Supreme Court of New Zealand

17 April 2014

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**SUSTAIN OUR SOUNDS INC V THE NEW ZEALAND KING SALMON COMPANY LTD & ORS (SC 84/2013)**

**[2014] NZSC 40**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.**

New Zealand King Salmon applied in 2011 to establish nine new salmon farms in the Marlborough Sounds. Under the Marlborough District Council's combined Regional District and Coastal Plan (the "Sounds Plan"), the Coastal Marine Area in the Marlborough Sounds is divided into two zones: Coastal Marine Zone 1 where marine farms are prohibited and Coastal Marine Zone 2 where they are usually a discretionary activity. With regard to eight of the sites, the application asked for a plan change so that these sites would be re-zoned to a new zone, Coastal Marine Zone 3, where the farming of salmon would be a discretionary (rather than prohibited) activity. Resource consents for the salmon farms at those eight sites were also sought. In addition, there was a separate resource consent application for the White Horse Rock site, which was situated in Zone 2.

The applications for the plan changes and the consents were referred by the Minister of Conservation to a Board of Inquiry and were heard and considered at the same time. The

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Board granted plan changes in relation to four of the proposed sites (Papatua, Ngamahau, Waitata and Richmond). This meant that salmon farming became a discretionary rather than prohibited activity at those sites. Resource consents were also granted for those four sites, subject to detailed conditions of consent that were designed to monitor and address adverse effects of the farms under an adaptive management approach. The White Horse Rock site application for consent was declined.

SOS challenged the Board's decision with regard to all four sites. In the High Court, SOS's appeal was dismissed. In the judgment on the EDS appeal, released at the same time as this judgment, the EDS appeal with regard to the Papatua site in Port Gore has been allowed. In practical terms, this means the SOS appeal only relates to the three remaining sites.

SOS had three main arguments on appeal: first, it contended that there was inadequate information on water quality issues before the Board to grant the applications for plan changes at all and in particular at the maximum feed levels; secondly, that the Board was wrongly influenced by the adaptive management measures contained in the resource consents in deciding to make the plan change; thirdly, that, even if an adaptive management approach was available, the parameters of that approach should have been in the plan and not the resource consents.

The Supreme Court has unanimously dismissed the appeal against the decision of the High Court with regard to the Ngamahau, Waitata and Richmond sites. The Court has concluded that the plan changes and consents granted were in accordance with the Resource Management Act.

In relation to the first contention that there was inadequate information on water quality issues to grant the plan changes, the Court has held that the adaptive management approach utilised by the Board in making the plan changes and granting the consents was an available response to the uncertainty surrounding water quality issues and, in this case, a proper application of the precautionary approach required under the New Zealand Coastal Policy Statement.

In relation to the second issue, the Court has held that it was not improper in this case for the Board to have regard to the conditions that it considered should be attached to the consents when considering the plan change. In relation to the third issue, the Court rejected the proposition that the adaptive management measures should have been

contained in the plan and not the consents. In this case, there was no need for the plan to contain more than it did on water quality.

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**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**ENVIRONMENTAL DEFENCE SOCIETY INC V THE NEW ZEALAND KING SALMON CO LTD**
**(SC 82/2013) [2014] NZSC 38**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz**

The New Zealand King Salmon Company Ltd (King Salmon) applied for changes to the Marlborough Sounds Resource Management Plan so that salmon farming would change from a prohibited to a discretionary activity in eight locations throughout the Marlborough Sounds. At the same time, King Salmon applied for resource consents to undertake salmon farming at these locations and one other. The Minister of Conservation determined that King Salmon's proposals involved matters of national significance and referred the applications to a Board of Inquiry, acting under amendments to the Resource Management Act 1991 (RMA) enacted in 2011 to streamline planning and consenting processes. After hearing extensive submissions, the Board determined that it would grant plan changes making salmon farming a discretionary activity in relation to four of the proposed sites, and granted resource consents at these sites.

The Environmental Defence Society Inc (EDS) took an appeal to the High Court, challenging the plan change in relation to Papatua in Port Gore. This was heard together with an appeal from Sustain Our Sounds Inc (SOS), which challenged all

four plan changes. Both appeals were dismissed by Dobson J. EDS and SOS then sought, and were granted, leave to appeal to the Supreme Court under s 149V of the RMA. The Supreme Court will deliver a separate judgment setting out the reasons why leave was granted in this case.

The EDS and SOS appeals were heard together. This judgment addresses the EDS appeal. The SOS appeal is dealt with in a separate judgment, being released contemporaneously.

Policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement (NZCPS) provide that areas of the coastal environment with outstanding natural character and outstanding natural landscapes are to be protected from inappropriate subdivision, use and development through the avoidance of adverse effects of activities on them. Section 67(3) of the RMA required the Board of Inquiry to "give effect to" the NZCPS. The Board recognised that Papatua in Port Gore is an area of outstanding natural character and an outstanding natural landscape, and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. Consequently, if the plan change was granted, policies 13(1)(a) and 15(a) would not be complied with. Despite this, the Board granted the plan change. The Board said it was required to give effect to the NZCPS "as a whole", and to reach an "overall judgment" on King Salmon's application in light of the principles contained in Part 2 of the Resource Management Act.

On appeal, EDS argued that the Board had erred in law. EDS submitted that the Board's findings that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS challenged the Board's "overall judgment" approach based on Part 2 of the RMA. EDS also argued that the Board was obliged to consider alternative sites and methods in light of the anticipated adverse effects on outstanding character and landscapes of the proposed plan changes. Dismissing the appeal in the High Court, Dobson J found that, while policies 13(1)(a) and 15(a) were important and a materially higher level of justification was required to override them, the Board had not erred on its approach. Moreover, Dobson J found the Board had not erred in rejecting a requirement to consider alternatives.

EDS was granted leave to appeal to the Supreme Court on the questions whether the Board's approval of the Papatua plan change was made contrary to ss 66 and 67

of the RMA because it did not give effect to policies 13 and 15 of the NZCPS, and whether the Board was obliged to consider alternative sites or methods when considering a plan change resulting in significant adverse effects on an area of outstanding natural character and an outstanding natural landscape.

The Supreme Court has decided by majority (comprising Elias CJ, McGrath, Glazebrook and Arnold JJ) that the appeal must be allowed.

The majority has rejected the Board's view that its obligation was to exercise an overall judgment in light of the principles contained in Part 2 of the RMA and that it was entitled to give effect to the NZCPS "as a whole". The majority has held that protection and preservation of the environment are part of the concept of sustainable management as expressed in Part 2. The NZCPS gives substance to Part 2 in relation to the coastal environment. Although Part 2 of the RMA does not give primacy to preservation or protection, this does not mean that a planning document such as the NZCPS cannot give primacy to preservation or protection in particular circumstances. The majority has held this is what policies 13(1)(a) and 15(a) of the NZCPS do. The use of the word "avoid" in these policies is a strong direction, meaning they are not merely relevant considerations to factor into a broad overall judgment. These policies are consistent with those supporting the development of aquaculture because they protect only particular limited areas of the coastal region - only outstanding areas and landscapes. The Court has held that, because the Board did not give effect to policies 13(1)(a) and 15(a) in allowing the plan change, the Board did not "give effect to" the NZCPS as required by s 67.

The Supreme Court has not addressed in detail the question whether the Board was required to consider alternatives, having allowed the appeal on the first question. However, the Court has held that whether consideration of alternatives is necessary depends on the nature and circumstances of particular plan change applications and the justifications advanced in support of them.

William Young J has dissented on the interpretation of policies 13(1)(a) and 15(a).

In accordance with the views of the majority, the appeal has been allowed.

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