

17 July 2013

Marlborough District Council
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Attention: Bruno Brosnan

Otanerau and Forsyth Farms

1. I refer to your two letters dated 24 June 2013, which request further information in respect of the s 127 applications for NZ King Salmon's Otanerau and Forsyth farms. A response to the questions outlined in those letters is set out below.

Question 1: Proposed ES Levels

2. This issue is addressed in detail in the Cawthron Reports annexed to the applications beginning on page 5 and ending on page 13, with effects assessed on pages 20 to 25. Can you be more specific as to precisely what further information you require?
3. I presume your reference to the level of impact being "consistent with our practice to date" is a reference to whether or not the level of impact is consistent with the level of discharge permitted under the present resource consent conditions. Can you please advise whether this is the case?

Question 2: Appropriateness of ES<6.0 based on Previous Monitoring Years

4. Nigel Keeley's response to this question is **attached**.
5. I do not accept the premise of the question. All recent reports record that ES6 is "permitted but undesirable".¹ With the applications at Forsyth and Otanerau NZ King Salmon is merely attempting to replicate the standard that is currently permitted at the inner zone boundary under the existing consents, in a manner consistent with the monitoring techniques used in Cawthron Report 2080.

Question 3: Ecological and Biochemical Difference Between ES5.0 and ES6.0

6. Some further information from Nigel Keeley is **attached**.
7. I also draw your attention to Cawthron Report 2080, March 2012 (copy **attached**).²

Question 4: Mortalities

8. Point 4 of both your letters requests information about mortalities at the Otanerau and Forsyth farms. The request for information about fish mortality does not relate to the

¹ See for example Cawthron Report 2080, Table 2.

² Please see the general description on page 4 and the precise method of calculation detailed between pages 9 and 13.

applications and cannot properly be requested pursuant to s 92(1) of the Resource Management Act 1991.³

9. By way of explanation, NZ King Salmon’s applications at Forsyth and Otanerau seek to make changes to the benthic monitoring conditions of the existing consents to make these conditions consistent with the most up-to-date monitoring techniques outlined in Cawthron Report 2080. The **attached** information from Dr Colin Johnston, an expert in aquatic animal health, suggests conditions of the benthos are not relevant to the issue of fish mortality.
10. In the decision of *Westfield New Zealand Ltd v North Shore City Council* [2005] NZSC 17 the Supreme Court held that the consent authority can only request further information necessary in order to enable it to better understand:⁴
 - a. The nature of the proposed activity;
 - b. The effect on the environment; or
 - c. The ways in which adverse effects might be mitigated.
11. In terms of the points outlined in the *Westfield* decision, the nature of the proposed activity is described at pages 10 to 15 of the Forsyth and Otanerau application documents. The potential effects on the environment are considered at pages 20 to 23. NZ King Salmon provides additional information from Dr Colin Johnston, which should alleviate any concerns held by the Council that the proposed changes will have an adverse effect on fish health.
12. Dr Colin Johnston has concluded in relation to the Forsyth farm:

There is no apparent or compelling evidence that any potential adverse changes to the benthos can be specifically linked to any defined pathological changes noted at this farm, rather all the pathological changes noted can be clearly related to other factors.
13. In relation to Otanerau he has noted:

It is my opinion, after due inspection of the farm and gross external and internal examination of fish on the site that the fish health profile is generally good and that there is no apparent or compelling evidence that any minor anatomical pathology noted can be attributed to any potential changes of the benthos below the farm.
14. NZ King Salmon refuse to provide the additional mortality information requested on the basis it is not relevant to the application and cannot be properly requested pursuant to s 92. The implications of this refusal in terms of notification are discussed further below.
15. NZ King Salmon is happy to brief the Marlborough District Council separately in relation to the Pelorus autumn mortality event.

Question 5: Fallowing & Additional Cages

16. The dates and periods of time when the Otanerau and Forsyth farms have either been fallowed, not farmed, or when the sites have contained sea cages in addition to their normal cages are as follows:
 - a. The Otanerau farm was fallowed from:
 - 1) 26 January 2009 – 20 April 2009;

³ Section 92(1) only permits the consent authority to request further information “relating to the application”. See also the leading decision of *Reuters Homes Ltd v Wanganui District Council* [2011] NZRMA 357

⁴ *Westfield New Zealand Ltd v North Shore City Council* [2005] NZSC 17 at [81] and [114].

- 2) 5 January 2010 – 24 April 2010;
- 3) 11 January 2011 – 12 April 2011;
- 4) 27 December 2011 – 18 April 2012;
- 5) 23 December 2012 – 23 April 2013.

The Otanerau farm has never contained sea cages in addition to its ordinary cages, with the exception that from 12 June 2010 to 2 October 2010 the Ruakaka farm was temporarily relocated to the Otanerau site. This was as a result of a harmful algal bloom affecting the inner Marlborough Sounds.⁵

- b. The Forsyth farm was fallowed for eight years prior to December 2009. The farm was reinstated from December 2009 to November 2011, after which it was fallowed for 11 months. On 6 October 2012 the Waihinai farm was towed to Forsyth (arriving at Forsyth on 7 October). Since being reinstated in 2009, the Forsyth farm has not contained any sea cages in addition to its normal cages.

Question 6: Use of Organic Zinc

17. NZ King Salmon began to purchase feed stocks containing organic (as opposed to inorganic) zinc in July 2011. The changeover to organic zinc at Forsyth and Otanerau would have been complete by around September 2011.
18. The request for information regarding the use of organic zinc at NZ King Salmon's farms should not properly be included as part of a s 92 request. NZ King Salmon is not proposing changes to zinc usage as part of the applications at Forsyth and Otanerau.

Question 7: Copper Based Antifouling

19. NZ King Salmon has previously advised the Council that it has ceased utilising copper based antifoul at Forsyth and Otanerau. The last time antifoul was used at Forsyth was on 13 May 2010. At Otanerau, antifoul was last applied on 23 March 2010.
20. The request for information regarding copper based antifoul use should not properly be included as part of a s 92 request. The use of antifoul at both Forsyth and Otanerau is regulated by a separate consent, U080726, and accordingly does not relate to the applications before the Council.

Question 8: Feed Discharge Levels

21. NZ King Salmon's applications at Forsyth and Otanerau seek to make the benthic monitoring conditions of NZ King Salmon's existing consents consistent with the most up-to-date monitoring techniques outlined in Cawthron Report 2080. They are not general reviews of the consent conditions and do not request changes to feed discharge levels.
22. In the case of the Forsyth and Otanerau farms, at this point in time benthic conditions are the limiting conditions. It may be that in the future, advances in feed technology mean a higher level of feed discharge can be achieved while remaining within conditions relating to the quality of the benthic environment.

⁵ See Cawthron Institute "Environmental Impacts of the Ruakaka Bay Salmon Farm: Annual Monitoring 2010" at page 3.

Question 9:

23. This is an issue of detail and should not properly be included as part of a s 92 request, however NZ King Salmon has no difficulty with the wording you suggest.

Peer Review

24. NZ King Salmon is not opposed to the Council seeking independent assistance with the applications. However, this is not a circumstance where a peer review may be formally required. It is a precondition of a peer review that “the activity for which the resource consent is sought may, in the authority’s opinion, have a significant adverse environmental effect.”⁶
25. The Council cannot reasonably form the view that these applications may have significant adverse environmental effects. All that is sought is that some concrete definition is placed around conditions which are vague, easy to misinterpret, and virtually impossible to enforce.
26. NZ King Salmon is volunteering a set of conditions which are, by and large, consistent with the Board of Inquiry’s conditions and the monitoring techniques outlined in Cawthron Report 2080. As the application records, this will have no, or at the very least, no significant environmental effects.
27. While NZ King Salmon does not believe this is a situation where peer review can be requested, the company is happy to volunteer to meet the reasonable cost of the peer review.

Notification

28. You have indicated that if NZ King Salmon refuses to provide any of the information requested the Council must notify the application pursuant to s 95C of the RMA.
29. In that regard I draw your attention to the decision of *Reuters Homes Limited v Wanganui District Council* [2011] NZRMA 357 (HC). In that case the High Court found that a request made by Council under s 92 did not seek information “relating to the application” and was not made for a proper purpose. In those circumstances, the Council Officers erred in law by treating the applicant’s refusal to comply with the request as justification under s 95C(2)(b) to publicly notify the application for consent.
30. That is the circumstance here. NZ King Salmon refuses to provide certain information about fish mortality because the statutory requirements are not met. In my view it would be an error of law for the Council to notify pursuant to s 95C.
31. As always, NZ King Salmon is able to enter into further dialogue with the Council in relation to these matters. Please contact me to discuss

Yours Faithfully

GASCOIGNE WICKS



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Partner

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⁶ Section 92(2)(a) Resource Management Act 1991.