

New Zealand

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1. Introduction

Aquaculture is the world's fastest growing industry¹ and in New Zealand, constitutes the fastest growing sector in the agricultural economy.² In 2012, 68 million tonnes of farmed species³ generated approximately NZ\$400 million for the New Zealand economy,⁴ although this comprised less than two percent of the global aquaculture economy, which was worth over US\$144.4 billion in 2012.⁵ Of the approximately 310 species farmed world-wide⁶ New Zealand's aquaculture industry primarily consists of green-lipped (exported as greenshell™) mussels, king salmon, pacific oyster and paua (abalone).⁷ The New Zealand government supports an industry target of growing aquaculture into a NZ\$1 billion industry by 2025,⁸ and species likely to be added to the current list of species farmed comprise kingfish, hapuku and geoduck clams.⁹

Aquaculture in New Zealand relies on a 'clean green' image in order to access premium export markets,¹⁰ and whilst New Zealand's marine environment is by no means free from human impacts – not least from overfishing,¹¹ – it is currently ranked 19th in the world for the health of its ocean environments¹² scoring 78 out of 100, well above the global average of 67 out of 100.¹³ A recent study on aquaculture in New Zealand concluded that owing to its current small size the

* The author would like to acknowledge the support of the KG Jebson Centre for the Law of the Sea and the New Zealand Law Foundation for support associated with research for this chapter.

¹ In 2012 world aquaculture production reached 90.4 million tonnes. See *The State of the World's Fisheries and Aquaculture* (2014, Rome, FAO) 18.

² MD Camara and JE Symonds, "Genetic improvement of New Zealand aquaculture species: programmes, progress and prospects" 48 (2014) *New Zealand Journal of Marine and Freshwater Research* 466 – 491 at 466.

³ Andrea G Alfaro, Andrew G Jeffs and Nick King, "Enabling and driving aquaculture growth in New Zealand through innovation" 48 (2014) *New Zealand Journal of Marine and Freshwater Research* 311 – 313 at 311.

⁴ *Ibid* at 470.

⁵ *The State of the World's Fisheries and Aquaculture* (2014, Rome, FAO) 18.

⁶ John Bostock, Brendan McAndrew, Randolph Richards et al, "Aquaculture: global status and trends" 365 (2010) *Phil. Trans. R. Soc. B* 2897 – 2912 at 2898.

⁷ Source: <http://aquaculture.org.nz>.

⁸ Source: *The New Zealand Aquaculture Strategy 2006*.

⁹ MD Camara and JE Symonds, note 2 at 466.

¹⁰ Michael Vincent McGinnis and Meghan Collins, "A Race for Marine Space: Science, Values, and Aquaculture Planning in New Zealand" 41 (2013) *Coastal Management* 401 – 419 at 402.

¹¹ See generally, Randall Bess, "Maintaining a balance between resource utilisation and protection of the marine environment in New Zealand" 34 (2010) *Marine Policy* 690 – 698.

¹² Source: http://www.oceanhealthindex.org/Countries/New_Zealand.

¹³ Source: <http://www.oceanhealthindex.org>. See generally Benjamin S Halpern, 'An index to assess the health and benefits of the global ocean' 488 (2012) *Nature* 615 – 620.

overall environmental impacts of the industry are so far low.¹⁴ For example, whilst there have been some cases of nutrient enrichment associated with salmon farming in the Marlborough Sounds area leading to a reduction in benthic fauna,¹⁵ this has largely been managed by rotation of cages and good management.¹⁶ Algal blooms often associated with finfish farming overseas, which can lead to eutrophication, reduction in water quality or changes in phytoplankton species composition have not occurred in New Zealand to date.¹⁷ There have been four documented incidents of dolphins becoming entangled in fishfarm predator nets and two cases of fur seals drowning following entanglement, but generally, fish farms in New Zealand are not located in habitat or migration routes critical for marine mammals.¹⁸ Similarly, negative impacts on seabird populations are not significant and in fact beneficial effects associated with the creation of roost sites close to foraging areas have been documented.¹⁹ The Greenshell™ mussel and Pacific oyster industries are almost entirely dependent on wild-caught spat from Ninety Mile Beach, Golden Bay, Marlborough Sounds (in the case of Greenshell™ mussels) and Kaipara Harbour (in the case of Pacific oysters).²⁰ There is currently minimal use of antibiotics, antibacterials and other therapeutic additives in New Zealand,²¹ and the use of transgenics is not currently practiced,²² both of which reduce the potential impact of escapees on wild fish populations.²³

Nevertheless, in most areas assessed it was noted that information on the impacts of particularly, mussel farming, was not complete. Moreover, all conclusions as to environmental impact to date emphasised that the small size of the current industry was a crucial factor in keeping those impacts low. Given that the aim of both the industry and the government is to more than double the size of aquaculture in New Zealand by 2025 it is likely if not inevitable that the negative environmental impacts of marine farming will grow in the future. Finally,

¹⁴ See *Literature Review of Ecological Effects of Aquaculture* available at: <http://www.fish.govt.nz/en-nz/Commercial/Aquaculture/Marine-based+Aquaculture/Aquaculture+Ecological+Guidance.htm>. See also MPI, *Overview of Ecological Effects of Aquaculture* (MPI 2013) available at: <http://www.fish.govt.nz/en-nz/Commercial/Aquaculture/Marine-based+Aquaculture/Aquaculture+Ecological+Guidance.htm>.

¹⁵ Nigel Keeley, *Literature Review of Ecological Effects of Aquaculture. Benthic Effects* (Cawthron Institute, 2013) at 3-4.

¹⁶ *Ibid* at 3-9.

¹⁷ Jeanie Stendton-Dozey, *Literature Review of Ecological Effects of Aquaculture. Pelagic Effects* (Cawthron Institute, 2013) at 2-3.

¹⁸ Deanna Clement *Literature Review of Ecological Effects of Aquaculture. Effects on Marine Mammals* (Cawthron Institute, 2013) at 4-2 – 4-6.

¹⁹ Paul Sagar, *Literature Review of Ecological Effects of Aquaculture. Seabird Interaction* (Cawthron Institute, 2013) at 6-2. See also Mark T Gibbs, "Assessing the Risk of an Aquaculture Development on Shorebirds Using a Bayesian Belief Model" 13 (2007) *Human and Ecological Risk Assessment: An International Journal* 156 – 179.

²⁰ MD Camara and JE Symonds, note 2 at 477 and 482.

²¹ Oliver Champeau, *Literature Review of Ecological Effects of Aquaculture. Effects from Additives* (Cawthron Institute, 2013) at 10-2.

²² Richard Ford, *Literature Review of Ecological Effects of Aquaculture. Effects from Genetic Modification or Polyploidy* (Cawthron Institute, 2013) at 9-2.

²³ Richard Ford, *Literature Review of Ecological Effects of Aquaculture. Escapee Effects* (Cawthron Institute, 2013).

relatively little is known about the cumulative impacts of aquaculture and other activities, especially those impacts associated with the input of nutrients into the coastal environment from agricultural run-off, particularly dairy farming.²⁴

Opposition to aquaculture in New Zealand generally arises not from the potential negative consequences marine farming may have on the coastal and marine environment but rather, from spatial conflict, described by McGinnis and Collins as 'the race for space.'²⁵ Moreover, to the extent that aquaculture activities impact upon commercial, recreational and customary fishers, conflict over water-column space is long-standing.²⁶ Coastal aquaculture developments will normally require terrestrial based coastal infrastructure including access roads or processing facilities and this can lead to significant conflict between fish farmers and other coastal interests such as tourism, dairy farming and local populations.²⁷ Furthermore, aquaculture sites are typically located in isolated locations often in areas of outstanding natural beauty. In a recent study of objections to planning applications in the Marlborough Sounds, the most significant region for aquaculture in New Zealand, it was found that social concerns were cited in over 90 percent of applications, in contrast to environmental concerns, which were highlighted in only 45 percent of applications.²⁸ Unsurprisingly recent research in New Zealand has focused on mechanisms for selecting aquaculture sites.²⁹ The focus on spatial conflict has shaped the development of aquaculture legislation over the last decade, which has, until recently, sought to apply a limited form of spatial planning to aquaculture development.³⁰ By contrast, it is notable that unlike many other states, New Zealand has yet to develop mandatory national standards relating to environmental controls, monitoring³¹ or the reporting of escapee fish.³²

2. Marine Management in New Zealand: The Regulatory Context

²⁴ See Chris Cornelisen, *Literature Review of Ecological Effects of Aquaculture. Cumulative Effects* (Cawthron Institute, 2013). New Zealand's dairy industry has increased dramatically in the last two decades with various negative environmental consequences including an increase in the use of nitrogen fertilizer of 800 percent since 1990. See Michael Vincent McGinnis and Meghan Collins, "A Race for Marine Space: Science, Values, and Aquaculture Planning in New Zealand" 41 (2013) *Coastal Management* 401 – 419 at 405.

²⁵ See Michael Vincent McGinnis and Meghan Collins, note 10.

²⁶ See Randall Bess and Ramana Rallapudi, "Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment" 31 (2007) *Marine Policy* 719 – 729.

²⁷ Wendy Banta and Mark Gibb, "Factors Controlling the Development of the Aquaculture Industry in New Zealand: Legislative Reform and Social Carrying Capacity" 37 (2009) *Coastal Management* 170 – 196 at 172.

²⁸ *Ibid* at 187.

²⁹ See for example Peter C Longdill, Terry R Healy and Kerry P Black, "An integrated GIS approach for sustainable aquaculture management area site selection" 51 (2008) *Ocean & Coastal Management* 612 – 624; Hamish G Rennie, Roger White, Lars Brabyn, "Developing a conceptual model of marine farming in New Zealand" 33 (2009) *Marine Policy* 106 – 117.

³⁰ The past and current legislative regime for aquaculture is discussed below.

³¹ MPI, *Comparison of the international regulations and best management practices for marine finfish farming* (MPI Technical PaperNo. 2013/47) (2013) at 1.

³² Richard Ford, *Literature Review of Ecological Effects of Aquaculture. Escapee Effects* (Cawthron Institute, 2013) at 8-2.

New Zealand's EEZ and continental shelf spans 30° of latitude from the sub-tropical waters surrounding Raoul Island 1000 km north of Cape Reinga to the sub-Antarctic waters surrounding Campbell Island 640 km south of Bluff.³³ New Zealand's EEZ covers over 4 million km² and its continental shelf beyond 200 nm adds a further 1.7 million km² to its maritime resources.³⁴ New Zealand's maritime area in total amounts to almost 15 times the area of its terrestrial territory.³⁵ There are 17,135 described living species within New Zealand's EEZ³⁶ and 80 percent of New Zealand's biodiversity is located within its marine environment.³⁷ Owing to the relative isolation of New Zealand, its marine biodiversity benefits from a comparatively high degree of endemism³⁸ and it is estimated that 44 percent of known marine species are endemic.³⁹

In accordance with international law New Zealand exercises sovereignty over its territorial sea⁴⁰ and continental shelf⁴¹ and, within its exclusive economic zone, exercises sovereign rights for the purposes of the exploitation of living and non-living resources and jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research and environmental protection.⁴² Constitutionally, New Zealand has a unicameral political system with a strong focus on regional autonomy in respect of activities taking place within 12 nautical miles of the coast.⁴³ New Zealand does not have a written constitution and whilst the 1840 Treaty of Waitangi is not formally part of New Zealand law, its principles must be given effect to within the New Zealand legal system.⁴⁴

The last decade has seen significant regulatory developments with respect to oceans governance in New Zealand including the adoption of the 2012 Exclusive Economic Zone (Environmental Effects) Act, the creation of expansive powers to control national and foreign vessels interfering with structures or vessels associated with oil exploration⁴⁵ as well as important changes to the aquaculture regime itself.

³³ Dennis P Gordon et al, 'Marine Biodiversity of Aotearoa New Zealand' 5(8) (2010) *PLoS ONE* e10905 at 1.

³⁴ Source: Land Information New Zealand - <http://www.linz.govt.nz/about-linz/what-were-doing/projects/new-zealand-continental-shelf-project/map-continental-shelf>.

³⁵ Dennis P Gordon et al, note 33 at 1.

³⁶ *Ibid.*

³⁷ Ministry for the Environment, *Environment New Zealand 2007* (Ministry for the Environment, Wellington 2007) p. 316.

³⁸ Randall Bess, note 11 at 691.

³⁹ Ministry for the Environment, *Environment New Zealand 2007* (Ministry for the Environment, Wellington 2007) p. 316.

⁴⁰ 1982 UNCLOS, Article 2.

⁴¹ 1982 UNCLOS, Article 77.

⁴² 1982 UNCLOS, Article 56.

⁴³ Joanna Vince and Marcus Haward, 'New Zealand oceans governance: Calming turbulent waters?' 33 (2009) *Marine Policy* 412 – 418 at 412.

⁴⁴ Derek Nolan (ed), *Environmental & Resource Management Law* (4th edition, LexisNexis 2011) 59.

⁴⁵ 1991 Crown Minerals Act, section 101B.

3. The Development of Aquaculture Regulation in New Zealand

Modern regulation of aquaculture began in the 1960s although early legislation in fact dates back to 1866.⁴⁶ Today, aquaculture is primarily managed under the 1991 Resource Management Act (RMA). The 1991 RMA represented a radical new approach to environmental law when it was adopted almost 25 years ago. The Act is designed to provide for the integrated and sustainable management of all of New Zealand's natural resources and its adoption resulted in the revocation of 167 statutes,⁴⁷ the amendment or modification of over 50 other statutes and regulations⁴⁸ and a reduction in the number of local government authorities from over 700 to 86.⁴⁹ Ideologically, the 1991 RMA moved the focus of regulation from managing individual activities to controlling, mitigating or prohibiting their environmental effects.⁵⁰ The 1991 RMA introduced a system of coastal permits for aquaculture activities issued at the regional level, in light of national priorities, combined with the requirement that a marine farming permit be issued under the 1983 Fisheries Act, confirming that permitted aquaculture activities would not have an undue adverse impact on fisheries activities.⁵¹

The original regulatory scheme was not however, considered successful. During the 1990s relatively few regions of New Zealand had coastal plans setting out priorities and principles in connection with aquaculture, and applications were essentially dealt with on a first-come first-served basis with minimal consideration for the management of industry-wide and cumulative impacts.⁵² Simultaneously a significant dispute was developing between Māori and the Crown over the status of the foreshore and seabed beneath New Zealand's internal waters and territorial sea and, in particular, there were fears that a significant development in aquaculture would exclude or otherwise alienate Māori from the coastal marine area. The claims of Māori were vindicated in 2002 with the release of a Waitangi Tribunal report, which concluded that the authorisation of wide-scale marine farming would potentially put the Crown in breach of its obligations under the Treaty of Waitangi.⁵³ In response to criticisms of the way the RMA was operating, and the broader implications for Māori of aquaculture development, the New Zealand government adopted a moratorium on granting new aquaculture permits in 2002.⁵⁴

⁴⁶ Hamish G Rennie, Roger White, Lars Brabyn, "Developing a conceptual model of marine farming in New Zealand" 33 (2009) *Marine Policy* 106 – 117 at 106.

⁴⁷ Randall Bess, note 11 at 693.

⁴⁸ Robert A Makgill and Hamish G Rennie, "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" 27 (2012) *International Journal of Marine and Coastal Law* 135 – 16 at 145.

⁴⁹ Randall Bess, note 11 at 693.

⁵⁰ See *Batchelor v. Tauranga District Council (No. 2)* [1993] 2 NZLR 84 at 86. For an overview of the aims, objectives and background to the RMA see Derek Nolan (ed), note 44, chapter 3.

⁵¹ For an overview of aquaculture regulatory development see Derek Nolan (ed), note 44 paras. 5.71 – 5.80.

⁵² *Ibid* para. 5.72.

⁵³ *Ahu Moana – The Aquaculture and Marine Farming Report* (Waitangi Tribunal, 2002).

⁵⁴ Resource Management (Aquaculture Moratorium) Amendment Act 2002.

In 2003 tensions between Māori and the Crown deepened further following a decision of the New Zealand Court of Appeal in *Attorney General v Ngati Apa*, which determined that Māori customary title to the foreshore and seabed had *not* in fact been extinguished by legislative developments post 1840, and that it was open, in principle, for the Māori land court to determine whether individual claims could be made to the foreshore and seabed.⁵⁵ The New Zealand government responded immediately to this decision by passing the controversial 2004 Foreshore and Seabed Act, which effectively over-turned the decision in *Ngati Apa* by vesting the public foreshore and seabed in the Crown. Domestically, the 2004 Act proved controversial – leading among other things to the formation of a new political party – the Māori party – and it was also criticised internationally as discriminating against the rights of Māori.⁵⁶

The moratorium on aquaculture was subsequently lifted in 2004 upon the adoption of the Māori Commercial Aquaculture Claims Settlement Act 2004 and the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, which attempted to respond to equity and management concerns respectively.

The Māori Commercial Aquaculture Claims Settlement Act 2004 responded to allegations of inequity between Māori and the Crown by transferring 20 percent of all existing space which had been allocated to aquaculture between 1992 and 2002 to iwi. Where such a transfer would prove impossible a financial settlement in favour of iwi would be entered into. Post 2004, 20 percent of all space allocated to aquaculture would be transferred to iwi.

The Aquaculture Reform Act 2004 made substantial amendments to the existing management regime under the RMA, the most significant of which was the creation of Aquaculture Management Areas (AMAs). Aquaculture Management Areas comprised those parts of the common marine area (CMA) designated by regional authorities as being appropriate for aquaculture development. Aquaculture outside of AMAs was prohibited, but there was no automatic presumption that permits would be issued for aquaculture activities within AMAs. Aquaculture activities were subject to the coastal consent process under the 1991 RMA, however, the requirement to obtain a separate permit under the 1986 Fisheries Act was abolished. Instead, the Ministry for Fisheries had to approve the designation of an AMA and make an assessment as to whether such a designation would have an undue adverse effect on commercial, customary or recreational fishing. The process for designating AMAs would normally be initiated by regional authorities but could also result from a private plan change application. The 2004 reforms to the RMA provided for transitional provisions, which permitted existing marine farms to be deemed AMAs and for marine farming permits to be deemed coastal permits. These reforms represented the most advanced example of spatial planning in New Zealand's marine environment and also constituted a significant conceptual shift from the regulation of the effects of activities to the regulation of a particular class of activities.

⁵⁵ *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁵⁶ United Nations Committee on the Elimination of Racial Discrimination. Sixty-sixth session, 17 February – 11 March 2005. Decision 1 (66): New Zealand CERD/C/DEC/NZL/1.

Whilst in principle the 2004 reforms should have facilitated proactive regional spatial management of aquaculture in light of national priorities and principles, in practice, this did not occur. Regional authorities found it complex, time-consuming and expensive to designate new AMAs, and local opposition to the expansion of aquaculture meant they had little incentive to amend local plans to create new AMAs.⁵⁷ In fact, regional authorities created no new AMAs post-2004 beyond the existing marine farms that were deemed to be AMAs under the transitional provisions in the legislation.⁵⁸ Consequently, the government subsequently concluded that the 2004 reforms had failed to meet the objective of the legislation, which was 'to enable the sustainable growth of aquaculture',⁵⁹ although it is not clear whether the failure lay in the concept of and processes relating to AMAs rather than mere lack of demand and/ or capacity for additional new aquaculture space.⁶⁰

The final stage in the saga of aquaculture reform (so far) occurred in 2011. As in 2004, the 2011 reforms related to both aquaculture management and, more generally, to the status of the foreshore and seabed within which all aquaculture in New Zealand currently takes place.

The most significant reform to the 1991 RMA⁶¹ abolished the concept of the AMA. Transitional provisions permit the retention of existing AMAs, which are deemed to be *Gazetted* AMAs by regional authorities⁶² and preserve existing coastal consents issued therein. Regional authorities must ensure that all references to AMAs and deemed AMAs are removed from coastal plans and that AMAs fully designated prior to 2011 are referred to as *Gazetted* AMAs.⁶³ Importantly, new aquaculture applications may now in principle be submitted in respect of *any* area of the coastal marine area although regional authorities may continue to identify areas in their regional plans where aquaculture is prohibited. The reforms re-introduce the requirement that the Chief Executive of the Ministry of Fisheries affirm that proposed aquaculture developments will not have an undue adverse impact on fisheries on a case-by-case basis, but this process is initiated by the relevant regional authority rather than by the individual applicant.

More generally, the government repealed the controversial 2004 Foreshore and Seabed Act, replacing it with the 2011 Marine and Coastal Area (Tukutai Moana)

⁵⁷ Ministry of Fisheries, *Departmental Report on the Aquaculture Legislation Amendment Bill (No. 3)* at 33.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 24.

⁶⁰ Wendy Banta and Mark Gibb, note 27 at 180 – 181. For example, there are over 670 existing aquaculture sites in Marlborough and the regional council was not and is not actively considering adding new areas to this list.

⁶¹ These reforms were introduced primarily under the Aquaculture Reform (Repeals and Transitional Provisions) Amendment Act 2011, the Resource Management Amendment Act (No. 2) 2011 and the Fisheries

⁶² 2004 Aquaculture Reform (Repeals and Transitional Provisions) Act (as amended by the Aquaculture Reform (Repeals and Transitional Provisions) Amendment Act 2011, sections 40, 44M and 44N.

⁶³ *Ibid*, section 44N.

Act.⁶⁴ The 2011 Act creates a special status for the 'common marine and coastal area' (CMCA) stipulating that '[n]either the Crown nor any other person owns, or is capable of owing, the common marine and coastal area.'⁶⁵ The Act restores any customary interests in the CMCA that were extinguished by the 2004 Act⁶⁶ and creates three new statutory rights. First, a right for affected iwi, hapū and whānau exercising kaitiakitanga⁶⁷ over an area of the CMCA to participate in conservation processes under consideration.⁶⁸ Second, a 'protected customary' right, essentially a 'use right',⁶⁹ which is a right that has been exercised since 1840 and continues to be exercised – in the same way or having evolved through time – and is not extinguished by law.⁷⁰ Protected customary rights exclude activities governed by the 1996 Fisheries Act, commercial aquaculture activities for the purposes of the 2004 Maori Commercial Aquaculture Claims Settlement Act, commercial or non-commercial fishery activities subject to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 or activities that relate to wildlife protected by the 1953 Wildlife Act and the 1978 Marine Mammals Protection Act.⁷¹ The third and most significant of the new rights is 'customary marine title' which is, in essence, 'a new form of legal title to land.'⁷²

A chronological history – albeit briefly described – of aquaculture regulation and reform in New Zealand reveals a series of underlying tensions that have proved challenging to reconcile. The most significant of these is the question of control and, ultimately ownership, of the foreshore and seabed. As an activity that exclusively takes place within New Zealand's territorial sea and which involves the occupation of the seabed, aquaculture became the focus of this tension for almost a decade in New Zealand, and regulatory reform during this period has undoubtedly been shaped by this tension. Less visibly however, reform has also been shaped by the tensions between environmental protection and economic development and the challenge of achieving the sustainable management – or development – of aquaculture.

3. Aquaculture Regulation in New Zealand Today

(a) The Principles

⁶⁴ See generally Abby Suszko, "The Marine and Coastal Area (Takutai Moana) Act 2011: A Just and Durable Solution to the Foreshore and Seabed Debate?" 25 (2012) *New Zealand Universities Law Review* 148 – 179.

⁶⁵ 2011 Marine and Coastal Area (Takutai Moana) Act, section 11(2).

⁶⁶ *Ibid*, section 6.

⁶⁷ Kaitiakitanga is defined as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources by section 2 of the 1991 Resource Management Act (interpretation).

⁶⁸ 2011 Marine and Coastal Area (Takutai Moana) Act, sections 47 – 50.

⁶⁹ Robert Makgill and Hamish Rennie, "The Marine and Coastal Area Act 2011" (2011) *Resource Management Journal* 1 – 7 at 3.

⁷⁰ 2011 Marine and Coastal Area (Takutai Moana) Act, section 51(1).

⁷¹ 2011 Marine and Coastal Area (Takutai Moana) Act, section 51(2).

⁷² Daniel Kaldermis and Marcelo Rodriguez Ferrere, "The marine and coastal area" [2011] *New Zealand Law Journal* 116 – 118 at 117.

For the purposes of regulation in New Zealand aquaculture is defined as any activity 'for the purpose of breeding, hatching, cultivating, rearing, or on-growing of fish, aquatic life, seaweed for harvest', including the taking of harvestable spat, involving the occupation of the coastal marine area (CMA).⁷³ Activities must be under the exclusive and continuous possession or control of persons engaged in aquaculture, and fish farming must be distinguishable from naturally occurring fish, aquatic life or seaweed.⁷⁴

The principal regulatory instrument for the management of aquaculture in New Zealand is the 1991 Resource Management Act (RMA). The purpose of the RMA is to 'promote the sustainable management of natural resources', which is defined as enabling communities to provide for their social, economic and cultural well-being, whilst protecting the reasonably foreseeable needs of future generations and safeguarding the life-supporting capacity of air, water, soil and ecosystems.⁷⁵

Functions in relation to any development within the CMA are divided between central, regional and local government under the RMA. The sixteen regional authorities in New Zealand have primary responsibility for managing the CMA and must adopt a regional coastal plan, which must be approved by the Minister of Conservation⁷⁶ for their respective region⁷⁷ setting out the principles guiding the management of the CMA and rules relating to specific activities, including aquaculture. Regional coastal plans must comply with the New Zealand Coastal Policy Statement (NZCPS), which is issued by the Minister for Conservation and sets national policies for managing the CMA.⁷⁸ The most recent NZCPS was adopted in 2010.⁷⁹ Furthermore, national and regional coastal plans as well as all decisions relating to activities taking place within the CMA must comply with the principles set out in sections 6, 7 and 8 of the RMA.

Section 6 of the Act sets out matters of national importance including but not limited to, the preservation of the natural character of the coastal environment, the protection of outstanding natural features and landscapes from inappropriate use and development, the protection of indigenous fauna and flora, the maintenance of public access to the CMA and the protection of protected customary rights. These matters of national importance have greater weight than regional or district goals and must actually be provided for in national, regional and local plans. The term 'coastal environment' is not defined in the RMA although by implication it covers a broader area than the CMA.⁸⁰ Judicial decisions have held that the term covers any environment in which the coast comprises a

⁷³ 1991 Resource Management Act, section 2.

⁷⁴ *Ibid.*

⁷⁵ 1991 Resource Management Act, section 5.

⁷⁶ 1991 Resource Management Act, section...

⁷⁷ 1991 Resource Management Act, section 64 and Schedule 1.

⁷⁸ 1991 Resource Management Act, sections 57 and 58.

⁷⁹ New Zealand Coastal Policy Statement 2010 available at:

<http://www.doc.govt.nz/documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement-2010.pdf>.

⁸⁰ Derek Nolan (ed), note 44 at para. 3.36.

significant element or part⁸¹ and will generally extend to the dominant ridge behind the coast.⁸² Infrastructure and access roads associated with aquaculture development must consequently be assessed in terms of their impact on the preservation of the 'natural character of the coastal environment.' The term 'natural character' itself is similarly not defined by the RMA but it has been held that the term is not synonymous with 'pristine',⁸³ and 'naturalness' operates on a continuum.⁸⁴

Section 7 lists additional other matters which decision-makers must have regard to, including the efficient use and development of natural resources, the maintenance and enhancement of amenity values, the intrinsic values of ecosystems and the maintenance and enhancement of the quality of the environment. In terms of hierarchy these other matters are to be given less weight when considered in the context of matters of importance under section 6 of the Act and its overall objective of sustainable management, but they nonetheless comprise an important component of the decision-making matrix in relation to both the development of plans and policies and decisions relating to resource consent. Finally, section 8 of the RMA requires decision-makers to take into consideration the principles of the Treaty of Waitangi.

The principles set out in sections 6 and 7 of the RMA are developed in the context of the coastal environment by the 2010 New Zealand Coastal Policy Statement (NZCPS), which establishes seven overall objectives and 29 policy statements. The objectives include safeguarding the integrity, form, functioning and resilience of the coastal environment, preserving the natural character of the coastal environment and its natural features and landscape values, maintaining public access, enabling peoples and communities to provide for their social economic and cultural well-being and permitting New Zealand to meet its obligations under international law.⁸⁵ The NZCPS places a strong emphasis on precautionary, strategic and integrated management of activities taking place in the CMA.⁸⁶ More specifically, and with particular relevance to aquaculture, it requires decision-makers to avoid "adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character" (Policy 13) and to avoid 'adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment' (Policy 15). In an important 2014 decision of the New Zealand Supreme Court concerning a private application to change the Marlborough Sounds Resource Management Plan to make salmon farming a discretionary rather than a prohibited activity at eight sites, it was held that Policies 13 and 15 were directive and effectively operated as 'environmental

⁸¹ *Northland Regional Planning Authority v. Whangarei County* (1977) DA 4828 at 4831.

⁸² *Dudin v. Whangarei District Council* NZEnvC Auckland A22/2007, 30 March 2007 at [19].

⁸³ *Harrison v. Tasman District Council* [1994] NZRMA 193.

⁸⁴ *Arrigato Investments Ltd v. Auckland Regional Council* [2000] NZRMA 241 at 273.

⁸⁵ New Zealand Coastal Policy Statement 2010 available at:

<http://www.doc.govt.nz/documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement-2010.pdf>.

⁸⁶ *Ibid*, Policies 3, 4 and 7.

bottom lines'.⁸⁷ The Supreme Court dismissed the approach of the High Court, which 'balanced' the adverse effects on various outstanding natural features in the region against the economic and social gains arising from the expansion of the marine farms, and asserted that regional authorities were required to give effect to Policies 13 and 15 of the NZCPS.⁸⁸ To the extent that resource consent applications in respect of activities associated with aquaculture have an adverse effect on outstanding natural features or landscapes they should be refused even where they are likely to provide economic benefit to the region. Nevertheless, Policy 8 of the NZCPS recognises the importance of aquaculture to the social, economic and cultural well-being of people and communities and encourages regional authorities to provide for aquaculture activities in their regional coastal plans taking into consideration issues relating to water quality and the need for land-based facilities associated with aquaculture activities.

(b) The Application Process

The 1991 RMA establishes a presumption against development of the CMA except where that development is expressly provided for in a regional coastal plan or where it is permitted by a coastal permit.⁸⁹ Activities associated with aquaculture including but not limited to the erection of structures in the CMA, depositing or discharging substances into the CMA or occupying areas of the CMA are specifically identified in section 12 of the RMA as prohibited unless authorised in a regional coastal plan or permitted by a coastal permit.

Regional coastal plans may designate activities according to one of six categories.⁹⁰ Permitted activities comprise activities in respect of which no coastal permit is required provided that the activity complies with any conditions specified in the plan. Controlled activities must be authorised by a coastal permit but a permit must be issued provided the activity meets any conditions relating to matters over which the control is reserved. Restricted discretionary activities must also be authorised by a coastal permit but the authority's power to decline a permit or to grant a conditional permit is restricted to the matters over which the discretion is restricted (as set out in the plan). Discretionary activities and non-complying activities must also be authorised by a coastal permit and the consent authority may decline the permit or grant it subject to any conditions they deem appropriate. Finally, prohibited activities cannot be authorised by a coastal permit. Section 68A of the 1991 Resource Management Act stipulates that aquaculture activities cannot be designated as 'permitted activities' in regional coastal plans and consequently all activities associated with aquaculture must be authorised by a coastal permit.

⁸⁷ *Environment Defence Soc Inc. v. The New Zealand King Salmon Co Ltd & Ors* [2014] NZSC 38. This case is discussed further in section 4, below.

⁸⁸ *Ibid.* The approach in *Environmental Defence Soc Inc. v. The New Zealand King Salmon Co Ltd & Ors* has recently been followed in *KPF Investments Ltd. v. Marlborough District Council* [2014] NZEnvC 152.

⁸⁹ 1991 Resource Management Act, section 12.

⁹⁰ 1991 Resource Management Act, section 87A.

Regional authorities currently take a diverse range of approaches to classifying activities relating to aquaculture. For example, in the Waikato region all activities associated with aquaculture are designated controlled or discretionary activities.⁹¹ In Northland, by contrast, activities associated with existing marine farms or mussel spat collection are discretionary activities but activities associated with new aquaculture applications are prohibited activities.⁹² Aquaculture activities in the Marlborough region are either discretionary or restricted discretionary activities depending on the area in which they are located⁹³ and the Bay of Plenty regional authority distinguishes between non-commercial and non-research aquaculture (a controlled activity), existing aquaculture activities (restricted discretionary activity), new commercial aquaculture applications outside of high value areas and permanently navigable harbour waters (discretionary activity), new commercial aquaculture applications within permanently navigable waters (non-complying activity) and new commercial applications within high value areas (prohibited activities).⁹⁴

The 1991 RMA establishes the process for applying for a coastal permit for new aquaculture activities outside *Gazetted* AMAs as well as transitional provisions in respect of existing permits and permits associated with *Gazetted* AMAs. Coastal permits for activities associated with aquaculture (new and existing) may be made subject to conditions (in accordance with regional coastal plans).⁹⁵ New permits will normally be issued for a period of between 20 and 35 years⁹⁶ although a permit can be issued for a shorter period where the applicant has requested a shorter period or where a shorter period is required to ensure that any adverse effects on the environment are adequately managed.⁹⁷

A coastal permit like any other resource consent issued pursuant to the 1991 Resource Management Act constitutes neither real nor personal property⁹⁸ and the New Zealand High Court has confirmed that fish farms created through coastal permits do not create interests in land that are rateable under the 2002 Local Government (Rating) Act.⁹⁹ This decision has been criticised as contrary to the ethos of the user pays approach of the Resource Management Act¹⁰⁰ although the Act does permit regional authorities to impose coastal occupation charges on individuals who occupy any part of the coastal marine area.¹⁰¹ To date however, regional authorities have been slow to impose coastal occupation charges on

⁹¹ Waikato Regional Coastal Plan (2011), chapter 16.5.

⁹² Northland Regional Coastal Plan (2003) [paras. 37.7.10 and 31.6.9].

⁹³ Marlborough Regional Plan (2011) [paras. 35.2.5 and 35.3.1]

⁹⁴ Proposed Bay of Plenty Regional Coastal Environment Plan (2014), section 6.4.

⁹⁵ 1991 Resource Management Act, section 108.

⁹⁶ 1991 Resource Management Act, section 123A.

⁹⁷ *Ibid.*

⁹⁸ 1991 Resource Management Act, section 122. For a discussion of this issue see Randall Bess and Michael Hart, "The role of property rights in the development of New Zealand's seafood industry" 24 (2000) *Marine Policy* 331 – 339.

⁹⁹ *Marlborough District Council v. Valuer-General* (High Court, Wellington, CIV 2006-485-933, 3 September 2007).

¹⁰⁰ See David Grinlinton, "Do coastal permits under the RMA create rateable interests in land?" 7 (2008) *BRMB* 116 – 120 at 120.

¹⁰¹ 1991 Resource Management Act, section 64A.

persons who occupy the coastal marine environment for aquaculture or other purposes.¹⁰² Nevertheless, notwithstanding that coastal permits constitute neither real nor personal property, they can be transferred to another person.¹⁰³ They cannot, however, be transferred to a different site unless such a transfer is expressly provided for in the relevant regional plan.¹⁰⁴

Where a coastal plan designates aquaculture as a prohibited activity in any particular area, an individual can apply for a private plan change in order to re-designate aquaculture as a controlled, restricted discretionary, discretionary or non-complying activity.¹⁰⁵ The application may be accepted or refused by the regional authority¹⁰⁶ and the Minister of Conservation must approve any change.¹⁰⁷ Where a change is not so approved, any coastal permit issued on the basis of the change must be cancelled.¹⁰⁸

The Act makes provision for any proposal deemed to be of national significance to be called in by the Minister of Conservation and to be referred either to a Board of Enquiry or to the Environment Court.¹⁰⁹ An application is deemed to be of national significance where it has aroused widespread national interest, involves the significant use of natural resources, impacts or is likely to affect a feature, place or area of national significance, is likely to result in significant or irreversible changes to the environment, involves new technologies likely to impact on the environment or is likely to affect New Zealand's international obligations.¹¹⁰ The Act also permits the Minister of Aquaculture to direct any regional authority (on the application of that regional authority) to consider multiple applications where this would permit the better assessment and management of the cumulative effect of applications.¹¹¹ Finally, the Minister of Aquaculture (on the application of a regional authority) may suspend all consideration of applications for aquaculture coastal permits where there is actual or anticipated high demand or competing demands for permits and the regional coastal plan will not allow the authority to manage those demands and it is desirable to allow time for the regional authority to amend the regional coastal plan or use other measures to manage demand.¹¹²

The Act makes provision for public consultation, review and appeal of coastal permit applications.¹¹³

¹⁰² Derek Nolan (ed), note 44 at para. 5.63.

¹⁰³ 1991 Resource Management Act, section 135.

¹⁰⁴ *Ibid.*

¹⁰⁵ 1991 Resource Management Act, section 165ZN.

¹⁰⁶ 1991 Resource Management Act, section 165ZS.

¹⁰⁷ 1991 Resource Management Act, section 165ZZA.

¹⁰⁸ *Ibid.*

¹⁰⁹ 1991 Resource Management Act, section 142.

¹¹⁰ *Ibid.*

¹¹¹ 1991 Resource Management Act, section 165ZF.

¹¹² 1991 Resource Management Act, sections 165ZB and 165ZD. Where applications have been suspended pursuant to sections 165ZB and 165ZD no person can submit a new application for a coastal permit in respect of space subject to a suspended application during the period of the suspension (section 165ZC).

¹¹³ 1991 Resource Management Act, Part 6.

Applications for new coastal permits associated with aquaculture outside of *Gazetted* AMAs must be forwarded by the relevant regional authority to the Chief Executive of the Ministry of Fisheries¹¹⁴ in order for the Chief Executive to make an assessment on whether the application will have an undue adverse effect on fishing.¹¹⁵ In making a decision the Chief Executive must have regard to an exhaustive set of factors listed under section 186GB of the 1996 Fisheries Act including the location of the area of application of the coastal permit in relation to fishing area, the likely impact of aquaculture activities on fishing including the extent to which fishing is excluded or can be moved to another area, the extent to which aquaculture activities will increase the cost of fishing and the cumulative impact on fishing of any authorised aquaculture activities. The Chief Executive may issue a determination, concluding that the proposed aquaculture coastal permit application will not have an undue impact on fishing or he/she may issue a reservation, indicating that he/she is not satisfied that the aquaculture activities authorised in the coastal permit will not have an undue impact on fishing.¹¹⁶ Where the Chief Executive decides that an application will have an undue impact on an existing fishing quota or right it is open to the applicant to agree to pay compensation to the affected individual, in which case, the coastal permit may be approved.¹¹⁷ The 1996 Fisheries Act makes provision for consultation¹¹⁸ and decisions must be made in writing, notified in the Gazette and, where the Chief Executive issues a reservation, must specify whether the reservation relates to commercial, recreational or customary fishing.¹¹⁹ Decisions are reviewable.¹²⁰ Section 116A of the 1991 Resource Management Act stipulates that coastal permits authorising aquaculture activities cannot commence until the Chief Executive has determined the impact of the proposal on fishing and the coastal permit must be amended to reflect any conditions imposed by the Chief Executive or to exclude any areas made subject to a reservation under the Fisheries Act. Finally, any application that affects navigation must be sent to Maritime New Zealand, which may report on the application within fifteen days.¹²¹

4. Case Study on Salmon Farming in the Marlborough Sounds

In 2014 the New Zealand King Salmon Company made a private application to alter the Marlborough Sounds Resource Management Plan to permit a change in the categorisation of salmon farming from a prohibited to a discretionary activity in eight locations. As the application was deemed to involve questions of national significance, the Minister of Conservation decided that it should be determined by a Board of Inquiry rather than by the regional authority. The Board of Inquiry granted plan changes and issued coastal consents in relation to four of the eight

¹¹⁴ 1991 Resource Management Act, section 107.

¹¹⁵ 1996 Fisheries Act, section 186E.

¹¹⁶ 1996 Fisheries Act, sections 186E and 186 C.

¹¹⁷ 1996 Fisheries Act, section 186ZN. Any agreement is normally entered into after arbitration, the process for which is set out under the 1996 Fisheries Act.

¹¹⁸ 1996 Fisheries Act, section 186D.

¹¹⁹ 1996 Fisheries Act, section 186H.

¹²⁰ 1996 Fisheries Act, section 186J.

¹²¹ 1991 Resource Management Act, section 89A.

sites.¹²² This decision was challenged, ultimately in the Supreme Court of New Zealand, in two cases. In *Environmental Defence Society (EDS) Inc. v. New Zealand King Salmon Company*, EDS appealed against the decision in relation to one of the plan changes, Papatua in Port Gore, and based their appeal on whether the Board of Inquiry had correctly applied the New Zealand Coastal Policy Statement in respect of policies 13(1)(a) and 15(a), which require the protection of areas of outstanding natural character and outstanding natural landscapes. The decision in *EDS v. New Zealand Salmon Company* is highly significant for future decision-making in respect of aquaculture activities in New Zealand in that it establishes environmental bottom lines with respect to aquaculture activities in areas of outstanding character and landscape and precludes decision-makers from compromising those bottom lines even where the activity is likely to have significant economic and social benefit. In *Sustain our Sounds (SOS) Inc. v. New Zealand King Salmon Company*,¹²³ SOS challenged all four plan changes, and their appeal focused on water quality. The decision in *Sustain our Sounds* provides important guidance as to the application of the precautionary approach to aquaculture development and, in particular, the relationship between the precautionary approach and adaptive management. Both cases were heard together with separate judgments delivered contemporaneously.

The primary argument of EDS in *Environmental Defence Society (EDS) Inc. v. New Zealand King Salmon Company* was that the Board of Inquiry had misapplied section 67(3)(b) of the 1991 Resource Management Act, which requires regional authorities to give effect to any New Zealand Coastal Policy Statement (NZCPS).¹²⁴ The policies in question were Policy 13(1)(a), which requires regional authorities to 'avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character' and Policy 15(a), which requires regional authorities to 'avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment'. The Board of Inquiry conceded that in respect of Port Gore, which they acknowledged was an area of outstanding character as well as an outstanding natural landscape, the effects of the proposed Papatua farm would be high.¹²⁵ The Board accepted that NZCPS Policies 13(1)(a) and 15(a) would *not* be given effect to in respect of this location.¹²⁶ However, the Board took a 'balancing' or 'overall judgment' approach to the application of section 67(3)(b) of the RMA and the NZCPS, and considered that the adverse effects on the environment would be offset by the economic and social benefits arising from the development of the marine farms within the region.¹²⁷

¹²² *Environment Defence Society (EDS) v. The New Zealand King Salmon Company Ltd* [2014] NZSC 38 [2].

¹²³ *Sustain our Sounds Inc. v. New Zealand King Salmon Company* [2014] NZSC 40.

¹²⁴ Emphasis added.

¹²⁵ *Environment Defence Society (EDS) v. The New Zealand King Salmon Company Ltd* [2014] NZSC 38 [19].

¹²⁶ *Ibid.* Emphasis added.

¹²⁷ *Ibid.* See also [34] – [38].

Whilst this 'overall judgment' approach is supported by long-standing jurisprudence interpreting the RMA,¹²⁸ EDS nevertheless argued that it failed to accord with the direction of 67(3)(b) of the RMA, which requires regional authorities *to give effect to* the NZCPS. The approach advocated by EDS, described as the 'environmental bottom line' approach, argues that if the policy cannot be achieved, such as the avoidance of adverse effects on areas of outstanding character or outstanding landscapes, then the purpose of the RMA is not achieved.¹²⁹

In weighing up the two approaches, the Supreme Court concluded that 'give effect to' was a 'strong directive, creating a firm obligation on the part of those subject to it.'¹³⁰ It noted that where a policy is framed in a specific and unqualified way – as is the case for Policies 13(1)(a) and 15(a) – the directive is more prescriptive than the requirement in respect of a more abstract policy.¹³¹ The Court highlighted the narrow scope of both policies in that they applied only to 'outstanding' areas.¹³² In interpreting the term 'avoid' as in 'avoid adverse effect of activities' the Court suggested that the most obvious meaning comprised 'not allow' or 'prevent the occurrence of'.¹³³

After considering the background to both the RMA and to the NZCPS, the Supreme Court concluded that Policies 13(1)(a) and 15(a) effectively constituted environmental bottom lines. The Court accepted that '[t]he RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document [such as the NZCPS] which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.'¹³⁴ The Court identified further factors which supported the rejection of the 'overall judgment' approach, namely, that the RMA sets out an elaborate process for the adoption of a NZCPS and it is unclear as to why that would be necessary if the NZCPS was simply one of a series of factors to be considered when making a decision, that the approach creates uncertainty for both applicants and decision-makers¹³⁵ and that it has the potential 'to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning'.¹³⁶

¹²⁸ Ibid [38]. See in particular *New Zealand Rail Ltd v. Marlborough District Council* [1994] NZRMA 70 (HC).

¹²⁹ *Environment Defence Society (EDS) v. The New Zealand King Salmon Company Ltd* [2014] NZSC 38 [38]. See also *Shell Oil New Zealand Ltd v. Auckland City Council* (W8/94, 2 February 1994 (PT)).

¹³⁰ *Environment Defence Society (EDS) v. The New Zealand King Salmon Company Ltd* [2014] NZSC 38 [77].

¹³¹ Ibid [80].

¹³² Ibid [62].

¹³³ Ibid [93].

¹³⁴ Ibid [132].

¹³⁵ Ibid [136 – 137].

¹³⁶ Ibid [139].

In *Sustain our Sounds (SOS) Inc. v. New Zealand King Salmon Company*,¹³⁷ the basis of appeal against the decision of the Board of Inquiry centred on the argument that owing to the unavailability of baseline data, inadequate information on water quality had been presented to the Board in order to enable it to grant the plan changes and associated resource consents.¹³⁸ Moreover, the modelling presented to the Board relating to feed discharge into the water focused only on 'maximum initial feed discharge' rather than maximum feed discharge and it was consequently 'extremely difficult to come to a finding on the nature or magnitude of the effects of this discharge.'¹³⁹ Nevertheless, the Board accepted that the inadequacy of the water quality data could be managed by an adaptive management approach, provided for as part of the consent conditions,¹⁴⁰ including a requirement to establish baseline information.¹⁴¹ The conditions provided that if the baseline report is not approved by the Council, the Council can refuse to permit any structure to be placed on the marine farm and effectively halt any further development of the site.¹⁴²

The Supreme Court concluded that in light of the risks associated with excess feed entering the coastal ecosystem and the relative absence of data the precautionary approach, as required by Policy 3 of the NZCPS must be applied.¹⁴³ The Court noted that Policy 3 acknowledges the role adaptive management can play in supporting the application of a precautionary approach to decision-making¹⁴⁴ and also cited international authority, including the 2007 IUCN Guidelines,¹⁴⁵ as well as New Zealand and international case law to this effect.¹⁴⁶ In deciding whether an adaptive management approach was available to the Board in this case, the Supreme Court asserted that 'there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.'¹⁴⁷ The Court ultimately concluded that these conditions had been met and it was appropriate for the Board to adopt an adaptive management approach in order to manage the risks to water quality in light of inadequate baseline information.¹⁴⁸

5. Concluding Remarks

¹³⁷ *Sustain our Sounds Inc. v. New Zealand King Salmon Company* [2014] NZSC 40. See generally Vernon Rive, "Adaptive Management in the Supreme Court: *Sustain Our Sounds Inc v. The New Zealand King Salmon Company Ltd*" 10 (2014) *BRMB* 137.

¹³⁸ *Ibid* [5] and [42].

¹³⁹ *Ibid* [46].

¹⁴⁰ *Ibid* [47].

¹⁴¹ *Ibid* [88].

¹⁴² *Ibid* [89].

¹⁴³ *Ibid* [101].

¹⁴⁴ *Ibid* [107].

¹⁴⁵ IUCN, *Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management* as approved by the 67th meeting of the IUCN Council, 14 – 16 May 2007. *Sustain our Sounds Inc. v. New Zealand King Salmon Company* [2014] NZSC 40 [109].

¹⁴⁶ *Sustain our Sounds Inc. v. New Zealand King Salmon Company* [2014] NZSC 40 [113 – 123].

¹⁴⁷ *Ibid* [125].

¹⁴⁸ *Ibid* [133].

Despite the long history of aquaculture in New Zealand its recent regulation has been subject to periodic and significant reform. Explicitly or implicitly its fate has been tied to the status of the foreshore and seabed and it is notable, that in contrast to fisheries management in New Zealand, aquaculture activities are entirely disassociated from any form of property rights, reflecting the sensitivities over the status of the foreshore and seabed. Nevertheless, the focus on regulation has largely been on managing spatial conflict between activities and the amenity values of landscape and natural habitat rather than on environmental consequences per se. In part, this emphasis results from the current boutique nature of New Zealand's aquaculture industry rather than from a deliberate disregard of the environmental impacts of aquaculture. It is likely that as the industry increases in size and scope greater regard will have to be paid to its negative environmental impacts. The two recent decisions of the Supreme Court in the *King Salmon Cases* bode well for future regulation of this industry. The strong endorsement of environmental bottom lines underpinning the NZCPS as articulated in the *Environmental Defence Case* represents a significant shift in New Zealand environmental jurisprudence,¹⁴⁹ supporting environmental values over development imperatives at least in areas of outstanding environmental significance. Similarly, the precautionary approach was strongly endorsed in *Sustain our Sounds* and adaptive management, a crucial environmental management tool, was identified as representing an important tool for implementing precaution where information is incomplete.

However, whilst New Zealand appears to be influenced by some international developments in relation to aquaculture regulation – such as precaution and adaptive management – in other respects it would appear to be departing from emerging international norms. This is particularly evident in New Zealand's abandonment of its brief experiment with spatial management and the creation of aquaculture management areas. This is particularly surprising in light of New Zealand's professed ambition to more than double its aquaculture industry by 2025 from both an environmental and an industry perspective, but it reflects New Zealand's more general reluctance to adopt a robust system of spatial and integrated marine planning at a national level.

¹⁴⁹ See generally, Ceri Warnock, "Reconceptualising the role of the New Zealand Environment Court" 26 (2014) *Journal of Environmental Law* 507 – 518.