IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA240/2020
[2021] NZCA 638

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

Hearing:	6 July 2021
Court:	Kós P, Miller and Gilbert JJ
Counsel:	L A Andersen QC for Appellant D A Allan and M C Wright for First Respondent A J Logan and T M Sefton for Second Respondent P D Anderson and S T Shaw for Third Respondent J W Maassen and B D Mead for Fourth Respondent
Judgment:	2 December 2021 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first, second and third respondents costs for a standard appeal on a band A basis plus usual disbursements.

REASONS

Kós P and Gilbert J [1]
Miller J [94]

KÓS P AND GILBERT J

(Given by Kós P)

Table of Contents

	Para No
Background	[1]
The PRPS and its consequences	[11]
Statutory and regulatory framework	[16]
The RMA: policy statements and regional plans	[16]
The NZCPS	[21]
Resource consents	[30]
The *King Salmon* decision	[35]
Majority judgment	[38]
Dissenting judgment	[50]
Issues arising from King Salmon	[53]
Environment Court interim decision	[62]
High Court decision	[66]
Approved question of law for appeal	[71]
Did the High Court misapply *King Salmon?*	[73]
Discussion	[78]
Conclusion	[87]
Two immaterial errors below	[88]
Result	[92]

[1] The New Zealand Coastal Policy Statement 2010[1] requires adverse effects in areas of outstanding natural character be "avoided". The essential question in this appeal is whether a proposed regional policy statement gives effect to that requirement by providing adverse effects in such areas be "avoided, remedied or mitigated"?

Background

[2] The Otago Harbour, or Ōtākou, is the only significant natural port located between Timaru and Bluff. Ngāi Tahu sold the Otago block to the New Zealand

[1] Herein, the NZCPS.

Company in 1844, and Dunedin was founded four years later. Harbour dredging to Port Chalmers began in 1865, and on to Dunedin in 1881.

[3] The harbour is a long, hill-girt waterway running southwest from its entrance at Taiaroa Head. That entrance is not without difficulty: a narrow, dredged channel lying between the dramatic, steepling Taiaroa Head to the southeast and a long low-lying man-made mole, over a kilometre in length, to the southwest at Aramoana. The mole, constructed in the 1880s, prevents littoral drift of sediment southward along Spit Beach. Without the Aramoana mole, a sand bar would form and block the harbour entrance.

[4] The navigation channel, dredged at this point to a depth of 13.5 metres, takes a serpentine course to Port Chalmers: past Harington Point to port and, to starboard, a long sandy feature off the Aramoana banks known as The Spit. A course adjustment to starboard is required soon after to continue down the channel: a vessel entering the harbour will now be heading due west past Taylor, Pulling and Acheron Points until, just before Rocky Point, a course shift to south is required to make Port Chalmers.

[5] Port Chalmers is now one of New Zealand's two deepest container ports, and the country's third largest port by product value. It employs over 300 staff. Substantial additional dredging was undertaken between 1975 and 1977, shifting 3.9 million m^3 of sediment from the harbour and enabling Port Chalmers to cope with container ships with an 11-metre draft at any state of tide.

[6] Smaller vessels may continue past Port Chalmers, along the Victoria Channel, to Dunedin wharves in the upper harbour, but there the channel is dredged only to 7.5 metres.

[7] Beyond the dredged channels, water depths are mostly less than 2 metres. At low spring tide, about one-third of the harbour surface is exposed sediment. At high spring tide the harbour has a mean surface area of 46 km^2.

[8] Sea grass beds cover about 32 hectares in the lower harbour area, providing nursery grounds for inter-tidal invertebrates and fish, as well as feeding areas for fish

and birds. The salt marsh at Aramoana, adjacent to The Spit, is a coastal protection area in the Otago Regional Plan and area of significant conservation value in the Dunedin City District Plan. There are important rocky shore habitats, cockle beds and shell banks. The latter were described in the Environment Court decision as "unique within Otago Harbour and very rare locally, nationally and internationally with birds using the banks in the harbour for roosting".[2]

[9] The proposed regional policy statement[3] does not itself identify natural landscapes of high or outstanding natural character within the harbour. Such classifications are for derivative plans, yet to be brought forth. Two areas were identified in evidence by the appellant, Port Otago, as likely areas of high or outstanding natural character or features. Whether the regional plan ultimately sustains that suggestion remains to be seen. The two areas identified by Port Otago were part of the stretch of coastline between the Aramoana mole and Heyward Point (natural feature — high and outstanding), and the salt marsh at Aramoana, adjacent to The Spit (natural feature — high and outstanding), reaching out into the dredged shipping channel itself (natural character — high). It may be noted that the current regional coastal plan is slightly different: it records the former area as an outstanding natural feature and landscape, but not the latter, and separately identifies Goat and Quarantine Islands, just upstream of Port Chalmers, as a second outstanding natural feature and landscape.

[10] There are also nationally significant surf breaks at Aramoana and Whareakeake, the latter outside the harbour to the west of Heyward Point. The Environment Court noted that these two surf breaks are maintained in part by managed disposal of dredged sediment from the main harbour channel.[4]

The PRPS and its consequences

[11] The PRPS was publicly notified in May 2015. A decision on the statement was released by the Otago Regional Council in October 2016, following submissions. That

---

2 *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 at [11(f)] [Environment Court interim decision].

3 Herein, the PRPS.

4 Environment Court interim decision, above n 2, at [14].

version did not contain any express provision for port activities at Port Chalmers or Port Dunedin.

[12] Concerned by the lack of a specific ports policy, Port Otago appealed. The parties to the appeal agreed a specific ports policy is appropriate but could not agree on its content. Port Otago proposed the following policy, policy 4.3.7:

> **Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin**
>
> Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage their effects by:
>
> (a) ensuring that other activities in the coastal environment do not adversely affect port activities;
>
> (b) providing for the efficient and safe operation of these ports and effective connections with other transport modes;
>
> (c) providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;
>
> (d) providing for those ports by:
>
> (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment;
>
> (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
>
> (iii) considering the use of adaptive management as a tool to avoid adverse effects;
>
> (e) where the efficient and safe operation of port activities cannot be provided for while achieving the policies under objective 3.1 and 3.2 avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area; and
>
> (f) otherwise managing effects by applying policy 4.3.4.

[13] Port Otago was concerned about the port otherwise having to shut down in the absence of such wording. It was particularly concerned about relocation of navigation beacons along the shipping channel when widened pursuant to existing consents, the disposal of dredging spoil and the effects of activities on surf breaks. Those concerns

were also pursued before us on appeal, but the exact problems faced by Port Otago were amorphous and difficult to assess. Its evidence shed very little light on them.[5]

[14] After an attempted mediation in 2017, the appeal was heard in February 2018. In September 2018 the Environment Court issued an interim decision, recommending a different wording for policy 4.3.7. It proposed (and required consultation on) the following:[6]

> … we suggest a wording of policy 4.3.7 (after 4.3.7(a) to (c)) along these lines:
>
> …
>
> (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to naturally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;
>
> (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;
>
> (f) in respect of naturally significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.

[15] An appeal was then mounted to the High Court by the Environmental Defence Society Inc.[7] It was heard in June 2019. In September of that year Gendall J allowed EDS's appeal.[8] He held, inter alia, that the Environment Court erred in recommending wording that did not give effect to the prescriptive avoidance policies of the NZCPS, contrary to s 62(3) of the Resource Management Act 1991.[9]

---

5 See further discussion on the reality of Port Otago's concerns at [84]–[86] below.
6 Environment Court interim decision, above n 2, at [135].
7 Herein, the EDS.
8 *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278 [High Court judgment].
9 Herein, the RMA.

Statutory and regulatory framework

The RMA: policy statements and regional plans

[16] New Zealand coastal policy statements state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand.[10] The Minister of Conservation prepares a New Zealand coastal policy statement.[11] A New Zealand coastal policy statement contains national objectives and policies.[12]

[17] Regional policy statements provide an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.[13] Section 62(1) sets out the contents of a regional policy statement — including, regional objectives, policies and the methods (but not rules) used to implement those policies. Importantly, s 62(3) provides a regional policy statement must "give effect to" a New Zealand coastal policy statement.

[18] Regional plans assist a regional council carry out its functions in order to achieve the purpose of the RMA.[14] But s 63(2) provides regional coastal plans are to assist a regional council, in conjunction with the Minister of Conservation, to achieve the purpose of the RMA in relation to the coastal marine area of that region. Regional coastal plans differ from other regional plans in that they require approval from the Minister of Conservation as well as the regional council.[15] Section 67 sets out the requisite contents of a regional plan (coastal or otherwise). A regional plan must state the objectives for the region, as well as policies and rules to implement those objectives.[16] Section 67(3)(b) and (c) provides a regional plan must, again, "give effect to" a New Zealand coastal policy statement and a regional policy statement. And s 293 permits Environment Court approval of departures from a New Zealand

---

10 RMA 1991, s 56.
11 Section 57.
12 Section 58(1).
13 Section 59.
14 Section 63(1).
15 Section 64 and sch 1, cl 18–19.
16 Section 67(1).

coastal policy statement (in the context of a proposed policy statement or plan) only where that departure is of "minor significance".

[19] This creates a hierarchical system of policy statements and plans. A local regional policy statement must give effect to a New Zealand coastal policy statement. A regional plan sits one rung lower in the hierarchy again and must give effect to all the policy statements above it — the relevant regional policy statement as well as a New Zealand coastal policy statement.[17]

[20] The function of each instrument changes according to its place in the hierarchy. Objectives and policies are set at the top and flow down through all documents, particularised to a local region. Methods to achieve those policies are introduced in regional policy statements. Rules to achieve those objectives and policies are then located in regional plans.

The NZCPS

[21] We turn now to the detailed drafting of the current NZCPS. It was gazetted in 2010 and is the second such statement to have been promulgated.

[22] Policy 6 concerns activities in the coastal environment generally. Relevantly it states:

> **Policy 6 Activities in the coastal environment**
>
> (1) In relation to the coastal environment:
>
> (a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;
>
> (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of

[17] See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10]–[11] [*King Salmon*].

population growth without compromising the other values of the coastal environment;

…

(2) Additionally, in relation to the coastal marine area:

(a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations:

…

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

…

[23] Policy 7 concerns "Strategic planning". It mandates, when preparing regional policy statements:

(a) consideration of where, how and when to provide for development and other activities in the coastal environment at a regional and district level;[18] and

(b) identification of areas of the coastal environment where particular activities, use and development are inappropriate or may be inappropriate without some form of resource consent process.[19]

[24] Because it is germane to the *King Salmon* decision, which we discuss in greater detail below, we also set out policy 8, which concerns aquaculture:

---

18 NZCPS, policy 7(1)(a).
19 Policy 7(1)(b).

Policy 8 **Aquaculture**

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[25] Policy 9 relates to ports. We set it out in full also:

Policy 9 **Ports**

Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by:

(a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and

(b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes.

We will return later in this judgment to the meaning and significance of this provision. Differing views on those matters lie at the heart of the different reasons given for allowing the present appeal.

[26] We turn now to the relevant avoidance policies, namely policies 11, 13, 15 and 16. Policy 11 concerns "Indigenous biological diversity". To protect areas of indigenous biodiversity in the coastal environment, policy 11(a) requires decision-makers "avoid" adverse effects of activities on areas with certain biodiversity characteristics. But the policy contains a hierarchy based on classification of both environment and environmental effect: policy 11(b) requires decision-makers "avoid" *significant* adverse effects on certain environments with specified biodiversity characteristics (for example, areas of predominantly indigenous vegetation in the coastal environment) and "avoid, *remedy or mitigate*" other (lesser) adverse effects of activities in areas with other specified biodiversity characteristics.

[27] Policy 13 is concerned with preservation of natural character. Relevantly it reads:

> **Policy 13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> …

Again, there is a hierarchy: avoidance of adverse effects in areas with outstanding natural character; in *other* areas it is *significant* adverse effects that must be avoided, and other adverse effects may be avoided, remedied or mitigated.

[28] Policy 15 follows the same hierarchical structure as policies 11 and 13. It provides that to protect natural features and landscapes in coastal environments from inappropriate use and development, decision-makers should "avoid" adverse effects of activities on outstanding natural features and landscapes and avoid significant

adverse effects, while avoiding, remedying or mitigating other adverse effects, of activities on *other* natural features and landscapes in the coastal environment.

[29] Policy 16 relates to "Surf breaks of national significance":

> **Policy 16** **Surf breaks of national significance**
>
> Protect the surf breaks of national significance for surfing listed in Schedule 1, by:
>
> (a) ensuring that activities in the coastal environment do not adversely affect the surf breaks; and
>
> (b) avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.
>
> (Footnote omitted.)

Resource consents

[30] Resource consents are governed by pt 6 of the RMA. Section 87A sets out classes of activities that do or do not require a resource consent. Two classes of activity are relevant for present purposes: discretionary activities and non-complying activities.

[31] If an activity is described in a plan or a proposed plan as a discretionary activity, a resource consent is required. The consent authority may decline or grant the consent with or without conditions. If granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the plan, or proposed plan.[20]

[32] If an activity is described as a non-complying activity, a resource consent is required for the activity also. The consent authority may decline or grant the consent, with or without conditions, but only if satisfied the requirements of s 104D are met, and the activity must comply with the requirements, conditions, and permissions, if any, specified in the plan or proposed plan.[21]

---

[20] RMA, s 87A(4).
[21] Section 87A(5).

[33] When granting a resource consent, section 104(1) provides a consenting authority must consider relevant provisions of a New Zealand coastal policy statement, as well as regional policy statements and plans. But the decision in *King Salmon*, to which we next turn, does not prevent consideration of pt 2 of the RMA — the general purposes and principles part — when considering a resource consent application.[22] Section 104D(1) provides a consent authority may only grant a resource consent for a non-complying activity if satisfied that either the adverse effects of the activity on the environment will be minor or the application is for an activity not contrary to the objectives and policies of the relevant plan or proposed plan.

[34] The NZCPS, and lower-order planning documents that give effect to it, are therefore highly relevant to resource consent applications. Particularly, where a proposed activity conflicts with an NZCPS policy, recourse to pt 2 of the RMA is likely unnecessary.[23] For a non-complying activity resource consent application, only the regional plan (or proposed plan) is directly determinative of whether a consent will or will not be granted. But given the hierarchical structure of these planning instruments, the NZCPS and relevant regional policy statement will significantly influence the regional plan and whether a consent is granted.

The *King Salmon* decision

[35] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*) concerned conjoint applications for a regional plan change and resource consents.[24] The former would change salmon farming from a prohibited activity to a discretionary activity in specific locations. One of the locations the subject of the applications was called Papatua. It was an area of outstanding natural character and an outstanding natural landscape.

[36] The applications were referred to a Board of Inquiry. The Board accepted that a salmon farm at Papatua would have significant adverse effects on natural character and landscape. The Board found policies 13(1)(a) and 15(a) of the NZCPS would not

---

22 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [70]–[72].

23 At [71].

24 *King Salmon*, above n 17.

be met if the plan change was granted. But it took the view they were in conflict with policy 8, concerning aquaculture. It was, it said, therefore required to balance the requirements of those policies and reach an overall judgment in light of the NZCPS and the principles contained in pt 2 of the RMA. The plan change and consents were granted for four sites, including Papatua.

[37] An appeal by the EDS to the High Court failed and a direct appeal to the Supreme Court ensued. Two judgments were delivered. The first, a majority judgment of Elias CJ and McGrath, Glazebrook and Arnold JJ delivered by the latter Judge. William Young J dissented. We now look at each judgment.

Majority judgment

[38] We focus here on the most important conclusions reached in the majority judgment, assessed in the context of the present appeal. Ten points may be noted.

[39] First, after noting the hierarchy in planning instruments effected by the RMA, the majority noted early divergence in caselaw concerning s 5 — the purpose section. Early Planning Tribunal decisions took an "environmental bottom line" approach, in which s 5(2) set out cumulative safeguards, all of which needed to be met for the purpose of sustainable management of the environment to be achieved.[25] In contrast, beginning with the 1993 High Court decision in *New Zealand Rail Ltd v Marlborough District Council*, a series of cases required an overall judgment to be made: the preservation of natural character was subordinate to s 5's overall purpose of promoting sustainable management.[26] The fundamental issue in the *King Salmon* appeal was whether the later approach was consistent with the legislative framework generally, and the NZCPS in particular.[27]

---

25 At [38], citing *Shell Oil New Zealand Ltd v Auckland City Council* PT Wellington W8/94, 2 February 1994; *Foxley Engineering Ltd v Wellington City Council* PT Wellington W12/94, 16 March 1994; *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* PT Wellington W26/94, 19 April 1994; and *Campbell v Southland District Council* PT Wellington W114/94, 14 December 1994.

26 At [39]–[42], citing in particular *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC). That decision drew upon jurisprudence under the Town and Country Planning Act 1977, and had distinguished the decision of this Court in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA), which held s 3 under that Act considerations (matters of national importance) were to be given greater weight in a plan change than s 4 matters (general purposes of district schemes).

27 At [43].

[40] Secondly, *King Salmon* confirms that the requirement in s 67(3), to "give effect to" a New Zealand coastal policy statement, was intended to constrain decision-makers. Until August 2003, s 67 had provided that a regional plan "shall not be inconsistent with" a New Zealand coastal policy statement. Thereafter the words "give effect to" were enacted. The majority observed that that change in language had resulted in a strengthening of a regional council's obligation.[28] It quoted, with apparent approval, an Environment Court decision observing that the phrase "give effect to" is a "strong direction".[29]

[41] Thirdly, the majority criticised the approach taken by the Board in determining the applications not simply by reference to the NZCPS but also by reference to pt 2 of the RMA. It observed that, in principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2, and there is no separate need to refer back to that part when determining a plan change.[30] Caveats identified by the majority (relating to lawfulness, coverage or uncertainty of meaning of a New Zealand coastal policy statement provision)[31] did not apply in that appeal (or this), and generally will be rare. The majority continued:[32]

> For these reasons, it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning.

[42] Fourthly, the majority contrasted the word "avoid" — used in policies 13 and 15 of the NZCPS — with that other term of art in resource management law, "avoid, remedy or mitigate".[33] It noted a decision of the Environment Court in *Wairoa River Canal Partnership v Auckland Regional Council* to the effect that the use of the word "avoid" sets a presumption (or a direction to an outcome) that developments in those areas will be inappropriate.[34] The majority expressed no view on the merits of that

---

28 At [76] and [91].
29 At [77], quoting *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 at [51].
30 At [85].
31 At [88].
32 At [90].
33 At [93].
34 At [95], citing *Wairoa River Canal Partnership v Auckland Regional Council* (2010) 16 ELRNZ 152 (EnvC) at [16].

analysis but went on to say that it considered that "avoid" had its ordinary meaning in s 5(2)(c) and the NZCPS of "not allow" or "prevent the occurrence of":[35]

> In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning.

The juxtaposition of "avoid" with these other two terms of art was a distinctive feature of the legislation and the NZCPS.

[43] Fifthly, focusing then on provisions of pt 2 and the NZCPS that in common refer to the preservation or protection of the natural character of the coastal environment from "inappropriate" use and development, the majority noted that the framers of both the RMA and the NZCPS recognised there might yet be appropriate development within such areas.[36] Objective 6 (providing that protection of coastal environment values "does not preclude use and development in appropriate places and forms, and within appropriate limits") and policy 6 of the NZCPS (set out at [22] above) expressly recognise that.[37] Context was critical. "Inappropriateness" needed to be assessed by reference to what it is that is sought to be protected.[38] It observed:[39]

> To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character.* The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[44] Sixthly, the majority observed that although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition of that expression in the RMA, it "may nevertheless have the effect of what in ordinary speech would be a rule".[40] The majority instanced policy 29 in the NZCPS as "an obvious example". Policy 29(2) directs local authorities to amend documents as necessary "to give effect to this policy as soon as practicable" in two particular respects, effectively limiting the activity classification of restricted coastal activity.

---

35 At [96].
36 At [98].
37 At [99].
38 At [101].
39 At [102].
40 At [116].

[45] Seventhly, noting that "avoid" is a stronger direction than "take account of", the majority accepted that there may be instances where particular policies in the NZCPS "pull in different directions".[41] But it said this was likely to occur infrequently given the drafting of the NZCPS and that an apparent conflict between particular policies may dissolve if close attention is paid to expression.[42] The majority went on:[43]

> Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

The majority continued:[44]

> A danger of the "overall judgment" approach [which it did not support] 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.

[46] Eighthly, the majority concluded that policies 13(1)(a) and (b) and 15(a) and (b) do provide "something in the nature of a bottom line".[45] Section 5(2) of the RMA contemplates protection as well as use and development. The RMA contemplates that district plans may prohibit particular activities. That being so, the majority said there was no obvious reason why a planning document which is higher in the hierarchy should not contain policies which contemplate the prohibition of particular activities in certain localities.[46]

[47] Ninthly, the majority considered it plain that the NZCPS contains policies that are intended to, and do, have binding effect. It again instanced policy 29.[47] But it went on:[48]

---

41 At [129].
42 At [129].
43 At [130].
44 At [131].
45 At [132].
46 At [132].
47 At [146]. See [44] above.
48 At [146].

> Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[48] Finally, the majority observed that the Board should not have granted the plan change. The proposed plan change in relation to Papatua would have significant adverse effects on an area of outstanding natural character and landscape, meaning the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were granted. The majority continued:[49]

> These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[49] It followed the plan change in relation to Papatua did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.[50]

Dissenting judgment

[50] We touch now on the dissenting judgment given by William Young J. The essence of the dissent lies in the Judge's observation that the majority interpreted policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character.[51] Yet policy 7 requires regional councils preparing regional policy statements and plans to identify areas of coastal environment where particular activities are or may be inappropriate. That analysis, William Young J considered, was pre-empted by the approach taken by the majority — that is, requiring "all activities with adverse effects on areas of outstanding natural character must be prevented".[52]

---

49 At [153].
50 At [154].
51 At [178].
52 At [189].

[51] On the approach taken by William Young J the approval of the salmon farm would turn on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, bearing in mind ss 5 and 6(a) and (b) of the RMA as material to the interpretation and application of those policies.[53] William Young J went on:[54]

> I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the policies are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:
>
> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:
>
> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[52] Relevantly for our purposes, William Young J expressed the view that the majority's approach pre-empted decisions which the NZCPS vested in regional councils.[55] He noted too that the majority approach was not entirely literal.[56] He considered that a corollary of the approach taken by the majority was that regional councils would be required to promulgate rules which specify as prohibited "any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character".[57] The Judge suggested this would preclude some navigation aids, and would impose severe restrictions on privately owned land in areas of outstanding natural character. Potentially, that would be entirely disproportionate in its operation as any perceptible adverse effects would be controlling irrespective of whatever benefits, public or private, might accrue if an activity were permitted.[58]

---

53 At [194].
54 At [195] (emphasis in original).
55 At [189].
56 At [197].
57 At [201].
58 At [201].

Issues arising from King Salmon

[53] A number of issues, in some instances, difficulties, arise with the *King Salmon* decision. They are worth noting, although in a sense they are irrelevant to our task. Whatever else might be said, it is plain that the decision binds this Court on this appeal, concerning as it does an appeal on a proposed regional policy statement and whether its terms "give effect to" the NZCPS in terms of s 62(3) of the RMA. The ratio decidendi in *King Salmon* concerned that issue, albeit in the context of a plan change rather than a proposed regional policy statement (and s 67(3)(b) rather than s 62(3)). The distinction is not material for present purposes.

[54] We make seven points.

[55] First, it is evident that *King Salmon*'s reinforcement of an "environmental bottom line", rather than overall balancing, approach is more consistent with Parliament's original intent when enacting the RMA.[59] For instance, the Hon Simon Upton, then-Minister for the Environment, observed in the third reading debate:[60]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair.

That environmental bottom line approach was the initial stance of the Planning Tribunal, the forerunner of the Environment Court. In a series of decisions reviewed by the majority in *King Salmon,* the Tribunal held s 5(2) set out cumulative safeguards, all of which needed to be met for the purpose of sustainable management of the environment to be achieved, and that pt 2 was not about achieving a balance between benefits and adverse effects.[61] But almost immediately the High Court headed off in a different direction in the *New Zealand Rail* decision, mandating what became described as the overall broad judgment approach.[62] That approach, at least at planning stages superior to resource consent applications, is overruled by

---

59 Geoffrey Palmer "Ruminations on the problems with the Resource Management Act 1991" [2016] NZLJ 2 at 5. See *King Salmon*, above n 17, at [107].

60 (4 July 1991) 516 NZPD 3019. See also (28 August 1990) 510 NZPD 3950 for comments of the Rt Hon Geoffrey Palmer, also the then-Minister of the Environment, in the second reading to the same effect.

61 *King Salmon*, above n 17, at [38]. See [39], n 25 above.

62 *New Zealand Rail Ltd v Marlborough District Council*, above n 26. See [39] above.

King Salmon.[63] In his judgment, Miller J makes the observation that the Supreme Court's decision adopts the "bottom line" approach with qualifiers, and that the outcome is not absolute.[64] We accept that is so. However, the "overall broad judgment" approach is clearly repudiated by the decision in *King Salmon*, and the terms of s 62(3) are clear: a regional policy statement must give effect to the NZCPS in the way described at [40]–[41] above.

[56] Secondly, the major difficulty inherent in this redirection is that Parliament, although relevantly strengthening the RMA in 2003 in the manner noted at [40] above, did not directly modify the approach taken in *New Zealand Rail*, or suggest such modification was needed. That decision became the established approach to policy statement and plan revisions throughout New Zealand from 1993, until overruled by *King Salmon* in 2014. Specifically, the NZCPS — which dates from 2010 — was itself drafted against the background of the *New Zealand Rail* decision. That is, in 2010 the expectation of those who drafted the NZCPS was that it would be construed and applied on the basis that an overall broad judgment would be taken to ss 62(3) and 67(3), along with additional reference as required to pt 2. Had the NZCPS been drafted in light of *King Salmon* rather than *New Zealand Rail*, its content likely would have been quite different. For instance, it might be expected to have drawn less stark environmental bottom lines and provided for more nuance in balancing competing policy interests in the absence of a *New Zealand Rail*-based decision-making framework.

[57] Thirdly, nor did the Minister of Conservation respond to *King Salmon* by revisiting the form of the NZCPS. The preparation of that instrument is the responsibility of that Minister under s 57 of the RMA. A direct consequence of that regulatory mismatch identified in the preceding paragraph is that the NZCPS, construed in light of *King Salmon*, now has the practical effect of setting quasi-rules, both in that instrument and a subsidiary regional policy statement. It does so despite the function of those instruments being to set out objectives and policies (and, in the latter case, implementation methods) about matters specified in the RMA.[65] Rules

---

63 See [34] above.
64 See [100]–[101] below.
65 RMA, ss 58(1) and 62(1).

belong by definition in regional and district plans, not in documents higher in the hierarchy which set objectives, policies (and to a degree legal methods).[66] The majority were certainly alive to this consequence: as we noted at [44] above, they observed that the NZCPS policies may be worded in such a way as to "have the effect of what in ordinary speech would be a rule".[67] The effect of *King Salmon* then is that a policy has been created that can have determinative effect as a rule, when the Minister may not have intended that effect, or the resultant extent of that effect, because of the then-prevailing *New Zealand Rail* decision-making framework. That more determinative effect is reinforced by the general preclusion on recourse to pt 2 of the RMA in construing and giving effect to the NZCPS.[68] The contextual, regulatory mismatch we have pointed to is not explicitly identified in *King Salmon*. But in a real sense it seems to underlie William Young J's concerns about the effect of the majority approach.

[58] Fourthly, there are a number of other consequences of this mismatch. One is that the overall broad judgment approach has been clung to by means of mitigation, because the NZCPS does not really work, in the post-*King Salmon* world, exactly in the way intended at the time it was gazetted in 2010. As a result, the approach in *New Zealand Rail* rolled on for some time in the Environment Court post-*King Salmon*, as courts and practitioners pondered the impact of that decision. The Environment Court decision in the present appeal is a case in point. So, too, the decision of that Court in *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council*.[69] There, as here, the High Court criticised the lower court's failure to implement the revised approach required by *King Salmon*.[70] A second fundamental consequence has been that the courts, and particularly those on appeal, are being asked to set policy in mitigation of the rigour of *King Salmon's* enforcement of NZCPS policies as quasi-rules. Again, the present case is one in point: that is exactly what Port Otago and the Marlborough District Council are asking this Court to do. But it is a task the

---

66 Section 43AA.

67 *King Salmon* above n 17, at [116]. See also at [152].

68 Derek Nolan and others "EDS v New Zealand King Salmon — the implications" (2014) 3 RMJ 1 at 4.

69 *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZEnvC 45.

70 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [103] and [106].

courts are ill-fitted to undertake on appeals ad hoc. And it is not an undertaking authorised by the reasoning in *King Salmon.* We think the effect of *King Salmon* is very clear; it may not be exactly what was understood when the NZCPS was gazetted, but the decision does not permit diffuse construction of that instrument by way of remedy. William Young J attempted that exercise in his dissenting judgment, drawing connection with "inappropriateness" of activities.[71] It did not find favour with the majority.

[59] Fifthly, this Court has since clarified that *King Salmon* does not prevent recourse to pt 2 when considering a *resource consent application*, because of the express wording — "subject to Part 2" — in s 104(1) of the RMA which concerns the consideration of such applications, rather than formulation of higher-order planning instruments.[72]

[60] Sixthly, in his dissenting judgment William Young J made two observations with which respectfully we do not agree. The first was that the effect of the majority decision is that all activities with adverse effects on areas of outstanding natural character must be prevented.[73] The second was that:[74]

> … a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character.

It followed that this would "preclude some navigation aids" and would impose severe restrictions on privately-owned land in areas of outstanding character.[75] It is this analysis that presumably contributed to the observation by Gendall J in the judgment under appeal that implementation of the avoidance policies in the NZCPS would inevitably result in rules creating prohibited activities that cannot obtain a resource consent (unless the NZCPS itself allows less than absolute compliance).[76] We will

---

71 See [50]–[51] above.
72 *R J Davidson Family Trust v Marlborough District Council*, above n 22, at [70]–[72]. See [33] above.
73 *King Salmon*, above n 17, at [189].
74 At [201].
75 At [201].
76 See [70] below.

return subsequently to why the majority ruling is not as absolute as William Young and Gendall JJ suggest.[77]

[61] Finally and relatedly, the core issue in applying *King Salmon*'s approach to the NZCPS in the drafting of a regional policy statement, such as in the present case, will be what the implementation of avoidance policies to preserve (or protect) the coastal environment from "inappropriate" use and development actually requires or prohibits. That ultimately depends on the cascade of objectives, policies and ultimately rules in the hierarchy of planning instruments. As we discuss in due course, it by no means follows from the judgment of the majority in *King Salmon* that new activities in a coastal environment, even in an area with high natural character, are precluded. Issues of existing modification to that environment, the appropriateness of development (assessed in the manner indicated by the majority),[78] the extent and duration of effects of the activity and the availability of methods to avoid those effects (such as adaptive management) all potentially mitigate the apparent rigour of the majority ruling.

Environment Court interim decision

[62] The Environment Court correctly recognised that the decision in *King Salmon* bound it. It noted that the avoidance policies in 13(1)(a) and (b) and 15(a) and (b) were held by the Supreme Court to provide "something in the nature of a bottom line" because of the manner of their expression.[79] It went on to say that the primary legal issue for a decision in this case was whether policy 9 (Ports) was "less deferential" to the avoidance policies than policy 8 (Aquaculture) with which *King Salmon* had been concerned or policy 6 (broadly speaking, Infrastructure) which was addressed by the High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[80]

[63] The Environment Court considered however that submissions to it had largely overlooked the relevance of policy 7, dealing with strategic planning. It saw this as offering a formula for identifying areas where development is appropriate and others

---

77 See [84]–[86] below.
78 See [43] above.
79 Environment Court interim decision, above n 2, at [69].
80 At [73], referring to *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 70.

where it is not.[81] In particular, it noted that some effects of port operations may be transitory and that the Supreme Court had clearly recognised that rules would not normally prohibit port activities if effects are "minor or transitory", although that would have to be read in light of the adverse cumulative effects provided for in policy 7(2) of the NZCPS.[82]

[64] In terms of the overall approach to be taken, the Environment Court held that if NZCPS policies for avoidance of adverse effects on natural character and outstanding natural landscape are "(incorrectly) considered only with policy 9", then there would appear to be a conflict inasmuch as policy 9 did not have the "deferential qualification" that the infrastructure policy (policy 6(1)(b)) has.[83] However, the Court considered the NZCPS was "more nuanced" than that.[84] It went on to say:[85]

> First, there is no suggestion that the avoidance policies automatically require activities which may cause adverse effects to be prohibited. Second, policy 7 (strategic planning) recognises that some activities which have the potential to cause adverse effects – and are therefore inappropriate at first sight – may need to be considered on a case by case basis so that the potential adverse effects can be considered in the context of a specific factual and predictive situation. Policy 7 suggests a procedural resolution for a substantive conflict. It suggests that the methods for resolving the conflict include methods in a subordinate plan requiring a resource consent be applied for and determined having regard to purposively framed objectives and policies.

The Environment Court therefore held that reference to policy 7(1)(b)(ii) "may be used to resolve any conflict between the directory provisions of policy 9 (Ports) and the even more directory avoidance policies of the NZCPS".[86]

[65] Later in its decision the Environment Court considered alternative options under s 32(1)(b)(i) of the RMA, and whether "the proposed policy 4.3.7 [should] provide an exception to the avoidance policies in the NZCPS?"[87] To that question it gave a conditional answer. It concluded that "to improve the coherence and coordination" of the PRPS, it should be made clear that the proposed ports policy was

---

81 At [84].
82 At [90], citing *King Salmon*, above n 17, at [145].
83 At [91].
84 At [91].
85 At [91].
86 At [92].
87 At [122].

related to the bottom lines in the policies implementing objective 3.2 of the PRPS.[88] Secondly, that it is a "backup" to policy 4.3.4 which expressly exempts some infrastructure from having to comply with objective 3.2's policies.[89] In light of those considerations the Court proposed modified wording for PRPS policy 4.3.7(d) to (f). That wording is set out above.[90]

High Court decision

[66] We turn now in more detail to the judgment of Gendall J.

[67] First, the Judge noted *King Salmon* confirmed that "avoid" in the context of policies 11, 13 and 15 means "not allow" or "prevent the occurrence of" and is "specific and directive".[91] Policies 13 and 15 state adverse effects of "inappropriate" development must be avoided and what is inappropriate must be assessed against the environment those policies protect.[92] The words used in policy 16 are different but had the same effect: "ensure" is direct and in context also meant avoid adverse effects.[93] The avoidance policies would give way to policy 9 if the latter was more specific and directive.[94] Policy 9(a) was specific and direct, in that decision-makers "must make certain" other development does not affect the safe and efficient operation of ports. But sub-para (a) did not address the interaction with protection under the avoidance policies distinct from development. The requirement to avoid adverse effects was not displaced.[95] Policy 9(b) directs decision-makers consider "where, how and when" to provide for safe and efficient operation of ports. The direction was broad and constraints on the where, how and when are found in the NZCPS policies.[96] The Environment Court had erred in distinguishing policy 6 from policy 9 on the basis of the inclusion of the words "without comprising the other values of the coastal environment" in the former but not the latter. Policy 8, at issue in *King Salmon*, also

88 At [125].
89 At [125].
90 At [14] above.
91 High Court judgment, above n 8, at [79].
92 At [80].
93 At [81]–[82].
94 At [83].
95 At [90].
96 At [92]–[94].

did not use that phrase but did not conflict with the avoidance policies. Nothing in policy 9 directed the avoidance policies were not to apply.[97]

[68] Secondly, the Judge held the Environment Court erred in reconciling perceived conflict between port and avoidance policies through policy 7.[98] Policy 7(1)(b) requires decision-makers to identify where development is inappropriate. The avoidance policies inform this decision and policy 7 is not a means to circumvent them.[99] Had the Supreme Court seen policy 7 as a means of circumventing the avoidance policies it would have reached a different decision in *King Salmon*.[100]

[69] Thirdly, and accordingly, the Environment Court failed to give effect to the NZCPS. The avoidance policies are prescriptive whereas policy 9 is not. The PRPS must require port activities to avoid adverse effects on outstanding coastal sites.[101] The Environment Court wrongly adopted an overall judgment approach.[102] The suggestion that perceived conflict could be resolved by reference back to pt 2 of the RMA on a case-by-case basis was wrong. *King Salmon* held the NZCPS gives effect to pt 2 of the RMA and reference back to that part is only necessary in the case of invalidity, uncertainty or lack of coverage.[103] Similarly, the Environment Court erred in undertaking a s 32 cost-benefit analysis to determine an effects management framework. The requirement to give effect to NZCPS limits the options available to decision-makers.[104]

[70] Fourthly, in the course of his reasoning above Gendall J observed that implementation of the avoidance policies in the NZCPS would inevitably result in rules creating prohibited activities that cannot obtain a resource consent unless the NZCPS itself allows less than absolute compliance with the policies because of some conflict with another policy in the NZCPS.[105] Further, that the effect of such prohibition would preclude the use of adaptive management to monitor at risk

---

97 At [95]–[96].
98 At [97].
99 At [99].
100 At [102].
101 At [104].
102 At [107]–[108].
103 At [109].
104 At [110]–[111].
105 At [52] and [55].

activities.[106] It is common ground between all parties to this appeal that these observations of the Judge are not correct. We return to them later in this judgment.[107]

Approved question of law for appeal

[71] An appeal lies to the Court of Appeal, by leave, on a question of law only.[108] The approved question of law for which leave was granted was: Did the High Court misapply the Supreme Court's decision in *King Salmon*?[109]

[72] Although counsel offered an array of sub-questions to tempt this Court's interest, that effort has not succeeded. We think the approved question sufficiently precise to resolve this appeal.

Did the High Court misapply *King Salmon*?

[73] For Port Otago, Mr Andersen QC submits the Judge focussed too narrowly on the words of the policies to establish a hierarchy with the effect that policy 9 was rendered completely ineffective. The port and avoidance policies only conflict if they cannot be implemented together in a particular fact situation. This approach was directed by *King Salmon* where the Supreme Court not only considered the words used, but was also informed by s 5 of the RMA. Here, Port Otago submits "where" in policy 9 is not relevant as the ports are pre-existing, but the "how" and "when" are mandatory considerations. There is conflict between the port and avoidance policies if the existing ports cannot operate safely and effectively and comply with the avoidance policies. That conflict is not reconciled by reading policy 9 subject to the avoidance policies, stripping policy 9 of its effect. Rather, conflict should be resolved under s 5 and pt 2 of the RMA.

[74] For the Marlborough District Council, Mr Maassen makes three broad points. First, the *King Salmon* environmental bottom line approach requires substantive force be given to the precedence of policies in the text of the NZCPS and that they not be simply treated as relevant considerations. The text of the NZCPS is the starting point

---

106 At [55].
107 See [84]–[86] below.
108 RMA, s 308.
109 *Port Otago Ltd v Environmental Defence Society Inc* [2020] NZCA 246.

and usually determinative. Though the avoidance policies may have precedence, the Supreme Court did not consider them to be rules — otherwise it would have said so.

[75] Secondly, where different policies are pulling in different directions in important respects, reconciliation of those policies is necessary. *King Salmon* did not limit reconciliation to where policies are equally directive. In the context of environmental planning difficult trade-offs are expected when applying policies in a particular area making evaluation necessary. Policy 7 and the requirement of "appropriateness" is a tool to reconcile tensions at a regional level — it is this sort of evaluation that strategic planning is intended to entail.

[76] Thirdly, in deciding whether policies pull in different directions and when reconciling those policies, the decision-maker must consider the comparative strength of the policies and the potential consequences of the policies when implemented on a regional scale. In other words, "[a] type of environmental cost-benefit analysis where the text is an important but not an overwhelming factor". Section 32 cost-benefit analysis is therefore directly relevant and not procedural. So too is pt 2 of the RMA.

[77] Finally, and specifically concerning the text of policy 9, Mr Maassen submits that text is distinguishable from policy 8. The verb "recognise" in policy 9 is stronger than the qualification of "appropriate[ness]" in policy 8; recognise requires an attribution of value.

Discussion

[78] With respect we consider these submissions overcomplicate a simpler enquiry. As we noted at the outset of this judgment, the NZCPS requires adverse effects in areas of outstanding natural character to be "avoid[ed]". The essential question in this appeal remains whether the PRPS gives effect to that requirement by providing adverse effects in such areas be "avoided, remedied or mitigated"? The answer to that question might be thought obvious.

[79] In agreement with the High Court Judge, we find that the alternative wording for policy 4.3.7 in the PRPS (whether or not modified in the manner suggested by the Environment Court) fails to give effect to the environmental bottom lines set by the

NZCPS avoidance policies in the manner required by the decision of the Supreme Court in *King Salmon*. While we have identified difficulties in the way the NZCPS applies in the post-*King Salmon* world — what we called a regulatory mismatch — we do not think there is scope in this case for any more liberal reading of the obligation under s 62(3).[110] The short point is this: a bottom line requiring adverse effects be "avoid[ed]" cannot be substituted with "avoid, remedy or mitigate". They are altogether distinct concepts, and the latter formulation fundamentally dilutes the former. In effect the wording suggested by the Environment Court — set out at [14] above — invites a decision-maker instead to reach a broad judgment, potentially permitting (rather than avoiding — that is, preventing the occurrence of) adverse effects of activities on natural character in areas of the coastal environment with outstanding character (and significant adverse effects on natural character in other areas of the coastal environment). The foregoing discussion focuses on policy 13, but the same applies to policies 11, 15 and 16.

[80] That is enough to dispose of the appeal, all members of the Court agreeing in the result if not the reasons therefor. However, in deference to the arguments made before us we make four further points.

[81] First, we do not accept the argument made by both counsel supporting the appeal (and accepted in part by Miller J)[111] that policy 9 is sufficiently textually or contextually different to policy 8 so as to enable a different outcome from *King Salmon* and enable the proposed policy 4.3.7 (original or modified) in the PRPS. In each case the policy requires recognition of the importance of port and aquaculture activities (as the case may be). In the case of ports, that recognition is of the requirement for an efficient national network of safe ports. "[R]ecognise" and "consider", as the Supreme Court noted in *King Salmon* (specifically referencing policy 9) gives decision-makers "considerable flexibility and scope for choice".[112] We do not accept that the operative verb in policy 9 is the word "requires". That word serves as an intensifier, as does "important" in policy 6(1)(a) and "needs" in policy 6(1)(d) and elsewhere in the NZCPS. It intensifies the condition referred to, which then requires

---

110 See [56]–[58] above.
111 See [111] below.
112 *King Salmon*, above n 17, at [127].

recognition; it does not give the provision greater imperative status with respect to policy 13 (which does have imperative status because of the use of "preserve" and "avoid"). If it were otherwise, then it would be odd that ports get that recognition when, say, the interests of tangata whenua in policy 2 do not. And the absence of explicit reference to ports in either the Preamble to the NZCPS — other than recognition that the coastal environment contains ports — or (more importantly) the Objectives is also telling. It does not suggest any higher prioritisation of port activities in policy 9. "[C]onsider", which anchors policies 7(1)(b) and 9(b), is essentially descriptive. It does not direct decision-makers regarding a specific outcome or action. In contrast, there is direction in policy 9(a), but it is the protection of ports from new development impinging on *their* activities. Policy 9(b) is distinctive in providing a far lower level of direction, and one broadly consistent with the provision for strategic planning in policy 7.

[82] Secondly, we do not see policies 7 and 9 as in conflict with the avoidance policies. Rather, the NZCPS contains its own directive hierarchy. The avoidance policies contain relatively clear environmental bottom lines; policies 7 and 9 contain lower level degrees of direction as to development and other activities in the coastal environment. To describe these policies as equally directive would be incorrect. Reconciliation is not a complex task because the NZCPS contains a clearly discernible prioritisation of values within its text. There is no fundamental ambiguity; context does not require an artificial approach to be taken to construction. We therefore do not accept that dilution of the avoidance policies is required to reconcile them with other policies in the NZCPS. The ports policy (policy 9) is applicable, but within bounds set by the more directive avoidance policies. The same is true of the strategic planning policy (policy 7) which, as Mr Anderson submitted for Forest and Bird, is essentially process-driven. It directs in an entirely generalised sense the consideration of where, how and when to provide for future development, and to identify areas where development is or may be inappropriate. We do not see it materially aiding Port Otago or the Marlborough District Council's arguments.

[83] Thirdly, if in the wake of *King Salmon* the NZCPS now poses unworkable standards for essential infrastructure, the answer lies elsewhere. The regulatory mismatch means the NZCPS was likely drafted on the premise that a broad overall

judgment would be taken in its construction and application in subsidiary planning instruments, and that recourse might be made to pt 2 in that process.[113] The Supreme Court has now however precluded the former, and permitted the latter only in a narrow range of exceptional cases. It noted there was no challenge before it to the NZCPS itself, meaning the Supreme Court proceeded on the basis it was and remained valid.[114]

[84] Fourthly, it is common ground that the Judge erred in inferring that the inevitable effect of *King Salmon* is that implementation of the avoidance policies in the NZCPS would result inevitably in rules creating prohibited activities that cannot obtain a resource consent. That goes too far. Provided plans give effect to the avoidance policies, prohibited activity status is not inevitable and the matter should not be prejudged at this stage when plans have not yet been formulated. Activity status will be set in regional and district plans, not the regional policy statement.[115] They will be set after a s 32 evaluation report analysis of costs, benefits and alternatives to proposed rules.

[85] The avoidance policies do not require activities to be avoided (or prohibited). Rather, the avoidance policies require adverse *effects* to be avoided in or on specific areas or values. This was a submission made by Mr Allan for EDS, particularly. Whether an activity has an adverse effect, whether that effect can be avoided, and how it can be avoided will depend on the facts of a specific proposal and its context. Where factual context is relevant in determining policy compliance, provisions enabling an application for resource consent can be appropriate. Whether *in fact* an *adverse* effect, *on natural character*, occurs in an area of the coastal environment *with outstanding natural character* from a proposed port activity is a fact-specific enquiry and requires detailed evaluation of both activity and environment.

[86] Furthermore, and as Mr Logan submitted for the Otago Regional Council, many of the activities Port Otago expressed concern about are ones that "are currently occurring (or could occur) in an environment in which commercial port activities have been taking place for over 150 years".[116] That environment has been shaped by the

---

113 See [56]–[57] above.
114 *King Salmon*, above n 17, at [33] and [88].
115 RMA, s 87A.
116 As to Port Otago's concerns, see [13] above.

effects of those activities; the avoidance policies apply to the environment as it exists now.[117] Port activities are not presumptively inappropriate in that environment and may not in fact, correctly analysed at the resource consent stage, adversely affect natural character in that environment at all. Proposed activity effects in context may be minor or transitory, or otherwise capable of being avoided. It is, for example, unlikely that renewed navigation lighting would adversely affect natural character in the area we are concerned with when proper consideration is given to (1) existing effects of port-related activities and (2) the counterfactual of not renewing navigation lighting. Further, whether enlarged dredging would adversely affect an area of outstanding natural character will depend first on the legitimate allocation of that status to the environment affected, and only then on the manner in which it is conducted. We agree with Miller J that these are not matters that can or should be prejudged at this point.[118]

Conclusion

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

Two immaterial errors below

[88] As noted at [70] above, Gendall J observed that his understanding of the implications of *King Salmon* was that implementation of the avoidance policies in the NZCPS would inevitably result in rules creating prohibited activities that cannot obtain a resource consent, and that the effect of such prohibition would preclude the use of adaptive management to monitor at risk activities. It is common ground that these observations are incorrect.

---

[117] By way of example, see the decision of this Court in *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [66], noting that the environment in that case was modified and not pristine or remote.

[118] See [107] and [114]–[115] below.

[89] As to the former point, the Supreme Court observed in *King Salmon* only that the avoidance policies *contemplate* the potential imposition of prohibited activity status.[119] For reasons noted at [84]–[86] above, such status is not inevitable, and ultimately it is for the resource consent process to resolve which port activities are or are not inappropriate in the coastal environment.

[90] As to the latter point, adaptive management was not considered by the Supreme Court in *King Salmon* at all. But in a companion judgment to *King Salmon*, *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* it was addressed by the Supreme Court. It was held that an adaptive management approach was consistent with the planning instruments, and a proper precautionary approach.[120]

[91] Neither of these errors was essential to the Judge's reasoning on the fundamental question before him: whether the approach taken in the interim decision of the Environment Court to PRPS policy 4.3.7 was legitimate. Correctly, he reached the conclusion that it was not. That conclusion did not rest on these two errors. They may be treated as immaterial.

Result

[92] The appeal is dismissed.

[93] The appellant must pay the first, second and third respondents costs for a standard appeal on a band A basis plus usual disbursements.

MILLER J

[94] The question for which leave was granted was whether the High Court misapplied *King Salmon*. I begin my answer by examining what that judgment stands for.

[95] Its narrow holding is that policies 13 and 15 of the NZCPS precluded salmon farms in areas of outstanding natural character in the coastal marine area of the

---

119 *King Salmon*, above n 17, at [132].

120 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [140].

Marlborough Sounds. That finding rested on the undisputed factual premise that the farms, a new use, would have significant adverse effects on the environment in the proposed locations.

[96] The decision depended relevantly on several findings of law which should be taken to form part of the ratio. The first is that the NZCPS may establish rules which must be followed or incorporated in lower-level planning instruments and decisions.[121] The second is that policy 8 of the NZCPS, which establishes a policy of "[r]ecognis[ing]" the contribution of aquaculture to wellbeing by providing for aquaculture activities in "appropriate places" in the coastal environment, is subject to policies 13(1)(a) and 15(1)(a), which establish policies of preserving and protecting outstanding natural character, features and landscapes by "avoid[ing]" adverse effects of activities in areas of the coastal environment that exhibit those characteristics.[122] The third finding is that "avoid" in the latter policies means "not allow".[123]

[97] I intend to make these reasons as brief as possible. I am in partial dissent and some of the submissions, especially those of the Marlborough District Council, address difficulties that, while brought into relief by this appeal, are respectfully better addressed by the Supreme Court. The judgment of Kós P and Gilbert J points to some of those difficulties.

[98] However, it is necessary to say a little more about the three relevant findings of law I have identified. With respect to the first finding, the Supreme Court held that higher-level planning documents may contain policies which contemplate — and may compel — the prohibition of particular activities in certain localities, though the prohibition will take effect in a district plan.[124] That was the outcome in *King Salmon* itself, the Supreme Court ruling that it had been an error of law to permit a plan change under which the salmon farms would be authorised.

---

121 This is what the Supreme Court meant by "rule" in *King Salmon*, above n 17, at [115]–[116] where, following *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 23, it distinguished rules "in the ordinary sense" from rules that under the RMA may be directly enforced against members of the public.

122 *King Salmon*, above n 17, at [131]–[132] and [152].

123 At [62] and [96].

124 At [132].

[99] With respect to the second finding, the Supreme Court did not state expressly that policy 8 was subject to the other two, doubtless because the NZCPS itself does not structure its objectives and policies in that way. However, that is the effect of its decision in law. I prefer to avoid the term "environmental bottom line". The Supreme Court used it, but with qualifiers and quotation marks indicating it was intended as a rhetorical device rather than a term of art. The term lends emphasis but is apt to mislead to the extent it suggests the "bottom line" can never be crossed. The avoidance policies are undoubtedly prescriptive, if considered in isolation. They envisage that "significant" adverse effects must be avoided in all areas exhibiting natural character, features and landscapes, and only in such areas that are not "outstanding" may lesser adverse effects be remedied or mitigated. But they are not the only policies in the NZCPS which can be called "environmental", and the Supreme Court also held that they may yield to other NZCPS policies.[125] In *King Salmon* itself they did not yield to policy 8, which did not mandate provision for aquaculture and specified only that aquaculture facilities should be located in "appropriate" places.[126]

[100] With respect to the third finding, the Court rejected the "overall judgement" approach, the availability of which it described as the fundamental issue in the appeal.[127] By that the Court referred to the approach which had been followed in the courts below and which it chose to trace to the judgment of Greig J in *New Zealand Rail Ltd v Marlborough District Council*.[128] Under that approach a proposal is assessed under pt 2 of the RMA, employing an overall broad judgement of whether it would promote the sustainable management of natural and physical resources. The Court found the overall judgement approach wanting because it admitted no "bottom line", environmental or otherwise, and so reduced the NZCPS to a listing of potentially relevant considerations of varying weight in different fact situations.[129] Rather, the

---

125 At [132]. The specific avoidance policies the majority referred to were policies 13(1)(a) and (b) and 15(1)(a) and (b).

126 At [126].

127 At [43].

128 At [40]–[41], citing *New Zealand Rail Ltd v Marlborough District Council*, above n 26. The Court might have traced the overall judgement approach to *Minister of Works and Development v Waimea County Council* [1976] 1 NZLR 379 (SC), and that judgment's approach to the Full Court decision in *Environmental Defence Society v Mangonui County Council*, above n 26 at 279–284 per Somers J, which had been distinguished in *New Zealand Rail* on the ground that none of the decision-making criteria in the Resource Management Act was given primacy over the others: see *New Zealand Rail Ltd v Marlborough District Council*, above n 26, at 83.

129 At [83].

NZCPS established policies to give effect to the purpose of the RMA and territorial authority plans must give effect to the NZCPS. It followed that regional and district councils need not go beyond the NZCPS, and back to pt 2, when formulating or changing a plan which must give effect to the NZCPS.

[101] However, the Court acknowledged that this was "[i]n principle" reasoning, by which was meant that it need not always hold true.[130] The Court accepted that particular policies in the NZCPS may "pull in different directions", though that conclusion should be reached only after close analysis and a thorough attempt to reconcile the policies.[131] Where policies do pull in different directions, or where their meaning is uncertain, reference to pt 2 may well be justified.[132] Generally, the Court accepted that NZCPS policies vest the relevant decisions in regional and district councils and allow them scope for choice, within limits.[133]

[102] It must follow that in particular settings where policies do pull in different directions, or are uncertain, territorial authorities must exercise judgement and may, perhaps must, have regard to pt 2. In doing so, a council is not reverting to the overall judgement approach so long as it is applying the NZCPS rather than treating it as a mere relevant consideration. I make this point because, while I agree the Environment Court erred in this case, it is not in my view an accurate criticism of the Court to say that it reverted to the overall judgement approach.

[103] Before explaining why I reach that view as (following *King Salmon*) a matter of construction of the NZCPS, I make two observations. The first is that we are concerned not with a proposed salmon farm and policy 8, but with an existing port and policy 9. It happens that the port relies on a dredged shipping channel which runs through environmentally significant areas.[134] There are existing environmental effects. No one suggests that Otago should do without a deep-water port, or that it

---

130 At [85].
131 At [129].
132 At [88] and [129].
133 At [91].
134 I express myself in that way because, while the channel cuts through an important conservation area which is elegantly described in the majority judgment, the relevant classifications have not yet been confirmed by the Regional Council, whose decision it is.

could be located elsewhere. These are important considerations. As I explain below, they distinguish *King Salmon* from this case.

[104] The second is that the anodyne question of law posed for this Court is apt to disguise the real meaning of our decision. Potential for conflict between port activities and the avoidance policies 11, 13, 15 and 16 was identified as the critical issue by the planning witnesses in their agreed statement before the Environment Court. In substance we are asked to resolve that conflict by affirming that policy 9 (ports) is subject to the avoidance policies. That is what Gendall J held. To declare that is to create a "rule", in the sense used by the Supreme Court. It is a rule which would require that the regional and district councils prohibit any port activities that have adverse effects in areas of outstanding natural character.

[105] Whoever imposes such a rule should understand its implications for the environment and the port. If they do not, it is difficult to see how they can have come to an informed understanding of what the NZCPS, and any other relevant policy instrument, requires in this particular setting. Unlike the Supreme Court in *King Salmon*, we do not understand the implications of the rule we are asked to reject or confirm.

[106] EDS, which took the burden of the argument in support of the judgment below, asserts that this need not concern us, because we are not really making a rule. That argument rests squarely on the proposition, rejected by the Supreme Court, that a "rule" is something stated in a lower level planning document. The entire point of this appeal is that the outcome in the High Court strictly circumscribes what counsel described as the circle of choice for the Regional Council when formulating those plans. The question of law posed for our decision presumes that *King Salmon* may leave us no choice in the matter either. What divides us is whether it does.

[107] We are also told that the environment is already modified and the adverse effects of port activities have not been determined. I accept this, but I reject the invitation made in argument to assume that existing effects are not adverse, or that if adverse they are minor or transitory, or that if adverse and neither minor nor transitory

they can be avoided by means of adaptive management.[135] The Environment Court doubted Port Otago's claim that the ports might have to shut down, but it did accept that the avoidance policies could cause problems for their safe and efficient operation.[136] The evidence includes a table cataloguing the effects of dredging and blasting in the channel (existing port activities), swinging area and berths. It is a long list which includes damage to reef systems, damage to benthic habitat in the harbour and at dump sites, damage to sensitive areas such as the Aramoana salt marsh, loss of customary food gathering opportunities, and loss of other cultural values. I add that in argument most counsel appeared to think that if the port policy is subject to the avoidance policies, choice for the Regional Council is likely to be so circumscribed as to prevent deepening or realignment of the channel to accommodate larger vessels. That seems to me a significant consequence in itself. It follows that, like the Environment Court, we cannot exclude the reasonable possibility that the ports policy and the avoidance policies do or will pull in different directions.

[108] This conclusion matters because the majority in *King Salmon* held that territorial authorities should seek to reconcile NZCPS policies in a way that gives effect to the avoidance policies *before* finding that policies are in conflict. That contemplates a process which leaves the decision with territorial authorities — as the legislature intended — and which ought to result in informed decision-making.

[109] Seen in that light, the EDS appeal to the High Court pre-empted reconciliation, which is not a question of law but a process of fact-finding and analysis.[137] If the argument before us confirmed anything, it is that we do not yet know whether adverse effects can be avoided or managed without affecting Port Otago's safe and efficient operations. The Environment Court cannot be said to have erred by establishing a framework that required the Regional Council to work out whether the policies do pull in opposite directions. There is a sense in which the appeal was premature.

---

135 Counsel agreed before us that adaptive management could be used, but I do not understand the concession to mean adverse effects might be tolerated; that would be inconsistent with the "bottom line" approach.

136 Environment Court interim decision, above n 2, at [24].

137 Such an inquiry was not necessary on the facts of *King Salmon* as noted at [95] above.

[110] That said, it seems the Environment Court was put in this position because the Regional Council had chosen not to include a specific ports policy in the decisions version of its regional policy statement, instead relying on general infrastructure policies.[138] And I accept that the legal pathway followed here is also available under the majority judgment in *King Salmon*. EDS may argue that policy 9 is subject in law to the avoidance policies however minor the adverse effects,[139] and however major the impact of a rule to that effect on the port. If that is correct, the Environment Court was wrong in law to admit the possibility that the avoidance policies might be compromised to any material degree.

[111] That brings me to the question of construction. Policy 9 is set out at [25] above. I acknowledge the views of Kós P and Gilbert J. I differ respectfully because the factual context leads me to think the main verb for purposes of this case is not "[r]ecognise" but "requires". For the Regional Council, provision for ports is not optional. There already exists a port at Port Chalmers which is essential infrastructure, forming part of a national ports network and servicing national and international shipping.[140] The NZCPS deems such infrastructure important to community wellbeing.[141] The Regional Council has no choice about deciding whether to provide for the port, and no choice about where to situate it. It follows that what policy 9 requires of the Regional Council is that it consider how and when to provide in its plans for the port's efficient and safe operation, the development of its capacity for shipping, and its connection with other transport modes. In my opinion these requirements are imperative, which sufficiently distinguishes them from the aquaculture policy at issue in *King Salmon*.

[112] For these reasons I do not agree that the ports policy is subject in this setting to the avoidance policies, as a matter of construction. Rather, as the

---

138 Environment Court interim decision, above n 2, at [2]. Under s 61 of the RMA a regional policy statement must be prepared in accordance with the NZCPS.

139 "Effect" is a defined term, as William Young J noted in dissent in *King Salmon*, above n 17, at [200]. The majority disagreed at [145], but in substance only to the extent that minor or transitory adverse effects might be permitted in an area the outstanding natural character of which must be preserved.

140 It is not clear whether the port at Dunedin, which uses the same channel, can be described in the same way.

141 Policy 6(1)(a).

Environment Court recognised, it is both lawful and prudent to provide for the possibility that they cannot be fully reconciled.

[113] I nonetheless agree that the Environment Court erred in its application of the NZCPS, though for reasons differing from those advanced by EDS and accepted by the majority. The Court did so by deciding that the ports policy would ultimately prevail should it prove irreconcilable with the avoidance policies. The Court contemplated a resource consent process under which adverse effects would be identified, their cause (safety or transport efficiency) would be established, and measures would be put in place to avoid, remedy or mitigate those effects. This approach is consistent with the notion that priority among the NZCPS policies is a simple question of construction, decided in the abstract. In that sense it mirrors the argument advanced by EDS. But it too is subject to the criticism that it pre-empts the process of investigation and reconciliation contemplated by the majority in *King Salmon*.

[114] In my view it might be permissible to establish a policy of the kind proposed by the Environment Court so long as Port Otago is merely continuing its existing operations, *if* the effects of those operations on areas of outstanding natural character were known to be limited. (The Court did not in fact make such findings, but presumably it might do so.) The Court could to that extent prejudge the outcome of investigation and reconciliation. That might allow, say, relocation of navigation beacons.

[115] But suppose Port Otago does wish in the future to realign and deepen the channel to accommodate larger vessels, with potentially extensive effects on an area of outstanding natural character. Under the Court's policy Port Otago would also be permitted to do that, subject to an obligation to remedy or mitigate the effects.[142] On my construction of the NZCPS it is possible that the ports policy would prevail in that scenario, but it might not and for that reason it seems to me both inconsistent with the NZCPS and unnecessary to make the decision now. Rather, the possibility that the

---

[142] There is a hint in the Court's proposed policy that the decision whether the ports policy prevails could be taken in the resource consent process, because it distinguished between safety needs, which were paramount, and transport efficiency needs, which presumably were not. But on my reading the policy would permit the port's needs to prevail in either case.

avoidance policies will preclude any development of port facilities by Port Otago should remain open until Port Otago's needs and the existence, nature and extent of any adverse effects are better known. In my view the Regional Council should return to the drawing board.

Solicitors:
McMillan & Co, Dunedin for Appellant
Ellis Gould Lawyers, Auckland for First Respondent
Ross Dowling Marquet Griffin, Dunedin for Second Respondent
Royal Forest and Bird Protection Society of New Zealand Inc, Christchurch for Third Respondent
Marlborough District Council, Blenheim for Fourth Respondent