TO EPA OR NOT? – that is the question

BY JUSTINE INNS, BA, LLB SOLICITOR WITH OCEANLAW NEW ZEALAND

The latest round in the saga of the New Zealand King Salmon applications for consent to establish a number of additional marine farming sites was heard in the Supreme Court in late November. The court reserved its decision and had not released it at the time of writing.

It has been widely reported that King Salmon has spent upwards of $10 million on the process to date, and that it has been more time-consuming and frustrating than the company believed it would be when it decided to lodge applications with the Environmental Protection Authority, rather than the Marlborough District Council. It will be little consolation to King Salmon that its experience has provided a valuable lesson to others of the pros and cons of the EPA process.

It's worth considering how differently might things have turned out if it had lodged its applications with the MDC in the usual way.

King Salmon was able to direct its applications to the EPA, rather than the MDC, because the Minister of Conservation determined that theirs was a proposal of national significance, according to criteria set out in the Resource Management Act 1991. King Salmon's argument in support of the significance of its proposal was that additional water space sought would make a substantial contribution to the aquaculture industry's goal of achieving $1 billion in sales by 2025 and that its existing farms are currently unable to meet domestic and international demand.

The EPA appointed a board of inquiry to hear and determine the applications. The board essentially performed the same function as a council's hearing committee, although was subject to more constrained timeframes. After receiving 1,273 written submissions and holding eight weeks of hearings, the Board of Inquiry issued its decision in February 2013, the essence of which was to allow the plan change and consent applications for four of the nine sites and decline the remainder.

The Environmental Defence Society and the Sustain Our Sounds group went on to appeal to the High Court against two of the four sites approved by the Board. It is worth noting that these were not appeals as to whether the Board was right or wrong to grant consent in respect of those sites, but were isolated to two separate questions of law, relating to the proper treatment of areas of "outstanding natural landscape" and the obligation to consider alternative sites. The appeals were dismissed in a decision issued in August 2013.

The appellants took the matter a step further and sought leave to appeal refined versions of the two questions of law to New Zealand's highest court, the Supreme Court. Leave was granted in mid-October 2013. It should be noted that there is no automatic right of appeal to the Supreme Court; rather the court itself must first grant leave, if it is satisfied that that matter in question is of general or public importance (other possible grounds for leave, such as a substantial miscarriage of justice having occurred, were probably not relevant in the present case). In a case such as this, where the appeal has not first been determined by the Court of Appeal, the Supreme Court must also be satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court.

So far, so exhausting – especially for the people paying the lawyers' bills. But if the same applications had been made to the MDC, and the usual course followed, the process could have been even more tortuous. The council's decision to grant or decline the applications could have been appealed to the Environment Court. An appeal of this sort would be heard by the Environment Court "de novo" (afresh), i.e. the decision of the council would be given some weight, but the court would hear all of the evidence for itself and make its own decision.

Further rights of appeal on questions of law would then arise from the Environment Court's decision, with appeals to each of the High Court, Court of Appeal and Supreme Court potentially being available, though there would some grounds for "leap-frogging" one or more of those steps, and leave would still be required for a Supreme Court appeal.

It is easy to see, therefore, why the EPA route was attractive to King Salmon at the outset: tighter timeframes on the initial hearing, no "de novo" appeals and a maximum of two levels or appeal on questions of law. In retrospect, however, the process probably does not feel as if it has delivered on the promises of being streamlined and efficient, and certainly the outcome will be less than desired by King Salmon, even if the Supreme Court declines the most recent appeals and upholds the Board of Inquiry's decision.

But, as unsatisfactory as the process has been, from King Salmon's point of view, what was the alternative? No doubt there are a number of commercial and strategic dimensions to that question. For example, the company may have been able to make different decisions about the staging and timing of its applications if it had known then what it knows now. It's impossible to guess whether the outcomes of a different approach would have been any more favourable to King Salmon, but it's unlikely that they would have been reached any more quickly than through the EPA route.

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