

Research Article

Preserving coastal natural character: Court interpretations of a long-standing New Zealand policy goal

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Abstract: New Zealand's policy goal to preserve coastal natural character was first incorporated into planning legislation in 1973 and protected area legislation in 1977. An evaluation of 100 relevant Resource Management Act Court decisions determined the Courts' interpretations of this policy goal. The Courts have repeatedly found that natural character is of nature (not culture), including natural elements, patterns, and processes. There is a continuum of naturalness from pristine indigenous ecosystems to the urban environment. A 2014 Supreme Court decision has upheld the use of environmental bottom lines for natural character and the importance of protection as part of sustainable management.

Key words: environmental naturalness, environmental policy, New Zealand Coastal Policy Statement, Resource Management Act.

Introduction

New Zealand has a statutory policy goal of preserving the natural character of the coastal environment and various freshwater environments and their margins. This was developed in response to widespread public concern in the late 1960s and early 1970s about the rapid rate of coastal and lake margin development (Minister of Works and Development 1974). Maplesden and Boffa Miskell (2000) and Peart (2009) describe the processes leading to the development of natural character policy and its incorporation into legislation (currently the Resource Management Act 1991 (RMA) and Reserves Act 1977). Since 1991, implementation of the natural character policy goal has primarily been through the RMA and its subordinate tools, including the New Zealand

Coastal Policy Statement (NZCPS), district and regional plans.

Even though policy to preserve the natural character of the coastal environment has been part of planning/development control and protected area legislation since 1973 and 1977, respectively, publications over the last 18 years have identified serious ongoing losses of natural character (Richmond & Froude 1998; Peart 2009) and inadequate responses by local government (Office of the Parliamentary Commissioner for the Environment 1996; Rosier 2004, 2005; Peart 2009). The 10-year review of the first NZCPS prepared under the RMA, found that district plans had made little detailed provision for protecting coastal natural character (Rosier 2005). The areas of poorest implementation were the monitoring of environmental outcomes by councils, and

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assessing the degree to which policies and plans had influenced environmental results (Rosier 2004, 2005). Reasons for the inadequate monitoring have included the absence of an agreed definition of natural character and a robust methodology for measuring its change and resource and capacity constraints at the local government level.

To address these deficiencies, a comprehensive definition of natural character and robust methodology for measuring its change have been developed (Froude *et al.* 2010; Froude 2011). The methodology development process included an evaluation of 100 relevant RMA court decisions to determine the Courts' interpretations of, and intentions for, New Zealand's natural character policy. This paper includes a summary of this Court decision evaluation. It then discusses the implications of various Court decisions following the gazettal of NZCPS 2010.

While a variety of searches found no use of the term 'natural character' in the current legislation of other jurisdictions, the concept of environmental naturalness is used in the legislation of some other countries. There has been considerable discussion on interpretations of 'naturalness' and its use as a goal for managing the USA's wilderness systems. For example, Landres *et al.* (1998) considered that the wording of the Wilderness Act 1964 and subsequent amendments implied that naturalness was the primary management goal for wilderness areas. Section 2(c) of the Wilderness Act stated that: 'wilderness. . . is hereby recognized as an area where the earth and its community of life are untrammelled by man. . . retaining its primeval character and influence . . . protected and managed so as to preserve its natural conditions . . . affected primarily by the forces of nature'. Czech (2004) described how the United States Federal statutes for national parks, forests, and range lands address concepts such as integrity, health, and naturalness.

The UK's Natural Environment and Rural Communities Act 2006 established 'Natural England' with the general purpose of ensuring 'that the natural environment is conserved, enhanced and managed for the benefit of present and future generations' (UK Government 2006). This includes 'promoting nature conservation and protecting biodiversity'.

Natural character policy in New Zealand legislation

Planning and resource management legislation

A 1973 amendment added a new section about specified matters of national importance (s2B) to the Town and Country Planning Act 1953. The preservation of the natural character of the coastal environment and the margins of lakes and rivers was one of those matters. This matter of national importance was carried into the Town and Country Planning Act 1977.

Following the election of a new government in 1984, there was a period of extensive restructuring of central and local government organisations and reform of the economy. This period, which spanned two governments, included an extensive review of a large number of resource management statutes affecting land, air, coast, and water, and culminated in the RMA 1991. In contrast to the earlier planning legislation, the intent of the RMA is to manage effects rather than activities (McGill & Rennie 2012).

The purpose of the RMA is to promote the sustainable management of natural and physical resources. As part of achieving this purpose, there are five matters of national importance, with the first being: 'The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development' (s6(a)). The coastal marine area (CMA) is defined (s2) to extend from the 12 nautical mile outer limit of the territorial sea to mean high water springs, with a special mechanism for defining inland boundaries at river mouths. The Act does not define natural character.

Two other relevant matters of national importance are: the protection of 'outstanding natural features and landscapes' (s6(b)) and 'areas of significant indigenous vegetation and significant habitats of indigenous fauna' (s6(c)). These matters have a threshold 'qualifier' – 'outstanding' and 'significant', respectively. This is in contrast to the absence of such a qualifier for natural character in s6(a).

Under the RMA, there is a hierarchy of decision-making instruments. In the coastal environment, the hierarchy begins with the

mandatory NZCPS – with the latest being in 2010 (Minister of Conservation 2010). This is followed by regional policy statements and then plans by regional and district councils. Regional coastal plans are mandatory and are approved by the Minister of Conservation. Coastal plans provide the decision-making regime for the CMA, although they may include policies and other provisions for the wider coastal environment. Rosier (2005) summarises the RMA planning and decision-making regime for the New Zealand coastal environment.

Protected areas legislation

One of the three purposes of the still current Reserves Act 1977 is to foster and promote ‘... the preservation of the natural character of the coastal environment and of margins of lakes and rivers and the protection of them from unnecessary subdivision and development’ (s3(1)(c)). To assist with the implementation, section 4(2) of the Act requires that the ‘... survey of the sea coast, its bays and islets and offshore islands [and] of lakeshores and riverbanks’ be completed and from time to time kept under review.

Other protected area statutes also address naturalness. For example, s3 of the Marine Reserves Act 1971 requires that marine reserves be preserved as far as possible in their natural state. Similarly, s4(2) of the National Parks Act 1980 requires that they shall be preserved as far as possible in their natural state.

Early steps to implement the natural character policy goal

In the 1970s, there was an active programme to preserve coastal, and lake and river margin natural character. The then Department of Lands and Survey progressively surveyed coastal land (by county) to identify priorities for protection. On the request of the Minister of Lands, the local Council designated in their district plans areas identified as priorities for reserves and open space. Designated lands were subsequently purchased where there was both a willing seller and available funds (Department of Lands and Survey 1973). The Department, however, reported that the purchase fund was fully expended buying nationally significant

land, and there were insufficient funds to buy areas of regional significance (e.g. Department of Lands and Survey 1974).

In the 1980s, the focus of the government’s environmental survey programmes on unprotected lands changed. The Protected Natural Areas Programme was established to assist the Government to meet its biodiversity protection requirements under s3(1)(b) of the Reserves Act by ‘ensuring as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscapes which in aggregate gave New Zealand its own recognisable character’ (s3(1)(b)). New Zealand was divided into 85 ecological regions and 268 ecological districts (Biological Resources Centre 1983) that formed the basis of the new programme of ecological survey. In 1987, the then new Department of Conservation took over the functions and administration of the Reserves Act 1977 as well as a variety of other conservation-related legislation. By the late 1980s, the use of designations in local authority planning documents to identify future reserves for conservation purposes was no longer a preferred tool of government agencies.

As the use of Reserves Act provisions began to decrease as a mechanism for preserving the natural character of the coastal environment, a 1989 landmark Court of Appeal decision (*Environmental Defence Society vs Mangonui County Council* (3 NZLR257; 13 NZTCPA, 69/77)) demonstrated that the planning legislation could have a role in preserving the natural character of the coastal environment.

Interpretation of natural character in RMA court decisions

Context

Applicants and others that formally participate in Council decision-making processes under the RMA can appeal Council decisions to the Courts. This appeal process has resulted in an extensive body of court decisions known as case law, some of which can have significant value in amplifying the statute law.

Most RMA case law relating to natural character comes from the Environment Court

(previously the Planning Tribunal). This Court hears appealed cases de novo. While it considers previous Environment Court decisions, it is only bound by the decisions of higher courts (i.e. the High Court, Court of Appeal, and Supreme Court). Appeals to the higher courts are on points of law and so decisions from these courts focus on legal matters such as the relationship between different sections of the Act. As appeals to the Environment Court are much broader in scope, its decisions have generally been more useful for determining Court interpretations of natural character.

Before the landmark 1989 Court of Appeal decision on *Environmental Defence Society vs Mangonui County Council* (3 NZLR257; 13 NZTCPA, 69/77), the Courts paid relatively little attention to the requirement to preserve coastal natural character. Maplesden and Boffa Miskell (2000) summarised early court decisions addressing natural character. Since the mid-1990s, there has been a substantial increase in the number of decisions addressing natural character, and in the size and complexity of those decisions. While early decisions focused on visual matters, ecological matters became increasingly important from the early 1990s (Maplesden & Boffa Miskell 2000). This has paralleled the increased biodiversity/ecological emphasis in the implementation of the protected area legislation.

Methodological approach used to assess Court interpretations of the natural character policy goal

A late 2007 search of the RMA net website (www.rma.co.nz) using the term 'natural character' found approximately 500 potentially relevant Court decisions. Full decisions were systematically analysed until information on 100 'useable' decisions had been compiled. To be 'useable', a decision had to directly address natural character matters. That analysis was updated in 2010 and is termed the 'primary analysis' in this paper. As part of the update, several recent decisions that addressed natural character in depth replaced several older decisions that had addressed natural character more superficially.

Data collected for each decision included: Court; decision date; official reporting details (if relevant); summary of the Court's decision;

effect of the Court's decision on the original council decision; whether the Court defined 'coastal environment' and/or 'natural character'; components of natural character addressed; and the Court's intended outcome (in categories) for the natural character of the area concerned. Most decisions assessed related to resource consent applications where additional information collected included: location, activity type and status in the relevant council plan; types of environment affected; and mitigation required. Detailed Court interpretations of natural character, coastal environment, and the implementation of s6(a) of the RMA were evaluated separately.

In July 2014, the 'primary analysis' was supplemented by a review of recent Court decisions where the 2010 NZCPS was an important element influencing the Court's decision-making for natural character.

Characteristics of the assessed decisions

Most decisions analysed in the primary analysis were appeals to the Environment Court or Planning Tribunal. A detailed discussion or interpretation of natural character was found in 15% of decisions analysed. Site-specific impacts on visual components of natural character were discussed in 30 decisions. Ecological components of natural character were discussed in 21 decisions and physical processes were discussed in 11 of decisions.

Eighty-nine per cent of decisions applied to the coastal environment. The remainder applied to freshwater environments and/or their margins. Several decisions applied to both coastal and freshwater environments. Overall, 65% of decisions applied to the terrestrial environment, 44% to aquatic environments, and 27% to the water surface. The activity spread of the assessed decisions was: 32% aquaculture; 22% buildings and structures including wind-turbines; 17% rural lifestyle subdivision; 12% residential subdivision; 7% marinas and ports; 5% jetties and wharves; and 9% other.

Court interpretations of natural character in decisions

Natural character has been discussed in many Court decisions. It has consistently been recognised as including natural elements, patterns,

and processes. Natural character is of nature, not culture. The Courts have also recognised that terrestrial natural character is present in a continuum from pristine indigenous vegetation → indigenous regeneration → indigenous and introduced species mixtures → production landscapes dominated by introduced species → built urban environment. It is not necessarily this linear. Introduced species have been recognised by the Courts as having some natural character values depending on context, although not as much as indigenous species. Court decisions about natural character in the marine environment typically address marine biota (including marine mammals and sea-birds).

Many of the assessed South Island decisions were for aquaculture projects in the CMA. Generally, the New Zealand seabed is not privately owned and the RMA takes a precautionary approach to proposals to occupy space and undertake activities in the CMA (McGill & Rennie 2012). Evidence and Court decisions on aquaculture proposals typically addressed ecological (as well as visual) components of natural character. This was particularly so in the northern South Island where the Department of Conservation's descriptive framework (McRae *et al.* 2004) provided context for natural character assessment.

In contrast, coastal subdivisions on private land were the subject of many assessed North Island Court decisions. While these coastal environment subdivisions were subject to the then 1994 NZCPS, often there were few, if any, specific natural character planning provisions in the relevant district plans. Much of the natural character evidence and Court discussion addressed the visual component of natural character. Some decisions included considerable discussion on natural character impact mitigation through the planting of indigenous species.

Sometimes Courts used revegetation and other ecological restoration mitigation to offset the impacts on natural character of relatively limited building associated with some rural-residential subdivisions. In the Arrigato case, 10 ha was to be planted for each subdivided lot (*Arrigato v Auckland Regional Council (A115/99)*; *Arrigato v Auckland Regional Council (CA84/01) [2000] NZRMA 481*; *Arrigato v*

Auckland Regional Council A145/2002). Depending on the plan provisions, the Courts did not necessarily approve proposals for lesser quantities of planting because of the precedent effect. In *Murphy v Rodney District Council (A133/2003)*, the Court declined a proposal for 2 ha of planting for each lot established. Whether the Court accepted the offered mitigation also depended on the impact of the actual development and the perceived benefits of the mitigation. In *Matakitaki Trust v Queenstown Lakes District Council (W10/2006)*, the development impacts were judged as major and the ecological restoration programme benefits were considered to be ambiguous and so the Court declined the application.

The context of a proposal could be critical. This includes the location relative to existing development and areas of high natural character, as well as the scale of the proposed development. A proposal for a development that has a discretionary status in the relevant planning document might be declined even though discretionary status means that the activity was generally suitable in that zone (e.g. *Marlborough Seafoods v Marlborough District Council (W12 98) [1998] NZRMA21*). Even long-standing residential zoning for an area might not prevail if consents required for associated activities could have a major impact on natural character (e.g. *Kotuku Parks v Kapiti Coast District Council (A73/2000)*). Nearby development might increase the relative value of natural character of what remains, depending on its qualities (e.g. *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council (W25/2002)*). Alternatively, such development could be considered as consolidation (as in policy 6(1)(c) of NZCPS2010).

Table 1 summarises natural character concepts identified in the 'primary analysis' of 100 RMA Court decisions. While common themes were repeated, there were some matters where the treatment by the courts was inconsistent (e.g. the impact of introduced trees (typically conifers) on natural character). In part, this was because decisions addressed different contexts. In *Kapiti Environmental Action v Kapiti Coast District Council (A60/02)*, the Court acknowledged that while pine plantations were ugly at harvest time and may have replaced some

Table 1 Summary of New Zealand court interpretations of natural character (developed from an analysis of 100 court decisions – made before 2011 – on appeals made under the Resource Management Act)

Natural character concept	Decision example(s)
Natural character is derived from nature.	<i>Aqua King (Anokoha Bay) v Marlborough District Council (W71/97)</i> <i>Kuku Mara Partnership (Admiralty Bay) v Marlborough District Council (W037/2005)</i>
The degree of natural character depends on the extent to which natural elements, patterns, and processes occur.	<i>Pigeon Bay Aquaculture v Canterbury Regional Council C179/03</i> <i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i> <i>The Matukituki Trust v Queenstown Lakes District Council (W10/2006)</i>
Natural character includes ecosystems and ecological processes.	<i>Gill v Rotorua District Council (W29/93)</i>
Natural character elements include: terrestrial landforms and coastal features, terrestrial vegetation, birdlife and feeding grounds, intertidal areas, estuaries, marine vegetation, seabirds, marine mammals, clear water quality, coastal ecosystems, seascapes, offshore waters.	<i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i> <i>Golden Bay Marine Farmers v Tasman District Council (W42/2001)</i> <i>Trio Holdings v Marlborough District Council (W103/96)</i>
Natural character processes include natural tidal movements, natural sedimentation, natural lake levels, animal migrations/movements.	<i>Golden Bay Marine Farmers v Tasman District Council (W42/2001)</i> <i>The Matukituki Trust v Queenstown Lakes District Council (W10/2006)</i>
Natural succession and regeneration processes are part of natural character.	<i>Gill v Rotorua District Council W29/93</i> <i>Kuku Mara Partnership v Marlborough District Council (W39/04)</i>
Natural character excludes built elements such as buildings, structures, and infrastructure.	<i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i> <i>Kuku Mara Partnership (Admiralty Bay) v Marlborough District Council (W037/2005)</i>
Natural character has a relative rather than an absolute value. The highest natural character is where there has been least human modification, where environments are composed entirely of natural elements, particularly indigenous communities	<i>Doves Bay Society Inc v Far North District Council (C126/02)</i> <i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i> <i>Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council (W25/2002)</i>
Natural character is present in a continuum. This continuum ranges from urban to wilderness.	<i>Doves Bay Society Inc v Far North District Council (C126/02)</i> <i>Kuku Mara Partnership (Admiralty Bay) v Marlborough District Council (W037/2005)</i>
Even highly modified coastal environments can have some natural character.	<i>Doves Bay Society Inc v Far North District Council (C126/02)</i> <i>Pigeon Bay Aquaculture v Canterbury Regional Council C179/03</i>
An area does not have to be pristine for natural elements, patterns, and processes to dominate.	<i>King-Turner v Marlborough District Council (W81/2000)</i>
Natural does not mean pristine or endemic to New Zealand.	<i>Eyres Eco_Park v Rodney District Council (A147/2004)</i> <i>Harrison v Tasman District Council ()</i>
Visual qualities are part of natural character.	<i>Horn v Marlborough District Council (W30/05)</i> <i>Trio Holdings v Marlborough District Council (W103/96)</i>
Experiential recognition of what is natural character relates to natural elements and patterns and an absence of built elements and unnatural patterns. It does not include subjective aesthetic assessments based on taste. The presence of unnatural patterns is independent of viewer perception and experience of them.	<i>Browning v Marlborough District Council (W20/97)</i> <i>Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council (W25/2002)</i> <i>Pigeon Bay Aquaculture v Canterbury Regional Council C32/99 (para 58, p32)</i>
Natural character differs from beauty.	<i>First Wave v Marlborough District Council W46/97</i>
Natural character differs from wilderness.	<i>Gannet Beach Adventures Ltd v Hastings District Council W90/04)</i>
People's perception of naturalness can differ significantly from reality. 'Natural character is derived from a large number of characteristics that have nothing to do with people's perception of them'.	<i>Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council (W39/04) (para 393, p110)</i>
People vary in their interpretations of naturalness.	<i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i>

Table 2 New Zealand Court interpretations on the implementation of section 6(a) of the RMA (developed from an analysis of 100 RMA court decisions made before 2011)

Policy concept	Decision example(s)
The preservation of natural character is subordinate to the purpose of the Act which is the promotion of sustainable management.	<i>New Zealand Rail v Marlborough District Council AP169/93</i>
The preservation of the natural character of the coastal environment (and other listed systems) is a matter of national importance.	<i>Director General (DG) of Conservation v Marlborough District Council W89/97</i>
The natural character of an area need not exhibit any special attributes or be of national importance to warrant protection.	<i>Arrigato v Auckland Regional Council A115/99;</i> <i>Clyma v Otago Regional Council W64/94</i>
Modification is not a reason to ignore the requirement to protect coastal natural character. Developments in the vicinity may increase the importance of protecting the remaining natural character in a particular location.	<i>New Zealand Shipping Federation v Marlborough District Council W38/2006</i> <i>DG of Conservation v Marlborough District Council W89/97</i>
Context is essential when assessing the appropriateness of a modification to natural character. While a use may generally be appropriate in an environment (e.g. coastal marine area) or zone, it is not necessarily appropriate in all locations in that environment or zone.	<i>DG Conservation v Marlborough District Council W89/97</i> <i>Lowe v Auckland Regional Council (A21/94)</i> <i>Pigeon Bay Aquaculture v Canterbury Regional Council C32/99</i> <i>Freda Pene Reweti Whanau Trust v Auckland Regional Council (A166/2004)</i>
Inappropriateness in the context of impacts on natural character is to be decided on a case by case basis, depending on the circumstances of a particular case.	<i>New Zealand Rail v Marlborough District Council (AP169/93)</i>
In assessing a development proposal, the focus of assessment is not the absolute level of natural character, but whether that proposal will adversely affect natural character, and if so to what extent.	<i>Pigeon Bay Aquaculture v Canterbury Regional Council (C179/03)</i>
Enhancement of natural character is required as well as protection in many locations.	<i>Murphy v Rodney District Council (A133/2003)</i>
Mitigation should be appropriate to the particular environmental circumstances and the damaging impacts of the proposed development.	<i>Stapylton-Smith v Banks Peninsula District Council (C191/04)</i>

native species, for much of the cycle, pine forest was relatively pleasant to view compared with dwellings among the sand dunes. In contrast, in *Rohaotia Marine Farms v Marlborough District Council (W5/106)*, the Court found that cleared pine plantations can have an industrial look and replacement plantations may not offer much naturalness. In another context, the Court found that planted trees with limited structures can result in higher natural character compared with completely pastoral landscapes (*Save the Bay v Christchurch City Council (C50/02)*). Lastly, in an area of significant indigenous regeneration, the Court held that wilding (introduced) pines modified natural character

only slightly (*Kuku Mara Partnership v Marlborough District Council (W39/2004)*).

Table 2 summarises interpretations by New Zealand Courts before 2011 on the implementation of s6(a) of the RMA. This excludes interpretations of what constitutes natural character as these have been addressed in Table 1.

In aquatic (especially marine) environments, natural character assessments under the RMA are constrained as the Act does not apply to controls on the harvest or enhancement of populations of aquatic organisms that are fisheries resources controlled under the Fisheries Act 1996 (*Challenger Scallop Enhancement*

Table 3 Analysis of the Courts' primary intention for natural character outcomes (developed from the analysis of 100 RMA decisions made by the Courts before 2011)

Decision	% of cases	Description of Court intention for natural character
Development or proposal declined	30	The only way to address adverse effects on natural character is for there to be no development of the nature proposed.
	5	While the site's natural character values have been degraded, this is not an excuse for further development and/or the site will improve with natural succession processes.
	2	Natural character is not the major reason to decline.
	5	The development was declined primarily because of the precedent effect and/or the proposal was contrary to s6 and/or NZCPS and/or the relevant zone provisions in the plan.
Development largely approved	15	Development assessed to have minor adverse effects on natural character
	5	Benefits of the proposal are so important (nationally) that the development should proceed even if there will be adverse effects on natural character.
	14	The site has been compromised by earlier development and/or consents issued.
Development approved with significant mitigation	5	Mitigation of potential adverse effects addressed through one or more of: a significant reduction in scale, a reduction in the term of consent, or a substantial change in style
	5	Mitigation of potential adverse effects addressed through substantial compensatory offset works
	4	Both above
	8	Upheld or tightened measures to improve natural character protection
Changes to plan provisions directly affecting natural character		

Company v Marlborough District Council [1998] NZRMA 342).

Court decisions have addressed only a small proportion of terrestrial coastal developments. This is because few such developments require consent under the relevant district plan, and fewer are publically notified. This means that much terrestrial coastal development has occurred without detailed assessments of individual or cumulative impacts on natural character.

Court's intention for natural character outcomes

The Courts' intentions for natural character outcomes were determined for each of the 100 assessed decisions made before 2011. In 34% of the assessed cases, the Court largely approved the proposal; in 14% of cases, the Court approved a reduced development and/or one with substantial mitigation, and in 42% of cases the Court declined the proposal. Table 3 sum-

marises the analysis of the Court's intended outcomes.

Has the 2010 NZCPS affected Court interpretations of natural character and the implementation of relevant statutory provisions?

Policy 13(2) in the 2010 NZCPS states 'that natural character is *not* the same as natural features, natural landscapes and amenity values and *may* include matters such as:

- a) natural elements, processes and patterns;
- b) biophysical, ecological, geological and geomorphological aspects;
- c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
- d) the natural movement of air, water and sediment;
- e) the natural darkness of the night sky;

- f) places or areas that are wild or scenic;
- g) a range of natural character from pristine to modified;
- h) experiential attributes, including the sounds and smell of the sea; and their context or setting’.

In *Port Gore Marine Farms v Marlborough District Council* (2012 NZEnvC-72), the Environment Court asserted that the distinction between natural character (s6(a) RMA) and the s6(b) and s7 matters made at the start of policy 13(2) was not clearly articulated. Other recent decisions indicate that there still appears to be confusion in the minds of some witnesses and sometimes the Courts on the distinction between assessing the level of natural character in the coastal environment (as in NZCPS policy 13(1)) and assessing landscapes in the coastal environment (as in NZCPS policy 15). The three-step process for landscape assessment described in several decisions (e.g. *High Country Rosehip Orchards v Mackenzie District Council* 2011 NZEnvC387) includes: identifying landscape unit boundaries; ascertaining whether a landscape is natural; assessing whether a landscape is an outstanding landscape. Conversely, the NZCPS process for coastal natural character includes measuring/assessing the level of naturalness and mapping those areas that exceed thresholds for high and outstanding naturalness.

Various decisions since the gazettal of the NZCPS2010 (e.g. *KPF Investments v Marlborough District Council* [2014] NZEnvC 152) have discussed natural character. No significant additional interpretations of natural character have been raised and so no changes are proposed for Table 1 (Court interpretations of natural character).

A key 2014 decision by New Zealand’s highest court – the Supreme Court – is of great relevance to the implementation of s6(a) of the RMA (subject of Table 2 in this paper). This decision (*Environmental Defence Society v New Zealand King Salmon* SC82/2013 [2014] NZSC 38) addressed an appeal by the Environmental Defence Society on the decision by a Board of Inquiry to grant a plan change to allow salmon farming to have discretionary rather than prohibited activity status in an area of outstanding natural char-

acter and an Outstanding Natural Landscape (ONL). The Supreme Court observed that the NZCPS 2010 is more directive than the NZCPS 1994. It upheld the use of environmental bottom lines (as opposed to overall judgements by decision-makers) and emphasised the importance of using protection as an integral part of sustainable management. The judgment has brought into question the overall importance of economic benefits and environmental benefits in the planning and consent process.

As a consequence, the following policy concepts can be added to an updated Table 2 (Court interpretations of the implementation of s6(a) of the RMA):

- While the definition of sustainable management in s5(2) of the RMA is general, it is clear ‘that environmental protection by way of avoiding adverse effects of use or development falls within the concept of sustainable management’
- The Minister has required that particular parts of the coastal environment be protected from the adverse effects of development in NZCPS 2010 ‘in policies 13(1)(a) [natural character] and 15(a) [landscapes] in relation to coastal areas designated as ‘outstanding’
- In the ‘avoid, remedy or mitigate’ hierarchy in Part 2 of the RMA and the NZCPS, the term ‘avoid’ has its ordinary meaning of ‘not allow’
- In the context of protecting areas from inappropriate subdivision, use, and development, ‘inappropriateness’ *should be assessed by reference to what it is that is sought to be protected.*

Policy 14 of the NZCPS 2010 promotes rehabilitation and restoration of the natural character of the coastal environment. This has become a component of some Court decisions (e.g. *Port Gore Marine Farms v Marlborough District Council* 2012 NZEnvC-72).

Environmental bottom lines versus balanced judgement

Recent Environment Court decisions have commonly applied the ‘balanced judgement’

approach to address potentially competing matters in RMA Part II (purpose and principles). This is in contrast to the original legislators' intent that sections 5, 6, and 7 be considered as general biophysical 'bottom lines' (Upton 1995). A review of sections 6 and 7 of the RMA (Dormer *et al.* 2012) proposed that instead of there being environmental bottom lines, that the legislation be amended to provide for overall judgements. This would mean that the natural character policy goal would no longer be an 'environmental bottom line'. Instead, decision-makers would recognise and provide for natural character values when they made overall judgements to achieve the purpose of the Act (s5). A key justification for them recommending this significant change was that Courts currently undertake an overall balancing judgement and the proposed law change would make it consistent with current Court practice.

In 2014, the Supreme Court, in the context of an application for plan changes and resource consents for salmon farming in the Marlborough Sounds, rejected the overall balancing judgement approach commonly practised by Councils and the Environment Court (*Environmental Defence Society v New Zealand King Salmon SC82/2013 [2014] NZSC 38*). They observed that this approach could mean that developments having adverse effects on outstanding areas would be permitted on a piecemeal basis. The Court stated that 'At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions'. The Court concluded that provisions in the NZCPS should be given effect to by decision-makers, treating s13(1)(a) and 15(a) of the NZCPS as environmental bottom lines for natural character and landscape, respectively.

Conclusion

An extensive body of case law has been used to determine the Courts' interpretation of the natural character policy goal under the RMA, and the Courts' intentions for natural character outcomes. The Courts have repeatedly found that natural character is of nature (not culture). It includes natural elements, patterns, and processes. Built elements are excluded. There is a

continuum of naturalness from extremely high (as in large pristine indigenous ecosystems) to the very low (highly developed areas). Context can be important. The treatment of introduced trees (especially conifers) varies, in part because of different contexts. Natural character is independent of viewer perception. It differs from beauty, wilderness, and aesthetic preference.

A 2014 Supreme Court decision upheld the use of environmental 'bottom lines' for natural character and the importance of protection as part of sustainable management. As the Supreme Court is New Zealand's highest court, this decision implies that there is no need to amend Part II of the RMA in the manner proposed by Dormer *et al.* (2012). This would allow the extensive body of Court decisions associated with natural character to retain relevance. In addition, the more consistent use of environmental bottom lines should provide more certainty for natural character outcomes.

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