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2 June 2017

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 three further issues, namely:

   1.1. Whether the s.360A proposed intervention by the Minister does not accord with the government's strategy for aquaculture and is therefore ultra vires by reason of s.360B(2)(c)(i)?

   1.2. Whether the proposed regulations are inconsistent with the RMA Part 7A which does not allow for an allocation method that is specific to one operator and therefore the proposed regulations are ultra vires?

   1.3. Whether paragraph 38 of my previous advice requires any revision in the light of the necessity to consult with the Minister of Conservation and the regional council (amongst others) pursuant to s.360B(2)(b)?

2. I will address each of those issues below.

**Whether the s.360A proposed intervention by the Minister does not accord with the government's strategy for aquaculture and is therefore ultra vires by reason of s.360B(2)(c)(i)?**

3. *(This issue has been raised by Royal Forest and Bird Protection Society of New Zealand Inc in submission no. 0587 at paras 9-12)*

4. S.360B(2) relevantly provides:

> *"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;"*

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5. Before turning to the specifics of the government policy for aquaculture, I note that the threshold for satisfaction in the above provision is expressed with a relatively broad brush. The requirement is "*necessary or desirable*" and "*in accordance*" with the relevant policy.

6. Turning to the policies at issue, these are articulated at para 12 of the submission of Royal Forest and Bird Protection Society of New Zealand Inc. In my view it is significant that these too are expressed in relatively broad terms, namely;

> "G*overnment should only intervene where we add value and where industry and others cannot act alone*" and
>
> "*Government should work with regional councils to ensure planning to identify opportunities for aquaculture growth, including through identifying new growing areas in appropriate places and provisions to enable better use of existing space*"

7. If the necessity or desirability need to fit within (ie be in "*accordance with*") those two policies, I do not see how any ultra vires issue arises. In terms of each of those policies in relation to the points raised by that submitter:

   7.1. The mere fact that regional planning is already underway in Marlborough does not and cannot negate government intervention. If it did it would effectively remove the ability for government to regulate in any region where regional planning was already underway and such a policy itself would be an unlawful attempt to override the regulation making power. I would suggest the preferable construction is a more prosaic and purposive interpretation of the policy, such that any analysis should be directed to considering what value government intervention adds, and whether the effect of the regulations is difficult to achieve if left to any one individual party acting alone.

   7.2. I see no reason why the exercise of the regulation making power negates the policy of working with regional councils to ensure planning to identify opportunities for aquaculture growth, etc. The fact that government has proposed regulations does not negate or end this policy.

8. For these reasons, I do not see how either of these policies are disenabling factors vis-à-vis the making of these regulations. Further, I do not consider the fact that the government's aquaculture strategy does not identify s.360A as an element of the strategy as of any significance or relevance.

9. **Whether the proposed regulations are inconsistent with the RMA Part 7A which does not allow for an allocation method that is specific to one operator and therefore the proposed regulations are ultra vires?**

10. *(This issue has been raised by Environmental Defence Society in submission no. 0592 (legal submissions) paras 12-23)*

11. s.360A(2) relevantly provides that an amendment by regulation of provisions in a regional coastal plan relating to management of aquaculture activities in the coastal marine area:

> *"..... must not be inconsistent with, and is subject to, the other provisions of this Act (for example, sub part 1 of Part 7A"*

12. The Environmental Defence Society's submission makes the point that Part 7A does not allow for an allocation method that is specific to one occupier or operator.

13. I agree that the provisions of Part 7A do not provide for an allocation method specific to one occupier or operator. It refers to "the public tender of authorisations or any other method of authorising allocations" (refer s.165G) and interestingly s.165I(i) provides:

> *"If a regional coastal plan includes a rule that provides for public tendering or another method of allocating authorisations, the regional council must by public notice and in accordance with the rule, offer authorisations for coastal permits for the occupation of space in the common marine and coastal area."*

and there are other provisions that refer to use of a public tender (see for example s.165L.) But whilst I would agree that Part 7A plainly contemplates the use of a non-exclusive allocation method, such as by public tender, I would stop short of concluding that a regulation, which by reason of its specificity to say, a particular site, and therefore effectively associated with a particular occupier or operator, is necessarily "inconsistent with" Part 7A. Part 7A certainly addresses allocation methods for regional coastal plans, including the management of competition for the occupation of space (refer s.165F). But in neither Part 7 nor in Part 7A does the RMA provide that public tender is to be the **only** method of allocation.

14. There is another factor in this: the proposed regulations. The question assumes that the proposed regulations provide for an allocation method that is specific to one operator (or occupier). I disagree that they do that. On my review of the proposed regulations (ie directed amendments to the regional coastal plan) I could find no wording that locks their application onto any specific operator (or occupier). It is perfectly true that the regulations are quite specifically directed to particular sites as in my previous advice I pointed out that they may do, but it is an extraneous fact that those sites happen to currently have one operator (or owner). The regulations themselves do not provide for an allocation method specific to one operator (or occupier).

15. For these reasons I do not consider any ultra vires issue arises in terms of this question.

16. **Whether paragraph 38 of my previous advice requires any revision in the light of the necessity to consult with the Minister of Conservation and the regional council (amongst others) pursuant to s.360B(2)(b)?**

17. (*The Advisory Panel has raised this directly in an email dated 27 May 2017.)*

18. Paragraph 38 of my advice dated 18 May 2017 was an attempt to answer the question of whether the s.360A regulation making power was narrowed or circumscribed by values shared with the Minister of Conservation or the regional council. But on reflection my answer in that paragraph is expressed too broadly, particularly in the last two sentences which currently read:

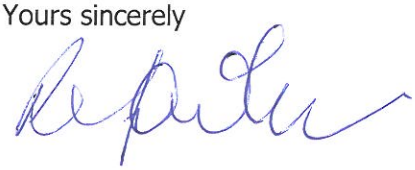
> *"The fact that particular values that might be likely to be affected could be said to be otherwise of greater interest to either the Minister of Conservation or the council is irrelevant. Those parties are not mentioned nor is there any mention of any factor in s.360A or s.360B that would create such a restraint."*

19. While those statements might be said to still be true as a comment on whether those sections create a restraint via shared values with those parties, they could well create the wrong impression that the Minister of Conservation or the regional council could have **no influence** on the making of the regulations. As you correctly point out, s.360B(2)(b) requires consultation with those two parties and others. On reflection I would therefore replace those two sentences with the following:

> *"Whilst I would answer this question by concluding that the regulation making power is not narrowed or circumscribed by the fact the values likely to be affected are within the shared responsibility of those other parties, I would acknowledge that s.360B(2)(b) contains a requirement of mandatory consultation with those parties and for that reason any views they may have that are relevant to the proposed regulations will need to be ascertained and taken into account. However that requirement does not of itself narrow the regulation making power."*

20. I trust that this addresses the issues you have raised but as previously, I would be very happy to reconsider or augment what I have said here if you think that could be of further assistance.

Yours sincerely



**Richard Fowler QC**