In the matter of **Ministry for Primary Industries Discussion Paper No: 2017/04**

Potential relocation of salmon farms in the Marlborough Sounds – Proposal to amend the Marlborough Sounds Resource Management Plan to enable the relocation of up to six existing salmon farms by regulations made under section 360A of the Resource Management Act 1991

Summary of concerns by way of comment by Friends of Nelson Haven and Tasman Bay Inc. and Kenepuru and Central Sounds Residents Association Inc.

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Introduction

1. This memorandum is on behalf of Friends of Nelson Haven and Tasman Bay Inc. (**Friends**) and the Kenepuru and Central Sounds Residents Association Inc. (**KCSRA**) (collectively **the Societies**). The Societies have concerns about the proposal to amend the Marlborough Sounds Resource Managaement Plan (**MSRMP**) to enable the relocation of up to six salmon farms by regulations made under section 360A of the Resource Management Act 1991 (**RMA**). This memorandum summarises their concerns and accompanies expert evidence that is filed on their behalf.

2. The Societies are long established groups having an interest in coastal issues affecting the Marlborough Sounds. Friends' interests extend across coastal areas of Te Tau Ihu. KCSRA have a more direct interest in matters affecting the Pelorus Sound. The Societies have collaborated on other matters of interest affecting the Marlborough Sounds, and do so again for the purposes of this proposal.

Initial observations – Ministers' powers

3. The proposal is advanced on behalf of the Minister for Primary Industries in his capacity as the Minister of Aquaculture (**Minister**). The first requirement for the Minister is to have regard to the provisions of the regional coastal plan that will be affected by the proposed regulations.[1] There is also a requirement that the Minister must be satisfied that the regional coastal plan to be amended by the proposed regulations will continue to give effect to the NZCPS,[2] and any applicable regional policy statement.[3]

4. The requirement to have regard to the provisions of the regional coastal plan must mean that the Minister should have proper and meaningful regard to relevant provisions of the MSRMP and their effect, and not perfunctory or summary regard. It is doubtful whether this has occurred in relation to the underlying rationale for the Coastal Marine Zone 1 (**CMZ 1**) under the MSRMP.[4]

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[1] Section 360B(2)(a).

[2] New Zealand Coastal Policy Statement 2010, effective 3 December 2010

[3] Section 360A(2)(c)(iii)

[4] An initial assessment of the proposal against the policy requirements of the various statutory documents is contained in the MWH January 2017 report. There is considerable reliance on the existing reports commissioned by MPI in promoting this proposal. Section 3.1 of the MWH report anticipates a full policy analysis being prepared after the consultation and

5. The introduction to chapter 9 of the MSRMP identifies that management of the coastal marine area is a shared responsibility of the Marlborough District Council (**MDC** or **Council**) and the Minister of Conservation under section 30(1)(d) of the RMA. That Minister must approve the relevant coastal provisions of the MSRMP, as well as having responsibility for the NZCPS, which has an important influence on Council's management of the coastal environment.[5]

6. The issue identified at chapter 9-2 is the restriction of public access to the coastal marine area due to the private occupation of public space. The objective at 9.2.1 is:

   The accommodation of appropriate activities in the coastal marine area whilst avoiding, remedying or mitigating the adverse effects of those activities.

7. Policies 1.1 and 1.6 within chapter 9.2 are specifically referred to as identifying the values which provide the basis for the CMZ 1. The explanation for CMZ 1 states:

   In the Coastal Marine Zone 1 the Plan identifies those areas where marine farms are prohibited in accordance with Policies 9.2.1.1.1 and 9.2.1.1.6. These areas are identified as being where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values.

8. For the Coastal Marine Zone 2 (**CMZ 2**), where marine farming is able to be consented, there is this explanation for the applicable rules.

   Within Coastal Marine Zone 2 out to 50 metres from mean low water mark, and beyond 200 metres from mean low water mark, marine farms are non-complying activities. In those areas marine farming involving fin fish farming may be appropriate and it is recognised that consent may be granted by a resource consent application.

report process has been completed. It is unclear what form this full policy analysis will take, or what opportunity there will be to comment on it.

[5] MSRMP, chapter 9 at 9-1

9. The Coastal Marine Zone 3 was introduced into the MSRMP in 2013 to give effect to the NZKS plan change proposal that was referred to a board of inquiry for determination under Part 6AA of the RMA. A new policy 1.17 was introduced into chapter 9-2 as the basis for identifying three sites for new salmon farming activities that were formerly within CMZ 1. A further five sites within CMZ 1 were not approved, as well as a site within CMZ 2.[6]

10. At section 4.3.4 of the MPI discussion paper, there is this reference to the three coastal marine zones in the MSRMP:

CMZ 1, which makes up about 80 percent of the Marlborough Sounds, recognises the natural landscape and environment that contributes to the region's culture, heritage and tourism. CMZ 1 generally prohibits aquaculture as part of the approach to ensure that allocation of public space for private use does not occur at the expense of public access and recreation values. There are however 22 marine farms in CMZ 1, comprising farms that existed before CMZ 1 came into force when the Marlborough Sounds Resource Management Plan became operative.

CMZ 2 recognises the productive value of aquaculture to the region, and allows applications to be made for marine farming under a range of activity statuses, depending on factors such as when the farm was originally consented and its location relative to the shore. There are approximately 558 marine farms within CMZ 2.

CMZ 3 was created specifically for the three salmon farms approved by the Environmental Protection Authority in 2013, and are the only farms in this zone. These sites were previously CMZ 1. Salmon farming within CMZ 3 is a discretionary activity, provided that it complies with the standards specified in the plan.

Like the Marlborough Regional Policy Statement, the Marlborough Sounds Resource Management Plan also contains a series of objectives and policies that are relevant to the management of the

[6] The CMZ 1 sites refused were Kaitira ,Tapipi (Pelorus Sound), Papatua (Port Gore), Kaitapeha, Ruamoko (Queen Charlotte Sound). The CMZ 2 site was at White Horse Rock (Pelorus Sound).

coastal marine area in the Marlborough Sounds, and to salmon farming.

11. This summary of the coastal marine zones under the MSRMP then leads into Part 3 of the discussion paper, which explains the proposed amendments to the MSRMP to enable the relocation proposal to proceed.[7] This is on the basis that a number of existing salmon farms exceed benthic environmental standards set out in management guidelines developed for salmon farms in the Marlborough Sounds.[8] The relocation proposal is intended to give effect to the Minister's stated commitment to *seeing the Benthic Guidelines implemented*.[9]

12. The establishment of a number of new salmon farms in the CMZ 1 requires a comprehensive assessment of the values that underpin that zone. That was what was required for the 2012/13 NZKS plan change proposal (a proposal of national significance under Part 6AA), which has similarities in terms of scale to what is now being proposed. The importance in maintaining the integrity of the coastal marine zones under the MSRMP is to ensure that the environmental results anticipated by the plan will continue to be met. Over the life of the MSRMP, consented space for marine farming in CMZ 2 has expanded from approximately 1000 ha in 1996 to approximately 2500 ha today. Provision has been made for marine farming in that zone. Allowing further incursion into CMZ 1 for marine farming requires a very careful assessment.

13. Embedded within the proposal appears to be a preoccupation with the concept of 'relocation', as if that somehow diminishes the impact of this intrusion into the CMZ 1. However, that is not a concept that is recognised under the MSRMP. At chapter 9-7, there is the explanation

    Separate provision for marine farm transfer sites is no longer appropriate as there is no consistent demand for any particular location or description of the effects of transferring marine farms. ***Accordingly, transferring a marine farm is treated as a new site where adverse effects can be considered.*** *(Emphasis added)*

[7] Set out in full in Appendix 1

[8] Best Management Practice Guidelines for salmon farms in the Marlborough Sounds, January 2015 MPI Technical Paper No: 2015/01

[9] Ministerial foreward page 3 of discussion paper no: 2017/04

14. As a new activity at a new site, all of the values that the CMZ 1 seeks to protect (and the anticipated environmental results) must be comprehensively considered. Furthermore, the values that are likely to be affected are predominantly those that are within the shared responsibility of the Council and the Minister of Conservation under section 30(1)(d) and reflected in policies of the NZCPS. They are not matters that a Minister of Aquaculture has primary responsibility for. This is reflected in the allocation of functions and powers to various Ministers under Part 4 of the RMA, including the functions of the Minister of Aquaculture under section 28B. Ms Allan comments on this in some detail in her evidence.

15. What this indicates is that the Minister's regulation making powers are not as extensive as a literal reading of section 360A and 360B might suggest. Of course, the meaning of any enactment must be ascertained from its text in the light of its purpose.[10] The relevant context includes those provisions of the RMA that confer on the Minister of Conservation a responsibility for the control of activities in the coastal marine area and for approving the provisions of any regional coastal plan before it is made operative.[11] That includes the provisions that underpin the CMZ 1.

16. When the requirement that any plan amended by regulations under section 360A must continue to give effect to the NZCPS (and any regional policy statement) is added to the relevant context, it becomes clear that the regulation-making power is a limited one that must be exercised within a relatively narrow scope.[12] Where, as here, the proposal is to create new salmon farming sites within CMZ 1 affecting recognised significant values that go beyond the suitability of the sites for aquaculture development, that is beyond the scope of the powers of the Minister of Aquaculture.

17. The Minister's regulation-making powers are effectively circumscribed by policy 8 of the NZCPS. He may exercise his powers to include in a regional coastal plan provision for aquaculture activities in 'appropriate places', while still continuing

[10] Interpretation Act 1999, section 5(1)
[11] Sections 28, 28A and clause 19 of schedule 1
[12] See also Ms Allan's evidence at paras 68 – 73

to give effect to the NZCPS as a whole. As the Supreme Court has emphasised in *King Salmon,*[13]

[100] The scope of the words 'appropriate' and 'inappropriate' is, of course heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities 'in appropriate places in the coastal environment', the context suggests that 'appropriate' is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of values of the coastal environment does not preclude use and development 'in appropriate places and forms, and within appropriate limits', the context suggests that 'appropriate' is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

19. And later at paragraph [126], the Supreme Court said:

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that 'avoid' in policies 13(1)(a) and 15(a) is a strong word, meaning 'not allow' or prevent the occurrence of', and that what is 'inappropriate' is to be assessed against the characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of 'appropriate' in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in ***all*** *places that might be appropriate for it in a particular coastal region.*

18. To the extent that a plan change proposal affecting aquaculture activities goes beyond technical suitability and affects areas where aquaculture is currently prohibited for the protection of the broader considerations contemplated by objective 6, then a regulation making-power cannot be regarded as a suitable plan change process. That is made clear by policy 7 of the NZCPS, which is directed at strategic planning and states relevantly:

Policy 7 Strategic planning

[13] Environmental Defence Society v New Zealand King Salmon Co Ltd [2014] NZSC 38

(1) In preparing regional policy statements, and plans

(a)….

(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

(i) are inappropriate; and

(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.

19. Where (as here) a proposal seeks to make provision for aquaculture in an area where aquaculture is currently prohibited (that prohibition considered necessary to give effect to a variety of recognised significant values), then the plan change process must go through the schedule 1 process. This provides for submissions and public hearings. Where rights of appeal are exercised, any adjudication by the Environment Court is in the form of an inquiry and report to the local authority and Minister of Conservation, who must ultimately approve the regional coastal plan, and any changes to it.[14]

20. A narrow purpose for promoting the plan change regulations (so that Benthic Guidelines can be implemented at sites not currently used for salmon farming) does not overcome the requirement for strategic planning in the coastal environment. This requires a full consideration of the values, uses and characteristics that are protected within the CMZ 1, and how they are affected by this proposal. A truncated regulation-making process under section 360B does not suffice. More than technical suitability is at stake, and the Minister of Aquaculture is the 'wrong' Minister to assume responsibility for changes that go to the very heart of coastal marine zoning under the MSRMP.

[14] See footnote 11

Further concerns – proper consideration and confusion of processes

21. Even if the Minister can assume wide-ranging powers to promote regulations under section 360A, it is clear that this proposal should not be the subject matter of such regulations.

22. These concerns are referred to in more detail in the evidence of Dr Steven, Mr Schuckard and Ms Allan for the Societies. I comment further as follows.

    (i) There is no sound basis for adding additional salmon farms into either the Waitata Reach or Tory Channel. These are required to be treated as new farms under the MSRMP. A comprehensive plan change for expansion of salmon farming in the Marlborough Sounds was inquired into by the NZKS board of inquiry as recently as 2012 and 2013. It found that an appropriate level of development of new farms in the Marlborough Sounds was four, reduced to three after the decision of the Supreme Court in *King Salmon* (declining the plan change for the Papatua farm in Port Gore).

    (ii) The sites that were selected for consideration by the board of inquiry were identified by NZKS through a vigorous selection process. The process now embarked upon lacks integrity in light of what the board of inquiry was told about that selection process. That lack of integrity is further compounded by use of a truncated decision-making process to create a further salmon farming zone (CMZ 4) without full evaluation through a schedule 1 process.

    (iii) The MDC has recently notified the Marlborough Environment Plan (**MEP**), which includes a proposed regional policy statement and is at an early stage in the schedule 1 process. Despite clear intentions that new aquaculture provisions were to be included in the notification of this proposed plan, they have not been. A proposal such as this should be part of the consideration of new aquaculture provisions that are currently being consulted on.

    (iv) The Minister only has power to make changes to an operative plan and not a proposed plan. The process he is

embarking on cuts across the proper consideration of aquaculture provisions to be included in a second generation RMA plan (and regional policy statement). Had the MDC notified its aquaculture provisions at the same time as it notified the rest of the MEP, then it is unlikely that there would be any consideration of using these regulation-making powers.

(v) What this proposal amounts to is the unprecedented use of regulations to amend a first generation RMA plan while the second generation plan is at an early stage of the schedule 1 process. The aquaculture provisions were removed from the MEP at a late stage (just prior to notification) and are now the subject of further pre-notification consultation. Had those aquaculture provisions been notified (as originally intended) when the MEP was publicly notified, these proposed regulations would have had no effect on those provisions. The Minister's proposal impacts on the integrity of the parallel schedule 1 process being followed for the MEP. It will have an unwarranted influence on substantive consideration of the MEP (including the proposed regional policy statement) through the schedule 1 process.

(vi) The proposals cut across findings made the NZKS board of inquiry and the Environment Court in *KPF Investments Ltd v MDC*[15] about the appropriate level of salmon farming development in the Waitata Reach. This was the subject of discussion among members of the Marlborough Salmon Working Group and Mr Crosby will be familiar with its genesis. I provided an opinion on these matters to a member of the Group, which was made available to the Group as a whole. Two other opinions were also commissioned. My opinion is *attached*. It is entirely consistent with the findings of the board of inquiry and the Environment Court. The other opinions seek to draw distinctions between the findings of the board of inquiry and the Environment Court that in my view are unwarranted.

(vii) A process seeking to establish a number of new salmon farms in the Marlborough Sounds before the new farms authorised by the NZKS board of inquiry are at full capacity under the adaptive management regime approved for those

[15] [2014] NZEnvC 152

farms risks undermining that regime. A pre-occupation with implementing the Benthic Guidelines will impact on the ability to establish an appropriate water column modelling baseline, as Mr Schuckard explains. This runs completely counter to the very detailed consideration given to this matter by the NZKS board of inquiry. The Minister's narrow approach does not allow a proper consideration of the full range of effects (including cumulative effects) from salmon farming and is contrary to the intent of policies 3 and 4 of the NZCPS. It has particular significance for the King Shag, as Mr Schuckard explains, which may also be an inhibiting factor under section 107(1)(g) of the RMA. The NZKS board of inquiry required a King Shag Management Plan to be prepared taking into account the two new farms approved for the Waitata Reach. Adding further risk to a species that is already threatened and at risk of extinction should be seen for what it is – an untenable risk that clearly conflicts with policy 11 of the NZCPS.

(viii) Reliance on Mr Hudson's landscape assessments for these new sites lacks any credibility in light of the findings of the NZKS board of inquiry and the Environment Court in *KPF Investments Ltd*, as fully explained by Dr Steven, who was a witness in both earlier proceedings. Mr Hudson's assessments are not even fully supported by the peer reviewer. It is no exaggeration to say that on fundamental aspects of giving effect to directive policies of the NZCPS, the proposal is entirely reliant on Mr Hudson's assessments. However, as Dr Steven points out the failure by Mr Hudson to refer to policies 13 and 15 in full is a startling omission. Reliance on Mr Hudson's opinion in these circumstances would be to rely on an incomplete assessment. There is no proper basis to say that policies 13 and 15 of the NZCPS can be given effect to. This again highlights the fact that this is the 'wrong' Minister (and the wrong Ministry) to be considering natural character and landscape values (and indigenous biodiversity).

(ix) Policies 13 and 15 of the NZCPS are directive policies that reflect the fact that environmental protection is a core element of sustainable management.[16] Reliance on overlay classifications notified through the MEP, which are

[16] King Salmon at [24] per Arnold J

themselves the subject of submissions, again highlights the confusion of processes that this proposal generates.[17] What if the overlays undergo significant change through the MEP schedule 1 process? Where does that leave Mr Hudson's assessments? If he is simply relying on those overlay classifications (which appears to be the case) then this proposal should also go through the same MEP plan development process. There is a real and significant risk of glaring inconsistencies. Again, a narrow approach to implementing he Benthic Guidelines leads to an approach which imperils sustainable management, and does not achieve it.

(x) Ms Allan's criticisms of the process adopted for this proposal are soundly based. There are other more appropriate processes for the Minister and/or NZKS to follow to implement a proposal such as this.[18]

Conclusion – 'No, Minister'

23. The only proper conclusion that can be reached after considering the matters specified in section 360B is that the Minister would be wrong to recommend regulations under section 360A to implement this proposal. It would be in excess of his powers to do so. The MSRMP would not continue to give effect to the NZCPS, and important environmental protection would be sacrificed in a wholly inappropriate way.

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27 March 2017

[17] Dr Steven's report which accompanies the Societies submissions on the MEP is attached to his evidence.
[18] See Ms Allan's evidence at paras 74 - 78