

In the matter of

the Resource Management Act 1991

An application by The New Zealand King Salmon Company Ltd to establish and operate two new salmon farms within a 1000 ha site located 5 km to the north of Cape Lambert, outer Marlborough Sounds

**Summary observations to accompany submissions and evidence by
Friends of Nelson Haven and Tasman Bay Inc., Kenepuru and Central
Sounds Residents Association Inc., Guardians of the Sounds Inc.,
Marlborough Environment Centre Inc, and the Marchant Family**

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Introduction

1. These initial observations accompany the submissions and evidence to be given on behalf of a coalition of public interest groups with a close interest in the welfare of the Marlborough Sounds, together with the Marchant Family, who are long-standing residents in Te Anamāhanga/Port Gore. These interested parties have participated in a number of proposals over the past decade by NZKS to expand its operations in the Marlborough Sounds. They bring to this hearing their combined knowledge, experience and observations on the environmental conditions associated with the Marlborough Sounds, its important attributes, and seek to draw attention to the fact that its natural and physical resources have finite limits.
2. The interested parties combine under the ethic of stewardship. They highlight the fact that the definition of sustainable management under the Act includes safeguarding the life-supporting capacity of ecosystems, and avoiding, remedying, or mitigating the adverse effects of activities on the environment. They make no apology for asserting, as they do, that protection of natural and physical resources is a core element of sustainable management.¹
3. The proposal is to establish two new large-scale salmon farms within an area of 1000 ha 5km to the north of Cape Lambert. The proposal is a continuation of a decade-long search for increased productivity by NZKS for its salmon farming operations in the Marlborough Sounds. The proposal is for the two farms to be stocked at densities enabling up to 10,000 tonnes of salmon feed to be discharged at each farm site annually. As Mr Schuckard observes, a comparison of harvest figures in 2011 and 2018 reveal that approximately 8000 tonnes were harvested in these two years from all existing NZKS salmon farms.² These harvest volumes are (in aggregate) lower than the potential harvest volumes from the Cape Lambert farms at maximum feed discharge levels.³ The maximum feed discharge levels sought are also equivalent to approximate feed discharge levels at all other NZKS sites for 2017 and 2018. That is the scale of *Blue Endeavour*.
4. The interested parties make the plea that the Commissioners will ensure that they have a clear understanding of how the maximum feed discharge levels will operate on an ongoing basis for these farms. There is a lack of correlation between the space applied for and the maximum feed levels that are sought, that is not well explained by the applicant. This in turn raises questions about co-ordination and management

¹ EDS v MDC [2014] NZSC 38 at [24]

² Schuckard at page 6

³ See the discussion at Schuckard pages 8-11.

between sites that Mr Johnson as the reporting officer alludes to.⁴ This may also have implications for the management of biosecurity risks that Hanneke Kroon will refer to.

NZCPS

5. The interested parties place particular reliance on NZCPS provisions. This is because of the status of the NZCPS as a planning document at the top of the hierarchy, but also because the Marlborough region is between first and second generation regional coastal plans.

Natural character and landscape (policies 13 and 15)

6. Figures 3 and 4 to the graphic supplement accompanying Mr Bentley's report show the current MEP natural character and landscape overlays. Use of the site by seabirds and marine mammals is referred to.⁵ At a broad level, there appears to be agreement that the site is characterised by at least high levels of natural character.⁶ An area of outstanding natural character currently extends into the south-western part of the site.⁷
7. Mr Bentley assesses the landscape/seascape values of the site as at least high, with high levels of visual amenity.⁸ The Commissioners will have benefited from their own site visit, but Mr Bentley describes views from the site as comprising the open expanse of the sea, islands, headlands and mountain ridges, within a broad seascape.⁹
8. As Mr Bentley identifies, the proposed farm structures will introduce geometric patterns and utilitarian built structures across approximately 50 ha of currently open water. Artificial lighting and the presence of working boats and barges will also impact on both the naturalness of the area, and its openness.¹⁰ In Mr Bentley's opinion development of the proposed Cape Lambert salmon farms will result in significant adverse effects on the natural character of this part of the coastal environment and will not protect the natural features, landscapes and seascapes of this part of the outer Sounds. The preservation and protection required by policies 13 and 15 of the NZCPS will not be achieved by the grant of consent for the proposed salmon farms.¹¹

⁴ Johnson section 42A report at 23(a)

⁵ Bentley at 7.27

⁶ Bentley at 7.38

⁷ Bentley at 7.36

⁸ Bentley at 7.47 and 7.54

⁹ Bentley at 7.55

¹⁰ Bentley at 8.13 and 8.14. See also Cliff Marchant, in particular at 5-8.

¹¹ Bentley at 9.7; see also Johnson at 86. Also Johnson at 147, where he refers to policies 13.21.4 and 13.21.6 introduced through Variation 1 to the proposed MEP

Discharges and the benthic environment (objective 1, policies 3, 11, 12, 13 and 23)

9. This is a proposal for two large salmon farms in a location that has not previously been used for any kind of marine farming. Notwithstanding policy 13.22.3, introduced through Variation 1 to the proposed Marlborough Environment Plan, no staged development is proposed. Policy 13.22.3 can be seen as a plan provision that seeks to give effect to policy 3 of the NZCPS. It is difficult to see how this proposal amounts to development in a precautionary manner. The two salmon farms will have an equivalent level of feed discharge to existing discharge levels across all existing NZKS salmon farms. A precautionary approach is undoubtedly warranted.
10. By not adopting a staged approach to development of the two farms, NZKS bears the onus of satisfying the Commissioners that effects of the proposed annual discharge of 10,000 tonnes of salmon feed at each site can be predicted with certainty, the effects are not unknown, they are well understood in this location, and they are not potentially significantly adverse. In particular, NZKS must be able to demonstrate that the risk of adverse effects is well understood and that environmental risk and any uncertainty is adequately avoided, remedied or mitigated by the proposed conditions of consent. That is a tall order. It is also objectively unrealistic.
11. Further, Hanneke Kroon's evidence highlights the sensitivity of Chinook salmon to increasing water temperatures. That appears to be directly relevant to the application of policy 3(2).¹² The (currently operative) regional policy statement also emphasises the need for a precautionary approach and the uncertainty as to the long term effects of marine farming.¹³
12. The interested parties highlight deficiencies in the assessment of impacts on the benthic environment. The marine ecologist engaged by the interested parties, Bryony Miller in a critique of the assessment of benthic characteristics refers in particular to the following:
 - (i) The limitations of the observational data and the use of that data to provide quantitative statements to establish whether a habitat is considered significant.¹⁴

¹² And see *SoS v MDC* [2014] NZSC 40 at [22]

¹³ See *Sos v MDC* at [26] to [30]

¹⁴ Miller at 16 - 17

- (ii) A need to reassess the overall confidence statements concerning ecologically important and sensitive habitats within the proposed benthic footprint of the farms.¹⁵
 - (iii) Likely underestimation of the important ecological function provided by horse mussel beds across the site.¹⁶
 - (iv) Field data collection did not target optimal tidal conditions and opportunities for improving habitat characterisation were not therefore taken up.¹⁷
 - (v) Inadequate number of sediment/infauna grabs within the proposed depositional footprint.¹⁸
 - (vi) Over-reliance on the accuracy of the VenOM model to determine the potential impact on habitat extending beyond McManaway Rock.¹⁹
 - (vii) The lack of appropriate tank based experiments to determine impact on horse mussels and brachiopods that are adapted to deep coastal habitat.²⁰
 - (viii) Failure to investigate soft sediment habitat as a potential site further from McManaway Rock, a recognised ecologically significant marine site under the MEP.²¹
 - (ix) Use of an enrichment stage scale (to determine the significance of effects) developed using data about infauna composition from farms located in more sheltered environments which do not have depth and current speeds comparable to the Cape Lambert site.²²
 - (x) Uncertainty as to how the farms will be developed and what adaptations will be implemented if predicted effects are underestimated.
13. It appears that NZKS do not see a need for the application of policy 3 of the NZCPS in relation to the volumes of annual feed discharge that are

¹⁵ Miller at 18 and 21

¹⁶ Miller at 19

¹⁷ Miller at 23

¹⁸ Miller at 24

¹⁹ Miller at 31-32 and 48-51

²⁰ Miller at 52

²¹ Miller at 56 and 69-70

²² Miller at 75-77

sought. The interested parties disagree. Even if policy 13.22.3 cannot yet be given full weight, policy 3 of the NZCPS should be.

14. Policy 12 relates to the control of activities that could have adverse effects on the environment through the release or spread of harmful aquatic organisms. The evidence of Rob Schuckard and Hanneke Kroon raise matters that are particularly relevant to a consideration of policy 12.²³
15. Policy 23 requires management of the discharge of contaminants into water. Particular regard must be had to the sensitivity of the receiving environment, and the capacity of the receiving environment to assimilate the contaminants. There is not a salmon farm in New Zealand that currently discharges 10,000 tonnes annually, let alone two in reasonable proximity. It is inherently implausible for NZKS to assert that the environmental risks from that level of discharge are well-known and able to be managed through the proposed conditions of consent without resort to the checks and balances inherent in policy 3 of the NZCPS, and more specifically detailed through policy 13.22.3 of the MEP.

Conditions

16. The proposed monitoring conditions would appear vulnerable to the criticisms that the Court of Appeal and Supreme Court levelled at the conditions set for the iron ore marine discharge consents granted by the EPA in *Trans-Tasman Resources Ltd*.²⁴ That was a case under the EEZ Act and adaptive management was not available for such consents. In particular, the Court of Appeal identified that the proposed mining activities were authorised in their entirety and that the conditions did not envisage scaling back the authorised mining activities, or the adjustment of effects permitted under the consent.²⁵
17. Where an adaptive management approach was not permissible (or, as here not pursued in relation to discharge volumes), conditions cannot overcome uncertainty by referring to vague terms, such as avoiding adverse effects on certain environments, or on certain flora and fauna. Nor was it permissible to flesh out what avoiding adverse effects might mean in management plans.²⁶
18. In the Supreme Court, the example was given of conditions relating to seabirds and various marine mammal species.²⁷ For certain seabirds, the condition imposed required that there be no adverse effects *at a population level*. The Supreme Court considered that the condition had

²³ Schuckard at pages 20-22; Kroon at paras 19-27

²⁴ [2020] NZCA 86; [2021] NZSC 127

²⁵ CA at [226]

²⁶ CA at [228](c)

²⁷ SC at [122] per Ellen France J

to say something more in terms of how the adverse effect would be measured.²⁸ This was not a condition such as a noise condition able to be measured against a standard. As such, it was not a condition that was adequate to avoid, remedy or mitigate adverse effects.

19. Looking at condition 3 of the proposed benthic conditions, these same uncertainties occur. Objective 3(a)(i) is an example. So is objective 3(b)(i) and (ii). It will be for the Council to comment, but it is difficult to see how condition 5 could be enforced.²⁹ It requires a degree of certainty in baseline information, which for reasons set out in Bryony Miller's critique, are simply not present. If a standard is exceeded, it triggers a *management response*. The farm benthic report required under condition 10 may include *recommendations for management practices to ensure compliance with the BQS*. These imply that alterations to farm management practices are the required *management response*. This is effectively a self-regulating regime.³⁰
20. The fleshing out of standards through management plans (conditions 6, 7, 8 and 9) would appear to run foul of the Court of Appeal and Supreme Court criticisms that management plans are not a substitute for the provision of sufficient baseline information, particularly for consents in a relatively unmodified part of the coastal marine area.³¹
21. For seabirds, Mr Schuckard has identified that the baseline information is particularly lacking.³² Conditions 65-69 are inchoate and cannot sensibly be commented on. Further, as Glazebrook J said in *Trans-Tasman Resources Ltd*, it was strongly arguable that pre-commencement monitoring conditions in that case were ultra vires because they went well beyond monitoring or identifying adverse effects, they were for the purpose of gathering absent baseline information.³³ There was also force in the submission by RF&BPS in that case that such conditions deprive interested parties of rights of participation.

*[277]...Participation is only meaningful on the basis of sufficient information, including as to the possible effects of the conditions. The information was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.*³⁴

²⁸ SC at [130]

²⁹ And see Dr Giles observations at 38-41

³⁰ And see Dr Giles observations at 48-50

³¹ CA 227; SC [282]. And see Dr Giles observations at 44-47

³² Schuckard at 13-14

³³ SC at [276] per Glazebrook J

³⁴ SC at [277] per Glazebrook J; see also per Winkelmann CJ at [329]; and CA at [259](c)

22. There is an inherent tension between the uncertainties and risks associated with the scale of such a proposal in this location, and the approach of NZKS to eschew any explicit acknowledgement that the discharge levels currently sought may not be appropriate to operationalise and implement. This extends to uncertainty over what response will be required to address the risk that (currently unspecified) standards may be breached.³⁵ The proposed conditions of consent tend to highlight the information gaps.
23. Much of the detailed operation of the consents for these salmon farms is left to the management plans yet to be developed. This fundamentally begs the question whether there is sufficient information to grant the consents sought, and how the farms will be operated on an ongoing basis. Finalisation of those management plans and how it is intended they will operate in practice is shielded from opportunities for public input. That may be convenient for NZKS, but it is not in accordance with the participatory principles of the RMA.

Hearing

24. The interested parties have taken much time and trouble to try and understand this application, and to give their perspective on it. Their nominated representatives will each address you on behalf of those they represent. They each have a worthy contribution to make to the determination of this application. At the heart of their concerns is the need to ensure that a countervailing voice for the preservation and protection of the natural and physical resources of the Marlborough Sounds is heard appropriately.



JC Ironside
Barrister
14 October 2021

³⁵ And see Dr Giles observations at 294-298. More generally Part D of Dr Giles report highlights major uncertainties and operational difficulties with the proposed conditions of consent relating to management of benthic effects.