

Case Note for Advisory Panel - Sustain Out Sounds Inc v NZ King Salmon Co Ltd [2014] NZSC 40

Issue focus - Adaptive Management

Background

1. SOS challenged the board of inquiry's decision to allow the plan change for 4 of the 8 proposed salmon farm sites to change CMZ1 to new CMZ3 thereby changing activity status for salmon farming from prohibited to restricted discretionary. The board also granted resource consent for salmon farming at those sites. The sites were located at: Papatua, Ngamahau, Waitata and Richmond.
2. In making its decision the board installed consent conditions requiring an adaptive management approach to water quality issues. SOS contended that an adaptive management approach was not available due to the lack of baseline data and consequential uncertainty of models: [5].
3. The key questions considered by the Supreme Court on appeal were "whether the Board was entitled to accept an adaptive management approach": [74]. "When an adaptive management approach can legitimately be considered a part of a precautionary approach": [124].
4. The Supreme Court concluded an adaptive management approach was available:[158].
5. In reaching that conclusion it set out a clear series of questions/steps that a decision-maker must answer before concluding an adaptive management approach is appropriate and consistent with a precautionary approach. These are set out below.

Test for validity of applying adaptive management approach

Step 1: Threshold

Question:

Can an adaptive management regime can even be considered?: [125].

Answer:

"There must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered...adaptive management is not a "suck it and see" approach": [125].

Application in SOS:

A sufficient evidential foundation was established because: Board had modelling showing water quality would not be compromised at the initial maximum feed level for all 9 locations. Although there was not modelling of high levels there was no guarantee those levels reached because of proposed conditions: [126] Amount enabled was less than 1/2

sought because of decision to decline 4 farms: [127]. Majority of experts agreed likelihood of shift in trophic state unlikely: [128].

Step 2: Analysis

Question:

Is an adaptive management response consistent with a precautionary approach or is prohibition required: [129].

Answer

Answered by reference to the following factors: [129].

- 1 The extent of the environmental risk (including the gravity of the consequences if the risk is realised).
- 2 The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment).
- 3 The degree of uncertainty.
- 4 The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty. This is the vital part of the test: [133]. Answer will depend on “the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach”: [139]. Factors to consider in assessment of 4th factor are: [133]:
 - There will be good baseline information about the receiving environment.
 - The conditions provide for effective monitoring of adverse effects using appropriate indicators.
 - Thresholds are set to trigger remedial action before the effects become overly damaging.
 - Effects that might arise can be remedied before they become irreversible.

Application in SOS

- 1 The extent of the environmental risk (including the gravity of the consequences if the risk is realised).

SOS application: gravity of risk if realised (ecological disaster) was grave. The extent of the risk is difficult to assess because of the uncertainties as to the baseline information and the lack of modelling for maximum feed levels. However, on current information, the majority of the experts considered that a change in trophic level of the Sounds was unlikely: [130].

- 2 The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment).

SOS application: importance of marine farming is outlined at Policy 8 NZCPS. The Board was also satisfied that these particular projects were individually and collectively of economic benefit at the local, regional and to a lesser extent, the national level: [131].

- 3 The degree of uncertainty.

SOS application: the uncertainty, particularly as to baseline and increased feed levels, was high. The modelling that had been done could be seen as having reduced the uncertainty somewhat, subject to the limits of modelling. As the Board noted, however, quoting Mr Knight, models “can never perfectly simulate what effects will transpire under real world conditions”, or, quoting another witness, “all models are wrong, but some models are useful”: [132].

- 4 The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty. This is the vital part of the test: [133]. Answer will depend on “the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach”: [139]. Factors to consider in assessment of 4th factor are: [133]:

- There will be good baseline information about the receiving environment.

SOS application: was not present in this case but condition of adaptive management approach that no structures or stocking of farms would occur if Council did not approve the baseline information report requirements. Also consistent with RPS to use as a tool to get additional information generally: [135].

- The conditions provide for effective monitoring of adverse effects using appropriate indicators.

SOS application: water quality standards agreed. Monitoring was independent and subject to Council review: [136].

- Thresholds are set to trigger remedial action before the effects become overly damaging.

SOS application: remedial action included in feed quantum reductions up to fish removal if no change and until quality levels return: [137].

- Effects that might arise can be remedied before they become irreversible.

SOS application: no BOI findings but implicit from acceptable that conditions apply with a precautionary approach: [138].