Submission

Strateraa's views on the NZCPS 2010

November 2016

Introduction

Straterra[1] appreciated the opportunity to participate in a stakeholder session on the stocktake of the New Zealand Coastal Policy Statement 2010 on 17 November 2016. This was a very useful discussion, to help inform officials in writing their report on the NZCPS stocktake to the Minister of Conservation (viz. Policy 28).

In preparing this feedback, Straterra has consulted with legal, planning and environmental management practitioners among our membership with expertise on the NZCPS and development projects in coastal space.

The NZ minerals and mining industry has a strong interest in the NZCPS, in relation to potential mineral sands projects in the coastal environment, and in terms of RMA case law implications for the RMA planning and consenting framework.

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Executive summary

The Supreme Court decision of 2014 on NZ King Salmon's marine farm applications in the Marlborough Sounds [2014 NZSC 38] (*King Salmon*), and subsequent case law, has affected the use of the NZCPS in RMA planning and consenting, to the extent that aspects are unworkable, from a mining industry perspective.

To prevent almost all economic development in coastal areas of significant biodiversity, and areas of outstanding natural character, features and landscapes – as *King Salmon* does, in its interpretation of the NZCPS – is an extreme policy outcome, and departs from Part 2 of the Resource Management Act 1991.

For this reason, Straterra seeks amendment of the NZCPS to restore balance to Policies 6, 11, 13 and 15, and to return the NZCPS into the context of Part 2 of the RMA (purpose and principles).

Remedies sought

Straterra recommends the Department of Conservation to consider the following proposed remedies to restore balance to the New Zealand Coastal Policy Statement 2010, and to make this national policy statement once again workable, in the context of the RMA:

a) Agree to insert specific reference to Part 2 of the RMA, to provide clarity that the NZCPS must give effect to Part 2[2] - rather than redefine and supersede Part 2;

[1] Straterra represents NZ minerals production, exploration, research, services and support. http://www.straterra.co.nz/about/

[2] The NPS on Electricity Transmission 2008 provides a precedent in the preamble, with the following wording: "However, the national policy statement is not meant to be a substitute for, or prevail over, the Act's statutory purpose or the statutory tests already in existence. Further, the national policy statement is subject to Part 2 of the Act. For decision-makers under the Act, the national policy statement is intended to be a relevant consideration to be weighed along with other considerations in achieving the sustainable management purpose of the Act. This preamble may assist the interpretation of the national policy statement, where this is needed to resolve uncertainty."

b) Agree to insert specific reference that decision-makers must exercise an overall broad judgment when making decisions on resource consent applications for activities in the coastal marine area;

c) Agree to insert specific reference to the effect that each Objective and Policy must be read and interpreted in conjunction with all Objectives and Policies; and

d) Agree to insert the phrase ", remedy or mitigate" after the word "avoid" in Policy 11 (a) and (b), Policy 13 (1) (a) and (b), and in Policy 15 (a) and (b).

Discussion

Problem definition

Policy 6 (2) (c) of the NZCPS was intended to recognise and provide for economic development with a "functional need to be located in the coastal marine area", with the qualifier that this occur in "appropriate places". This policy has now been trumped – following *King Salmon* - by Policies 11, 13 and 15, which require anyone carrying out an activity within the coastal space to "avoid adverse effects" on outstanding natural character, features and landscapes, and on significant biodiversity.

As consequences:

- The NZCPS, and its incorporation into regional policy statements and RMA plans, has led and could still lead to significant stretches of "coast" being designated as outstanding natural character, features and landscapes, and/or as containing significant biodiversity; and
- In these areas, it is, or will be very difficult or impossible to make a case for beach sand exploration and mining / quarrying because the adverse effects of development would have to be avoided. That would be an extreme outcome, and would also impact on many other activities in coastal space.

A secondary concern is that the Supreme Court qualified its approach in *King Salmon* by making an exception to the above for activities that are "transitory" in duration, and have effects that are minor. As we understand this decision, the Court wanted to ensure that a farmer in an area of outstanding natural character, features or landscapes could repair their fences, and that the owner of a lighthouse in such a place could give it a fresh coat of paint. Perhaps, there are other types of activity that would fit this qualification.

To be specific, the Supreme Court decided that "avoid" means avoid, as in "not allow", but not always, with lack of clarity on where the line is drawn. That is not helpful to the working of the NZCPS, or, for that matter, the RMA system as a whole.

Analysis of the problem

Straterra contends that the NZCPS, as currently interpreted, goes further than s6, RMA, which protects or preserves matters of national importance from "inappropriate subdivision, use or development". Appropriate development – not defined - can be considered in areas of outstanding natural character, features or landscapes, and in areas of "significant indigenous vegetation and significant habitats of indigenous fauna", with appropriate conditions and management regimes imposed in the event that application for resource consent is approved.

The *King Salmon* case law, and subsequent case law, e.g., Beatrix Bay[3] [2016 NZEnvC 81], prevents that discussion from occurring in consent processes. Part 2 is relegated to an afterthought only to be considered if there is some invalidity, incomplete coverage, or uncertainty in the planning instrument. However, the NZCPS is generally regarded as a complete document covering all activities in the coastal marine area (except, perhaps something entirely unexpected, like a marine shipping casualty, such as the MV Rena).

That is an undesirable outcome for the RMA system because the four wellbeings – environmental, social, cultural, economic – are unlikely to be met in an optimal or balanced way. Partly, this is because the language of "avoid" is so absolute - the approach of the Supreme Court allows no room for competing considerations to be considered, such as the economic and social well-beings that are also inherent to Part 2.

Policies that seek to enable or encourage economic activity, productive use of resources, and wellbeing for people and communities will always, on the Supreme Court's approach, be subservient to, or be trumped by "avoid" policies. It is simply not possible to draft a sensible "enabling policy" that could compete with an "avoid policy" – a policy requiring an activity to be allowed in all circumstances and in any location, for example, would not be appropriate.

An approach to a solution

Straterra's view is that activities that have a functional need to be located in the coastal marine area, e.g., exploration and mining of an economic minerals sands deposit on a beach (and these are few and far between in New Zealand), should qualify as an appropriate activity in an appropriate place.

The proponent of such an activity should be able to apply for resource consents, accepting that a high bar for approval would be set in areas where s6 (a), (b) and (c) of the RMA apply. Companies are willing to take on the risk of more onerous consent conditions that could or would be set in such areas. They do, however, wish to retain the opportunity to make their case: on the merits of their project, on the likely impacts on the environment, and proposals for their management, including biodiversity offsets and other mitigation or compensatory measures, and adaptive management[4].

That approach is in keeping with the original intent of the RMA, which was to be an enabling, effects-based regime, in which positive effects of development could also be considered, and case law which provided for an "overall broad judgment" to be made by decision-makers.

On the last point, common practice in law when interpreting a statute or statutory instrument is that any one provision must be read and interpreted in conjunction with the whole. This is particularly necessary in natural resource management, being a multi-faceted policy challenge. Indeed, this is the reason the concept of OBJ was introduced into RMA case law.

Decision-makers must take a range of factors into account when forming a decision, and apply an appropriate degree of weighting to each factor as the occasion demands. This is not simply a binary exercise of weighing the economy against the environment; it is rather an holistic approach to making a decision. This important principle of decision-making needs to be restored to the working of the NZCPS.

[3] It is noted that this decision concerning a proposed marine farm is under appeal on points of law to the High Court.
[4] Cf. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Concluding remarks

The NZCPS as applied prior to *King Salmon* did provide for balanced consideration of development that has a functional need to be located in the coastal environment, and of the need to provide appropriate protection of natural character, features and landscapes, and of biodiversity. From a minerals and mining industry perspective, that balance has been removed following *King Salmon*, both in the plan-making context and the resource consent context, as the Beatrix Bay case illustrates. It needs to be restored. This stocktake / review of the NZCPS is an opportunity to progress this objective.

We consider that amendment of the NZCPS would clarify the interplay of Policy 6 with Policies 11, 13 and 15, and place that firmly in the context of Part 2 of the RMA.