

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

ENV

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under s 120 of the Act

BETWEEN **THE NEW ZEALAND KING SALMON CO. LIMITED** a duly
incorporated company having its registered office at 93 Beatty
Street, Annesbrook, Nelson 7011, New Zealand

Appellant

(Continued next page)

**NOTICE TO ENVIRONMENT COURT OF APPEAL ON DECISION ON APPLICATION
CONCERNING RESOURCE CONSENT
Dated this 1st day of October 2021**

**GASCOIGNE WICKS
LAWYERS
BLLENHEIM**

Solicitor: Quentin A M Davies and Joshua S
Marshall
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AND

MARLBOROUGH DISTRICT COUNCIL a unitary authority

**NOTICE TO ENVIRONMENT COURT OF APPEAL ON DECISION ON APPLICATION
CONCERNING RESOURCE CONSENT, TRANSFER OF WATER PERMIT OR DISCHARGE
PERMIT, CERTIFICATE OF COMPLIANCE, OR ESPLANADE STRIP**

*Sections 41D, 120, 121, 127(3), 132(2), 136(4)(b), 137(5)(c), 139(12), 234(4), 267, and 268,
Resource Management Act 1991*

To: The Registrar

Environment Court

Christchurch

Name of Appellant

1 The New Zealand King Salmon Co. Limited ("**NZ King Salmon**") appeals a decision on the following matter:

(a) The decision of the Marlborough District Council ("**MDC**") to refuse three applications by NZ King Salmon (the "**Applications**"):¹

(i) An application to amend condition 40 of coastal permit U140294 (the "**Waitata Permit**");

(ii) An application to amend condition 40 of coastal permit U140296 (the "**Ngamahau Permit**"); and

(iii) An application to amend condition 36 of the Waitata Permit.

2 NZ King Salmon is the applicant.

Date on which notice of decision was received by Appellant

3 The Appellant received notice of the decision on 10 September 2021.

Name of decision maker

4 The decision was made by MDC under delegated authority by an independent commissioner.

¹ Note that the applications were modified by NZ King Salmon after the Applications were lodged but before the decision was notified.

- 5 NZ King Salmon has a right to appeal this decision under section 120 of the Resource Management Act 1991. The decision to which this appeal relates is not one of those activities excluded by section 120(1A) or (1B) of that Act.

Trade competition

- 6 NZ King Salmon is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.

Decision or recommendation appealed

- 7 The decision being appealed is: the decision to refuse the Applications.

- 8 The resource affected is:

- (a) A marine farm in Waitata Reach (Marlborough District Council Marine Farm Number 8632) and a marine farm in Tory Channel (Marlborough District Council Marine Farm Number 8634)

Reasons

- 9 The reasons for the appeal are as follows:

- (a) The effects of the proposed changes to consent conditions are no more than minor and consistent with the principles of sustainable management:
- (i) In terms of the changes to condition 40, the changes reflect the existing consent conditions. They are for the avoidance of doubt only.
- (ii) Alternatively, the potential increase in the level of disposition on the benthos (above those already consent) resulting from the changes to condition 40 would result in no material ecological effects on the environment.
- (iii) The proposed change to condition 36 is supported by monitoring to date and current scientific knowledge on the effects of salmon farms. Existing environmental quality standards and monitoring requirements mean the effects on the environment are adequately protect.
- (iv) The existing permits already allow certain effects on the environment (for example on King Shag). The existing consents contain conditions to address those affects. The changes proposed

(except as noted above) will not allow any effect not already consented by the existing consent.

- (b) MDC misinterpreted the existing resource consents:
 - (i) MDC incorrectly interpreted the intent of the Environmental Quality Standards (EQS) as originally granted by the board of inquiry.
 - (ii) MDC mischaracterised the outer limit of effects (OLE) and “footprint” of the farms to be the point where environmental effects from the farming “were predicted to be indiscernible from natural conditions and variation.” The outer limit of effects is not the outer limit of detection. MDC wrongly found that the depositional footprint is “significantly larger than predicted”.
 - (iii) MDC mischaracterised the purpose of the adaptive management approach as to address uncertainty and demine maximum sustainable feed levels. It has also formed the view such a process has failed which is irrational and inconsistent with the evidence.
- (c) MDC found that the existing consent conditions are not fit for purpose; this was wrongly used as a reason not to consider them part of the existing environment.
 - (i) MDC wrongly held that a comparison should be made with the baseline report made when the permits were granted. This consideration was irrelevant as the existing consent forms part of the existing environment.
 - (ii) MDC wrongly assumed that, because benthic conditions at reference stations may be changing, those changes must be caused by the salmon farm at Waitata.
- (d) MDC mischaracterised the effect of the application on the environment in ways which were irrational and inconsistent with the evidence:
 - (i) MDC failed to take into the account the statistical implications of basing EQS on individual component variables. In particular, MDC did not properly consider the inherent variability of individual component variables. As a result, the consent conditions may be breached as a result of environmental background variation even if the sites were not farmed.

- (ii) MDC incorrectly stated that the proposed amendment would remove the EQS requirement for conditions to be statically comparable with natural conditions.
 - (iii) MDC found there was considerable uncertainty as to the effects of the application. This is inconsistent with the evidence provided.
- (e) MDC misapplied the relevant planning framework:
- (i) MDC apparently formed a view not to grant the application before considering the relevant plans and policy statements
 - (ii) MDC misapplied the relevant law on the precautionary approach as it relates to policy 3 of the NZCPS.
 - (iii) MDC's decision on the relevance of the proposed Marlborough Environment Plan ("MEP") is inconsistent with the commissioner's statement at the hearing. At the hearing, the commissioner stated no regard would be given to the MEP. In light of that statement, the appellant did not address this point in reply. In the decision, MDC that "significant weight should be given to the MEP" which excluded aquaculture from its cope. Variations 1 and 1A were notified on 2 November 2020 and have not yet had hearings.
 - (iv) MDC misapplies the policies in the proposed variations to the MEP as they relate to enrichment stage.
- (f) MDC misapplied the relevant law:
- (i) MDC incorrectly held that the applicant's compliance history is relevant when deciding the application. MDC also made adverse findings as to the applicant's compliance status which was incorrect, unlawful, irrelevant and inconsistent with natural justice;
 - (ii) MDC incorrectly held it was constrained by the intent of the consent authority when the permits were originally granted;
 - (iii) MDC misapplied the statutory test for consent variations not considering effects in light of information currently known (as opposed to what was known when the consent was granted).
 - (iv) MDC accepted that one of the proposed changes would not have any direct environmental effects but nevertheless declined the application. It wrongly held that it could not incorporate an

external document by reference in consent conditions. It also mischaracterised and misunderstood the purpose of the proposed document to be incorporated (Best Management Practice Standards).

- (v) MDC improperly assumed that the applicant would breach any consent conditions and that MDC would take no enforcement action in the event of future breaches.
- (vi) MDC assessed the appropriateness of the proposed amendments against a hypothetical alternative application (a proposed comprehensive review of conditions) rather than the effects of the changes proposed.
- (vii) MDC has suggested it has some special authority to interpret resource consents and that it is improper for the applicant to form a view as to the proper interpretation of resource consents. This assertion fundamentally undermines the principle of separation of powers.
- (viii) MDC made unsubstantiated assertions of “many examples where ... the Council interpretation of consent conditions has been ignored.” This is factually incorrect, irrelevant and prejudicial to the applicant.
- (ix) MDC incorrectly held that retrospective consent changes can only be granted when the changes sought are within the scope of the assessment of effects of the originally granted consent;
- (g) MDC failed to address a number of arguments raised including:
 - (i) That the effects on King Shag are addressed by the existing consent conditions.
 - (ii) Ambiguity in the current consent conditions. MDC expressly states in the decision that “there is no ‘ambiguity’ in the definition of what constitutes ‘a year’”. This is wrong and demonstrates a failure to have regard to arguments presented.
 - (iii) The scope of the existing consented baseline as part of the existing environment.

Relief

- 10 The Appellant seeks the following relief:
- (a) Orders quashing the decision appealed;
 - (b) Orders granting the Applications; and
 - (c) Costs.

Attached documents

- 11 The following documents are attached to this notice:
- (a) a copy of the Appellant's applications;
 - (b) a copy of the relevant decision;
 - (c) a list of names and addresses of persons to be served with a copy of this notice.
 - (d) Best Management Practice Guidelines for salmon farming in the Sounds: Benthic (published by Fisheries New Zealand)
 - (e) summary statements by the applicants setting out the amendments sought as at the date of the hearing.



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Joshua S Marshall

Solicitor for Appellant

Date: 1 October 2021

(A signature is not required if notice is given by electronic means.)

Address for service of Appellant: Gascoigne Wicks, 79 High Street, Blenheim 7201, PO Box 2, Blenheim 7240

Telephone: 03 578 4229

Contact person: Quentin A M Davies and Joshua S Marshall, Solicitor

Note to appellant

You may use this form to lodge an appeal.

Your right to appeal may be limited by the trade competition provisions in Part 11A of the Resource Management Act 1991.

If you are appealing as a submitter on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions, your appeal must not be related to any submission or part of a submission that has been struck out under section 41A of the Resource Management Act 1991.

The Environment Court may require any parties to the appeal, anyone that intends to join under section 274 of the Resource Management Act, a council, or a Minister to attend a conference. The Environment Court may also ask one of its members, or another person, to conduct an alternative dispute resolution process at any time after the lodgement of proceedings.

You must lodge the original and 1 copy of this notice with the Environment Court within 15 working days of receiving notice of the decision. The notice must be signed by you or on your behalf. You must pay the filing fee required by regulation 35 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

You must serve a copy of this notice on the authority that made the decision within 15 working days of receiving notice of the decision.

You must also serve a copy of this notice on the applicant or consent holder, on every person who made a submission on the application or review of consent conditions, and (if the decision relates to a restricted coastal activity) on the Minister of Conservation within 5 working days of lodging it with the Environment Court.

Within 10 working days after lodging this notice, you must give written notice to the Registrar of the Environment Court of the name, address, and date of service for each person served with this notice.

However, you may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see form 38*).

Advice to recipients of copy of notice*How to become party to proceedings*

You may be a party to the appeal if,—

- (a) within 15 working days after the period for lodging a notice of appeal ends, you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (*see* form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the relevant application or the relevant decision. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Schedule C – Persons to be served with a copy of this Notice

Name	Contact / Address
<i>Local Authority</i>	
Marlborough District Council	15 Seymour Street, Blenheim and mdc@marlborough.govt.nz
<i>Submitters on related application to amend consent</i>	
Guardians of the Sounds	Clare Pinder <clarepinder@gmail.com>
Friends of Nelson haven and Tasman Bay	Rob Schuckard <rschckrd@xtra.co.nz>
McGuinness Institute	Morgan Slyfield <Morgan.Slyfield@stoutstreet.co.nz>
Kenepuru and Central Sounds Residents Association	Andrew Caddie <president@kcsra.org.nz> and <secretary@kcsra.org.nz>
Marlborough Environment Centre	Bev Doole <bev.doole@icloud.com>
Phillip Green	phil.kakariki@gmail.com
Director-General of Conservation	Geoff Deavoll <gdeavoll@doc.govt.nz>