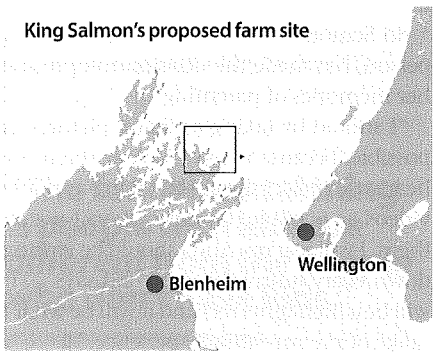
If it ain't broke

Does the Supreme Court's rejection of a salmon farm proposal prove that tinkering with resource law is uncalled for? by REBECCA MACFIE

Port Gore sits at the outer reaches of the Marlborough Sounds, flanked by two long pincer-like landforms reaching out into Cook Strait. It's wild, remote and exposed. Unusually for the Sounds, there is not a single jetty in the bay and it is seldom visited by yachties. There are a dozen baches scattered along the shore and a permanent population of three people.

On the western side of the bay is Papatua, a place of rocky cliffs, small beaches, folded pastoral hills and regenerating bush. It is classed by the Marlborough District Council as an outstanding natural landscape.



It was at Papatua that aquaculture company King Salmon applied in 2011 to develop a 91ha salmon farm. The application triggered a legal battle that ended up in the Supreme Court, producing what some say is the most significant judicial decision on the Resource Management Act (RMA) since it was introduced 22 years ago.

According to RMA architect Sir Geoffrey Palmer, the court's April ruling has also "spiked" the Government's claim that the RMA needs far-reaching reform.

The King Salmon plan was successfully challenged in the Supreme Court by the Environmental Defence Society after a Government-appointed board of inquiry gave the proposed fish farm the go-ahead.

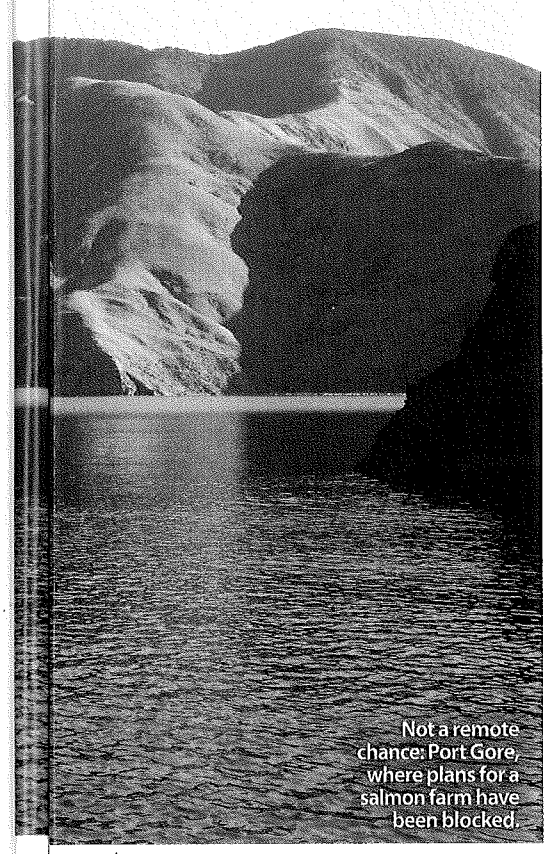
In essence, the board of inquiry made an "overall broad judgment" that although the development would have an adverse impact on Papatua's landscape and was contrary to the New Zealand Coastal Policy Statement, the site was suitable for a salmon farm. The ruling was upheld by the High Court.

According to barrister Rob Enright, who acted for the Environmental Protection Society in the case, this "overall judgment" approach was in line with the previous two decades of decision-making under the RMA, in which lower courts weighed up a range of environmental, economic and social evidence – as well as any relevant national and regional policy statements – in arriving at their decisions.

"It's been described as a 'black box' approach, where all these different considerations are fed in and you don't have any certainty as to the outcome."

In the King Salmon case the Supreme Court declared this approach was wrong, and that where there were policy statements drawn up under the RMA – in this case the Coastal Policy Statement – that set rules as to what can and can't be done, they have to be complied with.

"If there is no bottom line, and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, [with] one result being complex and protracted decision-making processes," it said in its 89-page majority ruling.



Not a remote chance: Port Gore, where plans for a salmon farm have been blocked.

THE POLITICAL BATTLE

What does this mean for the political battle over National's proposed RMA reform?

Environment Minister Amy Adams argues the Act's problems can't be fixed without fundamental reform to bring "consistency and guidance", "stronger environmental outcomes" and more efficient consenting.

The most controversial aspect of her proposal is an amendment to Part 2 of the legislation, which lays out the RMA's core purpose and principles. In particular, she wants to change sections 6 and 7 of Part 2.

Section 6 lists matters of national importance that must be recognised and provided for by decision makers, including the preservation of the coastal and freshwater environment, protection of areas of significant native vegetation, and the relationship of Maori to their ancestral sites. Section 7 covers issues including the efficient use of natural resources, the use and development of renewable energy and the effects of climate change that must also be taken account of.

Adams wants to collapse sections 6 and 7 into one list that decision-makers must consider when making "overall broad judgments" about development proposals.

She would delete some existing items – including reference to the "ethic of stewardship" and "amenity values" – and add new pro-development items, including the benefits from the use and development of natural resources, the efficient provision of infrastructure and the availability of land for housing. An amended section 7 would focus on speeding up the RMA's processes and limit the restrictions councils can impose on private land.

The Government has failed to win the backing of its minority support partners to get the reforms through during this parliamentary term and says it will campaign on the reform package as an election issue.

Adams says the suggestion from Palmer and other critics that "somehow we're making development more important than the environment is absolutely wrong". She denies there is any dilution of environmental protection and argues the "fundamental" problems with the RMA can't be fixed without changing Part 2 to "align" with issues such as the need for land for housing.

But Palmer claims the King Salmon case makes it impossible for the Government to sustain the claim that the proposals are a simple "rebalancing" of the law.

In an opinion for Fish & Game, he says the Supreme Court has underscored the importance of the existing sections 6 and 7 in establishing environmental protections and rejected the idea that decision-makers can make an "overall broad judgment" on proposals rather than complying with the environmental bottom lines contained in the RMA and national and regional plans.

Enright says if the problem with the RMA is a lack of clarity and certainty, the Supreme Court has delivered the solution – decision-makers have to follow the rules set down in national and regional policy documents. "It's simple really – just use the tools we already have. It's a far better way to the same outcome."

Enright says Adams's proposed section 6 will force decision-makers to weigh up a raft of competing values, with no guidance as to which are the most important. He predicts it will create a new era of litigation and uncertainty and be a policy "own goal" if enacted.

Rob Enright: "It's simple – just use the tools we have."

KAREN MARSHANT

It moves from a rule of law approach to a political approach, which can lead to pork-barrelling of infrastructure projects and corruption.

"EXCESSIVE DISCRETION AND UNCERTAINTY"

Veteran environmentalist Guy Salmon – who has been influential in National Party policy in the past – says Adams's proposed changes turn the core of the RMA into a "mush, with no clarity and no hierarchy as to which is more important". The line-up of competing considerations would mean equal priority could be accorded to outstanding landscapes or rare biodiversity as to proposed motorways or irrigation schemes.

He says the reform proposal needs to be considered in the context of the changes already made to the RMA – in particular the introduction of politically appointed boards of inquiry, set up under the Environmental Protection Authority to decide on projects of national importance.

He fears that this, combined with a set of competing principles at the core of the Act, would increase the risk of political interference in decisions over big projects. "It moves away from a rule of law approach to an arbitrary political approach, which some other countries have and they get pork-barrelling of infrastructure projects, and they get corruption."

Salmon says the problem with the RMA is not that too many projects are blocked by the law – most get approved. "The problem is the slow process that arises from excessive discretion and uncertainty."

Martin Williams, a Hawke's Bay environmental lawyer who chairs the Resource Management Law Association, says one certain outcome of Adams's proposed changes will be more work for lawyers as the courts figure out what they mean. "It will bring new opportunities to retest and relitigate approaches that have been well bedded down and that everyone really understands. It will be an absolute boon for me – but would that be a good thing?" ▮