Morgan Slyfield
BARRISTER

26 November 2019

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By email: **wmcg@mcguinnessinstitute.org**

Dear Ms McGuinness

U190357: NZKS WAITATA APPLICATIONS: "BASELINE" FOR EFFECTS ASSESSMENT

1. You have asked me to review and comment on an aspect of the legal submissions made on behalf of New Zealand King Salmon (**NZKS**) at the hearing underway for applications U190357.

2. In particular, you have requested my opinion on the statements made at paragraph [37] of those submissions, which I set out fully here:

> The correct approach is to assume the NZ King Salmon's existing consents are being used to their maximum extent and then assess the actual and potential effects of the difference between that scenario and the four additional pens. Essentially it is the additional cumulative effects which are relevant. The effects of the consent which have already been granted are not relevant.

3. I understand the "maximum extent" equates to a feed discharge of 6,000 tonnes per annum. NZKS is not applying to increase this amount.[1]

4. NZKS does not yet utilise the maximum feed discharge. NZKS' evidence is that it is currently "entitled to discharge" a maximum of 4,000 tonnes per annum.[2] However, I understand its actual discharges may have been

[1] See for example, paragraphs [33], [51], [52], [81] and [100] of the Assessment of Environmental Effects lodged on 8 May 2019, and paragraph [35](b) of NZKS' Legal Submissions, 25 November 2019.
[2] Statement of Evidence of Grant Lovell, 11 November 2019 at [20] and [42].

significantly lower: 2,761 tonnes in the first year, 2,894 tonnes in the second, and 2,164 tonnes in the third.[3] Further, even at these lower stocking levels (as I understand feed discharge directly correlates to biomass) NZKS has experienced higher than anticipated fish mortalities at the site.[4] A key incentive behind the present application is to enable a reduction in fish stocking density.[5] It is said the discharge will be no greater (than the maximum consented), but the proposed extension will allow that discharge to occur at a slightly lower density over a slightly larger area.[6]

5. With that understanding, I have some reservations about the approach quoted at paragraph 2, above. In my view, it is not appropriate to assume the consents are being used to their maximum extent, and limit the assessment of the current application to a comparison with that scenario.

6. If Mr Schuckard's evidence is correct, NZKS has been using less than half of the maximum; and even on Mr Lovell's approach, NZKS is "entitled to discharge" only two thirds of the maximum. Further, NZKS has brought the present application (at least in part) to address the unexpectedly high mortality it is confronting (even at the lower stocking levels).

7. In my opinion, this should put the Council on inquiry whether there is any reasonable basis to consider NZKS is in a position to implement its existing consent up to 6,000 tonnes of discharge.

8. NZKS may say it is not for the Council to delve into such matters. As stated in its legal submissions:[7]

> The risk of whether NZ King Salmon can increase its feed discharge at this site and comply with consented environmental standards is for the company, it is not for this hearing to assist NZ King Salmon to make what are essentially business decisions.

9. NZKS may of course choose to restrict such matters to its boardroom. However, if it does, it cannot have the benefit of comparing its proposal with a hypothetical "maximum extent" implementation of the current

[3] Statement of Evidence of Rob Schuckard, 15 November 2019 at [10].
[4] Statement of Evidence of Grant Lovell, 11 November 2019 at [23].
[5] Statement of Evidence of Grant Lovell, 11 November 2019 at [56].
[6] NZKS Legal Submissions, 25 November 2019 at [51].
[7] At [81].

consents. If it wishes to have that advantage, then it needs to provide evidence on which the Council can conclude that NZKS would be likely to implement the current consents to the maximum extent. This is clear from the leading authority to which NZKS refers,[8] *Far North District Council v Te Runanga-a-iwi o Ngati Kahu*[9]. Even in the passage quoted in NZKS' submissions, the Court signalled the need for the consent authority to be satisfied that the earlier consent will be implemented (emphasis added):

> …Its enquiry was focussed instead on the meaning of the "environment", taking proper account of its future state **if it found as a fact that Carrington's land use consent would be implemented**. Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor **when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent**.

10. This requirement is equally reflected in the two subsequent paragraphs of the Court of Appeal's decision (emphasis added):[10]

> In this respect we note this Court's statement in *Hawthorn* to the effect that it is permissible and will often be desirable or even necessary for the consent authority to consider the future state of the environment. However, that observation does not affect our conclusion. The Court was simply recognising that a consent authority will not always be required to consider the future state of the environment. But, as the Court expressly recognised, it would be contrary to s 104(1)(a) for the consent authority not to take account of the future state of the environment **where it is satisfied that other resource consents will be put into effect**. This is such a case.
>
> It follows that we must respectfully disagree with White J. In our judgment the Environment Court did not err in determining that it was required to take into account the likely future state of the environment as including the unimplemented land use consent for the purposes of s 104(1)(a) **if it was satisfied that Carrington was likely to give effect to that consent**.

11. In short, the emphasised parts of these passages disclose that it is not for the Council to *assume* that NZKS would utilise its existing consents up to the

[8] At [38] and [39].
[9] *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221.
[10] At [94] and [95].

6,000 tonnes maximum annual feed discharge, but rather for the Council to be satisfied of that fact, on the evidence.

12. In the absence of such evidence, the proper starting point for assessing the effects of the present application can only be to compare it with the *actual* level of current implementation (whatever the evidence shows that to be). Thus, in my view, if NZKS elects not to provide further evidence on these matters, then it cannot have the advantage of claiming that the present proposal merely distributes 6,000 tonnes of discharge over a slightly larger area. Rather, the effects would have to be assessed on the basis that they may enable the current tonnage of *actual* discharge (over the existing area), to increase over time to 6,000 tonnes of discharge (over the enlarged area).

Yours sincerely

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