

Mr Rob Schuckard
PO Box 98
Rai Valley 7145

21 September 2016

Dear Rob

RE: NEW ZEALAND KING SALMON – BOARD OF INQUIRY

Instructions

1. You have asked me to address a number of questions that have arisen during the course of deliberations by the Marlborough Salmon Working Group (**MSWG**), of which you are a member in your capacity as a member of the Sounds Advisory Group. The questions concern a consideration of cumulative effects arising out of the February 2013 report of the New Zealand King Salmon board of inquiry¹ into requests for changes to the Marlborough Sounds Resource Management Plan (**Marlborough Sounds Plan**), and for resource consents to establish nine new salmon farms in the Marlborough Sounds. The particular matters concern the board's findings in relation to the Waitata Reach. The board's decision allowed the establishment of two new salmon farms in Waitata Reach (Waitata and Richmond), but also determined that three other proposed salmon farms (Kaitira, Tapipi and White Horse Rock) should not be established. The questions are directed at whether this creates a threshold for future decision-making in relation to any new proposal to establish a salmon farm in the Waitata Reach.
2. Although the deliberations of the MSWG are confidential, you have obtained authority to instruct me in relation to this particular aspect of the MSWG's deliberations. In addition to the six questions that have been raised, you have also provided me with a copy of the terms of reference for the MSWG, which has been convened to consider options to implement the *Best Management Practice guidelines for salmon farms in the Marlborough Sounds*.² This is a technical paper commissioned by Marlborough District Council and New Zealand King Salmon (**NZKS**), the primary purpose of which is to provide consistent and clear guidelines for the management and benthic monitoring of existing salmon farms in the Marlborough Sounds. I make the initial observation that it is not immediately obvious how either the terms of reference, or the technical paper extend to a consideration of locating additional salmon farms within the Waitata Reach, if that is what is being considered by the MSWG.

¹ Board of Inquiry, New Zealand King Salmon requests for plan changes and applications for resource consents, 22 February 2013

² MPI Technical Paper No. 2015/01, January 2015

Relevant background

3. In order to properly address the six questions, it is necessary to (briefly) canvass the relevant background to the establishment of the board of inquiry. In 2007, NZKS identified to the Marlborough District Council that in order for its business to grow and meet an increasing demand for its salmon products, it needed to develop additional salmon farming sites. Through a review of possible options, NZKS had identified that additional sites were likely to be required in areas zoned coastal marine zone 1 (**CMZ 1**) under the Marlborough Sounds Plan. This could only be achieved through a plan change, because marine farming is generally a prohibited activity in the CMZ 1. NZKS began working on various planning initiatives between 2008 and 2011.
4. With amendments to the RMA that came into force on 1 October 2011, NZKS was able to lodge with the Environmental Protection Agency (**EPA**) concurrent applications for a private plan change and for resource consents to establish and operate new salmon farms at the sites applied for. NZKS applied for changes to the Marlborough Sounds Plan to establish a new salmon farming zone (CMZ 3) at eight locations. The concurrent resource consent applications were for the establishment of new salmon farms at these eight sites, and also the White Horse Rock site in Waitata Reach, which was the only site applied for that was not in CMZ 1 (it was in CMZ 2).
5. The Minister of Conservation, on the recommendation of the EPA considered the NZKS applications to be a proposal of national significance and referred the applications to a board of inquiry to determine under section 147 of the RMA. The Minister's direction addressed the relevant statutory matters set out under section 142(3) of the RMA, including that *the proposal is likely to arouse widespread public interest or concern regarding its likely effect on the environment*. The proposal was publicly notified. The EPA received more than 1200 submissions on the proposal. The hearing by the board of inquiry took place over 37 days at Blenheim, Waikawa Marae and Portage. The board received over 10,400 pages of evidence from approximately 181 witnesses and submitters. The transcript of the hearing occupies 4174 pages, with 84 exhibits. There was significant input by expert witnesses on a wide-ranging number of contested topics, including:
 - (i) the economic benefits of the proposal;
 - (ii) effects on the benthos and water column arising from nutrient inputs;
 - (iii) effects on pelagic fish, marine mammals and birds;
 - (iv) effects on the natural character and landscape characteristics of the Sounds;
 - (v) biosecurity and disease risks;
 - (vi) Maori cultural issues;
 - (vii) the integrity of the Marlborough Sounds Plan.

6. The board's inquiry into these matters was thorough and there was significant input from the many and varied Sounds communities.
7. I now turn to address the specific questions you have raised.

Question 1

Did the board of inquiry establish in its findings for Waitata Reach a cumulative threshold for further salmon farming in Waitata Reach beyond their two consented allocations?

8. The natural character and landscape context for consideration of the NZKS proposal was that the proposed new farms were to be located in some of the least modified parts of the Marlborough Sounds. Those areas had been largely protected from the impacts of marine farming by their inclusion within the CMZ 1. The board summarised this contextual conundrum at paragraphs [574] to [576] as follows.

[574] Few parts of the Marlborough Sounds are wholly natural. Mussel farming, in particular, lines the margins of many inlets and bays - from Croiselles Harbour to East Bay, and parts of Tory Channel. Throughout most of the Sounds, areas of open pasture, pockets of residential settlement and - perhaps most obvious of all - production forestry, leave their mark on the local landscape, disturbing its natural gradients and patterns. Tory Channel and the upper reaches of Pelorus Sound go well beyond this, as both appear seriously degraded from a landscape and natural character standpoint, despite being key gateways to the Sounds as a whole.

[575] Hardly surprising therefore, that some of the least modified parts of the Sounds - such as Port Gore, the Waitata Reach, and Queen Charlotte Sound approaching Picton from Cook Strait - remain in a fine state of balance. The question is - to what extent these landscapes are able to withstand change and development, and at what scale?

[576] Most of the inlets and bays either side of Pelorus Sound, as well as in the vicinity of Port Gore, are already lined by a significant proportion of the 575 consented marine farms scattered throughout the Marlborough Sounds. Fortunately, few of these current operations extend beyond their more sheltered margins out into the Sounds' main channels.

9. As to the extent of the Waitata Reach, at paragraph [644] the board identified that:

[644].....The Waitata Reach incorporates the body of water that connects Tawhitinui Reach at Maud Island to the south, to the open waters of Cook Strait to the north. The Reach is approximately 12 km long and the width of the passage typically varies between 2km and 4km.

10. In a comprehensive assessment of the effects on natural character, landscape and visual amenity that would be generated by the five farms proposed for Waitata Reach

(Kaitira, Tapipi, Richmond, Waitata and White Horse Rock), the board made the following findings.

(a) Natural character

[698] *The cumulative effect of the five proposed farms, in conjunction with the other consented salmon farms (Port Ligar and Waihinu Bay) would, in our view, have a high impact on the natural character of this Reach of Pelorus Sound. We find that, individually, each new farm would have an effect on natural character. Given the prominent locations of the White Horse Rock/Waitata site, Kaitira and Tapipi, even if only one or two of these farms were consented, the effect on natural character would be high.*

[699] *We find that the proposed farms at highly visible locations of the Kaitira and Tapipi sites would impact on the intactness of the natural character of this side of the Reach. They would have a very high impact.*

[700] *Again we acknowledge that the benthic and water column communities that contribute to subsurface natural character would be physically impacted, with the greatest impact in the immediate environs of the farms.*

(b) Landscape

[703] *The effects on the Waitata Reach as a whole were variously assessed as moderate to very high with the proposed farms at Kaitira and Tapipi having effects at the more serious end of the scale. We agree.*

(c) Visual amenity

[712] *We agree with Mr Brown that the combination of five new farms located off a series of headlands that define Pelorus Sounds would be a 'decisive' cumulative effect. The four headlands in question are all prominent landmarks, or 'way points' that help define the entry to Pelorus Sound and passage through Waitata Reach. From a visual and aesthetic point of view, the two more prominent farms off Kaitira and Tapipi are the defining element of the decisive cumulative effect.*

(d) Overall findings on natural character, landscape and visual amenity for Waitata Reach

[713] *We accordingly find that:*

- (a) *Five farms would have a **decisive** cumulative effect and from a visual and aesthetic point of view the two most prominent farms of Kaitira and Tapipi are the defining element of the **decisive** cumulative effect; and*
- (b) *At a more local level, the five proposed farms would have adverse visual effects. The most severe effects would be created by Kaitira and Richmond.*

11. In its evaluation of the plan change, the board identified three areas of concern that applied specifically to the Waitata Reach.³ They were:
- (i) ecological integrity, particularly with respect to habitat for the King Shag
 - (ii) cultural concerns arising out of the identified waka routes on the northeast part of the Reach
 - (iii) natural character and landscape values.
12. Following a discussion of each of these areas of concern,⁴ the board assessed the impact of the proposed plan change on the Waitata Reach as follows.

[1252] After careful consideration of all the balancing factors, we conclude that the siting of four proposed farms in this reach would not be appropriate. The assimilative capacity of the receiving waters and potential cumulative effects on the foraging areas of the King Shag are uncertain. The cumulative effects of the Kaitira and Tapipi [sites] on the natural character, landscape and seascape qualities of the entrance to the Sounds would be high. Further, Tapipi lies in the path of a traditional waka route – a taonga to Ngati Koata. It would also be in the vicinity of recorded sites of significance to Maori.

[1253] To grant all the zones would not give effect to the statutory provisions in respect of natural character, landscape, Maori, or ecological matters. The overall cumulative effects would be high.

[1254] We accordingly grant the request with respect to Waitata and Richmond, but decline the request with respect to Kaitira and Tapipi.

13. Because the White Horse Rock site was not part of the plan change proposal, the overall effects of developing that site were considered after the requests for the plan changes and concurrent resource consents had been considered and decided. In its assessment of the White Horse Rock application⁵, the board declined to grant consent for the site. It summarised its findings at paragraph [1356] as follows:

[1356] We find that the adverse effects on recreational fishing, customary fishing, navigation, natural character, when considered cumulatively with the existing farms and the farms consented would be sufficiently high to tip the balance against granting the application.

Discussion on question 1

14. The NZKS proposal was to establish five new salmon farms in the Waitata Reach. Of the five farms sought, the board granted approval for two of those farms (Waitata and

³ At paragraph [1244]

⁴ At paragraphs [1245] to [1251]

⁵ At paragraphs [1343] to [1357]

Richmond). The remaining three were declined (Tapipi, Kaitira and White Horse Rock).

15. The effect of the board's decision is that it establishes a factual threshold, in the sense that the existing environment for the Waitata Reach must now take into account the two new salmon farms. The effects of any new proposal to establish a salmon farm in the Waitata Reach will need to be assessed against the effects generated by the Waitata and Richmond farms. Further, because there has been a comprehensive review of the effects of attempting to establish a number of salmon farms in the Waitata Reach, and only two were able to be approved, any proposal to establish a further salmon farm (or farms) in the Waitata Reach will need to address relevant aspects of those findings. An illustration of this can be seen in the decision of the Environment Court in the KPF appeal,⁶ which is referred to in more detail in addressing question 3. The Environment Court considered that the board had established a threshold of two new salmon farms for the Waitata Reach and that in arriving at this threshold, the board's findings on relevant overlapping effects were persuasive.
16. It is also arguable that the board's decision establishes something of an ecological threshold, limiting development of any further salmon farms in the Waitata Reach, at least until the two new farms (Waitata and Richmond) are fully established in accordance with the conditions of their resource consents.
17. Those farms are subject to an adaptive management regime to monitor ecological impacts at various levels of discharged feed. The intention through the adaptive management process is to determine whether the environmental quality standards specified in the conditions are able to be met, so as to allow a staged increase in the volumes of feed able to be discharged. The board also imposed a requirement for NZKS to implement a King Shag management plan, consideration of which is a factor in any decision to allow increased discharges of feed at the Waitata and Richmond farms.
18. There is the potential for any new farm establishing in the Waitata Reach to undermine and have a confounding effect on the integrity of the monitoring effort required for the Waitata and Richmond farms. To maintain the integrity of that monitoring effort, it first needs to be established that the Waitata and Richmond farms can operate to the maximum levels of discharged feed authorised under the conditions of consent for the two farms, before any new farm could be allowed to establish in the Waitata Reach.
19. Further, the board's decision in relation to the White Horse Rock site illustrates the fact that the board itself considered that a threshold of two new farms was the limit of further salmon farming development for the Waitata Reach. Because of the order of decision-making adopted by the board, the plan change sites (and their concurrent resource consents) were decided first. When the board came to consider the resource consent application for the White Horse Rock site, it needed to take into

⁶ KPF Investments v MDC (2914) 18 ELRNZ 367

account the fact that it had already granted plan changes and resource consents for the Waitata and Richmond sites. Having made those decisions, the board was not prepared to grant consent for a further salmon farm in the Waitata Reach, and the White Horse Rock site was declined. This included consideration of the natural character and landscape values of the Waitata Reach as a whole.⁷

20. For these reasons, my answer to question 1 is yes.

Question 2

Did the Board of Inquiry consider cumulative effects, including on the natural character of the Waitata Reach in combination with the adjacent bays, or were they identified as separate entities?

21. Paragraph [694] of the board's decision refers to cumulative effects of the five proposed farms *in addition to the existing one*. Paragraph [698] refers to the cumulative effect of the five proposed farms with the other consented farms at Waihinu Bay and Port Ligar. There is also reference to the establishment of marine farms in the more sheltered (and visually less obtrusive) confines of bays at paragraphs [576] and [583], and at paragraph [644] to the fact that there was agreement among the landscape experts that the location and general character of the Waitata Reach *needs to be appreciated in the context of the overall labyrinth of waterways known as Pelorus Sound*. There is then a discussion of this wider landscape context at paragraphs [644] to [651]. However, the board had already identified that the Waitata Reach comprises the body of water that connects Tawhitinui Reach (at Maud Island) to the south with Cook Strait to the north, and that was its focus when considering the effects of the individual farms on natural character, landscape and visual amenity values within the Waitata Reach.
22. My answer to question 2 is that the majority of the board's discussion of effects on natural character, landscape and visual amenity values is directed at the Waitata Reach, and not the adjacent bays. The adjacent bays were considered as part of the landscape context, as outlined at paragraphs [644] to [651], and referred to as contributing to the cumulative effects on the natural character values of the Waitata Reach at paragraphs [694] and [698].

Question 3

If the answer to question 1 is yes, then in the KPF decision did the Environment Court use a threshold established by the board of inquiry to make a ruling for salmon farms in the Waitata Reach?

23. The KPF proposal concerned an application to convert part of a 12 ha mussel farm at the mouth of Port Ligar (Danger Point) into a salmon farm. By a decision dated 21 May 2012 the Council granted consent, subject to conditions. The decision was appealed to the Environment Court, and before the appeal could be heard the board

⁷ See paragraphs [1355] and [1356]

of inquiry released its decision on the King Salmon proposal. It was argued for KPF that the effects of the Waitata and Richmond salmon farms should not be considered part of the existing environment. The Environment Court disagreed and stated at paragraph [58] that the cumulative effects of the KPF proposal needed to be considered and concluded at paragraph [61]:

[61] The effects of the proposal on the marine environment will be considered within the existing environment of the full Waitata Reach (extending from Maud Island to the entry to Cook Strait) and Port Ligar. That environment includes the two EPA consented salmon farms at Waitata and Richmond.

24. Accordingly, in its assessment of the existing environment, the Environment Court took into account the Waitata and Richmond farms. A complicating factor in the KPF appeal was whether the board of inquiry had taken into account the KPF consent as part of the existing environment. The Environment Court stated at paragraph [60]:

[60] Mr Hunt submitted that, in any event, the Board did take into account the KPF consent as part of the environment and that there were clear indications of this in the decision. We agree that the Board considered that the KPF consented farm was part of the environment when considering some of the ecological effects of the New Zealand King Salmon applications and in terms of natural character considerations. However, no further references were cited to us in relation to the effects on landscape or tangata whenua values. Nor have we found any consideration of the cumulative effects of the Danger Point salmon farm in the Board's overall 'Evaluation of [the] Plan Change'.

25. In relation to tangata whenua values, the Environment Court stated at paragraph [187]:

[187] The Board of Inquiry considered that four new salmon farms in the Waitata Reach would 'compromise' Maori values 'to some extent' and in particular with respect to water quality as a result of the excess food and effluent, by the like effect on customary food gathering areas, by the potential impact on kaitiakitanga, and in diminution of their relationship with their rohe moana. In this case we had little evidence of the use of the Danger Point coastline specifically, or the reef beyond it for customary food gathering. Mr Buchanan stated more generally that he had dived or snorkelled in the vicinity of reefs in 'Waitata Bay'. However, the other three adverse effects would be likely to occur. We find that the addition of a third salmon farm in or beside the Waitata Reach (in addition to NZKS's Richmond and Waitata farms), or a fourth if the existing Waihinu Bay farm is included, would be a serious adverse effect on the values of Ngati Koata.

26. And at paragraph [209]:

[209] Another aspect which concerns us in relation to s 6(e) of the RMA is the cumulative effect of this proposal in addition to the two existing and the two approved salmon farms in the Waitata Reach and adjoining bays. At some point

Ngati Koata's mana moana would be substantially eroded if salmon farms continue to be placed in this part of Pelorus Sound. The NZBOI considered only two new farms should be allowed in the plan, and we respectfully agree. We hold that the threshold would be exceeded if consent were to be granted to the KPF application.

27. The Court's decision was to allow the appeal with the result that the grant of consent by the Council was cancelled. The Court found that the decision of the board of inquiry to allow only two new farms (at Waitata and Richmond) created a threshold in relation to tangata whenua values, which would be exceeded if the KPF proposal was also approved. This was a decisive factor in the Court's decision to cancel the KPF consent.⁸
28. There were also findings that to allow the KPF proposal would lead to a significant (cumulative) adverse effect on the natural character of the Waitata Reach/Port Ligar entrance⁹, and significant (at the low end) adverse effects on the Waitata/Port Ligar landscapes beyond those of the existing mussel farm.¹⁰ These were also decisive factors in the Court's consideration of relevant matters under section 104, and its decision to cancel the KPF consent.
29. My answer to question 3 is yes, in relation to tangata whenua values. The assessment of adverse effects on the natural character values at the Waitata Reach/Port Ligar entrance was also influenced by the board's findings.¹¹ Although the Environment Court was not strictly bound by the decision of the board of inquiry, it found that the board's decision established a threshold for development of further salmon farms in the Waitata Reach, which the Environment Court found to be persuasive in relation to these values.

Question 4

If the answer to questions 1 and 3 is yes, what threshold number of salmon farms for Waitata Reach was identified in the decision and ruling?

30. For reasons already given, my answer to question 4 is the two farms at Waitata and Richmond.

Questions 5 and 6

If the answer to question 2 is no, which bays containing salmon farms in addition to Waitata Reach were included in the assessment of cumulative effects in the NZKS decision and the KPF decision?

What reasons were used to underpin any such thresholds?

⁸ See paragraph [216]

⁹ At paragraph [154]

¹⁰ At paragraph [159]

¹¹ See for example paragraph [155]

31. See the answer to question 2 in relation to the board of inquiry, and the answer to question 3 in relation to the KPF decision. In the KPF decision, the Environment Court referred to the proposed and existing salmon farms when addressing aspects of the cumulative impact on tangata whenua values (at paragraph [209]), and in its concluding remarks (at paragraph [216]).

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'J' and 'I' intertwined, followed by a horizontal line.

JC Ironside
Barrister