

**BEFORE THE GREATER WELLINGTON REGIONAL COUNCIL**

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

of proposed Change 1 to the Wellington Regional Policy  
Statement.

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**Legal Submissions on behalf of**

**the Director-General of Conservation / *Tumuaki Ahurei***

**Hearing Stream 3 Climate Change, Topic: Natural Hazards**

**dated 14 August 2023.**

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May it please the Panel

## INTRODUCTION

1. These legal submissions address the Natural Hazards topic.
2. The Director-General's case is supported by evidence from Mr Murray Brass, Senior RMA Planner with the Department of Conservation.

## STATUTORY FRAMEWORK

3. I agree with the Wellington Regional Council's legal submissions in relation to the general statutory framework applying to this part of the regional policy statement plan change.<sup>1</sup>
4. The purpose of the NZCPS is to state objectives and policies in order to achieve sustainable management in relation to the coastal environment of New Zealand.<sup>2</sup> Accordingly, it is said that *"the NZCPS gives substance to part 2's provisions in relation to the coastal environment."*<sup>3</sup>
5. In the context of preparing a regional policy statement, the statutory requirement is *"to give effect to"* the NZCPS.<sup>4</sup> This means *"implement"*. This has been recognised as being a *"strong directive"*<sup>6</sup>, and one that creates *"a firm obligation on the part of those subject to it"*.<sup>7</sup>
6. The implementation of the NZCPS is affected by what the objective or policy relates to, or what must be given effect to. Accordingly, the terms of the NZCPS, and the extent to which they are directive is critical. *"A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction."*<sup>8</sup>
7. Accordingly, in giving effect to the NZCPS, it is of course critical to consider the precise wording of the objective or policy in issue. Is it formulated in a directive way, or is it formulated in a way that confers wide flexibility in implementation? Accordingly, a requirement to *"avoid"*, which occurs

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<sup>1</sup> [Legal-framework-and-plan-change-tests-Kerry-Anderson-DLA-Piper-.pdf \(gw.govt.nz\)](#) at para 12.

<sup>2</sup> See s 56 RMA.

<sup>3</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [85].

<sup>4</sup> See s 2(3) RMA.

<sup>5</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [77].

<sup>6</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [77].

<sup>7</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [77].

<sup>8</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [80].

in a number of NZCPS policies, is directive in nature, it means “not allow”, or “prevent the occurrence of”.<sup>9</sup>

## **NZCPS – NATURAL HAZARDS POLICIES**

8. The NZCPS provisions that address the management of coastal hazards are:

Objective 5, which requires plans and policy statements to ensure that coastal hazard risks taking account of climate change are managed by:

- Locating new development away from areas prone to such risks;
- Considering responses, including managed retreat, for existing development in this situation; and
- Protecting or restoring natural defences to coastal hazards;

Policy 3, which directs the adoption of a precautionary approach;

Policy 24, which sets out policies for the identification of areas potentially affected by coastal hazards and carrying out hazard risk assessments over a 100-year timeframe with a view to identifying high risk areas;

Policy 25, which manages uses for the avoidance and/or reduction of risk from coastal hazards, also within a 100-year timeframe;

Policy 26, which promotes the use of natural defences (such as dunes and coastal vegetation) to protect uses from coastal hazards; and

Policy 27, which provides for a strategic approach to managing coastal hazards.

## **CASELAW - *Gallagher v Tasman District Council [2014] NZEnvC 245***

9. Mr and Mrs Gallagher appealed a decision of the Tasman District Council in respect of Plan Change 22 to the Tasman Resource Management Plan. This plan change sought to impose controls on subdivision and development of land situated in the Mapua/Ruby Bay area.

10. In deciding on whether the plan change gives effect to the NZCPS the Court noted that if there is a requirement to “give effect” to something, as long as it is “specific”, then it gives more direction than a requirement to give effect to a policy even if it is considered a higher level document when the two things are looked at separately.

11. As noted by King Salmon the more specific and directive the clearer the obligation to give effect of implement the provisions.

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<sup>9</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd*, [2014] NZSC 38, [96].

12. This case was a policy development case and is authority for the point in King Salmon that the more specific and directive a provision then the clearer the obligation to give effect to it is.

#### **EVIDENCE**

13. Mr Brass makes recommendations relating to ensuring policies 29, 51 and 52 of the RPS plan change give effect to the NZCPS. In particular, the missing elements across policies 29, 51 and 52 of the proposed RPS policies relate to the requirement to avoid increasing risk of social, environmental and economic harm from coastal hazards, and the requirement to avoid redevelopment or change in land use what would increase the risk of adverse effects of coastal hazards.

14. The DOC guidance on Policy 25(a) says:<sup>10</sup>

*This clause directs decision-makers to avoid increasing the risk of harm from coastal hazards. This policy is written in a directive way, with the meaning of 'avoid' having been informed by court decisions since the gazettal of the NZCPS 2010, including the Supreme Court's decision on Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited.*

15. Mr Brass' recommendations relate to natural hazards in the coastal environment. In my submission, the amendments are consistent with both implementing the NZCPS specifically, and with the purpose of the RMA more broadly.

16. In my submission, the amendments sought as set out in appendix 1 to Mr Brass' evidence are required to give effect to the NZCPS.

#### **CONCLUSION**

17. I would like to thank the panel for the opportunity to be heard, and the reporting officers from the council for their valuable contributions to this process.

**DATED** 14 August 2023



Katherine Anton  
Counsel for the Director-General of Conservation

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<sup>10</sup> [NZCPS 2010 guidance note: Coastal Hazards](#), December 2017, Department of Conservation, page 44