BEFORE THE ADVISORY PANEL
AT BLENHEIM

PROPOSAL FOR RELOCATION OF SALMON FARMS IN THE MARLBOROUGH SOUNDS

LEGAL SUBMISSIONS BY ENVIRONMENTAL DEFENCE SOCIETY INC

5 May 2017

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MAY IT PLEASE THE PANEL:

INTRODUCTION

1 Marine farming in the Marlborough Sounds is not without controversy. Comparatively recent proposals by NZ King Salmon (in 2013) resulted in the now leading authority on the Resource Management Act 1991 (**RMA**), the ***EDS v King Salmon***[1] decision. The Supreme Court (in its majority decision) confirmed the importance of environmental bottom lines that are not to be overridden by an overall balanced judgment. S6 RMA and the New Zealand Coastal Policy Statement (**NZCPS**) are, in some instances, directive. Policies 13 and 15 NZCPS must be given effect to via plan change processes for aquaculture in the Marlborough Sounds.

2 S360A RMA states that putative regulations "*must not be inconsistent with, and is [are] subject to, the other provisions of this Act*". The "*subject to*" wording is familiar in RMA jurisprudence. Other statutory provisions are paramount[2]. This reflects the subordinate nature of regulations; the Executive cannot usurp Parliament's legislative directives. The "*subject to*" requirement in s360A must include the duty in s67(3)(b) RMA to give effect to the NZCPS and the Marlborough Sounds Regional Policy Statement (**RPS**). The Minister must be "*satisfied*" of this under s360B(2)(c)(iii).

3 Accordingly, a key issue for the Panel is whether, and to what extent, proposed regulations are "*inconsistent with*" other provisions of the RMA or fail to reflect the "*subject to*" hierarchy. This goes to jurisdiction as well as merits.

4 The proposed regulations are opposed for reasons of legal invalidity and on the merits. The proposal fails on its merits because:

[1] ***Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*** [2014] NZSC 38;
[2] ***EDSv Mangonui County Council*** [1989] 3NZLR 257 (CA) at 260, ***McGuire v Hastings District Council*** [2000] UKPC 43; [2002] 2 NZLR 577 at [22] and ***Auckland Volcanic Cones Society Inc v Transit New Zealand*** [2003] NZRMA316 (HC) at [59]-[60]. See also the discussion in ***R J Davidson Family Trust v Marlborough District Council*** [2017] NZHC 52 at [61]- [88].

a. Five of the six sites would adversely affect the outstanding landscape and natural character values of Waitata Reach and Pelorus Sound and New Zealand King Shag habitat and persistence. This does not give effect to the NZCPS[3];

b. Benefits are overstated;

c. Regulations are the wrong remedy, given the current review process for the operative Marlborough Sounds Resource Management Plan (**Operative Plan**). The regulations process does not involve the same level of rigour and independent testing enabled by plan change (such as the 2-tier process for appeals, including rights of cross examination);

d. s32 analysis has not to date been undertaken, creating substantive as well as natural justice issues. Query whether intended regulations are the most effective and appropriate in terms of process, site, and wording? We don't know because there is no direct evidence to address this;

e. MPI's answer seems to rely on ex post facto process "*inconsistent with"* s32(5) RMA: s32 RMA analysis will be undertaken following close of the hearing and (somehow) be "*informed by*[4]" Panel recommendations. Transcript references suggest MPI sees this as a dynamic process; meaning that a s32 report may be provided to the Minister that raises (or collates) new information not available through this hearing process[5]. This creates obvious natural justice concerns especially as the Minister must have "*particular regard*" to the s32 report (s360B RMA);

f. EDS's evidence confirms 'merits' limbs of s360A cannot be met. Cr Dormer's questioning has confirmed there is no significant 'offset' or credit arising from surrender of existing consented sites. Mr Brown and Mr Counsell will speak to the merits of the proposal in respect of landscape and natural character and economic

[3] Stephen Brown acknowledges that Tio Point is acceptable in terms of landscape and natural character effects because it has minimal incremental impact on the already degraded landscape of Tory Channel. Tory Channel has already passed its tipping point.
[4] Transcript 10 pril 2017 pg 39.
[5] Transcript 10 April 2017 pg 39 from line 24.

analysis. EDS adopts the submissions and evidence of Forest & Bird and its expert Dr Fisher on indigenous biodiversity and the New Zealand King Shag.

5 As to validity, EDS's original submission addressed most of the validity concerns. Intended regulations fall outside powers conferred by s360A RMA. S360A RMA does not allow for site-specific intervention and allocation of space in the CMA. It is intended to relate to management of generic aquaculture activities or methods of allocation. This is confirmed by the requirement for consistency with other RMA provisions. Query how this can apply to 'spot zoning' of individual sites, championed by applicants obtaining competitive advantage through Ministerial process.

6 These submissions adopt without repeating EDS's original submission.

SUMMARY OF POSITION

7 EDS does not oppose aquaculture in principle or seek that it be prohibited everywhere in the Marlborough Sounds. But it should only be provided for in appropriate locations as part of a strategic regional approach.

8 The proposal is consistent with neither of these things. It does not give effect to the NZCPS. It is *ad hoc* and unstrategic. It undermines Marlborough Council's plan review process. It exceeds powers and is unlawful.

9 The following issues are addressed:

- Regulation power
- Strategic planning
- Effects
- Conclusion & relief

REGULATION POWER

10 The proposal relies on the regulation making power in s360A RMA. This is the first time the power been used. The power exists and so must be capable of being exercised within stated

limits. S360B sets out conditions that must be satisfied before s360A regulations can be made. The Minister's discretion is fettered. Plan provisions "*amended*[6]" by regulation:

a. Must "*relate to the management of aquaculture activities in the coastal marine area*"[7];

b. Must "*not be inconsistent with*", and are "*subject to*", the other provisions of the RMA. Subpart 1 of Part 7A RMA is specifically identified[8] but regulations are subordinate to all parts of the RMA. This includes Part 2 RMA;

c. Must, in context of the amended coastal plan, give effect to the NZCPS[9];

d. Must, in context of the amended coastal plan, give effect to the RPS[10]; and

e. Must undertake a s32 RMA evaluation[11]. Timing is not stated but implied is that any s32 process will be consistent with sequencing specified in the RMA and adhere to natural justice requirements.

11 The Proposal does not meet these requirements.

Must not be inconsistent with, and is subject to, the other provisions of the RMA

12 The Proposal consists of two distinct elements:

a. Allocation and occupation of areas in the CMA.

b. Operation of NZ King Salmon Ltd salmon farms in those areas.

13 EDS accepts that both allocation and occupation of space and farm operation are captured by s360A[12]. Both must be consistent with and are subject to the other provisions of the RMA as per s360A(2)(b). S360A(2)(b) includes, without limitation, subpart 1, Part 7A RMA.

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[6] Includes amendment, omission, addition: s360A(3).
[7] S360A.
[8] s360A(1)(b).
[9] s360B(2)(c)(iii)(B).
[10] s360B(2)(c)(iii)(C).
[11] S360B(2)(d).
[12] Amendments must "*relate to management of aquaculture activities in the coastal marine area*". Aquaculture activities are defined in s2 RMA to capture (in summary) in activity described in s12 RMA for the purpose of breeding fish for harvest if it involves occupation of the CMA. Section 12(1) captures activities relating to structures and operation. Section 12(2) captures activities relation to occupation of the CMA.

14 Neither MPI or NZ King Salmon appear to have addressed s360A(2)(b) or subpart 1, Part 7A in legal submission. In fact, counsel for MPI has disregarded process issues raised by public consultation[13]. Subpart 1 sets out provisions relevant to "*managing occupation in common marine and coastal area*"[14]. Given occupation of the CMA is a key element of the proposal it is surprising these provisions have not been addressed by its proponents.

15 Sections 165F to 165H are relevant and:

a. Provide for regional coastal plans or proposed plans to include provisions to "*address the effects of occupation*" and to "*manage competition for the occupation of space*" in the CMA[15], including through specified measures;

b. Provide for regional coastal plans or proposed plans to include a rule "*in relation to a method of allocating space*" in the CMA, including by public tender or "*any other method*"[16]; and

c. Have regard to specific matters before including such a rule[17].

16 In context of regional plans a "*method*" sets out what is to be done to implement the policies for the region[18]. Such methods may include rules[19][20] or be non-regulatory. The word "*method*" itself is not defined by the RMA.

17 The online Oxford Dictionary provides the following definition:

> *A particular procedure for accomplishing or approaching something, especially a systematic or established one.*

18 That definition is consistent with RMA jurisprudence[21]:

> *[31] Secondly, s 30(1)(ga) creates a mandatory obligation on the part of regional councils to make objectives, policies and methods for the maintenance of indigenous biological diversity. Such methods may include rules. The Council contends that. Federated Farmers*

[13] Based on review of Transcript 10 April 2017.
[14] Title of subpart 1, Part 7A RMA.
[15] s165F.
[16] s165G.
[17] s165H.
[18] S67(2)
[19] In context meaning a regulatory planning rule as provided for under s68 RMA.
[20] S67(2).
[21] ***Property Rights in NZ Inc v Manawatu-Wanganui Regional Council*** [2012] NZHC 1272.

> *concedes that. PRINZ did likewise until the implications of its concession became plain. At the end of the day, s 68(1) confirms that*. ***More generally, a "method" is what it says: a way of doing something***. *In its RMA context it may include rules. Sections 31(2), 32(4)(a), 67(2)(b) and 75(2)(b), for instance, all make that abundantly clear.* ***Methods are not confined to rules (there may be nonregulatory methods too), but necessarily they may include rules***.
>
> [**emphasis** added]

19 The method specifically identified in the relevant RMA provisions is public tender. These provisions reinforce that the purpose of the regulation is to address (manage) generic aquaculture activities and not the merits of individual applications.

20 The Proposal does not provide a "*method*", "*systematic procedure*" for, or "*a way of*" allocating occupation in the CMA. It allocates occupation specifically to NZ King Salmon. It does not "*manage aquaculture activities*". It provides for salmon farms for NZ King Salmon. That is inconsistent with s165F to H and outside scope of the s360A power. Private applicant opportunity to apply for a concurrent application is specifically provided for in subpart 4, Part 7A RMA. The s360A power was not intended to be used as a vehicle for the Minister to step into the shoes of a private applicant (including meeting its costs) and circumvent subpart 4. It is not the role of a consent authority (via the coastal plan) to advantage a particular applicant or consent holder over others.

21 Sector level scale for generic intervention under s360A would however be consistent with the Government's Aquaculture Strategy and be lawful e.g. introduction of sector requirement to adhere to Benthic Guidelines.

22 Equity implications of MPI substituting itself for NZ King Salmon have come to the fore during the hearing process:

a. Change in zoning at Crail Bay site will remove current mussel farm coastal permit holder opportunity to apply for change in aquaculture activity[22]. In response to this issue Mr Gillard for NZ King Salmon suggested the permit holder could apply for consent now and then continue to operate despite any new prohibition[23]. This undermines any suggestion that fallowing of relocated farms has environmental benefits.

[22] See Transcript 12 April 2017 pg 38-40 for discussion with Mr Clarke.
[23] Transcript 19 April 2017 pg 2.

b. Expectations of analogous 'special treatment' have already been raised[24]. "Like for like" treatment is a function of fairness: ***Murphy v Rodney District Council***[25].

23 Requirement for processes ensuring fair and equitable opportunity for consent to occupy public space in the CMA for private use is evident from the RMA's aquaculture provisions[26]. It is inconsistent with those provisions to use the s360A regulation power to create an unfair, anti-competitive outcome.

Give effect to the NZCPS and RPS

24 Provisions recommended under s360A must "*give effect to*" or "*implement*"[27] the NZCPS and RPS. What is required to give effect to a provision in a higher order document will depend on how specific and directive the language is[28]. Some provisions are worded to give the decision-maker flexibility in implementation. Others will be so directive that they are (in the ordinary sense of the word) rules. The differences in wording reflect deliberate choices by the drafters. Those differences matter[29]. "*The requirement to give effect to the NZCPS was intended to constrain decision-makers*"[30].

25 The relevant RPS is arguably outdated. It predates the NZCPS and is currently subject to review. Context demands the Panel's and Minister's focus to be the NZCPS.

26 NZCPS provisions most relevant to the proposal are:

- Policy 2 Tangata whenua
- Policy 3 Precautionary Approach
- Policy 7 Strategic planning
- Policy 8 Aquaculture

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[24] Transcript 19 April 2017 by Mr Cully for Sanford.
[25] ***Murphy v Rodney District Council*** [2004] 3 NZLR 421(HC) at [39].
[26] For example: The provisions managing competition are expressly provided for: s165F(1). Multiple options for ensuring equity between applications are provided eg. common application & hearing dates: s165F(1)(a); public tender: s165F & s165H.
[27] ***EDS v King Salmon*** at [77].
[28] ***EDS v King Salmon*** at [78].
[29] ***EDS v King Salmon*** at [90].
[30] ***EDS v King Salmon*** at [90].

- Policy 11 Indigenous biological diversity
- Policy 13 Preservation of natural character
- Policy 15 Natural features and natural landscapes

27 Policy 7 is discussed below. Forest & Bird's submissions addressing Policies 3 and 11 are adopted.

28 The relationship between Policies 8, 13 and 15 NZCPS in context of salmon farming in the Marlborough Sounds was the focus of the Supreme Court's analysis in ***EDS v NZ King Salmon***. The majority rejected the overall broad judgement approach to plan-making which would allow aquaculture development in areas "*appropriate*" in terms of Policy 8 (i.e. in a technical sense) but with adverse environmental effects[31]. "*Appropriateness"* of an activity is to be determined against what is sought to be protected. The majority concluded:

> [131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, **we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other**. **Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas** of the coastal region – areas of outstanding natural character, of outstanding natural features and of outstanding natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). **Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict**.
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> [132] **Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line**. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development…
> (**emphasis** added)

29 Those findings apply to your recommendations and the Minister's decision. Counsel for NZ King Salmon's apparent inference that this Panel can apply an overall judgement approach is plainly at odds with the view of the Supreme Court[32].

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[31] ***EDS v King Salmon*** at [100].

[32] Transcript 18 April 2017, pg9 lines 36-44: The critical issue in this case, in my submission, is consistency with the national policy statement and the provision is slightly curious in that it says: "After amendment the regional plan must continue to give effect to the NZCPS." Which tends to suggest that giving effect to the NZCPS is a question of degree rather than absolute fact, but in my submission nothing turns on that."
And again at pg 16, line 41ff.

30 Both elements of the proposal must give effect to the NZCPS: occupation/rezoning and plan provisions.

31 As to rezoning, pursuant to Policy 7 the regional plan must identify and include provisions to protect areas at risk of adverse cumulative effects. Deletion of prohibited status for aquaculture in outstanding landscape and natural character areas also comprising King Shag habitat when cumulative effects on those values are in issue does not give effect to the NZCPS. Specifics are discussed below under heading Strategic Planning.

32 As to provisions, the proposed "*limited matters of discretion*"[33] do not include landscape or natural character effects[34]. This excludes consideration of those effects when assessing applications for resource consent[35]. Mr Brown's evidence is that five of the six salmon farms proposed will have adverse effects on outstanding landscape and natural character values[36]. This means the proposed provisions provide for grant of consent for an activity contrary to Policies 13 and 15 NZCPS. That does not give effect to those provisions.

Alternative sites

33 Evidence of adverse effects on outstanding landscape and natural character values means consideration of alternative sites and methods is a "*necessary*" [37] part of this Panel's decision-making. In context consideration of alternative processes is also required. Necessity is "*determined by the nature and circumstances of the particular site-specific plan change application"*[38]. Circumstances resulting in necessity identified by the Supreme Court in findings on the second error of law in ***EDS v King Salmon*** are present here:

a. MPI and NZ King Salmon claim the proposed sites have features making them "*uniquely, or even especially, suitable"*[39] for salmon farming. The decision-maker, in this case both the Panel in respect of recommendations and the Minister in respect of regulations, is

[33] Appendix A Consultation Document.
[34] Or indigenous biodiversity effects .Although not specifically discussed here the same arguments apply as addressed by Forest & Bird.
[35] s104C RMA.
[36] Given the Hudson Report identifies that the salmon farms proposed will result in a reduction in landscape and natural character values (e.g. from high to moderate) it is difficult to see how it does not reach the same conclusion.
[37] ***EDS v King Salmon*** at [170].
[38] Ibid.
[39] Ibid.

"obliged to test that claim"[40], which should involve consideration of alternative sites. This is particularly so where "*the activity will have significant adverse effects on the natural attributes of the proposed site*"[41].

b. The proposed provisions and rezoned sites will sit within the regional coastal plan which "*must reflect a regional perspective*",[42] and involve actual or potential effects to matters of national importance identified by Part 2 RMA and the planning hierarchy (NZCPS).

c. On behalf of NZ King Salmon MPI is "*seeking exclusive use of a public resource for private gain*"[43].

34 MPI's justification for preferring s360A as opposed to standard planning processes including contribution to Marlborough Council's plan review is not clear. Alternative sites and methods were considered by MPI in a separate process prior to notification of the proposal. That information should be provided to and considered by the Panel and form part of the consultation information (with scope for input by submitters) in order for appropriateness of proposed sites to be thoroughly assessed.

Section 32

35 Plan provisions are proposed but no s32 analysis provided. This is "*inconsistent* with" s32(5) RMA and so constitutes improper application of s360A process. S32(5) requires "*the person who must have particular regard to the evaluation report*", in this case the Minister, to "*make the report available for public inspection*":

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

36 This has not been done and it is highly irregular. Instead, the consultation document states that a s32 analysis will be undertaken subsequent to consultation. This breaches natural justice because the Minister will have access to analysis not seen or reviewed by submitters (or, potentially, the Panel). S360A is a plan-making power. The focus of the proposal should be on the proposed provisions and sites identified for rezoning. Without s32 analysis of

[40] Ibid.
[41] Ibid.
[42] ***EDS v King Salmon*** at [171].
[43] ***EDS v King Salmon*** at [173].

those provisions and sites it is not possible for submitters to understand why MPI considers them to be lawful, efficient, and effective. It is poor planning and reinforces the non-strategic nature of MPI's approach. Proper process would see release of a s32 analysis addressing the provisions and sites consistent with s32(5) RMA, and s32AA follow up analysis (with provision for public or submitter input).

37 Failure to provide a s32 analysis is unorthodox given MPI's detailed presentation at hearing on the 'reasoning' behind the proposed provisions[44].

38 EDS submits the appropriate process would be for the Panel to request MPI to publicly notify a s32 report, including identification and discussion of alternative sites, prior to making any recommendations and provide opportunity for public response.

STRATEGIC PLANNING

39 Counsel for NZ King Salmon's submission that the Proposal is the "*essence of strategic planning*"[45] is overstated and wrong. Policy 7 NZCPS identifies strategic planning as a process whereby regional policy statements and plans identify:

- Areas where particular activities are inappropriate or inappropriate without regulatory oversight; and
- Where there is significant risk from adverse cumulative effects and include management provisions.

40 *Ad hoc* 'spot zoning' to enable salmon farming for a nominated private entity while that precise process is being undertaken by the Marlborough Council is the antithesis of strategic planning. Questions by the Panel have brought particulars into focus:

- Double up of plan-making process is inevitable. Any regulations will result in changes to the Operative Plan. For those changes to then be incorporated into the Proposed Plan they will need to go through the Schedule 1 process. The new bespoke plan-making process introduced by the 2017 RMA Amendments may

[44] Transcript 10 April 2017 pg 46.
[45] Transcript 18 April 2017, pg 25 lines 12-13.

provide an alternative route. But even that would require a 2nd plan-making process requiring public consultation.

- Inefficiency and fallacy of logic in seeking changes to an outdated plan subject to review, and the rushed nature of the Proposal, were highlighted by Counsel for NZ King Salmon's suggestion that consent could be granted under the Operative Plan immediately prior to its replacement and then the proposal's provisions could be allowed to fall away[46]. New Zealand is not a banana republic in which such extraordinary contortions of due process should be contemplated or allowed.

EFFECTS

41 Details of environmental effects are left to the experts and were addressed in EDS's original submission. Two overarching matters are addressed: whether the proposal is for new farms or relocation of existing farms; and cumulative effects.

42 Cr Dormer questioned whether the proposal is in fact for six new farms given the proximity of the existing farms expiring dates and uncertainty of renewal/continuation of those operations[47]. This questions the extent to which perceived positive effects of discontinuation of the existing farms should be considered.

43 Counsel for NZ King Salmon agreed the proposed farms should stand on their "*own two feet*"[48] with the exception of cumulative effects i.e. a cumulative effects analysis should consider only six farms not 12[49].

44 EDS agrees description as a "*relocation*" is misleading and incorrect. The effects of the proposed farms are entirely different. Adverse effects are not fungible.

45 Counsel for NZ King Salmon's "*proviso*" that cumulative effects for removal of the existing farms should be considered is ironic given failure of MPI's experts[50] to consider cumulative

[46] Transcript 18 April 2017 pg 36 lines 1-10.
[47] For example Transcript 18 April 2017 pg 41 from line 9.
[48] Transcript at 14 April 2017.
[49] Transcript 14 April 2017 pg 38 line 1.
[50] Funded and supported by NZ King Salmon.

effects. Assessment of cumulative effects is not optional. Difficulty of assessment is irrelevant[51].

46 Whether the Sounds are at a tipping point in terms of cumulative effects on landscape and King Shag is in issue. Recommendations providing for rezoning of currently prohibited areas without thorough consideration of cumulative effects on the Sounds, (and in context particularly the Waitata Reach), and independent of the plan review undertaking that specific exercise, risks pushing the Sounds over the edge.

CONCLUSION & RELIEF

47 The Proposal is misconceived. It is an unprecedented and proposes an unlawful use of Executive powers to override accepted and strategic planning processes to the advantage of one market player: NZ King Salmon. Marlborough Council is in the process of developing a regional strategy for aquaculture and that process should be respected. The public interest in proper planning and good environmental outcomes should trump those private interests.

48 EDS respectfully submits the Panel should:

- Recommend that no amendments to the Operative Plan be made and that allocation of space for and operation of aquaculture, including salmon farming, be left to the regional plan review; or
- Recommend rezoning of the five Waitata Reach sites be declined on the merits due to landscape and natural character and indigenous biodiversity effects[52].

[51] ***EDS v Manawatu-Wanganui Regional Council*** insert reference.
[52] Noting that other effects not specifically addressed by EDS may also support recommendation to decline rezoning of all six sites on the merits.