

BEFORE THE HEARINGS COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the proposed Otago Regional Policy
Statement 2021 (Non-Freshwater Parts)

MEMORANDUM OF COUNSEL FOR ENVIRONMENTAL DEFENCE SOCIETY INC

Dated 15 September 2023

Environmental Defence Society Inc

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MAY IT PLEASE THE COMMISSIONERS

Introduction

1. This memorandum is filed in response to the Panel’s direction that any party wishing to make a submission on the possible implications of the *Port Otago Limited v Environmental Defence Society Incorporated*¹ Supreme Court decision (“**Decision**”) is to do so by 15 September 2023.
2. Counsel for the Otago Regional Council (“**Council**”) filed a memorandum on the Decision dated 28 August 2023 (“the **ORC Memorandum**”).
3. The Decision is directly relevant to the consideration of provision for ports in the proposed Otago Regional Policy Statement (“**pORPS**”). It suggests an amendment to the Ports Policy (Policy 9) in the pORPS. Council is due to report back to the Panel on its response to this policy by 22 September 2023.
4. The ORC Memorandum raises the possibility that some parties may interpret the Decision as having wider implications, going beyond provision for ports only.

EDS Position

5. EDS does not consider that the Decision has wider implications than simply setting the policy for the ports because:
 - 5.1 The issue for determination in the Decision was limited to the relationship between Policy 9 (“**Ports Policy**”) and Policies 11, 13, 15 and 16 (“**Avoidance Policies**”) in the New Zealand Coastal Policy Statement 2010 (“the **NZCPS**”) and how these policies should be reflected in lower order planning documents, such as the pORPS.
 - 5.2 The Decision upheld and effectively applied the approach to interpreting national planning instruments, such as the NZCPS, set out in *Environmental*

¹ [2023] NZSC 112

Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38 (“*King Salmon*”).

5.3 The Decision also upheld the finding in *King Salmon* that the Avoidance Policies have a directive character. The term “avoid” has its ordinary meaning of “not allow” or “prevent the occurrence of”.

5.4 In respect of the Ports Policy, the Decision concluded that the Ports Policy is also directive, and that “requires” is a key verb in that policy:²

*“We accept that “recognise” is also an operative verb and that the clause begins with it. However, the verb “requires” colours what the decision-maker is being asked to “recognise”. In other words, the decision-maker is being directed to recognise that a port network is required. To recognise that something is required is to accept that it is mandatory. So, **the directive nature of the ports policy arises from the two verbs taken together.**”* [emphasis added]

5.5 Interpreted in this way, the Decision found that the Ports Policy and the Avoidance Policies all have a directive character.

5.6 This interpretation is limited to the Ports Policy, as no other policy in the NZCPS links the verbs “recognise” and “requires” together. The Decision therefore does not extend to other policies in the NZCPS.

5.7 The Ports Policy was also interpreted in light of an already established ports network in Otago that occurs within areas of outstanding natural landscape, natural character and ecological and surf break significance. In that context, there was the potential for the Ports Policy to conflict with the Avoidance Policies. The Decision did not go as far as to say that such a conflict would arise in respect of a new port, either in Otago or elsewhere.

² Decision at [69]

5.8 Indeed, the Court states:

a) At footnote 78 “Our comments are limited to the efficient and safe operation of existing ports. Because it is not before us, we do not deal with expansion of the operations of the ports ...”

b) At footnote 75 “... No issue relating to new ports is, however, before us in this appeal and **the judgment is not therefore to be understood as dealing with new ports.**” [emphasis added]

6. Following on from its finding that, *in the context of existing port networks*, there was potential conflict between the Ports Policy and Avoidance Policies the Decision went on to address how such a conflict should be resolved. Following the approach taken in *King Salmon*, it noted that the area of conflict between policies should be kept as narrow as possible.
7. The Decision noted the preference for conflicts between NZCPS policies to be resolved at the regional policy statement and plan level, as far as possible. It also noted that there can be no presumption that one directive policy will always prevail over another. The appropriate balance between the Ports Policy and the Avoidance Policies will depend on the particular circumstances.
8. The Decision provided a suggested amendment to the ports provision in the pORPS. It directed the Council to consult with the parties, and any other persons it considers appropriate, on a redrafted policy either along the lines of the amendment proposed in the Decision, or otherwise in a way that gives effect to the policies of the NZCPS and their inter-relationships.
9. The Council is currently undertaking this exercise and is due to report back to the Panel on 22 September 2023.

Dated this 15th day of September 2023

A handwritten signature in black ink, appearing to read 'S. Schlaepfer', written in a cursive style.

S Schlaepfer

Environmental Defence Society Incorporated