

Partners:

Brian Fletcher LLB
Paul Gibson LL.M, BCA
Quentin Davies LL.M (Hons), BSc (Hons)
Alison Weaver LLB (Hons), BA

Senior Associate:

Scott Wight LLB, BSc

Associates:

Laurie Murdoch LLB, BA (Hons)
Rob Andersen LLB, BA

27 September 2016

Aquaculture New Zealand Limited
Level 1
Wakatu House
Montgomery Square
Nelson 7010

Attention: Rebecca Clarkson

**Cumulative Effects**

1. You have provided me with notes prepared by the Ministry for Primary Industries dated 21 September 2016 and an opinion by Julian Ironside of the same date.
2. I propose to review the questions posed in those documents. Before I do so, it is important to note the precedent value of earlier decisions.
3. The Environment Court is not bound by previous decisions. While the Environment Court is entitled to take into account the decisions of other Courts and Tribunals¹, it is not bound by its previous decisions and is free to consider each case on its own facts and merits. It is not an error of law if a subsequent decision maker does not take into account previous decisions.²
4. This matter was considered recently in *Shotover Park Limited v Queenstown Lakes District Council*.³ That case focused on two divisions of the Environment Court both dealing with 10 hectares of land adjacent to the Queenstown-Cromwell Highway. One division of the Environment Court was addressing the plan change application, and another division of the Environment Court with the resource consent application. In such circumstances the Court found that the questions each Court was examining were materially different and, as a consequence, there was no duty of one to consider the reasoning of the other.
5. In resource management it is very difficult to find cases which are alike. Where there is a materially different legal test or a materially different factual situation, then the issue of precedent does not arise.
6. The ministerial powers under s 360B are substantially different from those that the Board of Inquiry applied. It follows that it is not likely to be an error of law to discount the Board of Inquiry's conclusions.

¹ *Smeaton v Queenstown Borough Council* (1972) 4 NZTPA 410 (SC).

² *Raceway Motors Limited v Canterbury Regional Planning Authority* [1976] 2 NZLR 605.

³ *Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712.

JA-375336-5-1-V5:ALH

Question 1

Did the Board of Inquiry establish in its findings for Waitata Reach a cumulative threshold for further salmon farming in Waitata Reach beyond their two consent allocations?

7. No, the Board of Inquiry reached its findings on the evidence before it. The Board of Inquiry did not assess the consequences of locating farms in other parts of Waitata Reach. Consequently, while the Board of Inquiry process was comprehensive in terms of time and cost, the proposal that is on the table now is different from that which was before the Board of Inquiry.
8. Importantly, when assessing cumulative effects, the Board took into account the existing farm at Waihinu Bay and the KPF farm in Port Ligar⁴. The Port Ligar farm that was consented by the Marlborough District Council, but under appeal to the Environment Court, was subsequently refused by the Environment Court⁵. There is, therefore, one less salmon farm to factor into the assessment of cumulative effects in the current NZ King Salmon site swap proposal.
9. Jackson J, in *KPF Investments*, felt that the Board of Inquiry's decision was not helpful in assessing the effects on landscape, suggesting that in the consideration of cumulative effects on landscape "the KPF site seems to have dropped out of consideration."⁶ With respect, it seems implausible that the Board would have had regard to the consented salmon farms at Port Ligar and Waihinu Bay when assessing effects on natural character, only to discount the possible future existence of these farms when assessing effects on visual amenity just 13 paragraphs later. Rather, it is implied that the Board turned its mind to these farms throughout its assessment of the effects of the proposal on Waitata Reach. This is supported by the fact that the Board again referred to the existing farms and consented farms when assessing the cumulative effects of the White Horse Rock proposal.⁷
10. Little was said on cumulative effects in relation to landscape. In terms of effects on visual amenity in Waitata Reach, the Board concluded that "the combination of five new farms located off a series of headlands that define Pelorus Sound's main channel would be a "decisive" cumulative effect."⁸
11. The Board concluded that "the siting of four proposed farms in [Waitata] Reach would not be appropriate."⁹ Accordingly, it granted the request with respect to the Waitata and Richmond farms, and declined the highly visible Kaitira and Tapipi sites. The proposed White Horse Rock site (being the fifth proposed farm) was considered separately.
12. When considering the effect on natural character in relation to the proposed combination of salmon farms at Waitata and White Horse Rock, the Board concluded that "overall the combined effect of double parking the proposed farms would have a high adverse effect on the natural character of the locality... Reducing the number of farms to one would alleviate the effects to some degree."¹⁰ The cumulative adverse effects of the existing farms and

⁴ Board of Inquiry Decision at [698]

⁵ *KPF Investments Limited v Marlborough District Council* [2014] NZEnvC 152.

⁶ *Ibid* at [158].

⁷ Board of Inquiry Decision at [1356].

⁸ *Ibid* at [712].

⁹ *Ibid* at [1252].

¹⁰ *Ibid* at [670].

farms consented were found to be sufficiently high to tip the balance against granting the White Horse Rock application.¹¹

13. There are likely to be factual differences which apply to the present proposal. Briefly:
 - a. The proposal before the Board of Inquiry grouped salmon farms tightly. The proposal was for up to seven salmon farms clustered around four adjacent headlands. The present proposal is far more defuse. The distance between Blowhole Point and Horseshoe Bay is some 14 kilometres. At that distance, except perhaps from a low flying aircraft, salmon farms will not be able to be seen together. There are a number of different routes that might be taken which would avoid seeing all farms sequentially. If cumulative effects on amenity is relevant, then removing the farm from Forsyth Bay will diminish the cumulative effects.
 - b. There will need to be an assessment of whether the cumulative effects are effects on landscape or, as the Board of Inquiry appeared to suggest, merely an effect on amenity.
 - c. It may be that some of the farms are located in a different landscape. There is a question if this is the case as to whether there is a cumulative effect on landscape at all.
14. In summary, while the Board of Inquiry might, for its own purposes, have come to a view as to the cumulative effects threshold, especially in respect of amenity, there are likely to be a series of different factors at play in this case.

Question 2

Did the Board of Inquiry consider cumulative effects including on the natural character of the Waitata Reach in combination with the adjacent bays, or were they identified as separate entities?

15. When assessing the cumulative effect on natural character, [698] makes it clear that the Board is assessing five closely grouped farms, plus Port Ligar and Waihinu Bay, which it names specifically.
16. At [698] the Board refers to the prominence of all farms other than Richmond. This is a reference to the perceptual elements of natural character. Prominence has no relationship to the biophysical aspect of natural character. There is an argument that natural character relates primarily to biophysical elements, and people's perceptions of those biophysical elements.
17. The sub-bays were not identified as separate entities by the Board of Inquiry.

Question 3

If the answer to question 1 is yes, then in the KPF decision did the Environment Court use a threshold established by the board of inquiry to make a ruling for salmon farms in the Waitata Reach?

18. I did not give an answer to question 1 in the affirmative. However, I agree with Mr Ironside that the Environment Court was not strictly bound by the decision of the Board of Inquiry. In addition, I note that at [209] the Environment Court, on the evidence before it, agreed with the outcome of the Board of Inquiry decision. However, as discussed above at 9, the

¹¹ Ibid at [1356].

Environment Court was in error when it considered that the Board of Inquiry dropped the KPF Farm from its consideration.

19. In any event, as Mr Ironside observes, any future decision maker is not bound either by the Board of Inquiry decision or the Environment Court's decision in *KPF*.

Question 4

If the answer to questions 1 and 3 is yes, what threshold number of salmon farms for Waitata Reach was identified in the decision and ruling?

20. I answered neither of those questions in the affirmative. However, Mr Ironside is wrong in his answer. The Board of Inquiry found on the facts of that case that the threshold in Waitata Reach was four farms: Waitata, Richmond, Waihinu and KPF (Port Ligar).

Question 5 and 6

If the answer to question 2 is no, which bays containing salmon farms in addition to Waitata Reach were included in the assessment of cumulative effects in the NZKS decision and the KPF decision?

What reasons were used to underpin any such threshold/s?

21. At [698] the Board of Inquiry makes it clear that Port Ligar and Waihinu Bay were included in the assessment.
22. The question attempts to extract detail from the decision which does not exist. Certainly there is no reference to cumulative effects taking account of the Forsyth Bay farm in either of those decisions. The reality was that the Board of Inquiry and the Court in *KPF* were dealing with a tight cluster of farms in the vicinity of four adjacent headlands. It is understandable that the focus in that case was in respect of the area in contention.
23. The Minister would be bound by none of those decisions, although he may choose to address them if he wishes.

Yours faithfully

GASCOIGNE WICKS



Quentin Davies | Amanda Hills

Partner | Staff Solicitor

