

**BEFORE THE MARLBOROUGH SALMON FARM RELOCATION ADVISORY PANEL  
AT BLENHEIM**

**UNDER** the Resource Management Act 1991  
**IN THE MATTER** of Regulations under ss 360A and 360B of the Act  
**BETWEEN** **THE MINISTRY FOR PRIMARY INDUSTRIES**  
**Applicant**  
**AND** **THE MARLBOROUGH DISTRICT COUNCIL**

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**SUBMISSIONS ON BEHALF OF THE NEW ZEALAND KING SALMON CO LIMITED**

**Dated this 11th day of April 2017**

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**May it please the Panel:**

- 1 The New Zealand King Salmon Co Limited (NZ King Salmon) supports the Minister using his powers in respect of salmon farming in the Marlborough Sounds. NZ King Salmon is of the view that the outcome provided for as part of this process will be an improvement environmentally, socially and economically. These proposed regulations constitute strategic planning for fin-fish aquaculture in Marlborough. It will bring almost all farms<sup>1</sup> within a consistent benthic and water quality framework.
- 2 The alternative is a worse outcome for the environment, and a loss to the community resulting from lost job opportunities in the Marlborough Sounds.
- 3 My submissions will address the following matters:
  - (a) The regulation making power.
  - (b) The matters which the Minister must be satisfied of before making the regulations in that;
    - (i) the provisions are consistent with the Marlborough Sounds Resource Management Plan;
    - (ii) the regulations are consistent with Government Policy;
    - (iii) the matters are of regional and national importance;
    - (iv) the provisions will give effect to the New Zealand Policy Coastal Statement and the Regional Policy Statement; and
    - (v) the provisions do not conflict with any National Environmental Standard.
  - (c) I will respond to the argument that the Minister is bound either by the *Board of Inquiry* decision or by decisions of the Environment Court.
  - (d) I will address some of the technical issues raised by the Ministry for Primary Industries (MPI) proposal and other submitters.

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<sup>1</sup> Ngai Tahu has consent to farm small numbers of finfish in Beatrix Bay (U110680). That farm is not operational at present. The benthic standards imposed on the farm are broadly consistent with those proposed here. In addition there is a requirement for a comprehensive 'Marine Environmental Monitoring and Adaptive Management Plan' and corresponding 'Annual Monitoring Report' which could be aligned with what is proposed here.

## THE REGULATION MAKING POWER

4 The Minister here proposes to use the regulation making power under s 360A Resource Management Act 1991 (RMA).

5 Section 360A states:

**“360A Regulations amending regional coastal plans in relation to aquaculture activities**

- (1) The Governor-General may, by Order in Council, amend provisions in a regional coastal plan that relate to the management of aquaculture activities in the coastal marine area.
- (2) An amendment made under subsection (1)—
  - (a) becomes part of the operative plan as if it had been notified under clause 20 of Schedule 1; and
  - (b) must not be inconsistent with, and is subject to, the other provisions of this Act (for example, subpart 1 of Part 7A); and
  - (c) may be amended—
    - (i) under this section; or
    - (ii) in accordance with Schedule 1; or
    - (iii) under any other provision of this Act.
- (3) In this section and sections 360B and 360C, **amend provisions** includes—
  - (a) omitting provisions (whether other provisions are substituted or not);
  - (b) adding provisions.

6 The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) will argue that the use of s 360A is limited to amendments to insert or omit provisions, and does not extend to enable any changes to provide for occupation of the CMA by new salmon farms where they are currently prohibited.

7 In my submission the word ‘management’ should have the same meaning as “sustainable management” in s 5(2). The Minister, under s 360A may provide for the use, development and protection of the coastal marine area for aquaculture activities.

8 Section 360A was introduced by the Aquaculture Legislation Amendment Bill No. 3. During the first reading the Minister said:<sup>2</sup>

“The bill will also enable the Government to take a more active role in aquaculture planning. The bill creates a new ministerial power to recommend the making of regulations that amend aquaculture-related provisions in regional coastal plans. We do not foresee that power being used without talking to the public and, in particular, to the regional councils involved. Clear parameters are established for the use of that power. Those parameters include, among other things, a requirement for consultation and the requirement that the use of the power must be relative to achieving the purpose of the Resource Management Act. Use of the power will not in itself

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<sup>2</sup> (16 Nov 2010) 668 NZPD 15309.

enable new aquaculture activities to go ahead. Applicants will still need to apply for consents in accordance with normal processes, and those consents will be judged on their environmental production and merits as listed under the Resource Management Act.”

- 9 This provision was deliberately introduced to enable the Minister to create new aquaculture space. In the present situation, the creation of new space in return for the surrender of old space (which effectively amounts to a relocation<sup>3</sup>) is proposed. That plainly falls within the definition of the word “management”.

#### THE PRE-CONDITIONS TO MAKING A REGULATION

- 10 The pre-conditions for making regulations are set out in s 360B. That section requires the Minister to have regard to the provisions of the Regional Coastal Plan that would be affected by the proposed regulations,<sup>4</sup> consult a number of parties,<sup>5</sup> and have particular regard to a s 32 report before recommending the making of the regulations.<sup>6</sup>
- 11 In addition, the Minister must be satisfied in respect of four matters:

#### 360B Conditions to be satisfied before regulations made under section 360A

- (2) The Minister of Aquaculture must not make a recommendation unless the Minister:
- ...
- (c) is satisfied that—
- (i) the proposed regulations are necessary or desirable for the management of aquaculture activities in accordance with the Government’s policy for aquaculture in the coastal marine area; and
  - (ii) the matters to be addressed by the proposed regulations are of regional or national significance; and
  - (iii) the regional coastal plan to be amended by the proposed regulations will continue to give effect to—
    - (A) any national policy statement; and
    - (B) any New Zealand coastal policy statement; and
    - (C) any regional policy statement; and
  - (iv) the regional coastal plan as amended by the proposed regulations will not duplicate or conflict with any national environmental standard; and
- ...

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<sup>3</sup> I deal with this more fully below.

<sup>4</sup> Section 360B(2)(a).

<sup>5</sup> Section 360B(2)(b).

<sup>6</sup> Section 360B(d).

12 I will deal with each of these in turn.

**This Proposal is Consistent with The Marlborough Sounds Resource Management Plan**

13 The Marlborough Sounds Resource Management Plan (the Plan or the operative Plan) is consistent with the proposed regulations. I say that for two reasons:

(a) The Plan recognises that it inadequately planned for species other than bivalves. It says “It may become necessary for those provisions to be readdressed by Plan change”.

(b) The operative Plan has been recognised as providing ‘all things to all people’.

14 There is no requirement in s360A or s360B for the proposal to be consistent with any proposed plan. I deal with this topic below.

*The Plan Anticipates Plan Changes for Salmon*

15 The Marlborough Sounds Resource Management Plan states at s 9.2:

**Section 9.2 – Issue**

*The marine farm industry that has developed in the Marlborough Sounds is of significant value to the nation in terms of export earnings, and also to the region in terms of the employment and income flows that are derived from the industry. A substantial infrastructure involving processing facilities, ports, harvesting vessels and a multitude of other services has developed based on the marine farm industry and Sounds communities have been revitalised as a result of the development of the industry. All of that infrastructure is reliant upon marine farming which utilises the coastal marine area and the provisions of the Plan recognise that to maintain the strength of the industry, generally it is essential for resource consents to be able to be renewed to continue those marine farming activities.*

*The Plan recognises that in appropriate areas of the Sounds provision needs to be made respectively for conservation, residential/recreation interest and the interest of important industries utilising Sounds resources such as marine farming, tourism, forestry and land-based farming.*

*In addition, ongoing research is constantly occurring as to other means of aquaculture production involving species other than the present predominant species of mussels and it is possible that some other species may involve lesser effects on the environment through having less visible surface structures. **The current Plan provisions are based on the predominant bi-valve marine farm structures. It may become necessary for those provisions to be re-addressed by Plan Change. [emphasis added]***

16 These provisions were agreed by consent order.<sup>7</sup> The parties to that consent order included the Friends of Nelson Haven and Tasman Bay Incorporated, the

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<sup>7</sup> *Treble Tree Holdings Limited v Marlborough District Council* W11/99.

Minister for the Environment, the Minister of Conservation and the Nelson Marlborough Conservation Board, among others.

- 17 A further indication that the Plan treated finfish as an exception can be found in the Rules component of 9.2.2. There the Plan states:

*“Within coastal marine zone 2 out to 50m from mean low water mark, and beyond 200m from mean low water mark, marine farms are non-complying activities. In those areas marine farming involving finfish farming may be appropriate and it is recognised that consent may be granted by resource consent application.”*

- 18 The Plan itself provides for plan changes to re-evaluate provisions for farming species other than bivalves. Despite these express provisions, a myth has developed that the present zoning in the Plan was intended to be an enduring resolution of all issues regarding allocation of space for aquaculture. There are numerous difficulties with this argument, but the primary difficulty must be that, in fact, the Plan expressly records that such change is anticipated. These provisions appear to have been overlooked in the submission of Sylvia Allan.

*The Plan is “All Things to All People”*

- 19 The second but related difficulty with attempting to derive anything out of the Plan is that it has been found on a number of occasions to offer “all things to all people”.<sup>8</sup>
- 20 Ms Allan attempts to suggest that the proposed regulations do not give effect to the Plan, but in light of the repeated criticism by the Environment Court that the Plan does not provide strategic direction, that criticism is, in my submission, misplaced.

**In accordance with Government Policy**

- 21 Government Policy can be found in the New Zealand Coastal Policy Statement 2010 (NZCPS), the Aquaculture Strategy 2012 and the Natural Resource Business Growth Agenda 2015.
- 22 I do not understand there to be any substantial argument that what the Minister is proposing to do is not in accordance with Government Policy.

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<sup>8</sup> *Kuku Mara (Forsyth Bay) Partnership v Marlborough District Council* W25/2002; *Kuku Mara Partnership v Marlborough District Council* W039/04 at [715]; *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466; *Port Gore Marine Farms Limited v Marlborough District Council* [2012] NZEnvC 72 at [115]; *R J Davidson Family Trust v Marlborough District* [2016] NZEnvC 81 at [249].

**Regional or National Significance**

- 23 NZ King Salmon currently employs 452 team members and as such is one of the largest employers in the top of the South island. 400 shareholders in NZ King Salmon live in the top of the South Island.
- 24 If this site relocation is granted, the 17 surface hectares of suitable salmon farming space will eventually produce \$350m of revenue. The PwC estimate headcount for NZ King Salmon in the top of the South would increase by 261 over a 15 to 20 year period. Increased regional GDP would total \$32.9m per year.
- 25 NZ King Salmon's own calculations of estimate for future headcount would be about 900 by 2032, of which 800 will be based in Nelson and Marlborough – this takes into account expansion into higher value channels with more production, better use of bi-products, as well as the future growth from the three EPA sites.
- 26 Some of the submitters criticise the approach taken by PwC because NZ King Salmon's proposal will attract employees from other workplaces which pay less or are less profitable. The likes of Trevor Offen and Kevin Counsell would deduct the cost to the economy of these lower performing jobs being removed.
- 27 NZ King Salmon makes no apologies for improving the income and wellbeing of New Zealanders. Part of the difficulty with Mr Offen's analysis is that he fails to assume that as a result of the higher paying jobs being offered by NZ King Salmon, people will choose to enter into the workforce. He assumes there will be no migration into Marlborough from other regions. He assumes that all of this would happen instantly so that the labour market would not have adequate time to adjust.
- 28 There is no doubt that economic modelling has limitations. There is equally no doubt that the expansion of NZ King Salmon's production will enable substantial amounts of New Zealand products to be exported to the world. The benefits will be regionally and nationally significant. Section 360B(2)(c)(ii) is met.

### Consistent with National Policy Statement

29 After amendment by the regulations, the Regional Plan must continue to give effect to the NZCPS.<sup>9</sup>

30 I do not intend to repeat or replace the comprehensive analysis which has been undertaken by and on behalf of MPI in respect of this matter. I wish to comment, however, on three matters:

(a) why the site relocation process is consistent with the landscape and natural character provisions of the NZCPS;<sup>10</sup>

(b) why the proposal is consistent with the indigenous biodiversity provision of the NZCPS;<sup>11</sup> and

(c) why the proposed changes are strategic.<sup>12</sup>

### *Landscape and Natural Character*

31 NZ King Salmon's submission is that policies 13 and 15 of the NZCPS do not prevent all activity in areas which are designated outstanding. Rather, the policies prevent activities that interfere with the values which have made those areas outstanding.

32 I will develop this argument in three elements:

(a) In setting out this argument I will first begin with the NZCPS and demonstrate why the values of landscape, features and natural character are the determining elements.

(b) I will then address the case law, more specifically *King Salmon* and the most recent *Man O' War* decision to identify why that is so.

(c) I will then apply that reasoning to the facts as MPI has presented them.

### *The NZCPS Itself*

33 With much focus on the policies of the NZCPS, too little emphasis has been placed on the objectives set out in that document.

34 Objective 2 states:

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<sup>9</sup> Section 360B(2)(c)(iii)(B).

<sup>10</sup> Policies 15 and 13 NZCPS respectively.

<sup>11</sup> Policy 11 NZCPS.

<sup>12</sup> In accordance with policies 7 and 8 NZCPS.

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

35 Objective 6 continues:

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

...

36 A value is “the significance, desirability, or utility of something”.<sup>13</sup> If the objectives of the NZCPS seek to protect the values, then the policies should reflect that.

37 The policies go on to describe the sorts of values that the NZCPS seeks to protect. Consequently, in policy 13(2) and again in policy 15(c) there is an attempt to describe the relevant values. Policy 15(c) states:

“Policy 15: Natural features and natural landscape

...

- c. identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
- i. natural science factors, including geological, topographical, ecological and dynamic components;
  - ii. the presence of water including in seas, lakes, rivers and streams;
  - iii. legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;
  - iv. aesthetic values including memorability and naturalness;
  - v. vegetation (native and exotic);
  - vi. transient values, including presence of wildlife or other values at certain times of the day or year;
  - vii. whether the values are shared and recognised;
  - viii. cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
  - ix. historical and heritage associations; and

<sup>13</sup> B Garner *Blacks Law Dictionary* (9<sup>th</sup> ed, Thomson Reuters, 2009).

x. wild or scenic values.”

38 All of this boils down to a three stage process:

- (a) describing and characterising landscape or natural character;
- (b) determining whether the landscape or natural character is outstanding;
- and
- (c) identifying the values that cause the landscape to be outstanding.

39 This approach is consistent with the New Zealand Institute of Landscape Architects (NZILA) Landscape Assessment and Sustainable Management Best Practice Note. That document defines a landscape value as deriving from the importance that people and communities, including tangata whenua, attach to particular landscapes and landscape attributes. A landscape evaluation is the process of identifying and/or comparing landscape values.

*The Supreme Court Decision*

40 The facts of the Supreme Court decision<sup>14</sup> can be bluntly stated. *The Board of Inquiry* found that the Papatua farm was adjacent to an ONL and an area of ONC.<sup>15</sup> The effect on that landscape and natural character was high. The application would be contrary to policies 13 and 15 of the NZCPS.<sup>16</sup> The Supreme Court decision did not consider the question of whether the policy had been contravened - there was already a factual finding of the *Board of Inquiry* to that effect. The question for the Supreme Court was what the consequence of such a finding was.

41 That, by a majority decision, led to the refusal of the plan change and consequently the consent for the Papatua site. Of that decision, William Young J, in the minority said this:

“[201] ... I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any

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<sup>14</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Limited* [2014] NZSC 38.

<sup>15</sup> *Board of Inquiry New Zealand King Salmon Request for Plan Changes and Applications for Resource Consent*, 22 February 2013 at [628] and [634].

<sup>16</sup> At [634] and [635].

perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.”

42 The majority of the Supreme Court appear to respond as follows:

“[144] Third, it is suggested that this approach to policies (13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word “effect” is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 and 15. This, it is said, would be unworkable. We do not accept this.”

“[145] The definition of “effect” in s 3 is broad. It applies “unless the context otherwise requires”. So the question becomes, what is meant by the words “avoid adverse effects” in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development”. Policy 13(1)(a) (“avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character”) relates back to the overall policy stated in the opening words. **It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.** Moreover, some uses or development may enhance the natural character of an area.” [emphasis added]

43 Those comments have been echoed in a recent decision of the Court of Appeal in *Man O’War Farm Limited v Auckland Council* [2017] NZCA 24 (24 February 2017). In that case the Court noted at [65]:

“As the majority judgment indicates, however, **much turns on what is sought to be protected.** And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.” [emphasis added]

44 The Court of Appeal goes on to observe that in the context of that case the ONL would not be inimical to the ongoing use of Man O’War’s land for its current uses, which include vineyards, olive groves and pastoral farming.

45 The combined effect of the Supreme Court's decision in *King Salmon* and the Court of Appeal's decision in *Man O'War* is to reject the notion that every activity which can be seen in an ONL must be prohibited. Rather, it is important to identify those values inherent in landscape and natural character that make an area outstanding and then avoid effects on those values.

46 In that way the concern that William Young J expressed in his dissenting judgment would itself be avoided.

Application to this Case

47 The Marlborough District Council 2015 Landscape Study takes an approach broadly similar to that outlined in these submissions. In that study on page 14 the authors seek to identify the relevant landscape and features, then on page 15 they proceed to discuss the assignment of values to the landscape before on pages 17 to 19, breaking those values down into:

(a) bio-physical values;

(b) sensory values; and

(c) associative values.

48 The Marlborough District Council 2014 Natural Character of the Marlborough Coast Report takes a similar approach with the difference that, rather than use the word "values", they use the word "attributes", although in the text itself that word is replaced by the phrase "key values".

49 NZ King Salmon adopts the report of John Hudson. In John Hudson's assessment process he follows the approach mandated by the NZCPS and by the NZILA Best Practice Guide. He first identifies the proposed change of each of the farms, identifies the potential viewing audience and assesses the site's sensitivity to change. He then identifies the site's key values and the effects on these values after allowing for any appropriate mitigation, then forms a conclusion. In my submission that approach accords with the NZCPS, as well as the Supreme Court decision and the Court of Appeal decision in *Man O'War*.

50 Contrasting opinions have been given by Dr Steven for the Kenepuru and Central Sounds Residents Association and Mr Brown for EDS. It is a matter for the Minister as to whether or not he accepts or rejects those opinions.

51 Briefly:

- (a) Dr Steven agrees that there will be no effect on relevant features in the Waitata Reach<sup>17</sup> apparently due to Dr Steven's definition of a feature as excluding the landscape/seascape;
- (b) Dr Steven would define the entirety of the Waitata Reach (which includes all of the visual catchment from Maud Island through to the Chetwood Islands) as a landscape, which he would rate as outstanding,<sup>18</sup>
- (c) Dr Steven views the effects of the proposed salmon farms as being significant, but in the alternative he says that even insignificant effects need to be avoided, remedied or mitigated, and on the basis that form and colour is insufficient mitigation he states that the farms should be avoided;
- (d) Dr Steven does identify relevant values at [70]. The values which he describes however, are values which it states applies to all of the Marlborough Sounds, with presumably the conclusion that none of the Marlborough Sounds is suitable for any form of "intrusion of structural elements";
- (e) Dr Steven has a further difficulty in that, in light of the *Man O'War* decision, whether an area is outstanding needs to be determined in regional terms. The Court of Appeal stated:
- "[86] ... The question of whether or not a landscape may be described as outstanding necessarily involves a comparison with other landscapes. We also accept that the adjective is a strong one importing the concept that the landscape in question is of special quality. However, we suspect little is to be gained by applying a range of synonyms for what in the end involves a reasonably direct appeal to the judgment of the decision-maker. Whatever comparator is taken, the ultimate question is whether the landscape is indeed able to be described as outstanding.
- [87] We do not accept Mr Casey's argument that a comparison is required with landscapes that may be described as outstanding on a national basis. The fact that the word outstanding has to be construed in a section dealing with matters of national importance

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<sup>17</sup> At [73].

<sup>18</sup> At [83].

does not support MOWS's submission. We see no reason why a landscape judged to be outstanding in regional terms should not be protected as a matter of national importance, the legislative policy being achieved by the protection of ONLs throughout the country on this basis."

- (f) There is nothing of the sort of exercise which the Court of Appeal anticipates in Dr Steven's evidence. It may well be that Dr Steven has identified methodological flaws in the Boffa Miskell work. Nevertheless, if he proposed to take that approach, he would need to identify the values which justify Waitata Reach being outstanding, relative to the rest of the region.
- (g) Mr Brown does not appear to deal with outstanding natural features described in the Boffa Miskell report at all. Mr Brown appears to adopt the Boffa Miskell characterisation of features as landscape areas.
- (h) While Mr Brown agrees with Mr Hudson that the farms will have a relatively minor effect at a local and site level, he disagrees with Mr Hudson at the broader reach level. Quite how effects increase the further the viewer is from the farm is not adequately explained.
- (i) It is NZ King Salmon's evidence that it has managed to construct salmon farms which have a substantially lesser impact than those anticipated in the *Board of Inquiry*. In most viewing conditions Waitata and Kopāua are only noticeable at distances of less than one kilometre. This has been achieved by substantial attention to detail. It is not immediately apparent from reading Mr Brown's evidence whether he has been to Waitata Reach following the installation of the new farms.

52 Ultimately, the question for the Minister is whose evidence to accept.

*Indigenous Biodiversity*

53 The Minister must ensure that in relocating salmon farms, the Regional Coastal Plan will continue to give effect to policy 11 of the NZCPS. Critically that will require avoidance of effects on the King Shag species, of which there are less than 1,000 individuals left in the world and who reside exclusively in Marlborough.

54 The Environment Court in its recent decision *Royal Forest & Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 045 holds that the implications of the phrase “must be avoided” is context dependent. After citing paragraphs [100] and [131] of the *New Zealand King Salmon* decision, the Court states:

“[43] Of critical importance in this regard is whether or not the words “must be avoided” used in RCEP Policy NH4 requires a simple binary calculation as to whether or not all effects are avoided or not. It is clear that the Supreme Court, in interpreting the word “appropriate”, acknowledged that its meaning varied by context. We have concluded that even for words such as “avoid”, the context must go further than simply the wording of the Plan, but the context of the individual case or application.”

55 The first form of effect avoidance is site location. Half of the Blowhole Point sites and all of the mid-Waitata Channel sites are located over a greater depth than where King Shags are generally understood to forage. The Richmond and Horseshoe sites are 12 km from the Duffer Reef and towards the deep end of the range of King Shag foraging depths.

56 The effects of salmon farming on King Shags have been assessed:

(a) The proposed farms are not adjacent to breeding or roosting sites and consequently birds at those sites will not be subject to interference by the farms.

(b) Noise has been assessed by David Thompson of NIWA as unlikely to affect King Shags, as predicted noise levels at any King Shag breeding colony are below typical ambient noise levels.

(c) King Shags are unlikely to be excluded from potential foraging habitat as their prey species are unlikely to be excluded. Dr Dave Taylor states<sup>19</sup>:

“Witch flounder have also been observed directly beside salmon pens in the Marlborough Sounds, so they are likely to move in and feed in and around the vacated farm areas. Based on the feeding ecology of this species, and personal observations of epifauna at these sites, I conclude

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<sup>19</sup> Cawthron - Review of salmon farm effects on King shag diet – 15 March 2017

that it is likely that witch flounder would return immediately to fallowed sites, as these are likely to represent fertile feeding grounds.”

Other species may take 6-12 months, but studies have shown that witch make up 90% of the King Shag diet<sup>20</sup>. The location of the proposed farms are over areas with depths greater than generally reported as typical foraging areas.

(d) Finally, it has been postulated that salmon farms may change water characteristics, resulting in impacts on King Shags. NZ King Salmon proposes a staged and adaptive approach to increasing levels of nutrients into the water column. The Peer Review Panel has set initial acceptable levels following the EPA process. That will be revised through Best Management Practice Guidelines (for water column effects) work which is due to commence in 12 to 24 months. Consequently, this is unlikely to be a factor influencing King Shags.

57 King Shags have far more pressing concerns. In work prepared by Mennobart R. van Eerden & Marjolein J. Munsterman in 2012 for the Friends of Nelson Haven, they recommend that:

(a) breeding grounds need to be legally protected;<sup>21</sup>

(b) an advocacy programme be established to encourage set net users to adopt practices that minimise seabird bycatch;<sup>22</sup>

(c) pest quarantine measures need to be introduced;<sup>23</sup> and

(d) techniques need to be developed to establish shags at new colony sites.<sup>24</sup>

58 Absent from those recommendations are any suggestions in respect of existing aquaculture.<sup>25</sup>

59 Forest and Bird has circulated a paper prepared by Paul Fisher. Mr Fisher, as a result of his review of the relevant planning instruments, takes the approach

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<sup>20</sup> Lalas C, Brown D 1998. The diet of New Zealand king shags (*Leucocarbo carunculatus*) in Pelorus Sound. *Notornis* 45:129-140.

<sup>21</sup> At 5.3.1.

<sup>22</sup> At 5.3.2.

<sup>23</sup> At 5.3.3.

<sup>24</sup> At 5.3.4.

<sup>25</sup> The Minister might like to consider whether one or more of these recommendations might be taken up. Having said that, the population of King Shags appears to have remained stable despite a lack of regulation or management. It may be that these interventions are simply not necessary.

- that any absence of information is a basis for inconsistency with the NZCPS. Despite the acknowledged lack of scientific work in some areas, all of the evidence which does exist points to there being no impact on the King Shag.
- 60 More importantly, the proposal to shift existing farms from shallower areas, which are targeted by King Shags, to deeper areas represents an improvement.
- 61 Mr Fisher welcomes efforts being undertaken by the aquaculture industry, the Marlborough District Council and others to comprehensively work on the question of King Shags and to provide and implement an integrated monitoring programme for the Marlborough Sounds. Part of the information which will flow into that programme is to be provided as a condition of this relocation. Part of the monitoring for this project will be real time monitoring of key biological indicators. At present monitoring data is generally taken monthly. The ability to have monitoring information every 15 minutes or so will revolutionise the understanding of the underlying physical processes. That information, coupled with other research being proposed will provide the information which Mr Fisher says we lack.
- 62 Some care needs to be taken in the outcome in the *RJ Davidson Family Trust* litigation.<sup>26</sup> As the High Court notes at [98] the applicant chose not to call independent expert evidence on the King Shag and its habitat. In that case the Environment Court took the precaution of dismissing the application under s 104(6) on the basis that it lacked the necessary information.<sup>27</sup>
- 63 In this case MPI has called the necessary expert evidence. Mr Paul Taylor's evidence about the impact of salmon farms on the prey of King Shags is new. That work has not been available to hearings before now. It certainly clarifies that the views of bird experts that there will be an effect on fish preyed on by the King Shag is unfounded.
- 64 This can be buttressed against appropriate consent conditions. Certainly NZ King Salmon would agree to the sorts of conditions that were imposed by the EPA in respect of King Shags. In light of the recent *Forest & Bird* decision this would appear to be an appropriate response.

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<sup>26</sup> *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81; [Erratum] [2016] NZEnvC 148; *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52. Leave to appeal to the Court of Appeal has been sought. At the time of writing leave is yet to be granted.

<sup>27</sup> At [103].

*Strategic Planning*

- 65 This project is the essence of strategic planning. It has sought to identify the best location for salmon farming, having regard to landscape, natural character and indigenous biodiversity and other key concerns. What is recognised in these proposed regulations is that shifting farms within the Marlborough Sounds can create substantial improvements across environmental, economic and cultural values.
- 66 By contrast, the current situation is not strategic. The current farms are not required to comply with best practice. One of NZ King Salmon's farms (Waihinau Bay) has no controls on environmental performance other than a (generous) feed cap and anti-fouling. The identification for appropriate locations within the Marlborough Sounds for salmon farming, setting thresholds, and determining acceptable limits to change through one consolidated process is strategic planning in terms of s 7 of the NZCPS.
- 67 A criticism has been made that all of this should have been resolved through the Council planning process. I make four submissions in response to that:
- (a) The Plan itself anticipates Plan Changes for non-bivalve species.
  - (b) The Environment Court criticised the current Plan as lacking a strategic direction in 2002. In 2017 the Council was close to releasing a Plan for aquaculture.
  - (c) In the meantime, Marlborough is losing opportunities to improve its environment, increase the amount of monitoring undertaken in the Marlborough Sounds and increase the job opportunities for Marlburians.
  - (d) There is no guarantee that a first schedule process will result in a strategic outcome. Plans are incredibly complex. Resources are often limited. The first schedule process is unlikely to have the resources given to a single topic when compared with the process which MPI has promoted here.

**Give effect to the Regional Policy Statement**

- 68 In terms of s 43AA, a Regional Policy Statement (RPS) means an Operative Regional Policy Statement. Consequently there is no requirement for the Minister's proposed regulations to be consistent with the proposed

Marlborough Environment Plan (which is, in part, the proposed Regional Policy Statement).

69 An analysis of the provisions in the Marlborough Regional Policy Statement has been undertaken by MWH. I do not propose to repeat that process.

70 I do note that Ms Allan in her submission at paragraph 121 observes that the RPS provisions are outdated and are potentially inconsistent with the NZCPS 2010. That may be the case, but the legislation still requires consistency with the RPS.

#### TECHNICAL MATTERS

#### **You may take the Board of Inquiry decision into account, but you are not bound by it**

71 Mr Ironside in a letter dated 21 September 2016, which is appended to his summary of “concerns” dated 27 March 2017, states that the Minister is in some way bound by the decision of the *New Zealand King Salmon Board of Inquiry*. The Minister is not.

72 As I understand the argument, the *Board of Inquiry* decision is said to constitute a *res judicata*, although Mr Ironside uses the term “factual threshold” and “ecological threshold”.

73 Classically, a party setting up a *res judicata* must establish the following elements:

(a) the decision, whether domestic or foreign, was judicial in the relevant sense;

(b) it was in fact pronounced;

(c) the tribunal had jurisdiction over the parties and the subject matter;

(d) the decision was:

(i) final;

(ii) on the merits; and

(iii) it determined the question raised in later litigation and

(e) the parties are the same, or their privies, or the earlier decision *in rem*.

74 I make two submissions:

- (a) The issue before the *Board of Inquiry*, and the issue which the Minister will face is not the same either in terms of statutory context or in terms of subject matter.
- (b) There can be no effective *res judicata* in a changing situation. It is recognised both in the United Kingdom and in New Zealand that *res judicata* is inapposite in the planning context.

*The Issue is not the same*

The *New Zealand King Salmon Board of Inquiry* concerned nine sites. The context of the decision before the Board included NZ King Salmon's existing farms in Waihinau Bay, Forsyth Bay, Crail Bay, Ruakaka, Otenarau, Clay Point, Te Pangu and the consented KPF site at Danger Point just inside the entrance to Port Ligar.<sup>28</sup>

75 This case is substantially different to the case before the Board:

- (a) There is no longer a proposal to farm at Kaitira, White Horse Rock, Tapihi, Papatua, Kaitapeha or Ruaomoko.
- (b) NZ King Salmon is volunteering to swap space at Crail Bay, Waihinau, Forsyth, Ruakaka and Otenarau in return for granting the new sites.
- (c) The KPF farm at Danger Point remains a mussel farm. Consent for that site to be converted to a salmon farm was refused by the Environment Court.
- (d) There is a full suite of new evidence in relation to the effects of the new proposal which was not before the Board of Inquiry.
- (e) The proposal before the Board of Inquiry was for a tightly grouped set of salmon farms. If the Board had granted all seven sites, there would have been seven farms clustered around four adjacent headlands. The present proposal is far more diffuse. The distance between Blowhole Point and Horseshoe Bay is some 14 km. The evidence will be that the Kopāua site is difficult to make out from Waitata and vice versa. Consequently in NZ King Salmon's view, the only possible effect is one of viewing groups of farms separately but sequentially, which is a very different proposition to that which the Board faced.

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<sup>28</sup> Reference to the KPF site can be found in the *Board of Inquiry* decision at [387], [422], [698], [711] and [843].

76 The learned authors of Spencer Bower and Handley “Res Judicata”<sup>29</sup> state that in issue estoppel only applies if the issue in the second proceedings is the same as one decided in or covered by the first. The short point is that the circumstances are very different.

77 In addition, the Minister in this case is proposing to use his powers under s 360A of the Resource Management Act 1991. The statutory test under s 360B is different to that faced by the Board. The Board was charged with a concurrent application under part 7A subpart 4 of the RMA.<sup>30</sup>

78 There is no issue estoppel here.

*There can be no effective res judicata in a changing situation*

79 In *Thrasylvoulou* [1990] 2 AC 273, 290, Lord Bridge said “A decision to withhold planning permission resolves no issue of legal right... It is no more than a decision that in existing circumstances and in the light of existing planning policies for development... is not one which it would be appropriate to permit... such a decision cannot give rise to an estoppel *per rem judicatam*.”

80 The Environment Court is entitled to take into account the decision and dicta of other Courts and Tribunals which have considered the same or similar matters at earlier stages: *Smeaton v Queenstown* BC (1972) 4 NZTPA 410 (SC). It is not bound by its previous decisions, and is free to consider each case on its own facts and merits. Its failure to take previous decisions into account cannot be regarded as an error of law.<sup>31</sup>

81 This point has now been dealt with under the RMA by the Environment Court in *Pigeon Bay Aquaculture Ltd v Canterbury RC* [1999] NZRMA 209 (EnvC), endorsed in *Arrigato Investments Ltd v Rodney* DC[1999] NZRMA 241; (1999) 5 ELRNZ 540 (EnvC). The Court stated in *Arrigato* at 46–47, that “a precedent which is beneficial in its effects and which promotes the single purpose of the Act should not necessarily be declined merely because of its possible precedent effects”.

82 In *Shotover Park Ltd v Queenstown Lakes DC* [2013] NZHC 1712, the High Court considered whether one division of the Environment Court in considering plan appeals was bound to apply similar reasoning and conclusions of another

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<sup>29</sup> KR Handley *Res Judicata* (4<sup>th</sup> ed, Lexis Nexis, London, 2009).

<sup>30</sup> See also s 145(1A).

<sup>31</sup> *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605, (1976) 6 NZTPA 40 (SC) at 607; 41–42.

division of the Environment Court considering resource consent appeals, when both sets of appeals dealt with the same land and same subject matter. In considering the authorities like for like, the High Court held that the plan appeals and resource consent appeals were asking different questions and involved different statutory considerations. The division considering the plan appeals was therefore not obliged by law to consider the reasoning of the other division on the consent appeals. When considering the plan appeals, it was permissible but not mandatory for one division of the Environment Court to engage with the reasoning of the other division which considered consent appeals.

- 83 In the words of the House of Lords, the decision to refuse planning permission for further salmon farming in the Waitata Reach resolves no issue of legal right. It does not give rise to an estoppel. In terms of the New Zealand case law, while the Minister may choose to have regard to earlier decisions, he is certainly not bound by them, especially as the statutory context under which the decisions are being made are quite different.

#### **A Plan can be prescriptive**

- 84 The Environmental Defence Society in its submission at paragraph 17, first bullet point, argues that it is unlawful for a Plan to be as prescriptive as is proposed here. The *Society* argues:

“The proposed relocation documents should only focus on environmental effects to the extent necessary to determine whether the proposed areas to be rezoned are appropriate. The specifics of individual proposals should be assessed when a coastal permit is sought.”

- 85 The question, therefore, is whether it is permissible for a Plan to tightly prescribe the sort of resource consent which can be applied for.
- 86 The starting point is the RMA. There is nothing in s 63 (Purpose of Regional Plans), s 66 (Matters to be considered by Regional Council), s 67 (Contents of Regional Plans) or s 68 (Regional Rules) which would prevent the sort of Plan Provision being imposed here. Section 68(5) provides that a rule may apply throughout the region or only apply to a part of a region, may make different provision for different parts of the region and different classes of effects arising out of an activity, and be specific or general in its application.. There ought to be no criticism of these Plan provisions in those circumstances.

87 The submission which the Environmental Defence Society makes is contrary to the Supreme Court decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Limited* [2014] NZSC 38. The Supreme Court at [116] approved the Court of Appeal’s decision in *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18. The Court said:

“In short, then, although a policy in a New Zealand Coastal Policy Statement cannot be a “rule” within the special definition of the RMA, it may nevertheless have the effect of what an ordinary speech would be a rule.”

88 If a policy can direct an outcome, then a rule can do likewise.

89 This style of plan drafting has been used in the operative Tasman Resource Management Plan, for example at rule 35.1.4.2. A set of standard conditions are prescribed “to the extent they are applicable”.

90 There are good planning reasons why prescription is detailed here. NZ King Salmon is the holder of finite resource consents. The purpose of the Plan Change is to enable the existing rights to be exchanged for new rights. It is undesirable in those circumstances for NZ King Salmon to get less or more from the process than the Minister intends.

91 Finally, this is a situation where we have as much information now as we are ever likely to have during a resource consent process. Consequently, we are in the position now to make a decision in respect of these applications. As is observed elsewhere, the Plan is up for renewal. The detailed provisions need not survive the Plan review process. That is not, however, something that the Minister needs to concern himself with.

### **The Site Relocation**

92 NZ King Salmon’s position is that the proposed new farm locations stand on their own merits, independent of the site relocation process, and that the new farms could be provided for in the operative Plan.

93 The fact that farms are to be relocated is an additional benefit, but not the primary justification for the new sites<sup>32</sup>.

94 The proviso to this is cumulative effects. The site swap will mean that there is no prospect of additional discharge resulting from both old farms and the new

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<sup>32</sup> It is possible for a plan to authorise relocation of coastal permits (“transfer the whole or any part of the holder’s interest in the permit to another site”: s135(1)).

farms being operated at the same time. The new sites will be cumulative with those sites that stay.

95 NZ King Salmon notes two additional matters:

(a) Should only some of the new sites be granted, then there may be a need to transition off old sites while beginning to farm at new sites. NZ King Salmon would agree to the following conditions:

- (i) After fish are introduced to the new site, no new fish are to be introduced to the site to be surrendered.
- (ii) NZ King Salmon will be required to decommission its existing site as soon as reasonably practicable and in any event no later than nine months after fish are introduced to the new site.
- (iii) The old site is to be decommissioned no later than six months after the last fish are harvested.

(b) The order of relocation priority is addressed below.

#### *Cumulative Effects*

96 In NZ King Salmon's view, the site swap proposal ought to take into account the fact that NZ King Salmon has the ability under its existing consents to discharge at levels often in excess of the recently agreed Best Management Practice Guidelines. This process represents an opportunity to bring the entire Marlborough finfish industry in line with those Best Management Practice Guidelines. When assessing cumulative effects, at least in the short and medium term, it is appropriate to have regard to the benefits of removing the existing farm.

#### *CMZ3 or CMZ4*

97 NZ King Salmon does not object to the Council's submission that these new farms could be part of CMZ3, rather than in a new zone CMZ4.

98 Having said that, the reason for creating a new zone has considerable currency:

(a) As Frances Lojkine says, the new farms are restricted discretionary, so long as they meet their conditions of consent.

(b) It is important that these sites are properly supported by objectives and policies. Scheduling farms creates an impression that those farms are exceptions and consequently are not supported by the objectives and

policies. NZ King Salmon submits that the MPI proposal complies with s 67(1)(c).

**The proposed Marlborough Environment Plan is only of peripheral relevance to the Minister's discretion**

- 99 Section 360A enables regulations which have the effect of altering the operative Regional Coastal Plan.
- 100 The matters which the Minister must have regard to, be satisfied of, and whom the Minister must have consulted, are set out in s 360B. There are three references in s 360B to the Regional Coastal Plan. The RMA in s 2 defines Regional Coastal Plan by reference to s 43AA. That section defines a Regional Coastal Plan as the operative Plan. There is nothing in s 360B that directs the Minister to have regard to a proposed Regional Coastal Plan.
- 101 In my submission it is nevertheless permissible for the Minister to have regard to the proposed Marlborough Environment Plan. In that regard:
- (a) The weight to be given to the proposed Plan ought to be less than that which a decision-maker would give to a proposed Regional Coastal Plan under s 104. Section 360B contains no analogue of s 104(1)(b)(vi) which requires regard to be had to the relevant provisions of the proposed Plan;
  - (b) It would be difficult for the Minister to give much weight to a decision which the Council (and thereafter the Environment Court and the Minister of Conservation) make in the future; and
  - (c) Such an approach would be appropriately cautious.
- 102 The Blowhole Point sites are within an Outstanding Natural Feature in the proposed Plan but not in or adjacent to an Area of Outstanding Landscape Value<sup>33</sup> in the operative Plan.
- 103 There is conflicting authority on whether a plan is determinative, beyond identified exceptions.

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<sup>33</sup> Which are Outstanding Natural Features and Landscapes: See Policy 5.3.1.1 and Appendix 1.

- 104 A plan is conclusive except in the case of invalidity, incomplete coverage or uncertainty of meaning<sup>34</sup>. A plan is not conclusive when it predates some higher order instrument which it needs to give effect to<sup>35</sup>.
- 105 There are a series of cases which treat the Plan as only the starting point of identifying relevant landscapes:
- (a) *Chance Bay v Marlborough District Council* HC Wellington AP210/99, 15 March 2000;
  - (b) *Unison Networks Limited v Hastings District Council* [2011] NZRMA 394 (HC);
  - (c) ***Whangaroa Maritime Recreational Park Steering Group v Northland Regional Council*** [2014] NZEnvC 92;
  - (d) ***New Zealand Transport Agency v Architectural Centre Incorporated*** [2015] NZHC 1991 at [354] [historic heritage]; and
  - (e) ***Clearwater Mussels Limited v Marlborough District Council*** [2016] NZEnvC 21 at [62].
- (Cases in bold postdate the *King Salmon* Supreme Court decision)
- 106 Outside invalidity, incomplete coverage or uncertainty of meaning, the following cases are authority for the position that plans are conclusive:
- (a) *KPF Investments Limited v Marlborough District Council* [2014] NZEnvC 152 at [159];
  - (b) ***Thumb Point Station Limited v Auckland Council*** [2015] NZHC 1035 at [31];
  - (c) ***R J Davidson Family Trust v Marlborough District Council*** [2017] NZHC 52 at [77], [88].
- 107 The operative Plan was not prepared in light of the NZCPS:2010. However, the thrust of the NZCPS:2010 is the consequences of a finding of an ONL or ONF, not how to identify one.

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<sup>34</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Limited* [2014] NZSC 38 at [90]

<sup>35</sup> *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36 (17 March 2017) at [36]

- 108 To the extent that the NZCPS does list the matters of assessment, almost all of the issues listed in Policy 15 of the NZCPS:2010 are referred to in Appendix 1 to Volume 1 of the operative Plan<sup>36</sup>. Policy 15 changed the consequences of a finding that an area was an ONF or ONL but, in the case of Marlborough at least, did not significantly change the matters of assessment for identifying an ONL or ONF.
- 109 NZ King Salmon submits that the Minister should take a cautious approach. An assessment should be made under both:
- (a) the operative Plan; and
  - (b) the proposed plan, giving it little weight overall.

### **Part 2 is subsumed in the Policy Statements and Plans**

- 110 There is no express reference to Part 2 in s360A or B. However, s360A(2)(b) requires that the amendment “must not be inconsistent with, and is subject to, the other provisions of this Act (for example, subpart 1 of Part 7A)”. A cautious approach would be for the Minister to consider Part 2.
- 111 However, for the reasons discussed above, there are only limited circumstances when a Part 2 analysis is mandatory. This is not one of those circumstances. The Environment Court in *Infinity investments* stated:

*[36] Importantly, the weight to be attributed a higher order instrument when having regard to it under section 104(1)(b) will also be affected by whether that instrument post-dates the earlier plan. If it does then there can be no assurance that the higher order statutory instrument was considered let alone given effect to]. In effect there are three situations to consider:*

- (a) if there is no relevant incompleteness, ambiguity or illegality in the regional (or district) plan and it gives effect to the higher order instruments, then less weight needs to be given to the latter;*
- (b) there is the situation where there are no relevant difficulties in the regional (or district) plan but there are later, higher instruments*

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<sup>36</sup> Wildlife and cultural and associative elements are not specifically referred to in Appendix 1 of the operative Plan. Cultural and associative elements were however referred to in Policy 1.1.3 of the NZCPS:1994, which predates the operative Plan. In *Clearwater Mussels Limited v Marlborough District Council* [2016] NZEnvC 21 at [62], presumably because of the criticisms at [53] and [91], the Environment Court found the mapped AOLLV in the operative Plan was not conclusive.

*which must be had regard to and, if the district plan is inconsistent with them (obviously it does not give effect to a post-dated higher instrument), given considerable weight; and*

- (c) *finally if there is some incompleteness, ambiguity or illegality in a regional (or district) plan which at first sight brings Part 2 of the RMA into play, then there may still be no need to refer to Part 2 because there are higher instruments in the statutory hierarchy (which must be considered under section 104(1)(b) RMA) which will remedy the problem in the regional (or district) plan). That is especially so if the higher instruments came into force after the relevant local authority plan.*

112 In *Davidson* the High Court concluded that the Environment Court was “not required to consider Part 2 of the RMA beyond its expression in the planning documents”<sup>37</sup>. The cautious approach would be to make the assessment anyway. Part 2 is “open-textured”<sup>38</sup>, that is, it provides for “the protection of the environment as well as its use and development”.

## **COMMENTS ON THE PROPOSED AMENDMENTS TO THE MARLBOROUGH SOUNDS RESOURCE MANAGEMENT PLAN**

### **Order of relocation priority**

113 Policy 9.2.1.1.17(b) sets a priority for the relocation of low flow sites to high flow sites.

114 NZ King Salmon’s order of priority is as follows:

- a. Crail Bay MFL 32.
- b. Crail Bay MFL 48.
- c. Forsyth Bay.
- d. Otanerau.
- e. Ruakaka.
- f. Waihinau Bay.

115 The same order should be reflected in 35B.2.1.2(c).

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<sup>37</sup> At [92]

<sup>38</sup> *NZ King Salmon* at [151]

### **The size of Waitata mid-channel**

116 Appendix 4D condition 10 refers to Waitata mid-channel site as being 2 hectares. That area should be 2.5 hectares. The proposal is for five pens of up to 77 metre diameter to be in that location. The surface area covered by pens of that size would be at least 2.26 hectares. The area needs to be rounded up to account for any differences in measurement method, as well as allowing for adjoining surface structures.

### **The staging of feed increases**

117 Appendix D4 condition 21 and onwards is overly conservative. In addition what is proposed is impractical.

118 The amount of feed consumed by the fish varies from year to year. Differences are caused by matters as diverse as water temperature, feed composition and conversion ratio, growth rate, survival and presence of predators creating stress for the stock. Natural variations will cause greater variation than 150 tonnes of feed.

119 All of this means that estimates are made of how much feed will be consumed by a particular year class, but the results may vary by 10% or 20% due to the multiple variables.

120 The response to this in the Board of Inquiry was to allow a flexibility of up to 15% with a requirement as a rolling average to not exceed the maximum discharge over a three year period (see Ngamahau condition 36 note 1).

121 The water quality scientists tell us that this is not an area where precision matters. Indeed a definite change is preferable, as it enables effects to be more easily measured.

122 In our view the discharge increases are too conservative. We suggest the following changes:

(a) The minimum increment on each farm should be 500 tonnes; and

(b) The feed increase step should be able to be increased after two years rather three years of consistent monitoring; and/or

(c) The overall increase of feed discharges in the Pelorus, should be raised to 2,500 tonnes in any year and/or

(d) the quality standards must be met for two years before moving to the next stage.

- 123 There is a real question as to whether feed caps are required at all. Feed caps are a poor form of regulation. We have sophisticated tools to measure benthic effects. Increasingly we have sophisticated tools to measure effects on the water column, including real time water column monitoring.
- 124 Feed caps were appropriate when we had little information about the state of the environment and the effects of salmon farming. We now have more information about the effects of salmon farming than we have about any other activity in the Marlborough Sounds. We can measure those effects.
- 125 Feed caps are simply a crude tool to limit environmental effects. Now we are able to measure the actual environmental impact, feed caps no longer have relevance. It is NZ King Salmon's responsibility to manage the effects of its operation within the environmental parameters set by the conditions.
- 126 As part of an agreement reached with the Marlborough District Council, subject to the EPA process, NZ King Salmon is scheduled to embark on a Best Management Practice Guidelines process to address water column effects. The process is envisaged to be similar to the Best Management Practice Guidelines process for benthic effects. At this stage, we envisage that process commencing within the next two years. If feed caps are required, it needs to be recorded that it may be appropriate to remove those feed caps once the Best Management Practice Guidelines process is completed.

### **Feed Composition**

- 127 Appendix D4 condition 33 will require a substantial amount of work for little benefit, potentially requests commercially sensitive information, and is a partial duplicate of condition 46(a). It is best dealt with in another way.
- 128 It is important to understand that the chemical composition of feed remains relatively constant, with only subtle variation.
- 129 The company must report on the amount of nitrogen discharged monthly. It is able to calculate that quantity from records it keeps. This is best dealt with through condition 46(a).
- 130 The food is almost entirely consumed. It is not immediately apparent what environmental purpose there is in keeping the remainder of the information. It was not required by the Board of Inquiry. Protein (other than the fact that nitrogen is a component), lipids, carbohydrates and (in the context of the Sounds ecosystem) phosphorus in feed have no ecological impact.

- 131 There will be a significant amount of work required to maintain a log.
- 132 Rather than keeping a log, NZ King Salmon would be able to gather together this information (and more) in response to a specific request. If precise feed composition is identified as a potential cause of an environmental effect (and that seems highly unlikely based on present information), it would gather together the relevant information at that stage.
- 133 Keeping a formal log is disproportionate to the risk.

### **Environmental Water Quality Standards**

- 134 The Environmental Water Quality Standards are consistent with those recently imposed on NZ King Salmon at its Clay Point site. It is important to reinforce the context in which these levels are set. It is beyond doubt that there is a large natural variation in the nitrogen levels in the Marlborough Sounds. It is also beyond doubt that nitrogen is the limiting nutrient on algae growth in the Sounds.
- 135 NIWA has modelled the impacts of what is proposed. Their Scenario 13 assumes a discharge of 38,600 tonnes of fish feed into the Pelorus Sound. It assumes that all sites are granted and all sites operate at their maximum capacity without any other constraint such as the effects on the benthos.
- 136 Scenario 13 has been used as a basis of assessment by MPI. Even with those assumptions, the average summertime increase in chlorophyll is predicted to be approximately 0.08-0.10mg m<sup>-3</sup>. Consequently, in that scenario the natural exceedance of 3.5mg m<sup>-3</sup> will increase from 11%, 13% and 3% to 14%, 14% and 8% at Moetapu Bay, Double Bay and Yncyca Bay respectively.
- 137 NZ King Salmon has had experience in the past that its monitoring has uncovered water column conditions which are biologically significant, but have nothing to do with the farm. For example, in respect of the 2016 monitoring required for Te Pangu, NZ King Salmon reported that the dissolved oxygen results for March 2016 were anomalous. On that occasion, dissolved oxygen was measured at all stations, including the control stations at the Tory Channel entrance, as being between 81% and 83%.<sup>39</sup> Given that the control sites registered low oxygen readings, this incident was put down as unrelated to the farm.

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<sup>39</sup> Elvines D, Knight B, Taylor D 2016. Te Pangu Bay salmon farm: annual monitoring 2016. Prepared for The New Zealand King Salmon Co. Ltd. Cawthron Report No. 2809. 32 p. plus appendices.

- 138 This demonstrates why a trigger-investigation-response model is important, particularly for far field effects. The modelling results demonstrate that NZ King Salmon is unlikely to have a significant effect. Other potential sources of abnormal results need to be investigated at the time an abnormal result is detected.

### **Benthic Quality Standards**

- 139 Condition 38 describes the Benthic Quality Standards which will apply. The conditions are inconsistent with the Best Management Practice Guidelines. The Best Management Practice Guidelines require all monitoring stations to be beneath the relevant ES scores. The proposed condition here requires simply the average score to be beneath a certain threshold. While the proposal would be more lenient for NZ King Salmon, they have agreed to implement the Best Management Practice Guidelines and will not seek to water those down.

### **Nutrients to be monitored**

- 140 In condition 43(c) a series of nutrients is proposed to be monitored. NZ King Salmon's scientific advice is that total nitrogen is the most relevant measure to be monitored. Ammonium, nitrous oxide and nitric oxide are of course components of total nitrogen. They ought not to be monitored separately. NZ King Salmon's understanding is that the automatic monitoring equipment will only measure total nitrogen.

### **Monitoring the Effects of Artificial Lighting**

- 141 The consistent advice that NZ King Salmon has received from its scientific advisors is that submerged artificial lighting is not likely to have an environmental impact on the environment. A range of environmental studies have been undertaken,<sup>40</sup> all concluding that there is no real likelihood of an effect.
- 142 This is a matter raised in condition 45(h)(i).

### **Heavy Metal and Organohalogenated Compounds**

- 143 NZ King Salmon feed contains copper and zinc, a fraction of which pass through the fish and find their way into the environment. Copper can also be found in

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<sup>40</sup> Effects on artificial lighting on the marine farm environment at Clay Point and Te Pangu Salmon Farms (Cawthron Report 1851, October 2010); Zealand King Salmon Company Limited: assessment of environmental effects - submerged artificial lighting (Cawthron Report 1982, August 2011); Effects of artificial lighting on the marine environment at the Te Pangu Bay salmon farm (Cawthron Report 2374, July 2013).

anti-fouling products. Organohalides are strictly regulated and controlled in feed and, therefore, are not introduced into the environment at material concentration.

- 144 The work proposed in condition 45(h)(iii) is common to all farms. There is no need for each farm to prepare its own specific monitoring report.

**NZ King Salmon should be able to place structures in the water prior to the Baseline Plan being approved**

- 145 Condition 48 would prevent structures being placed on the marine farm until the Baseline Report is approved. NZ King Salmon agrees that no feed should be discharged, but there may be good reasons why structures could be placed in the water prior to the Baseline Report being approved. There seems to be no resource management reason for this restriction.

**Peer Review Panel**

- 146 NZ King Salmon would intend to use the existing Peer Review Panel approved for the EPA sites, rather than creating a new Peer Review Panel for these sites. Condition 51 should make that clear.

**Dolphin Entrapment**

- 147 Condition 54 of Appendix 1 suggests that the twine diameter of the predator net is of a sufficient gauge to be detected acoustically by dolphins. If this is an issue, then the figure should be specified. In reality, NZ King Salmon's existing operation does not involve a significant number of dolphin entanglements. Condition 54(d)(i) can be deleted.
- 148 By the same token, the word "immediately" in 54(e)(i) can be replaced with "as soon as reasonably practical".

**Biosecurity Management Plan**

- 149 There is a danger that the Biosecurity provision (condition 57) will duplicate or contradict new regulations currently being prepared by NZ King Salmon and MPI.
- 150 The aquaculture industry has entered into a Government Industry Agreement with MPI to assist in managing biosecurity risks. Regulations flowing from that agreement are going to be imposed under the Biosecurity Act 1993.

- 151 It makes little sense to have NZ King Salmon regulated both under the Biosecurity Act and under its resource consent. At worst there is a possibility that the two sets of regulations will conflict.
- 152 NZ King Salmon suggests the following be added to the start of this condition: “In the absence of any comprehensive biosecurity planning required to be undertaken under the Biosecurity Act 1993...”

### **Workshops**

- 153 NZ King Salmon sees that workshops are an appropriate way of resolving (or at least highlighting) differences between experts. I set out in a schedule who the participants to those workshops might be.

### **CONCLUSION**

- 154 The Marlborough Sounds deserves world-leading salmon performance, environmentally, socially and culturally. The use of their regulation making power will enable resource consents to be obtained to achieve this. NZ King Salmon submits that you should recommend to the Minister to proceed with making the regulations. What MPI proposes is appropriate management.



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Quentin A M Davies

Solicitor for the New Zealand King Salmon Co Limited

**Schedule – Workshops and participants**

1. Landscape (Expert only)
  - (a) John Hudson
  - (b) Dr Mike Steven
  - (c) Steven Brown
  
2. Navigation at Tio Point (Stakeholder workshop)
  - (a) Harbourmaster who may invite their consultant Marico Marine
  - (b) KiwiRail
  - (c) Port Marlborough
  - (d) Navigatus Consulting
  - (e) MPI
  - (f) Te Atiawa
  - (g) NZ King Salmon
  
3. King Shag (Expert only)
  - (a) Paul Fisher (Forest and Bird)
  - (b) Dr David Thompson (NIWA)
  - (c) Dr Dave Taylor (Cawthron)
  - (d) Paul Taylor (Statfishitics)
  - (e) Rob Schuckard (Friends), but only if he is appearing before you as an expert (over which I have had differing reports)

The workshops should occur as soon as possible (and before evidence is given before you)