

# Lessons from the Supreme Court

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# Big Picture Questions

National policy: directive or guideline?

What do “avoid” , “protect”,  
“preserve” mean ?

When is it “appropriate” to develop  
outstanding coastal areas ?

Who makes the balanced judgment –  
policy writer or decision-maker ?

When is it mandatory to look at other  
sites ?

4 limbs of Adaptive Management ?

# Outline

- Facts
- Environmental effects
- NZCPS
- Statutory framework
- Balanced judgment or environmental bottom lines?
- Alternative sites
- Adaptive management
- Battle-lines

# Basic Facts

- 2 existing zones, prohibited and discretionary
- 8 Salmon Farms, 7 prohibited status
- Key effects: Natural character, Landscape, Water quality
- Adaptive management
- 4:1 decision (EDS)

# Board of Inquiry

## Landscape & Natural Character

- “effects on natural character would be high, particularly Cape Lambert..high to very high adverse visual effects on an ONL..
- “Thus the directions in P13(1)(a) and P15(1)(a) of the NZCPS would not be given effect to”
- “..while the outstanding NC and landscape values of outer Port Gore count against..the advantages for risk management [biosecurity]..is compelling..Papatua zone would be appropriate”

# NZCPS:

- Policy 13:
- “..preserve natural character of coastal environment and protect from inappropriate..development..
- (a) avoid adverse effects of activities on natural character in areas of coastal environment with ONC
- (b) avoid significant adverse effects..in all other areas of coastal environment

# NZCPS

- Policy 15:
- “To protect natural features and landscapes of coastal environment from inappropriate..development:
- (a) avoid adverse effects of activities on outstanding natural features and landscapes in coastal environment
- (b) avoid significant adverse effects..in other natural features and landscapes..

# NZCPS Policy 8

- Policy 8: “Recognise the..significant contribution of aquaculture to..wellbeing by..including in RPS and RCP..provision for aquaculture in appropriate places in the coastal environment”



# Compare & Contrast

- “provision for aquaculture in appropriate places” (P8)

VS

“preserve natural character of coastal environment from inappropriate development..avoid adverse effects..in ONCs” (P13)

“protect..landscapes..from inappropriate development..avoid adverse effects on ONLs” (P15)

# Statutory framework

- Part 2 RMA: does it contain bottom lines ?
- What does “while” mean ?
- What does “avoid” in s5 (and elsewhere) mean ?
- S6 vs s7
- What does “give effect to” the NZCPS, NPS, RPS mean ?
- Can the CPS veto development ?

# Section 5 RMA

- Sustainable management: “the definition is broadly framed.. S5 states a guiding principle intended to be applied by [decision-makers]” not a “specifically worded purpose intended as aid to interpretation”
- In the sequence “avoid, remedy, mitigate” avoid “has its ordinary meaning of ‘not allowing’ or ‘preventing the occurrence of.’”

# “While”

- Controversy as to meaning of while
- Read as “an integrated whole” & not developmental interests vs intergenerational and environmental interests
- “sustainable management..involves protection of environment as well as use and development”
- “while” means “at the same time as” = achieve all outcomes

## s6 vs s7

- “as between s6 and s7, the stronger direction is given by s6”
- “the matters set out in s6 fall naturally within the concept of sustainable management”
- “matters in s7 tend to be more abstract and evaluative than..s6”
- “significant that three of the seven matters of national importance in s6 relate to preservation or protection of certain areas”
- S8 is “a different type of provision again” with both process and substantive importance

# Environmental bottom line ?

- Two different approaches to s5
- Bottom Line:
- S5(2)(a)(b)(c) are safeguards to be achieved
- Adverse effects must be avoided, remedied, mitigated regardless of positive effects
- Where CPS (or NPS, RPS) is directive, and requires no adverse effects to ONL / ONC, then this becomes bottom line
- Could be a “veto” (or a mandatory positive)

# Balanced judgment ?

- NZ Rail decision:
- S6(a) – requirement to protect natural character is not absolute
- Subordinate to primary purpose of sustainable management
- None of s5(2)(a)(b)(c) necessarily trumps ..  
Decision maker balances all relevant considerations

# Bottom Line trumps

Narrow ratio for EDS:

- In relation to Plan Changes, where NZCPS is directive, then it sets a bottom line (in this case avoid adverse effects to ONL, ONC)
- “give effect to.. is a strong directive..”
- Some policies are prescriptive, some flexible (“take account, recognise, promote”)



# Bottom Line trumps

Broader view of EDS:

- Arguably applies to NPS & RPS
- Discussion of Part 2 RMA, meaning of directive language in policy instructions, arguably highly persuasive to RC & designations
- “Parliament has provided a hierarchy of planning documents..it is these documents that provide the basis for decision making even though Part 2 remains relevant”

# NZCPS

- “because the purpose of the CPS is to state policies to achieve [Part 2 RMA] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration”
- Despite CPS, the Board went back to Part 2 RMA
- Board “We are required to make an overall broad judgment as to whether the Plan Change will promote the single purpose of the Act..Part 2 is starting [and] finishing point..”

# Alternative Sites

- May be mandatory to look at alternative sites even for private plan change on spot zone basis
- Context is key: use of public domain resource in outstanding area is different to spot zoning of privately owned land

# Effects: Water Quality

- “data..on water quality..is not an adequate description of the existing environment..
- “[considerable uncertainty] as to the receiving environment”
- “..astounding gap in the prediction of effects on the environment cannot be explained away by emphasising that the modelling is conservative” nor could it be filled by “simply invoking adaptive management”
- Lack of modelling at maximum feed levels was a “fundamental failing in the assessment of effects that we would not expect

# Adaptive Management under SOS

- Threshold question: is there enough baseline data

4 questions:

- Extent of environmental risk
- Importance of activity
- Degree of uncertainty
- Extent that adaptive management will diminish risk and uncertainty (“vital part of test”)

# Battle-lines

- NPSFW
- RPS
- “whole of region approach”
- Adaptive management regimes
- Judicial notice
- Next generation plan writing
  
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