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Professor Peter Skelton
The Chairperson
Marlborough Salmon Farm Relocation Advisory Panel
c/- Louise Walker
Email: salmonfarmhearing@gmail.com

Dear Professor Skelton,

Marlborough Salmon Farm Relocation Advisory Panel

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1. My advice has been sought on a series of questions and I will set out those questions together with my answers shortly.

2. However, it does occur to me that a number of the issues that have been raised relate one way or another to differing views as to the function of the Advisory Panel and its placement within the process trail contemplated by the Resource Management Act 1991 (RMA). So hopefully in order to render my answers to the questions a little more comprehensible I make some preliminary observations.

Preliminary Observations

3. The starting point must be RMA ss.360A and 360B and what they do and do not require. From a birds eye it is not a complex regime:

   3.1. s.360B(2) sets out a list of mandatory things the Minister of Aquaculture ("the Minister") must have done before he/she delivers the recommendation that triggers the making of the regulations;

   3.2. s.360B(3) sets some mandatory process requirements for the Minister.

4. Nowhere in the statutory provisions is there mention of the establishment or function of an advisory panel. It might be an obvious point, but it is therefore important to remember that what has been set up by the Minister in the commissioning processes of the Advisory Panel is a mechanism to meet and it would appear, exceed, the mandatory and therefore minimum requirements of s.360B(3). The terms of reference for the Advisory Panel dated 21 February 2017 refer. It could be described as a hybrid mechanism, meeting the mandatory requirements, but providing some additional opportunities for submission and hearing participation or input, and sitting somewhere between those statutory minima and the characteristics of a plan change. That is not a criticism – far from it because it is very much in the spirit of the public law participation principles of the RMA – merely an observation.

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5. Finally by way of preliminary observation, in my view it is important to note that there is nothing in s.360B that fixes the timing of the various steps or requirements **within** (2) and/or (3) by way of compelling a particular sequence – other than the obvious point that the report and recommendation would be the end point of any s.360B(3) process. In other words, there is no sequence fixed in stone for the path to reach a recommendation.

6. I turn now to the particular questions.

7. **Is the proposed use of ss.360A and 360B to relocate salmon farms in the Marlborough Sounds an improper or unlawful use of s.360A because:**

   7.1. **It is a concurrent plan/coastal permit application dressed up as a plan making exercise?**

   7.2. **It is not appropriate for the Ministry for Primary Industries to undertake the role and cost of a private plan change/consent process?**

   7.3. **It is inefficient for the Ministry for Primary Industries to amend a plan mid-review as it undermines a strategic and integrated approach to aquaculture management?**

8. *(These issues have been raised by the Environmental Defence Society in submission number 592 para 17.)*

9. As to the first limb of the question, while I could accept that it would be possible in an extreme case for the High Court to set aside a regulation that was manifestly promulgated for an improper purpose (see *Harness Racing New Zealand v Kotzikas* [205] NZAR 268((A) at [62]) I do not consider this situation comes anywhere near that. In that regard The Environmental Defence Society submission is predicated on the proposition that the provisions of a planning instrument can never be site specific, and that is plainly not the case: see s.68(5)(d) which provides that a rule can be specific or general in its application. It is therefore very difficult to see how these regulations, directed to specific environment effects at sites of six potential salmon farms, could possibly be unlawful or ultra vires.

10. As to the second limb of the question I must confess I am struggling to understand the criticism of the role of the Ministry for Primary Industries in this exercise. There is nothing in the statutory provisions that would prohibit that ministry from overseeing or administering the current process which is manifestly not a private plan change/consent process.

11. There might just be a little more to the third limb of the question, although in the end I do not consider it really affects the current process. As I understand it, the criticism is that since a plan review is underway it is "inefficient" for the Ministry for Primary Industries to 'trump' that by regulation.

12. The reason I say there might be slightly more in this point is that s.360A(2)(a) refers to "the **operative** plan" (emphasis added). So it might be argued that the review process should be unaffected. But in practical terms that goes nowhere

because the effect of regulation is to override the relevant parts of the operative plan. By virtue of that regulation the overriding is effected without review. However, once regulations are made there is nothing preventing a regional council carrying out a review (in the s.79 sense) as explicitly anticipated in s.360A(2)(c). Any questions of efficiency and appropriateness are not legal issues.

13. **Is the non-provision of a s.32 report at this stage of the process unlawful?**

14. (*This issue has been raised by the Environmental Defence Society in submission number 592 at paras 18-19.)*

15. Presumably the suggestion that a s.32 report should have been provided by now is based on s.32(5) which requires that the s.32 report must be given particular regard to, and made publicly available:

> *(a) as soon as practicable after the proposal is made (in the case of a standard or a regulation); or*
> *(b) at the same time as the proposal is publicly notified (emphasis added).*

16. I understand that the Environmental Defence Society focuses solely on (b) and argues that because this was not done, it is such a major process flaw that the proposal should be withdrawn and renotified.

17. However, this ignores the fact that this is a regulation and s.32(5)(b) does not apply. Instead s.32(5)(a) applies which is an alternative within subsection (5). On that analysis there is a statutory sequence that has been followed. The language of s.32(5)(a) and s.360B(2)(d) (requiring the s.32 report to be prepared and given particular regard "when deciding whether to recommend the making of the regulations") would point to a requirement that sits at the end of the process.

18. But in any event, as I outlined in the Preliminary Observations above, I am of the view that s.360B does not fix a finite sequence and if s.32(5)(b) is inapplicable there is no reason why the s.32 report needs to be available now.

19. Thus I conclude that the fact that a s.32 report has not been provided at this stage does not impugn the process that is underway or render it unlawful.

20. **Is the use of s.360A to provide for salmon farms in currently prohibited locations beyond the power of the provision?**

21. *(This issue has been raised by Royal Forest and Bird Protection Society of New Zealand Inc in submission number 0587 para 4(a).)*

22. I can see nothing in s.360A that restricts the ambit of the regulation making power provided the s.360B requirements are met. There is certainly nothing in s.360A that states any special restriction or limitation regarding locations where aquaculture (or any other use) is currently prohibited.

23. The last part of para 4(a) of the submission refers to the inappropriateness of using the regulation making power when there is a plan review underway. This is already addressed in paras 11-12 above.

24. **s.360A(1) allows regulations to be made amending provisions in regional coastal plans that relate to the management of aquaculture activities in the coastal marine area. Does this mean that this power cannot be used to provide for occupation of the coastal marine area?**

25. *(This issue has been raised by Royal Forest and Bird Protection Society of New Zealand Inc in submission number 0587 para 6 and by Tony Black in submission number 0124)*

26. The submission asserts that because s.360A(1) only mandates regulations that make amendments to a coastal plan "that relate to the management of aquaculture activities in the coast marine area" the regulation making power does not extend to making changes that provide for occupation. The submission asserts that the RMA draws a distinction in that regard between occupation of the coastal marine area for aquaculture and management of aquaculture where occupation is provided for.

27. Mr Black's submission develops this point further. He notes that s.360A(1) refers to "the management of **aquaculture activities** in the coastal marine area" (emphasis added) and that "aquaculture activity is defined in s.2 as ".....any activity described in s.12....". He then argues that s.12 only addresses the nuts and bolts of running a marine farm and does not provide a basis for zoning change by regulation.

28. To be fair, he then confronts the major problem with that analysis in that s.12(2) specifically refers to permission or consent to occupy. He deals with this in the following way:

> *"However a zoning change flowing from the regulation will not provide that authorisation. It will merely create a zone."*

29. I am not sure I understand how this addresses the point – namely, that s.12(1) and (2) provide for both occupation and the activities that can be carried out within that occupation. Since both those aspects fall within the term "aquaculture activities" I do not follow how there could be any impediment to regulation under s.360A(1). Whatever the Maori Commercial Aquaculture Claims Settlement Act 2004 provides by way of drawing any distinctions between occupation and aquaculture activities, that has no bearing on the interplay in the RMA between s.360A and s.12 because the latter countenances both.

30. I do not agree that the reference in s.360A(1) to " the management of aquaculture activities in the coastal marine area" means the regulation making power cannot extend to provisions that permit occupation.

31. Mr Black makes two further ancillary points but both seem readily answerable to me:

    31.1. First, he points to s.360A(2)(b) which provides that the amending regulations must not be inconsistent with other parts of the RMA, for example sub part 1 of Part 7A. He then refers to an inconsistency with the

treatment of the CMZ1 zone in the Marlborough Sounds Resource Management Plan. But that is an inconsistency with the plan not the RMA, and is the whole point of the need for amendment by regulation in the first place.

31.2. Secondly, he points to the net balancing aspect of the proposed regulations in prohibiting marine farming on sites where consents have been surrendered in exchange for a permission in one of the newly created zones. He says a power to regulate is not usually construed to permit the prohibition of the very activity that is to be regulated. Again, I do not understand why that should be so. s.360A(1) creates a power to regulate to amend provisions in a regional coastal plan "that relate to the management of aquaculture activities". The prohibition of aquaculture activities in particular areas must surely relate to their management.

32. **s.360B(2)(c) sets out various requirements that the Minister must be satisfied of before he/she recommends to the Governor General the making of regulations. Is the fact that he has not yet done so wrong in law?**

33. *(This issue has been raised by Friends of Nelson Haven and Tasman Bay in submission number 0598 paras 3-4)*

34. I agree that s.360B(2)(c) sets out the various requirements of which the Minister must be satisfied before he/she makes the recommendation. Once again the issue that is being raised relates to the sequence – ie whether the fact that the Minister has not so satisfied himself/herself at this point renders the current process unlawful.

35. Once again this is answered by the point made earlier regarding sequencing. In short, there is no reason why the Minister's satisfaction of the s.360B(2)(c) matters needs to have been achieved at this point in time.

36. **Is the regulation making power in 360A narrowed or circumscribed by reason of the fact that the values likely to be affected are predominately those within the shared responsibility of the council and the Minister of Conservation, or by reason of the requirement to continue to give effect to the NZCPS and in particular policy 8?**

37. *(This issue has been raised in the submission of the Friends of Nelson Haven and Tasman Bay in submission number 0598 paras 14-17.)*

38. s.360A(1) is permissive in terms of the regulation making power and the only restraining filter is that the regulations must "relate to the management of aquaculture activities in the coastal marine area". The fact that particular values that might be likely to be affected could be said to be otherwise of greater interest to either the Minister of Conservation or the council is irrelevant. Those parties are not mentioned nor is there any mention of any factor in ss.360A or 360B that would create such a restraint.

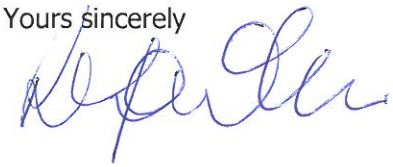
39. It is true that by reason of s.360B(2)(c)(iii)(B) before the Minister makes the recommendation he/she must be first satisfied the regional coastal plan to be

amended by the proposed regulations will continue to give effect to the NZCPS. In that sense there is force in the point that the NZCPS does operate as a filter or a restraint. (I am not sure that to suggest it 'narrows' the regulation making power is an apt description.)

40. However, whether the filtering effect of the NZCPS causes any particular difficulty or issues here with these proposed regulations is not a matter of law but a matter of assessment on which the Advisory Panel can choose to make a recommendation under its terms of reference.

41. I trust that this addresses the issues you have raised but if there is any aspect which you think I should reconsider or augment or further explain, I would be very happy to further assist if I can.

Yours sincerely



Richard Fowler QC