proposed plan's settled objectives which had not been appealed, and on Royal Forest & Bird's concession that those settled objectives give effect to the higher order planning documents. It further argued that the Environment Court's findings can be construed in a manner consistent with *King Salmon*, submitting that the Environment Court's decision allows for the location of regionally significant infrastructure — both existing and new — in high value areas, but only in the narrowest of circumstances where no practical alternative locations exist, the avoidance of effects is not possible, and any residual adverse effects are remedied or mitigated as far as practicable or offset.

[66] Tauranga City Council also argued that Royal Forest & Bird and Ngāti Mākino misapplied *King Salmon*, suggesting that they seek to elevate various comments made by the Supreme Court into legal tests, and that in so doing, they ignore the different context in which the Environment Court's decision was made. It was argued that there are many factual and policy distinctions between *King Salmon* and the Environment Court's decision and that the Environment Court did not err when it compared, interpreted and ruled on the objectives and policies in the lower order documents. It submitted that the Environment Court was entitled to make findings favouring a proportionate response, given the lack of pre-eminence within the lower order planning provisions, and that an overall broad approach, in the sense discussed in *King Salmon*, was not adopted.

[67] The Te Tumu Landowners — comprising Te Tumu Kaituna 14 Trust, Ford Land Holdings Pty Ltd and Carrus Corporation Ltd — argued that there are many distinctions between *King Salmon* and the situation which confronted the Environment Court. They referred to the factual context, noting that *King Salmon* involved a "spot zone" private plan change which sought to authorise specific proposals. They also noted that the RPS is recent and settled. It was argued that *King Salmon* did not promulgate a "bright line test" and that the Supreme Court did not endorse a blanket or absolute prohibition for development even in areas of high natural value. They argued that the reconciliation of policies 8, 13 and 15, undertaken by the Supreme Court, does not constitute a blueprint for the reconciliation of policies that involve public infrastructure and strategic planning.

[68] The same submissions were advanced on behalf of PowerCo Ltd.

[69] Transpower's submissions understandably focussed on the national grid. It did suggest that the Supreme Court in *King Salmon* was faced with resolving policy tensions within the same policy document, but not tensions between different planning documents. Nevertheless, it accepted that helpful guidance can be derived from *King Salmon* where tension exists between different documents. Further, it agreed with Royal Forest & Bird's submission that the presumption that the RCEP's unchallenged objectives implement the higher order planning documents does not mean that the Environment Court could consider those objectives in isolation from the higher order planning documents. It argued that where regional plan objectives could lead to more than one policy framework, it is necessary for decision-makers to check whether their chosen policy framework gives effect to the higher order planning documents. Essentially it submitted that the Act requires decision-makers to adopt a "checks and balances" approach to the hierarchy of planning documents.

[70] The New Zealand Transport Agency acknowledged that a "simplistic" reading of the Supreme Court's decision in *King Salmon*, and the various statements made by the majority in relation to "environmental bottom lines", might suggest that all activities that have more than minor adverse effects upon the high value areas protected by policies 11, 13 and 15 of the NZCPS need to be protected. It argued for a more careful reading of the decision taking into account the context in which it was delivered. The Agency expressed its concern with what it termed the "absolutist" reading of the NZCPS it suggested occurred in *King Salmon*, and argued that the decision is limited to the matters that were before the Supreme Court. It argued that only limited guidance was provided by the Supreme Court in relation to how other statutory requirements relevant to the formation of plans should be implemented. It referred to subsequent decisions — namely, *Man O'War Station Ltd v Auckland Council*,[53] and *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council*[54] — and suggested that they are authority for the proposition that a contextual assessment can be appropriate.

(d) *Analysis*

(i) *The Act*

[71] The starting point must be the provisions contained in the Act. Broadly, the relevant statutory provisions can be summarised as follows:

(a) The purpose of regional plans is to assist regional councils to carry out their functions in order to achieve the purpose of the Act. Specifically, the

53 *Man O'War Station Ltd v Auckland Council*, above n 45.

54 *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980, (2017) 20 ELRNZ 390.

purpose of the preparation, implementation and administration of regional coastal plans is to assist regional councils, in conjunction with the Minister of Conservation, to achieve the purpose of the Act in relation to the coastal marine areas of their regions.[55]

(b) A regional council may prepare a regional plan for the whole or any part of its region for any of the functions specified in s 30(1)(c), (ca), (e), (f), (fa), (fb), (g) or (ga).[56] Relevantly, s 30(1)(ga) refers to the function of establishing, implementing and reviewing objectives, policies and methods for maintaining indigenous biological diversity.

(c) A regional council must prepare and change any regional plan in accordance with, inter alia, the provisions of pt 2 of the Act, and the council's obligation to prepare an evaluation report in accordance with s 32.[57] An evaluation report is required to examine the extent to which:[58]

(i) the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act; and

(ii) the provisions in the proposal are the most appropriate way to achieve the objectives.

(d) A regional plan must give effect to any National Policy Statement, any New Zealand Coastal Policy Statement, a National Planning Standard and any Regional Policy Statement.[59]

(e) A regional plan must state the objectives for the region, the policies to implement the objectives, and the rules (if any), to implement the policies.[60]

[72] The documents listed in s 67(3), which a regional plan must give effect to, are conjunctive and not disjunctive.

[73] The statutory provisions require that a proposed plan give effect to both any New Zealand coastal policy statement and any regional policy statement. The requirement that a proposed plan's policies implement the proposed objectives is a separate and distinct obligation. The requirement for an evaluation report under s 32 to examine, inter alia, the extent to which the proposed provisions are the most appropriate way to achieve the objectives, is a procedural obligation. Neither the obligation to implement a proposed plan's objectives, nor the requirement for an evaluation report, removes the necessity for a proposed plan to give effect to both the any New Zealand coastal policy statement and any regional policy statement.

[74] The leading authority considering the inter-relationship of planning documents and the effect of s 67(3), is the decision of the Supreme Court in *King Salmon*. Is its effect limited as the Environment Court appears to have thought, or can it be distinguished as the respondent council and numerous of the s 301 parties submit?

(ii) *Is King Salmon limited or can it be distinguished?*

[75] As noted at [59], the Environment Court appears to have considered that *King Salmon* was of limited assistance, because, unlike the Supreme Court, it was required to deal with multiple national policy statements, the RPS and the unchallenged parts of the RCEP.

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55 Resource Management Act, s 63(1) and (2).

56 Section 65(1).

57 Section 66(1)(b) and (d).

58 Section 32(1)(a) and (b).

59 Section 67(3). No National Planning Standard has been developed to date.

60 Section 67(1).

[76] I acknowledge that *King Salmon* was concerned with the resolution of tensions in the one planning document, the NZCPS. I do not, however, consider that *King Salmon* is of limited assistance where the tensions are in multiple documents. First, the Environment Court thought that the tensions it considered existed were manifest in each document from the NZCPS downwards. They were not between documents, but rather in each document. Secondly, the approach discussed by the majority in *King Salmon* is applicable in either context. It seems to me that if there is a tension perceived in a lower order document, the approach taken by the majority in *King Salmon* should be applied to try and resolve that tension. If the tension cannot be resolved, then recourse should be made to the higher order planning documents to see if the tension is more apparent than real. I agree with counsel for Transpower that, where regional plan objectives could lead to more than one policy framework, it is incumbent on decision-makers to check whether their preferred policy framework gives effect to the higher order planning documents. That is what s 67(3) requires.

[77] Turning to the submissions that were made, I acknowledge the point made by those who suggest that *King Salmon* can be distinguished — the decision related to a privately initiated plan change, which effectively sought spot zoning of certain areas in the coastal marine area, and resource consents for some of those areas.

[78] I do not consider that this factor is of any great relevance. A regional plan must be prepared in accordance with sch 1 to the Act.[61] Any person may request that a regional council change a regional plan,[62] also in the manner set out in sch 1. The local authority to which the request is made — which is defined to include a regional council[63] — is required to consider the request. It can adopt the request; if it does so, the provisions of pt 1 of sch 1 apply. It can accept the request in whole or in part, and proceed to notify the request under cl 26.[64] If the request is accepted, pt 1 of sch 1, with all necessary modifications applies to the change requested.[65] The procedure is the same, whether or not a plan change is initiated by a regional council of its own initiative, or pursuant to a private request.

[79] Other differences suggested by the parties are also of little assistance. For example, it does not matter that the RPS at issue in this case is recent and settled. That is irrelevant, both in terms of the statutory scheme and the Supreme Court's observations in *King Salmon*. Nor does it matter that the plan change in issue in *King Salmon* was accompanied by resource consent applications. This factor did not colour the Supreme Court's observations in relation to plan changes generally. Similarly, in my view, it does not matter that the Supreme Court's decision was given in circumstances where the Board of Inquiry had already found that there would be adverse effects on areas with outstanding natural attributes. That is simply a reflection of the stage in the process at which the case came before the Supreme Court.

[80] I accept that the ratio of *King Salmon* is relatively narrow. I have endeavoured to summarise what I understand it to be in [47] above. While strictly obiter, all of the majority's observations which led to the conclusions I have set out are highly persuasive. They are observations made by our highest Court, discussing some of the provisions and issues which are directly at issue in the present case. They cannot, in my judgment, be ignored or glossed over.

61 Section 65(2).

62 Schedule 1, cl 21(1), but not a regional coastal plan — see cl 21(2).

63 Section 2.

64 Schedule 1, cl 25(2)(a) and (b).

65 Clause 29(1).

[81] I do not consider that *King Salmon* can be distinguished, or that it is of limited assistance only.

(iii) *The hierarchy of planning documents — what is it necessary to refer to?*

[82] As noted, the Environment Court started by focusing on the documents lowest in the planning hierarchy — namely the unchallenged objectives in the RCEP. It then referred to some provision in the RPS, but only briefly, and then, even more briefly, to a very few provisions in the NZCPS. It adopted this approach in reliance on what it termed a "concession" by Royal Forest & Bird, and, perhaps, implicitly, on the approach taken by the Supreme Court, to the need to refer to pt 2 when considering provisions in the NZCPS.

[83] I do not consider that the Environment Court was entitled to take the approach it took — namely focusing largely on the unchallenged provisions in the RCEP.

[84] There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.

[85] Counsel pointed to the decision of this Court in *Thumb Point Station Ltd v Auckland City Council*[66] and some argued that it supports the approach taken by the Environment Court. I disagree. In *Thumb Point*, Andrews J described the effect of *King Salmon* in this regard as follows:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is an exception, however, where there is a deficiency in the plan. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act. As such, it is necessary to assess whether the highlighted anomaly required the Court to have regard to the wider context of the Act.

I do not consider that this observation supports the Environment Court's approach. The reference to the purpose and principles of the Act is clearly a reference to pt 2 of the Act. In my judgment, the Supreme Court in *King Salmon* and this Court in *Thumb Point*, were simply referring to the extent to which pt 2 is required to be considered when giving effect to a national policy statement or a settled plan. Neither decision was considering whether and when higher order planning documents need to be considered when lower order planning documents are settled or parts of them are not challenged.

[86] Counsel also referred me to *Appealing Wanaka Inc v Queenstown Lakes District Council Inc*, where the Environment Court held as follows:[67]

> The recent decision of the Supreme Court in *EDS v NZ King Salmon* sets out an amended — and simpler — approach to assessing plan changes … The principle in *EDS v NZ King Salmon* is that if higher order documents in the statutory hierarchy existed when the plan was prepared then each of those statutory documents is particularised in the lower document. It appears that there is, in effect, a rebuttable presumption that each higher document has been given effect to or had regard to (or whatever the relevant requirement is). Thus there is no necessity to refer back to any higher document when determining a plan change provided that the plan is sufficiently certain, and neither incomplete nor invalid. This seems to have been accepted by the High Court in a recent decision — *Thumb Point Station Ltd v Auckland City Council*. …

66 *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035, [2016] NZRMA 55 at [31].

67 *Appealing Wanaka Inc v Queenstown Lakes District Council Inc*, above n 49, at [43].

> We respectfully agree provided that the reference to giving effect to the "purposes and principles" of the Act includes giving effect to the higher order statutory instruments, and indeed to the consideration of the other statutory documents referred to in sections 74 and 75 of the RMA.

[87] As I have already noted, the Environment Court in the case before the Court did not refer to the *Appealing Wanaka* decision, but it appears to have adopted the same approach.

[88] I have reservations about the approach taken by the Environment Court in *Appealing Wanaka*. First, I do not consider that it accurately records what was said in *King Salmon* or by this Court in *Thumb Point*. Secondly, and perhaps more importantly, in my view there is a distinct risk that the intent and effect of higher order plans can be diluted, or even lost, in the provisions of plans lower in the planning hierarchy. Put colloquially, the story can be lost in the re-telling. Indeed, a similar point was noted in *Appealing Wanaka*, where the Court sounded a warning in the following terms:[68]

> … While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon*.

In my judgment, there are dangers in the truncated approach taken in *Appealing Wanaka* and by the Environment Court in this case.

[89] In my judgment, the Environment Court erred when it proceeded primarily by reference to the RCEP's objectives, with only limited reference to the RPS and the NZCPS. Its approach in effect ignored the statutory directive contained in s 67(3). That subsection is clear in its terms. It requires that decision-makers promulgating regional plans must "give effect to", inter alia, National Policy Statements and Regional Policy Statements. The Environment Court failed to have regard to the majority of the Supreme Court's finding that the words "give effect to" mean to implement, and that this is a strong directive, creating a firm obligation on the part of those subject to it.

[90] The "concession" by Royal Forest & Bird does not assist. The Environment Court recorded the concession by reciting from Royal Forest & Bird's submissions before it as follows:[69]

> … the Court is entitled to rely on the proposed plan's settled objectives and does not need to venture further into the higher order planning documents unless it considers that the proposed plan's objectives are deficient in one of the ways described in *Thumb Point* or *King Salmon*. It is submitted there is no such deficiency. The higher order planning documents are entirely consistent with the proposed plan's settled objectives, and reinforce their clear meaning.
>
> However, the interpretation of the proposed plan's objectives contended for by the respondent [council] and opposing [section 301] parties would be deficient, as becomes apparent from a review of the higher order planning documents that the proposed plan's objectives are meant to give effect to.

[91] Before me, Royal Forest & Bird did not seek to resile from these submissions made to the Environment Court, but it disagreed that they amounted to a concession. It argued that its submissions before the Environment Court did no more than say that, if the Environment Court accepted Royal Forest & Bird's interpretation of the RCEP,

68 At [47].

69 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [3].

then there was no need to go further, but that if it considered that there was a conflict in the lower order documents, recourse should be made to the higher order documents in an attempt to resolve that conflict.

[92] I am sympathetic to Royal Forest & Bird's argument, and it seems to me that the Environment Court erred when it treated the submissions it recited as a concession. Further, as a matter of law, it is not open to a party to waive the statutory requirements put in place by s 67(3). The concession, if that is what it was, was irrelevant, and in any event, Ngāti Mākino, supporting the appeal, did not concede the issue. It was a s 274 party before the Environment Court, and it could not be bound by any concession made by Royal Forest & Bird.

[93] The Environment Court also appears to have assumed that it was unnecessary for it to consider the NZCPS in any detail, because there was no evidence to suggest that the RCEP's objectives were not "entirely in keeping with the superior documents, including the NZCPS, the NPSET, or, if relevant, Part 2".[70] With respect, this was not an issue of evidence. Interpretation of the relevant planning documents and their interrelationship was for the Environment Court, and it does not matter whether or not there was evidence on the issue.

(iv) *Tension — should an attempt have been made to resolve it?*

[94] The Environment Court considered that the RCEP objectives raised a tension between the various elements in play in recognising regionally significant infrastructure, while at the same time recognising kaitiakitanga, the avoidance of adverse effects, and, since 2017, the need to provide for urban growth management areas.[71]

[95] The Court also discussed the RPS briefly, noting that it emphasises the need for the integrated management of the coastal environment, that it also discusses natural character and ecological functioning of the coastal environment, and that it nevertheless addresses the use and allocation of coastal resources. The Court commented on those provisions in the RPS which deal directly with regionally significant infrastructure, and which identify matters of national importance, including protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. The Court did not expressly state that there was tension in the RPS, but it did observe that the RCEP's objective framework was intended to reflect the RPS.[72] Given that the Environment Court considered that there was a tension in the "[o]bjective framework" in the RCEP, it would seem to follow that it must also have considered that there was tension in the RPS, at least insofar as it relates to the coastal environment, the provision of infrastructure and the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.[73]

[96] The Environment Court also referred briefly to the NZCPS, discussing some, but not all of its objectives. It considered that the NZCPS itself recognises "the distinction and tensions" between the various elements within the coastal environment.[74]

[97] The Environment Court used these identified tensions to justify the proportionate response it considered appropriate. It did not seek to analyse the tension it considered the various policies evince.

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70 *Royal Forest & Bird Protection Society Inc v Bay of Plenty Regional Council*, above n 1, at [4].

71 At [12] and [21].

72 At [30].

73 At [38] and [44].

74 At [35].

[98] The Environment Court's approach was, in my judgment, in conflict with the various observations of the Supreme Court in *King Salmon*. As noted above in [50]-[52], the majority discussed the correct approach to be taken to the interpretation of the, at first glance, disparate policies in the NZCPS. It set out the obligations of decision-makers considering those policies, and what they should do if they consider that particular provisions pull in different directions. These observations were made in relation to the NZCPS. This was one of the documents the Environment Court was called upon to consider in this case. Further, and as I have already noted, the majority's observations in *King Salmon* are equally applicable to documents lower in the planning hierarchy which seek to implement higher order documents. The Environment Court did not follow the approach the majority in the Supreme Court considered appropriate. It made no attempt to resolve the tensions and it failed to make "a thoroughgoing attempt to find a way to reconcile"[75] the provisions it considered to be in tension.

(v) *Avoid*

[99] In my judgment, the Environment Court also erred in the interpretation it gave to the word "avoid". As I have noted, it concluded that "even for words such as avoid, the context must go further than simply the wording of the plan".[76]

[100] The Supreme Court discussed the word "avoid" used both in the Act and in various policies in the NZCPS. It held that it has the ordinary meaning of "not allowed" or "prevent the occurrence of".[77]

[101] As I discuss shortly, in my judgment the Environment Court should have considered the relevant avoidance or environmental bottom line policies — policies 11, 13 and 15, in the NZCPS. It should have acknowledged and applied the view of the majority in *King Salmon* that policies 13 and 15 seek to avoid the adverse effects of activities on natural character in areas of outstanding natural character and are so directive that they provide something in the nature of an environmental bottom line.

[102] By finding that the word "avoid" is contextual, and that it is necessary to go further than simply the wording of the plan, the Environment Court has, in my judgment, failed to properly apply the directive provisions contained in the NZCPS and the majority's observations in *King Salmon*.

(vi) *A proportionate response?*

[103] The Environment Court's proportionate response is also inconsistent with the approach taken by the Supreme Court in *King Salmon*. The majority roundly rejected the broad overall judgment taken by the Board of Inquiry in that case, and the proportionate response adopted by the Environment Court in this case is an overall judgment approach — albeit by a different name. The more restrictive regime flowing from the Supreme Court's decision in *King Salmon* does not permit the proportionate, or contextual, response taken by the Environment Court.

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75 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [131].

76 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [43].

77 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [92]-[93] and [129].

[104] 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 characteristics of the natural area in issue. By way of example, in *Man O'War Station Ltd* the Court of Appeal said as follows:[78]

> In the present case, as the Environment Court noted, it was agreed that the areas to which the ONLs [Outstanding Natural Landscape classifications] were applied are sufficiently natural for the purposes of s 6(b) of the Act. It is also clear that there are a number of different elements currently forming part of the ONLs. Thus significant areas of native vegetation and pastoral land are both elements of ONL 78 together with buildings (albeit said to be subservient to other elements) and vineyard and olive grove activities. Although natural, it is not pristine or remote. As Mr O'Callahan acknowledged on behalf of Auckland Council, it is in that setting the question of whether any new activity or development would amount to an adverse effect would need to be assessed.

[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.

[106] In my judgment, in taking its proportionate response, the Environment Court was not referring to context in this sense. Rather it was considering context in the round. It was suggesting that the benefits and costs of regionally significant infrastructure, seeking to locate in Indigenous Biological Diversity Areas A and that could have adverse effects on such areas, should be assessed on a case by case basis, having regard to all relevant factors. Given the majority's decision in *King Salmon*, this approach was not available to it.

Did the Environment Court err in its interpretation and implementation of the NZCPS and the RPS?

[107] Given my conclusions set out above, I can deal with the remaining points on appeal relatively quickly.

[108] The NZCPS is an instrument at the top of the planning hierarchy. As the Supreme Court observed in *King Salmon*, it is a document which reflects particular choices, and the notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances "does not fit readily into the hierarchical scheme of the [Act]".[79]

[109] The Environment Court referred only to objectives 2, 3, 4, 5 and 6 when discussing the NZCPS.[80]

[110] There are a large number of other provisions which are relevant to a greater or lesser extent.

[111] Policy 6(1)(a) seeks to recognise, in relation to the coastal environment, that the provision of infrastructure is an activity important to the social, economic and cultural wellbeing of people in communities. Policy 6(1)(b) enjoins decision-makers

78 *Man O'War Station Ltd v Auckland Council*, above n 45, at [66]; In *Royal Forest & Bird Society of New Zealand Inc v Auckland Council*, above n 54, at [34], Whata J discussed this paragraph and the following paragraph from *Man O'War Station* and stated as follows: "The Court of Appeal also noted, with respect orthodoxically, that the requirement to 'avoid' adverse effects is contextual, so that whether any new activity or development would amount to an adverse effect must be assessed in both in the factual and broader policy context". The comment that the requirement to avoid adverse effects is contextual cannot to be seen in isolation from that which follows, it explains that the context being referred to is whether any new activity or development would amount to an adverse effect. Read carefully, the observation is consistent with *Man O'War*.

79 *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [90].

80 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [35].

to consider the rate at which built development and public infrastructure should be enabled to provide for the reasonable foreseeable needs of population growth without compromising the other values of the coastal environment. Policy 6(2) refers to the need to recognise potential contributions to the social, economic and cultural wellbeing of people in communities from use and development of the coastal marine area, and to the need to recognise those activities that have a functional need to locate in the coastal marine area, and to provide for them in appropriate places. Relevantly, it is also recognised that activities that do not have a functional need to locate in the coastal marine area generally should not be located there.

[112] Policy 7 deals with strategic planning. It provides that, in the preparation of regional plans, there is a need to consider where, how and when to provide for future residential and rural residential settlement, urban development and other activities in the coastal environment at both a regional and district level. There is also a need to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate, or may be inappropriate without consideration of the effects through a resource consent application.

[113] These policies are broadly about planning, providing for growth, and the associated provision of infrastructure, in a sustainable and interpreted way. They are less prescriptive policies.

[114] In contrast, policy 11 seeks to protect indigenous biological diversity in parts of the coastal environment, by avoiding adverse effects on indigenous taxa, indigenous ecosystems, the habitats of indigenous species, areas containing nationally significant examples of indigenous community types, and areas set aside for full or partial protection of indigenous biological diversity. It also seeks to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on activities on areas of predominantly indigenous vegetation in the coastal environment.

[115] As I have recorded earlier in this judgment, Indigenous Biological Diversity Areas A detailed in the RCEP are areas singled out and identified in the RCEP because they meet the criteria contained in policy 11(a). Insofar as I am aware, there has been no challenge to this part of the RCEP, or to the areas identified as Indigenous Biological Diversity Areas A in the RCEP. It was common ground before me that Indigenous Biological Diversity Areas A are areas in the coastal environment with outstanding natural character.

[116] Policy 13 is directed to the preservation of the natural character of the coastal environment, and the need to protect it from inappropriate subdivision, use and development. It records the requirement to avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character.

[117] Policy 15 is directed at the need to protect the natural features and natural landscapes of the coastal environment from inappropriate subdivision, use and development, and again, by avoiding adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment.

[118] The Supreme Court in *King Salmon* noted, in relation to policies 13 and 15, as follows:[81]

> The overall purpose of these directions is to preserve the natural character of the coastal 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). Accordingly, then, the local authority's obligations vary depending on the nature of the

81 *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 3, at [62].

> 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 occurrence of", but that is an issue to which we return at [92] below.

Policies 13(1)(a) and 15(a) were described by the majority as providing "something of a nature of a bottom line",[82] and the Court saw "no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed".[83]

[119] Another decision of the Environment Court has accepted that the Supreme Court's approach to policies 13 and 15 is equally applicable to policy 11.[84]

[120] In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 — which is in more prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.

[121] It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8.[85]

[122] As I have noted, the Environment Court's consideration of the NZCPS policies was brief and incomplete. The Court concluded that policy 11(a) is "not absolute or binary"[86] but it did not attempt to reconcile policy 11, or policies 13 and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.

[123] In my judgment, the Environment Court erred in approving policies and a rule that do not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a).

[124] Turning to the RPS, the most significant objectives for present purposes are objectives 2, 4, 6, 7, 18, 19, 20 and 23. Some seek protection of the natural environment; others seek to enable use and development.

[125] There are a number of policies that seek to implement these objectives. Relevantly, policy CE 2B(a) seeks to preserve the natural character of the coastal environment and protect from "inappropriate" subdivision use and development by including provisions in the regional plan which avoid adverse effects of activities on attributes that comprise natural character in areas of a coastal environment identified

82 At [132].

83 At [146].

84 *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [162]. This decision was upheld by this Court, (although the appeal was not in respect of this finding) — *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, (2017) 19 ELRNZ 628. Leave has been granted to appeal this Court's decision to the Court of Appeal.

85 And see *Opoutere Ratepayers and Residents' Association v Waikato Regional Council* [2015] NZEnvC 105, (2015) 19 ELRNZ 254 where the Environment Court considered the relationship between policy 7(1)(b) and policy 11.

86 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [52].

in the RPS as having outstanding natural character. Policy CE 6B refers to using the criteria in policy 11 of the NZCPS to identify and protect areas of indigenous biological diversity in the coastal environment requiring protection.

[126] The applicable parts of these policies are directive. They either use the word "avoid", or cross-refer to it. They do not say "avoid where practicable" or "avoid, remedy or mitigate".

[127] Policy EI 5B seeks to give priority to ensuring development or upgrades to regionally significant infrastructure avoid adverse effects on natural and physical resources identified in policy MN 1B[87] as matters of national importance, and to appropriately remedy or mitigate adverse effects that cannot practicably be avoided.

[128] The Environment Court discussed these various policies,[88] but without considering their specific wording. It found that there is nothing within the RPS or in the RCEP which isolates one issue or objective as being the pre-eminent consideration when setting methods and rules. It considered that the RPS and the RCEP seek to integrate the various issues and objectives within the broader context of the other documents relevant to the region.[89]

[129] In my judgment, the Environment Court erred by failing to consider the directive nature of relevant policies — particularly policies CE 2B, and CE 6B. It failed to consider whether or not these policies had pre-eminence in the sense discussed in *King Salmon*, and as a result, it failed to take into account the effect of the directive provisions on the RCEP policies and rule that it put in place.

Did the Environment Court err in its interpretation and implementation of relevant RCEP objectives?

[130] The Environment Court largely focused its attention on unchallenged RCEP objectives. It referred to objectives 1, 2, 2A, 3, 4, 25A, 25B and 26.

[131] I have already referred to these various objectives above.[90] As is clear from that discussion, objective 2 seeks to protect the attributes and values of high value areas from "inappropriate" subdivision use and development. Objective 2A seeks to protect Indigenous Biological Diversity Areas A and objective 3 seeks to prevent the loss of threatened habitats. Objective 25 refers to "appropriate locations"; objective 25A to "appropriate circumstances", and objective 25B to "appropriate locations".

[132] The majority in *King Salmon* considered the meaning of the words "appropriate" and "inappropriate" in not dissimilar provisions. I have discussed this above and quoted the relevant paragraph from the majority judgment at [55(b)] above. The Supreme Court also considered how provision for activities in appropriate places can be reconciled with protective avoid policies — see [56] above.

[133] Objectives 2, 2A and 3 can be reconciled with objectives 25, 25A and 25B in a similar manner. Objectives 25, 25A and 25B recognise that provision needs to be made for activities with a functional need to locate in the coastal marine area or which are dependent on its resources, along with regionally significant infrastructure, in areas suitable for those activities. This is not inconsistent with the requirement that such activities cannot occur in one of the areas described in objectives 2, 2A and 3, particularly if the activities would not protect — that is keep safe from harm — the

87 Policy MN1B is concerned with recognising and providing for matters of national importance.

88 *Royal Forest & Bird Protection Society Inc v Bay of Plenty Regional Council*, above 1, at [21]-[28].

89 At [30].

90 Above at [9] and [10].

values and attributes of the identified areas. Objectives 25, 25A and 25B do not suggest that provision must be made for the activities they refer to in all parts of the coastal environment.

[134] This is supported by objective 26. It requires that activities and structures in the coastal marine area should be located, designed and undertaken in a manner that is appropriate given the values and existing uses of their location. This reinforces the idea that some high value locations will be inappropriate for activities and structures. It links objectives 25, 25A and 25B with objectives 2, 2A and 3.

[135] In my judgment, the Environment Court misconstrued the objectives contained in the RCEP. Read carefully, and following the *King Salmon* approach, they recognise that provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area.

Did the Environment Court err in its interpretation of ss 87A, 104 and 104D in the Act?

[136] The Environment Court found that according regionally significant infrastructure, seeking to locate in an Indigenous Biological Diversity Area A, status as a non-complying activity, might have less prospect of avoiding adverse effects than if it were given status as a discretionary activity.

[137] The Environment Court said as follows:[91]

> Beyond that, the status of the activity as non-complying may have less prospect of avoiding adverse effects than a discretionary consent. Our reasons for this comment are:
>
> (i) on an application for discretionary consent the objectives and policies of the plan are clearly to be given effect to and achieved in the granting of the consent. All parties agree that the objectives and policies of the plan (and the superior documents) are clear, and NH 4 itself is clear in its intent that adverse effects are avoided; and
>
> (ii) any application for consent as a discretionary consent would therefore have to pass a high hurdle, including specifically addressing all matters in NH 11 and NH 11A (proportionate to the application and its context).
>
> (iii) if treated as a non-complying activity, it is clear that it would be contrary to the objectives and policies of the plan given Ms Gepp's interpretation of the avoidance policy. This would mean that the effects could be no more than minor. Clearly, this does not, in itself, mean that effects would be avoided.
>
> (iv) such a conclusion would require a judgement again of the level of effects, and a proportionate response to all elements of the application to properly consider a non-complying consent.
>
> What concerns the Court, particularly, is that such a non-complying evaluation may then seek to avoid reference to the objectives and policies of the RCEP because it is clearly contrary to those policies of the plan (which would by definition be contrary if the obligation is to avoid). It could then be argued that the policies were not applicable and the application could be considered on a more generic basis. The concern of this Court is that non-complying status might not lead to an appropriate and integrated approach to management, taking into account the many other aspects of the plan that would be applicable to ascertaining whether a particular application should be granted consent.
>
> However, overall and in practical terms, we consider there is little difference between non-complying and discretionary consent status …

91 *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 1, at [53]-[54].

[138] Royal Forest & Bird argued that the Environment Court erred to the extent that it appears to have thought that objectives and policies in applicable planning documents are less relevant to an application for a non-complying activity than to an application for a discretionary activity.

[139] Under s 87A, resource consent may be granted for a non-complying activity if the consent authority, inter alia, is satisfied that the requirements of s 104D are met. Section 104D of the Act operates as a gateway for non-complying activities. It provides as follows:

> **Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—
>
> (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
>
> (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
>
> (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
>
> (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

[140] Section 104 sets out the matters that are to be considered when considering an application for a resource consent for a non-complying activity. Relevantly, it provides as follows:

> When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
>
> (a) …
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard;
>
> (ii) other regulations;
>
> (iii) a national policy statement;
>
> (iv) a New Zealand coastal policy statement;
>
> (v) a regional policy statement or proposed regional policy statement;
>
> (vi) a plan or proposed plan; and
>
> …

[141] While the Environment Court's comments are curious, and not particularly easy to follow given the statutory provisions, I do not consider that they were findings made by it. The Environment Court did not expressly make any finding as to the relative importance of objectives and policies when considering an application for either a discretionary activity or a non-complying activity. Rather, its comments were conceptual — the word "may" was used repeatedly, and the Court simply observed that it "could be argued" that policies might be more relevant in one context than the other.

[142] I do not consider that the Environment Court made an erroneous finding in this regard.

Materiality

[143] Each of the above errors I have identified — issues 1 to 3 (inclusive) — were material to the Environment Court decision. No party contended to the contrary, and the materiality of the errors is self-evident.

Relief

[144] Royal Forest & Bird initially sought that the Environment Court's decision should be quashed, and that this Court should itself amend the policies. In the course of the hearing, it resiled from this position. It accepted that the more appropriate course is to remit the matter to the Environment Court, so that it can reconsider matters, in light of this Court's judgment. All other parties took the same approach. It seems to me that this is appropriate, particularly given that the Court is still to finalise its decision in relation to iwi resource management issues.

Result

[145] The appeal is allowed in part. In my judgment, the Environment Court erred in its interpretation and application of the *King Salmon* decision, of various provisions in the NZCPS, the RPS, and the RCEP.

[146] The matter is remitted to the Environment Court, to reconsider in light of this judgment.

Costs

[147] Royal Forest & Bird is entitled to its reasonable costs and disbursements. In that regard, I direct as follows:

(a) unless the parties can agree on costs and disbursements, Royal Forest & Bird is to file a memorandum, setting out the costs and disbursements it seeks, and indicating how it considers they should be apportioned between the parties (other than Ngāti Mākino), within 15 working days of the date of this decision;

(b) those parties against whom costs are sought, are to file memoranda in opposition, within a further 15 working days;

(c) Royal Forest & Bird's memoranda is not to exceed 15 pages in length;

(d) memoranda from other parties are not to exceed 10 pages in length;

I will then deal with the issue of costs and disbursements on the papers, unless I require the assistance of counsel.

Appeal allowed in part; matter remitted to the Environment Court for reconsideration

Reported by Barbara Rea

Appendix

Tables showing three versions of Proposed Regional Coastal Environment Plan provisions in dispute:

Table 1: PRCEP Version 9.1(d): version provided to the Environment Court for the natural heritage hearing.

Table 2: Relief sought by Forest & Bird.

Table 3: PRCEP Version 9.1(g): version approved by the Environment Court in the decision appealed from.

Table 1: PRCEP Version 9.1(d): version provided to the Environment Court for the natural heritage hearing*

Policy NH 1	In relation to the natural heritage of the coastal environment, activities may be considered appropriate if they contribute to the restoration and rehabilitation of natural heritage or cultural values associated with natural heritage (including kaimoana resources and cultural landscape features), or if they: (ee) Involve the operation, maintenance, upgrading or development of existing regionally significant infrastructure; or (c) Have a functional need to be located in or near the coastal environment in general, or in or near a specific part of the coastal environment and no reasonably practicable alternative locations exist; and (a) Are compatible with the existing built environment and level of modification to the environment. This includes but is not limited to: (i) Modification that is anticipated as a permitted or controlled activity in an operative District or City Plan; and (ii) Urban development activities and associated provision of quality open spaces in Urban Growth Areas contained in the Regional Policy Statement where urban development has been provided for in that area in the relevant District or City Plan, and the development is consistent with the Urban and Rural Growth Management Policies (UG policies) of the RPS; and (b) Are compact, and do not add to sprawl or sporadic development; and (d) Are of an appropriate form, scale and design to be compatible with the existing landforms, geological features and vegetation or will only have temporary and short-term effects on such features; and (e) Will not, by themselves or in combination with effects of other activities, have significant adverse effects on the natural processes or ecological functioning of the coastal marine area; except that clauses (a), (b), (d) and (e) do not apply for the National Grid.

Policy NH 5	While having particular regard to the level of protection afforded by Policy NH 4, consider providing for subdivision, use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where: (aa) After an assessment of a proposal in accordance with Policy NH 4A, transient or minor adverse effects are found to be acceptable; or (a) The proposal: (i) Relates to the construction, maintenance or upgrading of regionally significant infrastructure that is consistent with Policy SO 4(b) as if that policy applied to the coastal environment; or (ii) Relates to the provision of access to offshore islands, or use and development, as set out in Schedule 15 to this Plan; or (iii) Relates to the operation, maintenance and protection of an existing River Scheme or Land Drainage Scheme; or (iv) Relates to the continuation of a use that was lawfully established on or before 22 June 2014, provided there has been no change to the scale and significance of effects associated with an activity; or (v) Provides for the restoration or rehabilitation of indigenous biodiversity, natural features and landscapes or the natural character of the coastal environment in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4; or (vi) Provides for public walking, cycling or boating access to and along the coastal marine area in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4; and (b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and (ba) The avoidance of effects required by Policy NH 4 is not possible; and (c) The associated adverse effects on natural heritage values and attributes will be managed in accordance with Policy NH 11.

Policy NH 11	Manage the adverse effects of subdivision, use, maintenance and development activities that meet the criteria in Policy NH 5(a) on the values and attributes of the areas listed in Policy NH 4, in accordance with the following management regime: (a) Route or site selection considers the avoidance of significant natural heritage areas listed in Policy NH 4 or, where avoidance is not practicable, considers utilising the more modified parts of these areas; (b) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; (c) Adverse effects which cannot be avoided are remedied or mitigated; and (d) The Regional Council will consider allowing a biodiversity offset for residual adverse effects that are more than minor but less than significant on the values and attributes of any Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or on any taxa that meet the criteria listed in Policy 11(a)(i) or (ii) of the NZCPS where the offset results in no net biodiversity_loss and preferably a net biodiversity gain. If a biodiversity offset is to be used, it should be developed in a manner consistent with the principles contained in Schedule 13. **Advisory note:** Some significant natural heritage areas are located next to existing and future urban areas. Adverse effects could be caused by people accessing the coast for recreational purposes in inappropriate locations. In some instances, appropriately located, designed and constructed structures, such as board walks and public toilets, may assist in remedying or mitigating these adverse effects
Policy NH 11A	n/a

Rule SO 10	**Discretionary — Structures, occupation and use in the coastal marine area in Indigenous Biological Diversity Area A or an Area of Outstanding Natural Character** The 1 Occupation of any part of the common marine and coastal area; 2 Erection and placement of new structures, and the reconstruction, maintenance, alteration, extension, demolition, removal or abandonment of existing structures; and 3 Change in use of an existing structure in the coastal marine area. In an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or an Area of Outstanding Natural Character (as identified in Appendix I to the Regional Policy Statement), or that is not otherwise a permitted activity under a rule in this Plan, is a discretionary activity where the structure is one for one or more of the following purposes: (a) Providing protection, restoration or rehabilitation of the biodiversity values associated with such areas; (aa) Improving water quality, connections between water bodies or between freshwater bodies and coastal water, or improving other cultural connections or natural processes in the Area; (b) Providing educational, scientific or passive recreational opportunities that will enhance the understanding and long-term protection of the biodiversity values of the area; (c) Navigational aids; (d) Structures erected, reconstructed, placed, altered, or extended prior to the date on which this Plan was publicly notified; (e) The operation, maintenance, and protection of existing and new regionally significant infrastructure; (f) The operation, maintenance and protection of Existing River Schemes and Land Drainage Schemes; (g) The maintenance or enhancement of navigational safety in permanently navigable harbour waters; (h) Use and development identified in Schedule 15 Offshore Islands; or (i) Associated with maritime incidents and their management.

* These versions incorporated additional tracked change text (new text underlined, deleted text struck through) to show amendments agreed between the parties but subject at that time to the Environment Court's approval. As those aspects of the provisions are not in dispute, the track changes are not shown.

Table 2: Relief sought by Forest & Bird in bold-italic with new text underlined and deleted text struck through*

Policy NH 1	***Subject to Policy NH 4, i***n relation to the natural heritage of the coastal environment, activities may be considered appropriate if they contribute to the restoration and rehabilitation of natural heritage or cultural values associated with natural heritage (including kaimoana resources and cultural landscape features), or if they: (ee) Involve the operation, maintenance, upgrading or development of existing regionally significant infrastructure; or (c) Have a functional need to be located in or near the coastal environment in general, or in or near a specific part of the coastal environment and no reasonably practicable alternative locations exist; and (c) Are compatible with the existing built environment and level of modification to the environment. This includes but is not limited to: (i) Modification that is anticipated as a permitted or controlled activity in an operative District or City Plan; and (ii) Urban development activities and associated provision of quality open spaces in Urban Growth Areas contained in the Regional Policy Statement where urban development has been provided for in that area in the relevant District or City Plan, and the development is consistent with the Urban and Rural Growth Management Policies (UG policies) of the RPS; and (d) Are compact, and do not add to sprawl or sporadic development; and (d) Are of an appropriate form, scale and design to be compatible with the existing landforms, geological features and vegetation or will only have temporary and short-term effects on such features; and (e) Will not, by themselves or in combination with effects of other activities, have significant adverse effects on the natural processes or ecological functioning of the coastal marine area; except that clauses (a), (b), (d) and (e) do not apply for the National Grid.

Policy NH 5	While having particular regard to the level of protection afforded by Policy NH 4, consider providing for subdivision, use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where: (aa) After an assessment of a proposal in accordance with Policy NH 4A, transient or minor adverse effects are found to be acceptable; or (a) The proposal: (i) Relates to the construction, maintenance or upgrading ***of the national grid.*** ~~***regionally significant infrastructure that is consistent with Policy SO 4(b) as if that policy applied to the coastal environment;***~~ or (ii) Relates to the provision of access to offshore islands, or use and development, as set out in Schedule 15 to this Plan; or (iii) Relates to the operation, maintenance and protection of an existing River Scheme or Land Drainage Scheme; or (iv) Relates to the continuation of a use that was lawfully established on or before 22 June 2014, provided there has been no change to the scale and significance of effects associated with an activity; or (v) Provides for the restoration or rehabilitation of indigenous biodiversity, natural features and landscapes or the natural character of the coastal environment in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4; or (vi) Provides for public walking, cycling or boating access to and along the coastal marine area in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4; and (b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and (ba) The avoidance of effects required by Policy NH 4 is not possible; and (c) The associated adverse effects on natural heritage values and attributes will be managed in accordance with Policy NH 11.

Policy NH 11	Manage the adverse effects of subdivision, use, maintenance and development activities that meet the criteria in Policy NH 5(a) on the values and attributes of the areas listed in Policy NH 4, in accordance with the following management regime: (a) Route or site selection considers the avoidance of significant natural heritage areas listed in Policy NH 4 or, where avoidance is not practicable, considers utilising the more modified parts of these areas; (aa) ***Significant adverse effects must be avoided (except that this requirement does not apply to the National Grid)*** (b) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; (c) Adverse effects which cannot be avoided are remedied or mitigated; and (d) The Regional Council will consider allowing a biodiversity offset for residual adverse effects that are more than minor but less than significant on the values and attributes of any Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or on any taxa that meet the criteria listed in Policy 11(a)(i) or (ii) of the NZCPS where the offset results in no net biodiversity_loss and preferably a net biodiversity gain. If a biodiversity offset is to be used, it should be developed in a manner consistent with the principles contained in Schedule 13.
Policy NH 11A	n/a

Rule SO 10	**Discretionary — Structures, occupation and use in the coastal marine area in Indigenous Biological Diversity Area A or an Area of Outstanding Natural Character** The 1 Occupation of any part of the common marine and coastal area; 2 Erection and placement of new structures, and the reconstruction, maintenance, alteration, extension, demolition, removal or abandonment of existing structures; and 3 Change in use of an existing structure in the coastal marine area. In an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or an Area of Outstanding Natural Character (as identified in Appendix I to the Regional Policy Statement), or that is not otherwise a permitted activity under a rule in this Plan, is a discretionary activity where the structure is one for one or more of the following purposes: (a) Providing protection, restoration or rehabilitation of the biodiversity values associated with such areas; (aa) Improving water quality, connections between water bodies or between freshwater bodies and coastal water, or improving other cultural connections or natural processes in the Area; (b) Providing educational, scientific or passive recreational opportunities that will enhance the understanding and long-term protection of the biodiversity values of the area; (c) Navigational aids; (d) Structures erected, reconstructed, placed, altered, or extended prior to the date on which this Plan was publicly notified; (e) The operation, maintenance, and protection of existing ~~*and new*~~ regionally significant infrastructure ***or the operation, maintenance, upgrading and development of the National Grid;*** (f) The operation, maintenance and protection of Existing River Schemes and Land Drainage Schemes; (g) The maintenance or enhancement of navigational safety in permanently navigable harbour waters; (h) Use and development identified in Schedule 15 Offshore Islands; or (i) Associated with maritime incidents and their management.

* These versions incorporated additional tracked change text (new text underlined, deleted text struck through) to show amendments agreed between the parties but subject at that time to the Environment Court's approval. As those aspects of the provisions are not in dispute, the track changes are not shown.

Table 3: PRCEP Version 9.1(g): version approved by the Environment Court in the decision appealed from. Changes from Version 9.1(d) are shown underlined (new text) or strikethrough (deleted text).

Policy NH 1	In relation to the natural heritage of the coastal environment, activities may be considered appropriate if they contribute to the restoration and rehabilitation of natural heritage or cultural values associated with natural heritage (including kaimoana resources and cultural landscape features), or if they: (ee) Involve the operation, maintenance, upgrading or development of existing regionally significant infrastructure; or (c) Have a functional need to be located in or near the coastal environment in general, or in or near a specific part of the coastal environment and no reasonably practicable alternative locations exist; and (a) Are compatible with the existing built environment and level of modification to the environment. This includes but is not limited to: (i) Modification that is anticipated as a permitted or controlled activity in an operative District or City Plan; and (ii) Urban development activities and associated provision of quality open spaces in Urban Growth Areas contained in the Regional Policy Statement where urban development has been provided for in that area in the relevant District or City Plan, and the development is consistent with the Urban and Rural Growth Management Policies (UG policies) of the RPS; and (b) Are compact, and do not add to sprawl or sporadic development; and (d) Are of an appropriate form, scale and design to be compatible with the existing landforms, geological features and vegetation or will only have temporary and short-term effects on such features; and (e) Will not, by themselves or in combination with effects of other activities, have significant adverse effects on the natural processes or ecological functioning of the coastal marine area; except that clauses (a), (b), (d) and (e) do not apply for the National Grid. Advice note: Particular consideration must be given to Policies NH 4, NH 4A, NH 5 and NH 11 if an activity may have adverse effects on the values and attributes of an Outstanding Natural Feature and Landscape (ONFL), an area of Outstanding Natural Character (ONC) or an Indigenous Biological Diversity Area A (IBDA A).

Policy NH 5	~~While having particular regard to the level of protection afforded by Policy NH 4,~~ e<u>C</u>onsider providing for subdivision, use and development proposals that will adversely affect the values and attributes associated with the areas in Policy NH 4 <u>only</u> where: (aa) After an assessment of a proposal in accordance with Policy NH 4A transient or minor adverse effects are found to be acceptable; or (a) The proposal: (i) Relates to the construction, maintenance or upgrading of regionally significant infrastructure that is consistent with Policy SO 4(b) as if that policy applied to the coastal environment; or (ii) Relates to the provision of access to offshore islands, or use and development, as set out in Schedule 15 to this Plan; or (iii) Relates to the operation, maintenance and protection of an existing River Scheme or Land Drainage Scheme; or (iv) Relates to the continuation of a use that was lawfully established on or before 22 June 2014, provided there has been no change to the scale and significance of effects associated with an activity; or (v) Provides for the restoration or rehabilitation of indigenous biodiversity, natural features and landscapes or the natural character of the coastal environment in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4; or (vi) Provides for public walking, cycling or boating access to and along the coastal marine area in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4. (b) ~~There are no practical alternative locations available outside the areas listed in Policy NH 4; and~~ (ba) ~~The avoidance of effects required by Policy NH 4 is not possible; and~~ (c) ~~The associated adverse effects on natural heritage values and attributes will be managed in accordance with Policy NH 11.~~

Policy NH 11	~~Manage the adverse effects of subdivision, use, maintenance and development activities that meet the criteria in Policy NH 5(a) on the values and attributes of the areas listed in Policy NH 4, in accordance with the following management regime:~~ An application for a proposal listed in Policy NH 5(a) must demonstrate that: (i) There are no practical alternative locations available outside the area listed in Policy NH 4; and *(moved from Policy NH 5 above)* (ii) The avoidance of effects required by Policy NH 4 is not possible; and *(moved from Policy NH 5 above)* (iii) Route or site selection has considered~~s~~ the avoidance of significant natural heritage areas listed in Policy NH 4 or, where avoidance is not practicable, it has considered~~s~~ utilising the more modified parts of these areas; and (iv) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and (v) Adverse effects that cannot be avoided are remedied or mitigated to the extent practicable. (a) ~~The Regional Council will consider allowing a biodiversity offset for residual adverse effects that are more than minor but less than significant on the values and attributes of any Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or on any taxa that meet the criteria listed in Policy 11(a)(i) or (ii) of the NZCPS where the offset results in no net biodiversity loss and preferably a net biodiversity gain.~~ ~~If a biodiversity offset is to be used, it should be developed in a manner consistent with the principles contained in Schedule 13.~~ ~~**Advisory note:**~~ ~~Some significant natural heritage areas are located next to existing and future urban areas.~~ ~~Adverse effects could be caused by people accessing the coast for recreational purposes in inappropriate locations.~~ ~~In some instances, appropriately located, designed and constructed structures, such as board walks and public toilets, may assist in remedying or mitigating these adverse effects~~
Policy NH 11A	For proposals listed in Policy NH 5(a), the Regional Council will consider allowing a biodiversity offset developed in a manner consistent with the principles contained in Schedule 13 to compensate for more than minor adverse effects on Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or on any taxa that meet the criteria listed in Policy 11(a)(i) or (ii) of the NZCPS that cannot be avoided, remedied or mitigated. **Advisory note:** Some significant natural heritage areas are located next to existing and future urban areas. Adverse effects could be caused by people accessing the coast for recreational purposes in inappropriate locations. In some instances, appropriately located, designed and constructed structures, such as board walks and public toilets, may assist in remedying or mitigating these adverse effects

Rule SO 10	**Discretionary — Structures, occupation and use in the coastal marine area in Indigenous Biological Diversity Area A or an Area of Outstanding Natural Character** The: 1 Occupation of any part of the common marine and coastal area; 2 Erection and placement of new structures, and the reconstruction, maintenance, alteration, extension, demolition, removal or abandonment of existing structures; and 3 Change in use of an existing structure in the coastal marine area. In an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or an Area of Outstanding Natural Character (as identified in Appendix I to the Regional Policy Statement), or that is not otherwise a permitted activity under a rule in this Plan, is a discretionary activity where the structure is one for one or more of the following purposes: (a) Providing protection, restoration or rehabilitation of the biodiversity values associated with such areas; (aa) Improving water quality, connections between water bodies or between freshwater bodies and coastal water, or improving other cultural connections or natural processes in the Area; (b) Providing educational, scientific or passive recreational opportunities that will enhance the understanding and long-term protection of the biodiversity values of the area; (c) Navigational aids; (d) Structures erected, reconstructed, placed, altered, or extended prior to the date on which this Plan was publicly notified; (e) The operation, maintenance, and protection of existing and new regionally significant infrastructure; (f) The operation, maintenance and protection of Existing River Schemes and Land Drainage Schemes; (g) The maintenance or enhancement of navigational safety in permanently navigable harbour waters; (h) Use and development identified in Schedule 15 Offshore Islands; or (i) Associated with maritime incidents and their management.