

**BEFORE THE ADVISORY PANEL
AT BLENHEIM**

**PROPOSAL FOR RELOCATION OF SALMON FARMS IN THE MARLBOROUGH
SOUNDS**

LEGAL SUBMISSIONS BY ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

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MAY IT PLEASE THE PANEL:

INTRODUCTION

- 1 Findings of the Supreme Court and subsequent Environment and High Court decisions confirm that environmental bottom lines established through directives provisions in the New Zealand Coastal Policy Statement (**NZCPS**) cannot be overridden by an overall broad judgement. Those bottom lines require avoidance of adverse effects on outstanding natural landscapes, areas of outstanding natural character and on identified indigenous biodiversity¹, and must be given effect to by plan changes in the Marlborough Sounds, including changes actioned by Ministerial regulation.
- 2 Evidence before the Panel confirms MPI's proposal disregards those bottom lines and so fails on the merits. In particular, the proposed salmon farms will adversely affect the threatened, indigenous New Zealand King Shag and so do not give effect to the NZCPS.
- 3 It also fails in terms of jurisdiction. The Minister's power under s306A-C RMA is not unfettered. Plan amendments "*must not be inconsistent with*" and "*are subject to*" the other provisions of the RMA, and "*must give effect to*" the NZCPS and Marlborough Sounds Regional Policy Statement (**RPS**). *Ad hoc* 'spot zoning' for salmon farms in areas with outstanding landscape, natural character, and biodiversity values as a restricted discretionary activity with matters of discretion excluding consideration of those factors, does not comply with those requirements. Prohibition on notification as part of the proposed provisions raises issues of natural justice.
- 4 The proposal undermines Marlborough Council's ability to ensure integrated management and strategic planning of the Sounds. Provision of sites for salmon farming should form part of wider regional assessment of appropriate and inappropriate areas for aquaculture as per Policy 7 NZCPS. The Policy 7 exercise is currently underway. Impropriety of process is emphasised by inevitable 2 step planning process to incorporate changes made by regulations to the outdated, operative plan under s360A into the new.

¹ Policies 11, 13, 15 NZCPS.

- 5 These submissions adopt without repeating Forest & Bird’s original submission. Details of environmental effects are left predominately to the experts². EDS’s submissions and evidence on landscape and natural character impacts are adopted.
- 6 The following issues are addressed:
- a. Scope of regulation power;
 - b. The law on the application of the regulation making power;
 - c. The application of the regulation making power including the following key issues:
 - i. Strategic planning (Policy 7 NZCPS)
 - ii. King Shag (Policy 11 NZCPS, s30 RMA);
 - d. Proposed provisions;
 - e. Overstatement of effects (new farms v relocation); and
 - f. Conclusion & relief.

SCOPE OF REGULATION POWER

- 7 The prerequisites to using s360A are that the Minister must be satisfied³:
- a. The proposed regulations are necessary or desirable for the management of aquaculture activities in accordance with the Government’s policy for aquaculture in the CMA;
 - b. The matters to be addressed by the proposed regulations are of regional or national significance; and
 - c. The regional coastal plan to be amended by the proposed regulations will continue to give effect to:

² And were addressed in Forest & Bird’s original submission.

³ S360B RMA.

- i. Any national policy statement.
- ii. An NZCPS.
- iii. Any regional policy statement.

8 In addition, any amendments made must “*not be inconsistent with*” and “*are subject to*” the other provisions of the RMA⁴.

Government’s Aquaculture Strategy

9 The Government’s Aquaculture Strategy includes the following principle:⁵

“Government should only intervene where we add value and where industry and others cannot act alone”.

10 Intervention by s360A in this case is plainly at odds with that principle. Common sense interpretation of the requirement to “*add value*” is to make a positive contribution. Government intervention providing for site-specific rezoning while a plan review providing for *inter alia* a regional approach to aquaculture undermines integrated and strategic management. It results in inequitable access to and opportunity for resource use. Intervention resulting in those outcomes does not “*add value*”.

11 Further, the word “*cannot*” is directive. On plain reading it requires that industry (and others) ability to act alone is not possible. That is not the case here. 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 undertake the role (and cost) of a private applicant and circumvent subpart 4. It is available to NZ King Salmon use the subpart 4 process or to participate in the current plan review.

12 The Government’s Aquaculture Strategy also states it will:⁶

⁴ S360A RMA.

⁵ *Government’s Aquaculture Strategy and Five-year Action Plan to Support Aquaculture*, 2012, pg 2 ‘Governments Role’.

⁶ *Government’s Aquaculture Strategy and Five-year Action Plan to Support Aquaculture*, 2012, pg 4 ‘Objective Quality Planning and Permitting: Action’.

“Work with regional councils to ensure planning to identify opportunities for aquaculture growth, including through identifying new growing areas in appropriate places and provision to enable better use of existing space”.

And:⁷

“Build understanding of the environmental effects of aquaculture to support consistent decision making and community comfort.”

- 13 Use of Ministerial regulation making power to amend an outdated operative plan currently under review to provide for *ad hoc* site-specific zoning is not *“working with”* Marlborough District Council. It does not *“support consistent decision-making”*. Issues regarding integration of amendments to the operative plan into the proposed plan were addressed by Mr Hawes for Marlborough Council. A 2 step process is unavoidable. This is inefficient and will result in additional Council cost. A strategy of working with Marlborough District Council would see Government contributing to and supporting the plan review process.
- 14 In implementing its strategy Government must adhere to the law, including giving effect to environmental bottom lines in the NZCPS. The Government’s Strategy confirms that aquaculture must occur *“within environmental limits”*⁸. The NZCPS provides direction on *“appropriate”* and *“inappropriate”* locations for activities in the coastal environment. A proposal providing for activities with adverse environmental effects, where those effects are required to be avoided, cannot be proper interpretation and implementation of this principle.

THE LAW ON THE APPLICATION OF THE REGULATION MAKING POWER

- 15 Pursuant to s360A(1)(b) any regulations *“must not be inconsistent with”* and are *“subject to”* the rest of the RMA. Section 30(1)(ga) requires Marlborough Council to establish and implement *“objectives, policies, and methods for maintaining indigenous biological diversity”*. That function is to be provided for in regional plans, including the regional coastal plan.⁹ Maintenance of indigenous biodiversity is a mandatory¹⁰. It is an obligation not a

⁷ ⁷ *Government’s Aquaculture Strategy and Five-year Action Plan to Support Aquaculture*, 2012, pg 2 ‘Governments Role’.

⁸ ⁸ *Government’s Aquaculture Strategy and Five-year Action Plan to Support Aquaculture*, 2012, pg 2 ‘Governments Commitment’.

⁹ Section 63(1), s64, s66(1)(a) RMA.

choice. To maintain something is to preserve a state or condition¹¹. The 2011 draft Biodiversity NPS defined maintenance as no net loss.

16 Pursuant to s360B(2)(c)(iii) the regional coastal plan, as amended by any regulations, must give effect to the NZCPS. Failure to do so is an error of law¹². It must also give effect to the RPS. However 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.

17 In *EDS v King Salmon*¹³ the Supreme Court considered the NZCPS's place in the context of the RMA. The Court held that the NZCPS is:¹⁴

... an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics.

18 It is a document which “reflects particular choices”¹⁵. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances “does not fit readily into the hierarchical scheme of the RMA”¹⁶. The fact that the RMA and the NZCPS allow local authorities scope for choice in implementation does not mean that the scope is infinite. The requirement to give effect to the NZCPS is intended to constrain decision-makers¹⁷. What is required to give effect a provision in a higher order document will depend on how specific and directive the language is¹⁸. 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. Those differences matter¹⁹.

19 The Supreme Court concluded the requirement to avoid adverse effects and significant adverse effects in Policies 13 and 15 NZCPS “provide something in the nature of a bottom

¹⁰ *Property Rights in NZ Limited v Manawatu-Wanganui Regional Council* [2012] NZHC 1274 at [31].

¹¹ Oxford Dictionary.

¹² *Environmental Defence Society Incorporated v New Zealand King Salmon Ltd* [2014] NZSC 38; *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191 at [8] and [169] – [177].

¹³ [2014] NZSC 38.

¹⁴ *EDS v King Salmon* at [152].

¹⁵ *EDS v King Salmon* at [90].

¹⁶ *EDS v King Salmon* at [90].

¹⁷ *EDS v King Salmon* at [90].

¹⁸ *EDS v King Salmon* at [78].

¹⁹ *EDS v King Salmon* at [90].

line"²⁰. The same applies to Policy 11 NZCPS which is framed in the same directive terms. It requires that in order to protect indigenous biological diversity in the coastal environment, adverse effects on particular taxa, ecosystem types and high biodiversity value areas must be avoided, and significant adverse effects on other areas with biodiversity value must be avoided.

- 20 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 Court²¹. The Environment Court decision referred to related to provision for regionally significant infrastructure and is under appeal. The Supreme Court's findings should be the focus of this Panel's analysis of lawfulness of the proposed provisions.

APPLYING THE REGULATION MAKING POWER

- 21 There are two critical issues when it comes to applying the regulation making power. These relate to:
- a. Strategic Planning; and
 - b. King Shags.

Strategic Planning

- 22 The proposal does not implement Policy 7 NZCPS which provides a process for strategic planning in the coastal environment:
- (1) **In preparing** regional policy statements, and **plans**:
 - (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and:
 - (b) **identify areas of the coastal environment where particular activities and forms of subdivision, use and development**:
 - (i) **are inappropriate**; and

²⁰ *EDS v King Salmon* at [131].

²¹ 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.

(ii) may be **inappropriate without the consideration of effects** through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process; **and provide protection** from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

(2) **Identify** in regional policy statements, and plans, coastal processes, **resources or values that are under threat or at significant risk from adverse cumulative effects**. **Include provisions in plans to manage these effects**. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.
[emphasis added].

- 23 The proposal is aptly described as *ad hoc*. Its focus is narrow and ignores the wider context in terms of both effects and strategic provision for aquaculture. Significant gaps in the supporting technical information and obvious inefficiencies resulting from attempting to amend an outdated plan subject to review indicate the proposal has been ‘rushed through’.
- 24 *Ad hoc* rezoning to enable NZ King Salmon farms in areas where aquaculture is prohibited under the operative plan while the Policy 7 process is being undertaken is the opposite of strategic planning.
- 25 Reference to identification of “*inappropriate*” locations in Policy 7 reinforces requirement to “*avoid adverse effects*” in Policies 11, 13 and 15 NZCPS. Interpretation of “*inappropriate*” is contextual and depends on what is sought to be protected. The NZCPS’s provisions must be read together. Policies 11, 13 and 15 require protection of landscapes, natural character, and indigenous biodiversity and identify specific adverse effects that must be avoided. Reading Policies 7, 11, 13 and 15 together it is clearly inappropriate to provide for salmon farms in areas where those adverse effects will result, or to provide from them without the ability to assess and control those effects where they may result.
- 26 It appears NZ King Salmon has confused strategic planning for company profitability purposes with strategic planning for regional sustainable management purposes.

King Shag

- 27 The Waitata Reach relocation sites fall within the foraging of the King Shag breeding colony at Duffers Reef²² and the satellite colony at Tawhitinui. The King Shag is endemic to New Zealand²³. It is a Nationally Endangered species in the Department of Conservation New Zealand Threat Classification System²⁴. It is identified as “*vulnerable*” by the International Union for Conservation of Nature and Natural Resources Red List²⁵. It is naturally rare and its population small²⁶. Policy 11(a)(i), (ii) and (iv) apply. Adverse effects of activities must be avoided on the King Shag itself and on its habitat. Policy 11 is absolute. There is no exception for “*appropriate*” activities. The proposal suggests the proposed sites will not have an adverse effect on the King Shag or its habitat because the proposed pen areas are either entirely or partially at depths towards the end range or outside of the foraging depth preferred by 74% of King Shags²⁷. The technical inadequacies of that assessment have been addressed by Dr Fisher.
- 28 No assessment of the cumulative effect of exclusion of foraging area by all proposed relocation sites, other existing aquaculture activities²⁸, and other marine structures, has been undertaken. Given the extent of the depositional footprints of the proposed farms the cumulative excluded area is likely to be extensive. In the absence of such an assessment it is reasonable to conclude the proposal will adversely affect the King Shag and its habitat. Dr Fisher & Mr Schuckard hold that view. Counsel for NZ King Salmon’s contention that “*the evidence all points to the fact it [the proposal] won’t*”²⁹ adversely affect King Shag is an overstatement and incorrect.
- 29 This raises questions as to the validity of:
- The proposed relocation sites; and
 - The proposed provisions.

²² The King Shag is known to breed at less than 10 locations. The 4 main colonies at Duffers Reef, Trio Islands, Sentinel Rock and White Rocks: *RJ Davidson Family Trust v Marlborough District Council* 2016 NZEnvC at [102].

²³ *Davidson EC* at [88].

²⁴ *Davidson EC* at [97].

²⁵ *Davidson EC* at [100].

²⁶ Duffers Reef may represent around 30-40% of the world population with approximately 240 birds: *Davidson EC* at [103].

²⁷ 74% of King Shags prefer to forage in water 20-40m deep: Relocation Proposal AEE pg 78.

²⁸ Salmon farms and mussel farms.

²⁹ Transcript 18 April 2017 pg 23 line 32.

- 30 First, Forest & Bird say the relocation sites are not appropriate. Adverse effects on King Shag must be avoided under Policy 11 NZCPS. In discussing effects on King Shag habitat and population the Environment Court in *RJ Davidson Family Trust*³⁰ noted the degradation caused by existing aquaculture. While acknowledging that the impact of a marine farm (in that context a mussel farm) by itself will generally have less than minor impacts on habitat, the cumulative effect of activities which have led to a degraded and reduced habitat are adverse and more than minor and *“the Trust’s application can only add to those adverse effects on habitat”*. The proposed farms must similarly contribute to those adverse effects.
- 31 Given the King Shags’ vulnerability a precautionary approach to planning and decision-making under Policy 3 NZCPS is appropriate. Policy 3 NZCPS requires decision-makers to:
- “adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse”*.
- 32 The coastal environment is specifically recognised to include *“habitat of indigenous species”*³¹. That the effects of aquaculture, including salmon farming, are uncertain, unknown, or little understood, appears to be agreed between experts. This uncertainty has been extensively examined by the Environment Court³². The King Shag population is below 1000. Any decline in population could set the species on the path of extinction. *“Waiting for a reduction in population is no longer regarded as an appropriate trigger for protecting taxon”*³³. A precautionary approach is appropriate.
- 33 Application of a precautionary approach to cumulative effects of multiple activities was recently confirmed by the Environment Court in the freshwater context due to the complexity of that environment³⁴. The marine environment is equally as complex. Effects of multiple activities are uncertain and difficult to assess with significant potential adverse effects. The same approach should apply. Zoning for salmon farming at the proposed sites should not be provided for.

³⁰ At section 4.4.

³¹ Policy 1 (2)(e) NZCPS.

³² *Davidson EC*.

³³ *Davidson EC* at [285].

³⁴ *EDS v Manawatu-Wangai Regional Council* [2017] NZEnvC 37 at [56] and [67]

34 Second, the proposed “*limited matters of discretion*”³⁵ do not include effects on indigenous biodiversity³⁶. This excludes consideration of those effects when assessing applications for resource consent³⁷. Dr Fisher’s evidence is that the specific salmon farms proposed for the Waitata Reach risk adverse effects on the threatened King Shag and its habitat³⁸. This means the proposed provisions provide for grant of consent for an activity contrary to Policy 11 NZCPS and s30(1)(ga) RMA. That does not give effect to Policy 11 and is inconsistent with s30(1)(ga).

OVERSTATEMENT OF POSITIVE EFFECTS - NEW FARMS V RELOCATION

35 An issue that arose during the course of the hearing relates to the overstatement of positive benefits. The claimed benefit is that the existing farms will be discontinued, so the adverse effects of them will cease.

36 The issue arose during questioning by Cr Dormer, who exposed the overstatement of positive effects by MPI and NZ King Salmon. Proximity of the existing farms expiry dates paired with uncertainty of renewal/continuation of those operations due to issues leading to the current proposal, questions the extent to which perceived positive effects of discontinuation of the existing farms should be considered. It cannot be assumed that existing farms will be provided with consents past their expiry date. If applications are made to continue the existing marine farms the environment against which the applications will be assessed does not include activities authorised by the consents for the existing marine farms³⁹.

37 Counsel for NZ King Salmon agreed the proposed farms should stand on their “*own two feet*”⁴⁰ with the exception of cumulative effects i.e. a cumulative effects analysis should consider only six farms not 12⁴¹.

38 To the extent they are relevant, contended positive cumulative effects are overstated because:

³⁵ Appendix A Consultation Document.

³⁶ Or landscape or natural character is addressed by EDS.

³⁷ s104C RMA.

³⁸ Habitat capturing foraging area and Duffers Reef colony consistent with IUCN description of habitat.

³⁹ Port Gore Marine Farms v Marlborough District Council [2012] NZEnvC 165 at [75]

⁴⁰ Transcript 14 April 2017 pg 37 line 29.

⁴¹ Transcript 14 April 2017 pg 38 line 1.

- a. As identified by Cr Dormer the existing farms may not continue irrespective of the outcome of the proposal;
- b. The effects of the proposed farms are entirely different and cannot be 'traded off'; and
- c. Rejuvenation of area beneath discontinued farms takes time. Dr Fisher's evidence disagrees with MPI's and NZ King Salmon's contention that King Shag predominate prey is the 1st species to return⁴².

PROPOSED PROVISIONS

Section 32

- 39 No s32 report has been provided. The public and the Panel are required to assess detailed proposed provisions on their face without any indication as to why MPI considers them to be lawful, efficient, and effective. The proposal's consultation process is restricted. The public has a single opportunity to assess the provisions and provide comment. No merits appeal opportunity applies. These factors emphasise importance of provision of all information at the outset of the process. Failure to do so compromises fair and just process.
- 40 Public participation is further curtailed through proposed non-notification of subsequent consent applications. This is opposed. The matters being addressed are of regional and national significance as s6 matters of national importance: protection of outstanding natural landscapes, preservation of coastal natural character, and protection of the King Shag and its habitat. It is not appropriate to exclude public input of specific farm operations. Those are not the focus of this consultation process.

Effectively a controlled activity

- 41 Effects on landscape, natural character, water quality and indigenous biodiversity have not been included in the matters of discretion. This prohibits assessment by decision-makers. As a result the proposed provisions provide for activities the evidence shows would have adverse effects on those values. This is contrary to Policies 11, 13 and 15 NZCPS.

⁴² See Dr Paul Fisher supplementary statement for caucusing filed 2 May 2017.

42 In effect, the matters over which discretion is reserved are so narrow to effectively constitute a controlled activity status. This is not appropriate. Ability to decline consent must be available.

CONCLUSION & RELIEF

43 The proposal is opposed. It falls outside the scope of the s360A power. It undermines Marlborough District Council's ability to undertake a comprehensive and strategic review and update of its approach to aquaculture. It provides for activities with effects contrary to Policies 11, 13 and 15 NZCPS.

44 Forest and Bird respectfully submits the Panel should recommend that no amendments be made to the Operative Plan and that allocation of space for and operation of aquaculture, including salmon farming, be left to the regional plan review.