Comments on MPI legal advice as referred to at paragraph 27 (footnote 58) of memorandum dated 1 May 2017

Julian Ironside

From: Julian Ironside
Sent: Friday, 21 October 2016 2:16 PM
To: 'Sara Ritchie'
Cc: 'John Galvin (John)'; Rob Schuckard (rschckrd@xtra.co.nz)
Subject: RE: Cumulative threshold advice - Waitata Reach

Dear Sara

I have responded to your caucusing notes in my email of 13 October. You have asked to now respond to your memorandum of advice dated 11 October, which I received only after my 13 October email was sent. Your advice addresses a further question set out at paragraph 5 of your memorandum. In responding to your conclusions on that question, I will briefly respond to other aspects of your memorandum.

(i) Paragraphs 8(a), 10 and 13

My opinion is that the board of inquiry did adopt a 'threshold' of two new farms for the Waitata Reach. Whereas my opinion is reflected in the findings of the Environment Court in the *KPF Investments* case, your and Mr Davies' opinions are not. The reality is that the question of a threshold really only becomes a live issue for a subsequent decision-maker. In this case the subsequent decision-maker was the Environment Court in *KPF* and the court interpreted the board's decision as I have. Further, for reasons set out at paragraph 19 of my opinion dated 21 September, the board's decision in relation to the White Horse Rock site did apply that threshold. At paragraph [1355], the board stated that in looking at the Reach as a whole, the introduction of five new farms would have a high impact on natural character and landscape values. NZKS had of course applied for five new farms in the Waitata Reach. I have commented on the order of decision-making, which meant that the White Horse Rock resource consent decision was made after the plan change (and resource consent) decisions had been made for all of the other Waitata Reach sites. The board's decision was that only two new farms in the Waitata Reach could be supported. My opinion is also consistent with the board's decision in relation to the White Horse Rock site.

I also consider that the last sentence of your paragraph 10 is unduly speculative and does not adequately reflect the fact that the board was aware that in not granting plan changes for the Kaitira and Tapipi sites, those sites and the remainder of the Waitata Reach would remain in CMZ 1. The Supreme Court in the EDS appeal recorded (at paragraph [71]) that the CMZ 1 designated areas are 'areas where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural residential or amenity values.' The board's decision meant a continued CMZ 1 zoning for the Waitata Reach, apart from the Waitata and Richmond sites. Under that zoning there is no scope for locating 'proposed farms over the span of the Reach, thus providing a very different density of farms [which] may have resulted in a different conclusion', as your paragraph 10 seeks to suggest. No person can apply for such a consent and it requires a plan change (as NZKS were proposing to the board) in order for that to occur. The board was clearly aware of the implications of its decision on that aspect.

This last matter also appears to have been overlooked by you in making the observations that you do at paragraph 13 of your memorandum. The CMZ 1 zoning clearly arises under the Marlborough Sounds Plan.

(ii) Paragraph 15

It follows that I do not agree with the statement that you make at paragraph 15 that a decision-maker looking at locating further salmon farms in the Waitata Reach 'does not need to take into account' the decisions of the board and the Environment Court. Those decisions were made under relevant planning instruments for the same environment. There would need to be some identifiable and material change in those instruments or that environment for your statement to have such a broad sweep. I think it is inconceivable that a subsequent decision-maker would not pay particular heed to both decisions. That is what the Environment Court did in *KPF* in relation to the decision of the board. Nor am I sure that your

statement is consistent with the second part of paragraph 15, or indeed paragraph 14 of your memorandum.

(iii) Paragraph 24

I do not think it is correct to say that there are not divergent views. While I acknowledge that each proposal must be considered on its merits, I consider that you and Mr Davies downplay the significance of the decisions that were made by both the board and the Environment Court in relation to locating salmon farms in the Waitata Reach. Those decisions were made under planning instruments that the Supreme Court has stated give effect to Part 2 of the Act. Neither decision lends support to the proposition that locating further salmon farms in the Waitata Reach amounts to appropriate development. My answers on questions 1 and 3 are consistent with those decisions.

Because of time constraints, I have confined my response to the principal matters in contention. I have already commented on the fact that, given the relevant history, there must be some doubt whether a plan change through subordinate legislation (which allows public comment but not effective public participation) will meet appropriate expectations, bearing in mind the environment and values affected.

I have copied Mr Schuckard into this email.

Best regards
Julian

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