IN THE COURT OF APPEAL OF NEW ZEALAND

CA422/2015
[2017] NZCA 24

	BETWEEN	MAN O'WAR STATION LIMITED Appellant
	AND	AUCKLAND COUNCIL Respondent

Hearing:	29 June 2016
Court:	Harrison, Miller and Cooper JJ
Counsel:	M E Casey QC and MJE Williams for Appellant B O'Callahan and J A Burns for Respondent R B Enright and M C Wright for Environmental Defence Society Incorporated P R Gardner for Federated Farmers of New Zealand Incorporated
Judgment:	24 February 2017 at 12 pm

JUDGMENT OF THE COURT

A We answer the questions of law as follows:

(1) Is the identification (including mapping) of an outstanding natural landscape in a planning instrument prepared under the Resource Management Act 1991 for the purpose of s 6(b) of that Act informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

No.

(2) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Resource

Management Act 1991 changed (being elevated) as a result of the degree of protection required for an outstanding natural landscape (particularly in the coastal environment) by reason of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*?

No.

(3) Where a landscape has been identified as an outstanding natural landscape under a policy framework and approach to outstanding natural landscape identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

No.

(4) Is it relevant to the identification of an outstanding natural landscape (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an outstanding natural landscape should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

No.

(5) Was the High Court correct to find that in assessing whether or not a landscape is an outstanding natural landscape there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

In assessing whether or not a landscape is an outstanding natural landscape a regional council should consider whether the landscape in question is outstanding in regional terms.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] Man O'War Station Ltd (MOWS) owns land at the eastern end of Waiheke Island and on the nearby Ponui Island in the Hauraki Gulf. The landholding comprises 2,364 ha. Substantial parts of it are in pasture and MOWS operates it as a farm.

[2] Proposed change 8 to the Auckland Regional Policy Statement (ARPS) introduced new policy provisions for outstanding natural landscapes (ONLs) in the Auckland Region. The identified ONLs were shown on maps forming part of the proposed change. Two ONLs, referred to as ONL 78 (Waiheke Island Eastern End) and ONL 85 (Ponui Island) together covered 1,925 ha of MOWS's land.

[3] The proposed change underwent the normal public notification and submission process. MOWS made submissions because it was concerned that ONLs 78 and 85 would inhibit the ongoing use and development of its land for pastoral farming and other activities. Following the receipt of submissions the Council undertook further landscape assessment work, which resulted in a revised set of ONL maps when the Council released its decisions on the submissions in 2010. Ten appeals were filed in the Environment Court against the Council's decisions, one of them by MOWS.

[4] A process of alternative dispute resolution followed, which resulted in a memorandum of counsel setting out an agreed basis for settlement of all but three of the appeals. A new version of the proposed change was produced showing changes to the text agreed between the parties with the exception of MOWS. In the absence of unanimity the Environment Court was not able to formally resolve the appeals by consent, but it proceeded to hear the outstanding appeals on the basis of the new version of the change agreed by the other parties. Its decision was based on this version of the change, which it referred to as the "Hearings version".[1] We understand MOWS did not oppose that approach.

[5] MOWS did not succeed on its appeal in the Environment Court. Apart from some limited amendments, the Hearings version of the proposed change was confirmed by the Environment Court. MOWS appealed to the High Court on questions of law, but its appeal was dismissed.[2] MOWS now appeals to this Court on questions of law pursuant to leave granted by the High Court under s 308 of the Resource Management Act 1991 (the Act) and s 144 of the Summary Proceedings Act 1957.[3]

[6] We set out the five questions raised below.[4] They reflect MOWS's concerns that in identifying the ONLs the Council, and subsequently the Environment Court, set the bar too low, and that the strict approach to avoidance of adverse effects in outstanding areas of the coastal environment flowing from the Supreme Court's

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1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167, [2014] NZRMA 335 at [2].
2 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329.
3 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 1537.
4 Below at [31].

decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* will impede the reasonable use and development of its land.[5]

The Environment Court decision

[7] The Court recorded that a number of matters had been agreed between MOWS and the Council.[6] Significantly, it was agreed that all of the areas where the ONL classification was disputed had sufficient *natural* qualities for the purposes of s 6(b) of the Act.[7] Appendix F-2 of the proposed change gave descriptions of each of the ONLs, dealing separately with, among other things, their "Landscape Type, Nature and Description", "Expressiveness" and "Transient Values".[8] The Environment Court did not set out the relevant provisions of the Appendix, but it will be helpful to mention some of them at this point. The Landscape Type, Nature and Description for ONL 78 included the following:

> Very extensive sequence of rolling to steep hill country and rocky/embayed coastline at the eastern end of Waiheke Island, including large areas of remnant native forest intermixed with open pasture and vineyards, and a convoluted shoreline. (Includes the Stoney Batter historic defence features and landscape context).

It was ranked as high or very high in respect of other attributes mentioned in the Appendix. Under the heading Expressiveness it was described as a "[v]ery iconic sequence of landforms and natural/pastoral landcover flanked by a wild and highly scenic coastal edge". Under the heading Transient Values it read: "Highly atmospheric interaction with the Hauraki Gulf, affected by weather and light conditions, time of year/day. Abundant coastal birdlife."

[8] ONL 85's Landscape Type, Nature and Description was described as follows:

> Very extensive island feature, comprising a natural sequence of coastal headlands, cliffs, bays and beaches framed by [an] inland backdrop of rolling

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5 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

6 *Man O'War v Auckland Council*, above n 1, at [4].

7 Section 6(b) refers to the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development

8 The drafting of the Appendix and the headings used was clearly designed to address the factors set out in Environment Court decisions articulating a methodology for landscape assessment, such as *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) [*WESI*].

> hill country that contains a mixture of remnant native forest and open pasture.

Under Expressiveness the wording was as follows:

> Extensive and relatively cohesive combination of remnant forest, open pasture and natural coastal margins contribute to a landscape that displays many of the hallmarks of the archetypal Hauraki Gulf landscape.

[9] The Court noted that MOWS called evidence that ONL 78 comprised coastal and interior landscape character areas with only parts of the former being an ONL. The Court referred to a related dispute about whether the "quality bar" for an ONL should be set at a regional or national level, MOWS arguing ("with a degree of equivocation") that the latter should apply.[9] There was also a contest about the boundaries of ONLs 78 and 85 in five specific locations.[10]

[10] The Court referred to the decision of the Supreme Court in *King Salmon*, which had been delivered after the Environment Court hearing, noting that it had received submissions from the parties discussing the potential impact of the decision. The Court then summarised the law applicable at the time of the hearing of the appeals in May 2013. In the course of the summary, the Court referred to the fact that under s 62(3) of the Act, a regional policy statement must give effect to a New Zealand coastal policy statement. The Court later quoted provisions of the New Zealand Coastal Policy Statement 2010 (NZCPS) of particular relevance. These included, amongst others, policy 13, which includes the following:

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

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9 *Man O'War v Auckland Council*, above n 1, at [5(c)].
10 At [5(d)].

including by:

(c) …

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

[11] The Court also referred to policy 15, which relevantly says:

Policy 15 Natural features and natural landscapes

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

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

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district …

[12] Also included in the Court's summary of the relevant law was a discussion of the factors for assessing the significance of landscapes set out in previous Environment Court decisions.[11]

[13] After largely rejecting a challenge by MOWS of the use of the term naturalness in various provisions of the proposed change, the Court discussed the possible impact of *King Salmon* on both the wording of parts of the proposed change, and on the proper extent of mapping of ONLs on the properties owned by MOWS on Waiheke and Ponui Islands. It is clear from this discussion that the Court was aware of the key aspects of the decision.

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[11] At [14], citing *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 (EnvC) and *WESI*, above n 8. The Environment Court referred to the landscape assessment considerations as the *WESI* factors.

[14] The Court noted that there was substantial agreement about the wording of the relevant issues, objectives and policies of the proposed change, with argument confined to a "handful of aspects".[12]

[15] In the course of its judgment, the Court dealt specifically with concerns advanced by MOWS about Method 6.4.23.2(i), a provision providing for the control of subdivision but contemplating the avoidance of further subdivision, particularly where ONLs are also areas of high natural character and areas of significant indigenous vegetation and significant habitats of indigenous fauna. The associated statement of reasons for the method was also challenged by MOWS. The Court found the challenged provisions were appropriate:

> [52] We have determined that retaining the contested Method in the ARPS is consistent with national and regional planning documents and meets the requirements of pt 2 RMA. In giving effect to the RPS objectives and policies, our current view is that Method 6.4.23.2(i) is appropriate in ensuring that Policy 15 of the NZCPS is addressed in district plans by avoiding adverse effects of subdivision on outstanding natural landscapes in the coastal environment. It also recognises the importance of protecting outstanding natural landscapes required by s 6(b) and provides an appropriate mechanism for achieving this.

[16] However, leave was reserved for the parties to make further submissions on the wording of the provisions discussed in the light of the *King Salmon* decision.[13] This aspect of the decision was summarised at the end of the judgment as follows:

> [151] The current indication is that the Hearings Version text of PC8 should be confirmed except for the limited amendments indicated in the body of the decision. This conclusion is tentative however in light of the recent decision of the Supreme Court in *King Salmon*.

[17] We were advised by Mr Casey QC, counsel for MOWS, that MOWS did not take up the opportunity to make further submissions on the text of the proposed change that the Environment Court afforded to it, taking the view that it was clear that the policies would be made more restrictive in future as a result of the *King Salmon* decision. There was also the opportunity to further engage (which we were told MOWS did) with both the relevant objectives and policies and the extent of the

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12 At [40].
13 At [54].

provision for ONLs on its land in the Auckland Unitary Plan process then underway.[14]

[18] The Environment Court then turned to the issues concerning the extent and boundaries of ONLs 78 and 85. The Court discussed an argument advanced by MOWS that in assessing whether a landscape was outstanding, for the purpose of s 6(b) of the Act, the threshold should be set "at the very highest level", the bar being set on the basis of a national scale.[15]

[19] In dealing with this submission, the Court observed:

> [67] It will be seen from analysis of the parties' cases that follows, that we struggle with the approach advocated by MOWS that identification of ONLs should be on a national rather than a regional scale. Two concerns arise. First, the task could become enormously complex — query impossible. Second, one might be forgiven for postulating that if pristine areas of New Zealand like parts of Fiordland, the Southern Alps and certain high country lakes, were to be regarded as the benchmark, nothing else might ever qualify to be mapped as Outstanding. These remarks should be seen as tentative at this stage because MOWS has [signalled] it wishes to maintain this line of submission. We simply signal our discomfort and leave the matter open for the present.

[20] We take it that the reference to MOWS signalling a desire to "maintain this line of submission" was a reference to the possibility that further submissions would be advanced on the issue in response to the *King Salmon* decision. In the event, that did not occur. It is clear from the judgment as a whole that the Environment Court proceeded on the basis that the quality of the relevant landscape for the purposes of s 6(b) of the Act was to be assessed on a regional scale.[16]

[21] The judgment contained a detailed discussion of the evidence called by the parties from landscape experts concerning ONL 78. It is unnecessary for us to give the detail of this part of the judgment. It is sufficient to note that MOWS contended that parts of ONL 78 and ONL 85 did not comprise coherent landscapes and were not appropriately characterised as outstanding. It was the case of MOWS that ONL

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14 MOWS referred us to a statement of evidence given by a council planning officer, Mr McPhee, to the Auckland Unitary Plan Independent Hearings Panel suggesting various policy changes. We understand that decisions on content of the Unitary Plan have been made, but they cannot affect the outcome of this appeal.

15 At [57].

16 See at [83] where there was a further reference to adopting a "regional perspective".

78 comprised coastal and interior landscape character areas with only parts of the former being an ONL.[17] In addition, as noted above, the boundaries of the ONLs were disputed in respect of specific locations.[18]

[22] The Court prefaced its findings in relation to the disputed extent of ONL 78 by referring to an inspection that the Court itself had made. In the course of this it had viewed all parts of the land proposed to be included in the ONL from both land and sea viewpoints illustrated in photographic evidence given by the landscape witnesses.[19] It said:

> [128] During the visit it became obvious to us that the appellant's property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke Range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. This observation is consistent with the approach taken by Mr Brown and summarised earlier. In particular we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception near Cactus Bay that we will come to, we do not find it appropriate to separate coastal and inland landscape areas for individual assessment as recommended by Ms Gilbert … .

[23] The Court then discussed particular parts of the ONL largely expressing its agreement with conclusions reached by the Council's witness, Mr Brown, whose evidence was generally preferred to that of the MOWS landscape witnesses, Mr Mansergh and Ms Gilbert.

[24] The Court made orders that ONLs 78 and 85 be revised in accordance with its decision, "subject to possible further consideration of mapping should wording in the ARPS change after further agreement or input from parties".[20] We were not

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17 At [5(c)].
18 At [5(d)].
19 At [127].
20 At [152].

referred to any relevant further change to the wording of the ARPS, or agreement or input from the parties.[21]

[25] It is fair to say that nowhere in the Court's decision was there a comprehensive statement of why it considered ONLs 78 and 85 were outstanding. We infer the explanation for that is that there were concessions that substantial parts of them were properly so described,[22] perhaps subject to the qualification (the Court referred to a "degree of equivocation" on this, as noted above) that the bar should be set on a national scale rather than on a regional one. The Court clearly rejected the latter contention, and then dealt with particular issues that had been raised as to the extent and boundaries of the ONLs.

[26] While MOWS has argued strongly for a national comparator in this Court, there is no argument that, adopting a regional comparison, the Environment Court had no evidence on which it could confirm the ONLs. The merits of the Court's conclusions are not matters for this Court.

The High Court judgment

[27] The High Court judgment dealt with four alleged errors of law in the Environment Court decision. It was said that the Environment Court had erred in failing to:

(a) address the *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* (*WESI*) factors when determining whether the landscapes in question were ONLs;[23]

(b) undertake the assessment of whether areas of MOWS's property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

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21 The High Court judgment recorded that, although the Environment Court decision was called an "Interim Decision" and contemplated possible further consideration of mapping, MOWS in fact accepted that it was a final decision as to the mapping of the ONLs: *Man O'War v Auckland Council*, above n 2, at [4]–[5].

22 The maps attached to the evidence of Mr Mansergh, one of MOWS witnesses, showed substantial areas that he acknowledged should be classified as ONL.

23 *WESI*, above n 8.

(c) recognise that, as a result of clarification of the level of protection required for ONLs in the coastal environment in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under proposed change 8; and

(d) recognise that, given the implications of the judgment in *King Salmon*, it was required to determine which parts of MOWS's property fell within the coastal environment and which did not.

[28] The High Court rejected MOWS's case on each of the identified issues. It held that the Environment Court had undertaken an appropriate assessment of the disputed ONL areas noting that the Court had referred to the *WESI* factors and had analysed the relevant evidence on the issue without error. The conclusions as to which areas were ONLs were factual determinations unable to be appealed.

[29] On the question of whether the assessment should have been by reference to landscapes in New Zealand as a whole rather than by reference to landscapes in the Auckland region, the Environment Court rejected the proposition that a national comparator should be used. Andrews J thought that if s 6 had intended only nationally significant landscapes to be protected, the Act would have said so. She also expressed the view that it was unnecessary to have a comparator for the purpose of identifying an ONL.

[30] Further, the Court rejected MOWS's argument that as a consequence of the *King Salmon* judgment the identification of ONLs must necessarily be made more restrictive. The Court also held that it was unnecessary to determine which part of MOWS's land fell within the coastal environment and which part fell outside it.

The questions of law

[31] The High Court granted leave to appeal on the following questions:

(a) Is the identification (including mapping) of an ONL in a planning instrument prepared under the Act for the purpose of s 6(b) of the Act

informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

(b) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act changed (being elevated) as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the Supreme Court's decision in *King Salmon*?

(c) Where a landscape has been identified as an ONL under a policy framework and approach to ONL identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *King Salmon*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

(d) Is it relevant to the identification of an ONL (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an ONL should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

(e) Was the High Court correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

MOWS's principal argument

[32] Although five questions have been asked, Mr Casey submitted that the central issue is the proper interpretation and application of the word outstanding in s 6(b) of the Act, policies 13 and 15 of the NZCPS and the relevant provisions of the ARPS.

[33] MOWS's principal argument is that proposed change 8 was prepared prior to the Supreme Court's decision in *King Salmon*, and that both the policies it contains and the maps showing land identified as ONLs reflected the law as it was understood at that time. This involved a common understanding that the protection to be afforded to an ONL was one factor in the overall judgment called for by s 5 of the Act. Under that approach, consent might be granted for uses and developments in an ONL, including those adversely affecting the landscape, if considered appropriate by reference to other considerations based on achieving the Act's purpose of sustainable management. Since such an approach is no longer possible after the Supreme Court's judgment in *King Salmon*, Mr Casey submitted that the proper approach to identifying an ONL should be to apply the concept only to landscapes that are exceptional on a national scale or short of that, only to landscapes that are *clearly* outstanding, and not just "notable", "representative" or even "magnificent".

[34] Mr Casey pointed to various provisions in the proposed change that he claimed showed that the Council had based its approach on the law as understood prior to *King Salmon*. He submitted that, overall, the proposed change 8 policy framework is permissive and enabling of ongoing use and development of MOWS's land for rural production and tolerant of adverse effects, including potentially significant adverse effects that can be "managed" and need not be "avoided".

[35] Similarly as to the maps, MOWS argues that the extent of the ONLs reflects a pre-*King Salmon* origin in which, in accordance with the overall judgment approach, the use and further development of rural land for farming purposes could take place, subject to obtaining any necessary resource consent under the policy framework provided.

[36] The fundamental proposition advanced by Mr Casey is that the decision in *King Salmon* involves a significant change to the approach previously taken to the protection of ONLs in the coastal environment, so that all adverse effects within them will now have to be avoided. This is said to flow from the Supreme Court's interpretation of policy 15 of the NZCPS as creating an environmental bottom line, to be implemented by regional and district councils in formulating regional and district planning instruments.

[37] The argument makes it necessary to set out our understanding of what was established by the majority judgment in *King Salmon*.

King Salmon

[38] King Salmon had applied for changes to the Marlborough Sounds Resource Management Plan so as to change the status of salmon farming from prohibited to discretionary activity in eight locations. It also sought resource consents to enable it to undertake salmon farming at those locations and one other for terms of 35 years. A Board of Inquiry decided the plan should be changed and resource consents granted for salmon farming at four of the proposed locations. Opponents of the proposals appealed to the High Court but their appeals were dismissed.[24] Under s 149V(5) of the Act an appeal could not be filed in this Court, but s 149V(6) provided for applications for leave to appeal to the Supreme Court and that Court granted the Environmental Defence Society leave to appeal.

[39] The appeal by the Environmental Defence Society focused on only one of the plan changes, related to Papatua in Port Gore. The Board found that this was an area of outstanding natural character and an outstanding natural landscape. In considering whether to grant the plan change application, the Board was required to give effect to the NZCPS, but because of the findings about the natural character and landscape, policies 13(1)(a) and 15(a) of the NZCPS could not be complied with if consent were granted. The Board nevertheless granted the plan change. It took the view that although the relevant policies in the NZCPS had to be given considerable weight they were not determinative and it was required to give effect to the NZCPS as a whole. The Board considered that it was required to reach an overall judgment on King Salmon's application in light of the principles contained in pt 2 of the Act, and in particular s 5.

[40] The Supreme Court granted leave to appeal on two questions of law, but we need only discuss the judgment insofar as it relates to the first of those questions. That question asked whether the Board's approval of the Papatua plan change was

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

made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of policies 8, 13 and 15 of the NZCPS.[25]

[41] The Board had found that the area affected by the plan change was in a relatively remote bay and that all of the relevant landscape experts had identified part of the area adjoining the proposed farm as an ONL. The Board said:[26]

> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.

[42] The Board nevertheless stated that it had to balance the adverse effects against the benefits of economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources, purporting to apply to s 5 of the Act. Section 5 provides as follows:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
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> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[43] The Board concluded:

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[25] Policy 8 deals specifically with aquaculture and contemplates that regional policy statements and regional coastal plans would make provision for aquaculture activities in appropriate places in the coastal environment.

[26] Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 at [1236].

> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[44] The Supreme Court gave an overview of the structure of the Act, summarising the hierarchy of planning instruments provided for, addressing the provisions of pt 2 and referring to the "central role" played by the NZCPS in the statutory framework.[27] Importantly, the Court said that because no party had challenged the NZCPS it was proceeding on the basis that it conformed with the Act's requirements, and with pt 2 in particular.

[45] The Court noted that two different approaches to s 5 had been identified in early jurisprudence under the Act. The first was to hold that the section contemplated an environmental bottom line. This was to treat s 5(2) of the Act as requiring adverse effects to be avoided, remedied or mitigated, irrespective of benefits that may accrue from a particular proposal.

[46] The second approach was to hold that the section required an overall judgment to be made, which the Supreme Court identified as having its origins in the judgment of Greig J *New Zealand Rail Ltd v Marlborough District Council*.[28] The Supreme Court observed that in that case, the Judge had rejected a contention that the requirement of s 6(a) to preserve the natural character of a particular environment was absolute. Rather, he held that the preservation of the natural character was subordinate to s 5's primary purpose: to promote sustainable management. The protection of natural character was not an end or objective of itself, but an "accessory to the principal purpose" of sustainable management.[29]

[47] Similarly, in *North Shore City Council v Auckland Regional Council* the Environment Court held that:[30]

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27 *King Salmon*, above n 5, at [33].
28 At [39], citing *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
29 *New Zealand Rail Ltd v Marlborough District Council*, above n 28, at 85.
30 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94.

> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose … . Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

[48] The Supreme Court also noted that the Environment Court had held that the NZCPS is to be approached in the same way. Particular policies in the NZCPS may be irreconcilable in the context of a particular case[31] and the Court's role is to reach an overall judgment having considered all relevant factors.[32]

[49] The Court concluded that the directions in policies 13(1)(a) and (b) and 15(a) and (b) had as their overall purpose the preservation of the natural character of the coastal environment, protecting it and the natural features and landscapes from inappropriate subdivision, use and development. The Court observed:[33]

> Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects. In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of" … .

[50] The next important aspect of the decision for present purposes is the emphasis given to s 67(3) of the Act, which provides that a regional plan must "give effect to" any national policy statement, any NZCPS and any regional policy statement. The hierarchy established by the Act meant that the Board was required to give effect to the NZCPS in considering the plan change applications.[34] To give effect to is to implement, and was a matter of "firm obligation".[35]

[51] The Court interpreted the word avoid, used in s 5(2)(c) and policies 13(1)(a)–(b) and 15(a)–(b) of the NZCPS as meaning "not allow" or "prevent the occurrence of".[36] The Court observed that the scope of the word

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31 *King Salmon*, above n 5, at [42], citing *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 .
32 *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*, above n 31, at [258].
33 *King Salmon*, above n 5, at [62] (footnote omitted).
34 At [77].
35 At [77].
36 At [96].

inappropriate, used in s 6(a) and (b) of the Act, is heavily affected by context.[37] It said:

> [101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.

[52] Consequently, in the particular context of s 6(b) of the Act, a planning instrument that provided that *any* subdivision, use or development adversely affecting an area of outstanding natural attributes is inappropriate, would be consistent with the provision. Further:[38]

> … the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected … . The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning.

[53] And in the context of the NZCPS:[39]

> … 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.

In the result, inappropriate is to be interpreted in s 6(a) and (b) against the "backdrop of what is sought to be protected or preserved".[40]

[54] The Court recognised, however, that the discussion of the meaning of both avoid and inappropriate did not resolve what it described as the fundamental issue in the case: whether the Board was correct to adopt the overall judgment approach.

[55] The Court held that the Board's approach was incorrect. Its reasoning turned on the following considerations:

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37 At [100].
38 At [102].
39 At [102].
40 At [105].

(a) Section 58(a) of the Act, prescribing the contents of New Zealand coastal policy statements, enabled the Minister for the Environment to set national priorities in relation to the preservation of the natural character of the coastal environment. The provision contemplated the possibility of objectives and policies that would provide absolute protection from the adverse effects of development in relation to particular areas. This was seen as inconsistent with the overall judgment approach: the Court thought it inconceivable that regional councils would be able to act in a manner inconsistent with the priorities set by the Minister on the basis that the priorities set by the Minister were only relevant considerations. Similar reasoning applied in respect of other subsections of s 58.

(b) Section 58A of the Act provides that a New Zealand coastal policy statement can incorporate material by reference under sch 1AA. Matters in cl 1 of the schedule include "standards, requirements, or recommended practices". The Court considered the language of the schedule envisaged matters that were prescriptive and expected to be followed, once again contemplating that a New Zealand coastal policy statement can be directive in nature.

(c) The language of the relevant policies in the NZCPS itself. Here the Court focused on the word avoid in policies 13(1)(a) and 15(a) contrasting it with words in other objectives and policies in the NZCPS containing more flexibility and being less prescriptive in nature. The Court observed that when dealing with a plan change application the decision-maker would first need to identify the policies that were relevant, paying careful attention to the way in which they were expressed. Acknowledging the possibility that particular policies in the NZCPS might be inconsistent, the Court recognised that it would only be where there was no proper basis for reading the provisions as not in conflict that there would be any

justification for reaching a determination that one policy should prevail over another. The Court said:[41]

> 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.

This was to concede a limited role for s 5, that of assisting a "purposive interpretation" of the NZCPS.[42]

(d) The overall judgment approach in relation to the implementation of the NZCPS would be inconsistent with the process required before a national coastal policy statement can be issued. The statutory process would have been less elaborate if all that was intended was the creation of a list of relevant factors to guide decision-makers.

(e) The overall judgment approach would create uncertainty. Suggestions that the NZCPS could be applied in the round or as a whole were neither easy to understand or apply. This could result in protracted decision-making processes with uncertain outcomes.

(f) The overall judgment approach had the potential, at least in the case of plan change applications seeking zoning changes in particular coastal areas with outstanding natural attributes, to "undermine the strategic, region-wide approach" that the Court considered the NZCPS requires of regional councils.[43]

(g) While s 5 set out the Act's overall objective, Parliament had provided for a hierarchy of planning documents. The purpose of those documents was:[44]

> … to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content

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41 At [130].
42 At [88].
43 At [139].
44 At [151].

> and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.

(h) The NZCPS was an instrument "at the top of the hierarchy". Its objectives and policies reflected "considered choices" made on a variety of issues. The Court said: "As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice."[45] The Minister had been fully entitled to require that particular parts of the coastal environment be protected from the adverse effects of development, as had been done by adopting policies 13(1)(a) and 15(a) in relation to coastal areas with features designated as outstanding.

[56] Policies 13(1)(a) and 15(a) would not be given effect to if the plan change in question were to be granted because of the Board's finding that implementing the proposed change would result in significant adverse effects on areas with outstanding natural character and landscape. Those policies were strongly worded directives and the plan change did not comply with s 67(3)(b) of the Act because it did not give effect to those policies of the NZCPS.

[57] As we understand the decision, the overall judgment approach was rejected because of the prescriptive nature of the relevant provisions in policies 13 and 15 of the NZCPS. Because those policies were so specific and clear in what they prohibited, the overall judgment approach, by which a decision would be made balancing various considerations under s 5 of the Act with a view of achieving the Act's overall purpose, was not lawful. This case involves application of the same prescriptive provisions of the NZCPS that were engaged in *King Salmon.*

[58] The preceding discussion enables us to deal quite briefly with the questions of law we are asked to answer.

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[45] At [152].

First question

[59] This question asks whether the identification (including mapping) of an ONL for the purpose of s 6(b) is informed by, or dependent upon, the protection afforded to the landscape under the Act and/or the planning instrument. The suggestion is that whether or not land qualifies as an ONL and the extent of the land so described must be influenced by the consequences of according it that status in terms of what may take place on the land.

[60] We accept some of the propositions on which MOWS's argument that the level of protection should be taken into account is based. For example, it is clear that both the policies and the maps in proposed change 8 were developed prior to the Supreme Court's decision in *King Salmon* and that the Council would not have contemplated at the time that the land in the ONLs would be subject to the inevitably more restrictive regime flowing from the Supreme Court's decision. Mr Casey was right to characterise the overall effect of the policies in the proposed change as contemplating ongoing use of the land and a degree of development for rural production purposes.

[61] However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected. Although that was underlined in *King Salmon*, the Court was simply reflecting an important legislative requirement established when the Act was enacted. The same is true in respect of areas identified as having outstanding natural character in the coastal environment, in accordance with policies 13(1)(a) and 15(a)–(b) of the NZCPS.

[62] The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL

arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.

[63] The result of this approach may mean that, in some cases, restrictions of an onerous nature are imposed on the owners of the land affected. In a dissenting judgment in *King Salmon* William Young J drew attention to the potentially wide reach of the restrictions resulting from the decision having regard to the broad definition of effect in s 3 of the Act (the definition embraces, amongst other things, any positive or adverse effect, whether temporary or permanent).

[64] William Young J considered that the effect of the majority's judgment was that regional councils would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character".[46] He raised the possibility of significantly disproportionate outcomes as a result of the strict approach inherent in the majority judgment.

[65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.

[66] In the present case, as the Environment Court noted, it was agreed that the areas to which the ONLs 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

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[46] *King Salmon*, above n 5, at [201].

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.

[67] Mr Casey endeavoured to persuade us that a more restrictive regime will be in place under the new Auckland Unitary Plan. However, that is not an appropriate matter for us to assess in the context of a second appeal on questions of law arising from a decision on a different planning instrument, and we decline to do so. Relevantly, as Mr Casey's submissions tended to demonstrate, the policy content of the Hearings version of the ARPS provided a context that means the ONLs would not be inimical to the ongoing use of MOWS's land for its current uses.

[68] We should add that none of the questions raised for this Court was designed to test the lawfulness of the policies of the ARPS post *King Salmon*, and as has been seen, only a few of those provisions were apparently the subject of argument in the Environment Court.

[69] The first question must be answered no.

Second question

[70] This question asks whether the threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act has changed as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the decision in *King Salmon*.

[71] We do not consider that *King Salmon* is a judgment about the threshold to be applied in deciding whether a landscape is outstanding for the purposes of s 6(b) of the Act. The questions for the Board in that case, and for the Supreme Court on appeal, were whether a spot zoning should be allowed and a resource consent granted enabling salmon farming to proceed in an area already identified as of outstanding quality. The Supreme Court did not hear or deal with an argument that the area was not outstanding. Nor was there any dispute about the Board's finding that the proposed salmon farm would have significant adverse effects on the natural character and landscape of the area. The argument in the Supreme Court was, rather,

about whether the proposed plan change and resource consent could be granted on an overall judgment approach under s 5 notwithstanding the adverse effects on that environment.

[72] As a result there is nothing in the majority judgment of a definitional nature about ONLs. While the Court discussed the Marlborough Sounds Plan, it did so in terms that recorded that the Council, in developing the plan, had assessed the landscapes in the Sounds for the purpose of identifying those that could be described as outstanding, and noted that the plan described the criteria against which the Council made that assessment and contained maps identifying the areas of outstanding value. The Court observed that the exercise carried out was a "thoroughgoing one".[47] But nothing was said about the considerations taken into account by the Council in fixing on the outstanding areas.

[73] Overall, there is no language in the decision that suggests the Court was endeavouring to raise the test or threshold for deciding whether a landscape is outstanding. This question must also be answered no.

Third question

[74] The third question raised is whether a landscape identified as an ONL should be reassessed if the identification took place under a policy framework, and an approach to ONL identification, not now correct in law or needing to be changed by reason by *King Salmon*. Although couched in general terms, the obvious intent is to ask whether ONLs 78 and 85 should be reassessed by reason of *King Salmon*.

[75] The difficulty with this question is that it again attempts to link policies in the ARPS that apply to ONLs with the identification of ONLs. These are conceptually separate ideas. We see nothing in *King Salmon* that affects the identification of ONLs even if the policy framework might need adjusting as a result of the decision.

[76] Further, it must be noted that the Environment Court was well aware of the decision in *King Salmon* and plainly did not consider that it had any implications for

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47 At [73].

the extent of the ONLs identified in the ARPS. In fact, it recorded its agreement with a submission made to it by counsel for the Council that whether and to what extent land owned by MOWS is an ONL is a matter of fact, to be resolved on the basis of its view of the evidence called and an application of the relevant criteria in the proposed change. The "planning consequences" (that is, the impact of policies on the land) would flow from the fact the land was an ONL, and were not relevant to determining whether or not it was an ONL.[48]

[77] Finally, as we have already said, the policy framework contained in the ARPS as it stood in terms of the Hearings version did contemplate ongoing use of the land and a degree of development of it for rural production purposes.

[78] This question must also be answered no.

Fourth question

[79] The fourth question asks whether it is relevant to the identification as ONL of a landscape (particularly in the coastal environment) comprising a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming. The question goes on to refer to whether the identification of an ONL should take account of future changes over time by reason of that landscape's character as a working farm.

[80] This is a further question predicated on a link between identification of an ONL and the activities contemplated by the relevant planning instrument within that ONL. For reasons we have already explained, we are not persuaded that there is a logical link between the two. Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

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[48] *Man O'War v Auckland Council*, above n 1, at [38]–[39].

Fifth question

[81] The final question asked whether the High Court was correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator, that is, a basis of a comparison with other landscapes, nationally or in the relevant region.

[82] This question is again intended to accommodate MOWS's argument that as a consequence of the *King Salmon* decision a higher threshold should be applied to the identification of an ONL. It therefore covers some of the same ground as the second question.

[83] Here, however, Mr Casey made the explicit submission that the High Court had been wrong to determine that for the purpose of assessing whether a landscape is outstanding there is no need to have a point of reference against which to determine whether a landscape is outstanding. MOWS also submitted that the comparator should be landscapes acknowledged as being of national significance. Mr Casey argued that this follows from the use of the word outstanding in s 6(b), when other subsections in that section do not employ similar adjectives, and from the fact that the section itself is addressing matters said to be of national importance.

[84] In developing this aspect of the argument, Mr Casey referred to *WESI*, in which the Court referred to dictionary definitions of outstanding as "conspicuous, eminent, especially because of excellence; remarkable in" and definitions from other Environment Court decisions.[49] He submitted that an outstanding landscape is one that "stands out from the rest", which necessarily requires an assessment of what the rest is. He also noted the Court's observation that a landscape "may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes."[50]

[85] In the present case, the Environment Court proceeded on the basis that the identification of ONLs involved an assessment that took into account the landscapes

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[49] *WESI*, above n 8, at [82].

[50] At [82], citing *Munro v Waitaki District Council* Environment Court C98/97, 25 September 1997.

in the region rather than an assessment on a national basis. We have quoted what the Court said on this issue above.[51]

[86] We do not see any error in the Environment Court's approach. The question of whether or not a landscape may be described as outstanding necessarily involves a comparison with other landscapes. We also accept that the adjective is a strong one importing the concept that the landscape in question is of special quality. However, we suspect little is to be gained by applying a range of synonyms for what in the end involves a reasonably direct appeal to the judgment of the decision-maker. Whatever comparator is taken, the ultimate question is whether the landscape is indeed able to be described as outstanding.

[87] We do not accept Mr Casey's argument that a comparison is required with landscapes that may be described as outstanding on a national basis. The fact that the word outstanding has to be construed in a section dealing with matters of national importance does not support MOWS's submission. We see no reason why a landscape judged to be outstanding in regional terms should not be protected as a matter of national importance, the legislative policy being achieved by the protection of ONLs throughout the country on this basis.

[88] It is necessary to take into account that in developing a regional policy statement, the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region. The purpose of regional policy statements, set out in s 59 of the Act, is to achieve the purpose of the Act (that is, the sustainable management of natural and physical resources)[52] by:[53]

> … providing 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.

[89] Further, the council must prepare and change the regional policy statement in accordance with its functions under s 30.[54] These specifically include "the

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51 Above at [19]–[20].
52 Resource Management Act 1991, s 5(1).
53 Section 59.
54 Section 61(1)(a).

preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance".[55]

[90] In addition, s 61(1)(b) requires the council to prepare its regional policy statement in accordance with the provisions of pt 2. That embraces the protection of outstanding natural features and landscapes from inappropriate development, in terms of s 6(b). Further, the regional policy statement must give effect to any national policy statement or New Zealand coastal policy statement.[56] In this respect, the position applicable to the regional policy statement is the same that applies to regional plans under s 67(3) of the Act, a provision prominent in the reasoning of the Supreme Court in *King Salmon*.

[91] It is appropriate also to underline that in *King Salmon* the Supreme Court emphasised in several places that a regional council has a responsibility to consider issues on a regional basis. For example, it observed:[57]

> It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[92] Further, although the context was slightly different, the Court noted:

> [171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. … Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application.

[93] These statements support our conclusion that the task of the regional council in formulating its regional policy statement is to assess the environment on a regional basis. That means ONLs should be those that are outstanding in terms of the region's natural environment. That is the approach the Environment Court took here.

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55 Section 30(1)(b).
56 Section 62(3).
57 *King Salmon*, above n 5, at [69].

Result

[94] For the reasons given the first four questions are answered no. Although these were posed as questions of law the underlying issue was essentially one of fact and judgment on the merits, not matters properly pursued in this Court.

[95] We answer the fifth question by stating that in assessing whether or not a landscape is an ONL a regional council should consider whether the landscape in question is outstanding in regional terms.

[96] The appeal is dismissed.

[97] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel. We did not find it necessary to call on the other parties and no costs orders are made in respect of them.

Solicitors:
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