

# KING SALMON: A question of appeal?



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**A**s we predicted in our last column, the New Zealand King Salmon applications to expand their salmon farming operations in the Marlborough Sounds have not yet reached the end of the line.

In mid-March, the Environmental Defence Society filed an appeal in the High Court against the recent Board of Inquiry decision relating to applications to establish further salmon farming operations in the Marlborough Sounds, by King Salmon Limited.

There are two specific points of appeal, both points of law:

1. "The Board found that the Papatua (Port Gore) site was outstanding but then failed to protect it."
2. "The Board... failed to consider alternative options for zoning sites outside of prohibited areas."

The appeals have been filed in respect of two of the four sites that were approved by the Board, being the Port Gore site and the Waitata site.

The point of appeal notes that Port Gore is "outstanding" which we take to be a reference to the status of Port Gore as an area of "outstanding natural character."

"Outstanding natural character" has a distinct meaning, as defined in section six of the Resource Management Act 1991, and the New Zealand Coastal Policy Statement. The NZCPS aims to preserve the character of New Zealand's coastal areas, including recognition of characteristics and qualities that contribute to the natural character of an area, and seeking to preserve areas of national importance.

The appeal in respect of the "outstanding natural landscape" of Port Gore will be particularly interesting, given the apparently contradictory decision of the Environment Court that we have discussed in an earlier edition, *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC. That case involved an appeal against a decision of the local Marlborough District Council to not issue permits for the continued operations of existing mussel farms in Port Gore. The Environment Court in that case upheld the decision to refuse permits largely on the basis of the adverse visual and amenity effects the activities would have on surrounding land owners and their use of the land in Port Gore. Similar issues, but entirely different outcome to the King Salmon decision.

Although a Board of Inquiry, such as that which decided the King Salmon applications, is not a standard part of the hierarchy of decision-makers under the RMA, it effectively sits at the same level as the Environment Court, in that both can only be appealed to the High Court. So how can two different authorities, which are essentially on an even footing in the legal hierarchy, have reached similar conclusions as to the outstanding character of landscape of the same place but ended up making entirely different decisions as to the appropriateness of aquaculture activities in that place?

Were the facts and evidence so different in the two cases as to justify the different decisions. Because the RMA allows the decision of the King Salmon Board of Inquiry to be appealed only on points of law, the EDS will need to establish that it is the latter, in order to the decision overturned.

We should be clear in pointing out that both decisions record the natural beauty of Port Gore, its remoteness and wildness.

The Environment Court held that the natural landscape of Port Gore was remote and wild, with several important recreational aspects, and as having an "outstanding natural landscape."

The Board of Inquiry noted that all the landscape experts who had given evidence before them identified that Port Gore includes areas of Outstanding Natural Landscape, including the area of Port Gore (Pig Bay), which will actually have the salmon farm in it. After identifying that area of Outstanding Natural Landscape, the Board noted:

"At the site level there is no disagreement that the proposed farms would have high unavoidable adverse effects on the outstanding natural character of Cape Lambert Scenic Reserve."

And went on to say:

"We find that the effects on natural character at the site would be high. This would include the effect on the seabed and on the Cape Lambert Reserve, which is recognised as an area of Outstanding Natural Character... Overall the effects on Port Gore as a whole, in our view, would be low to moderate."

The Environment Court considered that the impact of mussel farming activities in Port Gore could not be sufficiently mitigated in terms of visual pollution by a move to sub-surface farming operations and the Environment Court refused to allow the appeal. The upshot of that was that the existing activities became non-permitted activities when the applications for permits were declined.

Conversely, the Board identified the impacts of the operation on the area, noted the Environment Court's decision, and went on to conclude that the adverse effects, which arguably are greater (at least in terms of visual pollution) with finfish farming could be managed by consent conditions.

It will be interesting to see how the appeal determines the legal questions put forward. In order to succeed, EDS would need to establish that the decision of the Board of Inquiry has applied the law incorrectly. It appears that the Board have approached this matter as a balancing exercise, identifying the area as being of outstanding natural character, but finding that the impact on that area can be mitigated by conditions placed on the consent. The Environment Court found that the area was of outstanding natural character, and therefore could not permit the mussel farming activities. Whether these different outcomes have arisen as a result of differing applications of law, or as a result of different factual scenarios remains to be seen.

