

DECISION and ORDER

NSARB 2021-001

**NOVA SCOTIA AQUACULTURE REVIEW BOARD**

**IN THE MATTER OF:** application made by **KELLY COVE SALMON LTD.** for a **BOUNDARY AMENDMENT TO MARINE FINFISH LICENCE AND LEASE AQ#1039** in **ANNAPOLIS BASIN, DIGBY COUNTY.**

**BEFORE:** Jean McKenna, Chair  
Michael McKinnon, Board Member  
Richard Patterson, Board Member

**HEARING DATE:** November 15 to 18, 2021

**DECISION DATE:** January 28, 2022

[1] The application of Kelly Cove Salmon Ltd. (KCS) for an amendment to lease AQ#1039 (Rattling Beach) was heard by the Board, November 15 to 18, 2021, in Yarmouth, Nova Scotia. Rattling Beach is located on the Annapolis Basin. The application is for an amendment to the boundaries, in order to bring the farm infrastructure entirely within the lease. The farm has been in operation on the site since 2004. The number and configuration of cages, as well as the farmstock, has not changed since then, and will not change with the boundary amendment.

**The issue:**

[2] The issue in this case is straightforward. What, if any, impact will the proposed “operation” (a boundary amendment only) have, in considering the eight factors set out in s. 3 of the *Aquaculture Lease and Licence Regulations (O.I.C. 2015-338 (October 26, 2015), N.S. Reg. 347/2015 amended to O.I.C. 2019-322 (effective November 12, 2019), N.S. Reg. 186/2019)*, made pursuant to the *Fisheries and Coastal Resources Act, S.N.S. 1996, c. 25.* (“the Act”).

[3] The short answer is none, with the possible exception of 3(b), the contribution of the proposed operation to community and provincial economic development. This “proposed operation” consists only of redrawing a line on the water, so to speak. If the application is refused, the farm would continue to exist, but the cages, and therefore the production of stock would be reduced by 80%, with an obvious consequential negative impact on economic development.

[4] However, the applicant and the intervenor, perhaps with an abundance of caution, have approached the question as though it is “should the farm exist at all”. Since that approach was taken, and a great deal of material has been generated on both sides of the question, we will also examine the issue from the broader perspective.

**Facts:**

[5] In 2004, KCS acquired lease AQ#1039, and installed an array of 20 cages. Some portions of the farm infrastructure were located outside of the original lease boundaries, including some cages or portion of cages, and the moorings. The lease dimensions had been created in 1993. There was no evidence before the Board of criteria used by the Province in creating the original site dimensions in 1993, however there was no issue taken by the Province then, or since, with the number and array of cages on the lease, or with the stocking density or quantity of salmon. As well, then, and in 2004, the regulations did not require the mooring lines to be within the lease boundaries, and perhaps the government of the day did not turn their mind to the dimensions needed to encompass moorings as well as cages.

[6] The array of cages and stocking density has not changed since 2004 and will remain unchanged should the application be allowed. If the application is not allowed, KCS would have to place all moorings and all cages within the original boundary, which would necessarily reduce the number of cages on the farm to three or four from the present 20.

[7] In 2008, the Province, in discussion with the aquaculture industry, decided to bring all older pre-2008 sites into boundary compliance simply by amending the boundaries to encompass the mooring lines and anchors.

[8] Accordingly, KCS applied for amendments to its three Shelburne Harbour farms; it was told by the Province to complete those changes before commencing application for its Rattling Beach farm. Those amendments were approved in 2011 by the Province.

[9] KCS was ready to proceed with boundary amendment application for Rattling Beach, but the Province directed KCS to wait until 2012, and then later, until 2013, to do the Rattling Beach amendments. However, in 2013, the Province placed a moratorium on all applications pending completion of the just commissioned Doelle-Lahey report on aquaculture.

[10] The Commission consulted with numerous interested parties, including the Atlantic Salmon Federation, the Nova Scotia Aquaculture Association, the Ecology Action Centre, the Nova Scotia Fisheries Sector Council, the Union of Nova Scotia Municipalities, the Nova Scotia Salmon Association, and the Coastal Coalition of Nova Scotia. Members of the public were encouraged to participate, including Ronald Neufeld, (who later filed a 3-volume affidavit in this matter “in support of” Intervenor Dr. Hemming). At the time Mr. Neufeld had been expressing concerns about the boundary violations at the Rattling Beach site. On December 19, 2013, Barry McPhee, Acting Executive Director of the Nova Scotia Department of Fisheries and Aquaculture (DFA), in responding to his concerns, stated “I would encourage you to participate in the Doelle–Lahey panel”. Whether he did or not is unknown.

[11] In 2014, the report, “A New Regulatory Framework for Low Impact / High Value Aquaculture in Nova Scotia” (the Doelle – Lahey Report”) was issued. Although some participants, including the Ecology Action Centre, had called for a moratorium on marine open pen sites, a moratorium was not recommended. The authors concluded:

“In this report, we conclude that a fundamental overhaul of the regulation of aquaculture in Nova Scotia is called for. We conclude that this overhaul should be guided by the idea that aquaculture that integrates economic prosperity, social well-being and environmental sustainability is one that is low impact and high value. By this, we mean aquaculture that combines two fundamental attributes: it has a low level of adverse environmental and social impact, which decreases over time; and from the use of coastal resources it produces a positive economic and social value, which is high and increases over time. A number of participants in our process urged us to conclude that marine-based fin-fish facilities – and more particularly, salmon farms – cannot be sustainably operated, and to recommend that a permanent moratorium be imposed on this kind of aquaculture. Our conclusion, after careful consideration of the state of the science and opportunities to reduce impacts through effective regulations, is that the regulatory framework should not be prohibitory at a provincial scale. Instead, we recommend fundamental changes to the regulation of aquaculture, which we conclude can address the serious and legitimate concerns raised without foreclosing the opportunity associated with this sector of the industry.”

[12] The legislation and regulations were altered in 2015 following the release of the Doelle – Lahey Report, and KCS was finally advised to either reconfigure its gear within the existing lease boundaries or to apply for an adjudicative boundary amendment:

1) License holder shall submit a scheduled re-alignment plan on or before October 26, 2016 to Nova Scotia Environment. The scheduled re-alignment plans must receive approval from NSE and will be required to provide the detailed steps the license holder plans to take to move all equipment and produce back within the lease boundaries and must also provide the proposed schedule for completion of these tasks; or

2) License holder shall submit an application for an adjudicative or administrative amendment on or before October 26, 2016 to DFA's Aquaculture Division. The format for these applications and review process is stipulated in the new *Aquaculture License and Lease Regulations*. DFA should be contacted for specific questions about these processes.

[13] The directive was issued by the Nova Scotia Department of Environment (NSE). KCS chose the latter option.

[14] As noted, KCS would not be adding or altering the infrastructure on site, nor changing the farm stock volume. This brings us to this hearing, some 13 years after the initial amendment plan, and some four years after Kelly Cove embarked on the new process by way of its application of November 22, 2017.

**Chronology:**

[15] In 2004, KCS acquired the Rattling Beach lease and license, and installed an array of 20 cages. That array continues to exist; however, some cages and most moorings are, and always were, outside the lease boundaries. According to the evidence of Jeffrey Nickerson, Business Development Manager of KCS, GPS technology in 2004 was somewhat less accurate than it is today.

[16] In 2007, Mr. Ronald Neufeld moved to Port Wade on the Annapolis Basin, close to another KCS lease site, and some 2-3 km across the basin from Rattling Beach.

[17] In 2008, the Province, in consultation with the aquaculture industry in Nova Scotia, recognized that a number of farms in the province were operating outside of their boundaries. A decision was made that they should be brought back into compliance through boundary amendments.

[18] In 2010-2011, KCS applied for, and was granted, amendments to the boundaries of three sites that it operated in Shelburne Harbour. The Province had directed KCS to delay its application for the Rattling Beach amendments until Shelburne was complete. When that was completed, KCS was instructed by the Province to wait until 2012, and then again, until 2013, to pursue the Rattling Beach amendment.

[19] In 2012, when KCS began to install a new farm on the Port Wade site, Mr. Neufeld became interested in the Rattling Beach operations. He concluded that portions of the Rattling Beach farm fell outside the original lease boundaries (this was never in dispute; it had been known since at least 2008). He brought his concerns to his MLA, Hon. Stephen McNeil (later, Premier Stephen McNeil). He met with Mr. McNeil and also raised his concern with various staff people.

[20] In 2013, the Province placed a moratorium on any further applications pending completion of the work of the Doelle-Lahey Commission. Mr. Neufeld continued to express his concern about the boundaries to DFA. In December 2013, he was advised by DFA that they were working with the operator on the issue, and he was encouraged to participate in the Doelle –Lahey panel. There is no evidence to show that he did so. He does not appear to have expressed his concerns to KCS directly.

[21] In 2014, Mr. Neufeld continued to investigate the Rattling Beach site. He took measurements with his hand-held GPS, and the odometer in his vehicle. He moved from Port Wade to Shelburne, although he states in his affidavit that he continued to periodically contact former neighbours regarding the Rattling Beach site. (Although his affidavit is filed in support of the Hemming intervention, he does not at any point mention Dr. Hemming or Dr. Hemming's issues regarding an alleged impact of Rattling Beach farm on his property). Mr. Neufeld became active with the "Protect Liverpool Bay" community group, who with some other groups, including Healthy Bays Network, (HBN), St. Mary's Bay Protectors (SMBP) oppose all marine open pen farming.

[22] In November 2014, the Doelle – Lahey report was released.

[23] In 2015, the governing legislation and regulation was amended (the *Act*, supra).

[24] On April 27, 2016, KCS submitted an application for renewal of its licence and lease for the Rattling Beach site. In 2016, Ronald Neufeld had been living in the Shelburne area for some two years but continued to voice his concern with the operation of the farm. Specifically, and solely, that the farm was operating outside of the lease boundaries.

[25] On July 11, 2016, DFA renewed the lease and licence for the site, but noted that all equipment and product were to be within the lease boundaries, and that KCS would be required to submit either a boundary amendment application or a site realignment application to NSE on or before October 26, 2016. A similar directive had been issued by NSE in May 2016. The difference between the two directives was that DFA required that the submission be made to NSE, while the NSE required the submission be made to DFA.

[26] On October 26, 2016 Kelly Cove submitted its applications.

[27] On March 17, 2017, KCS held a public information meeting in Digby. It was properly advertised in the community. It was attended by approximately ten members of the public who generally supported the proposal. Mr. Neufeld, still vigorously focusing on Rattling Beach boundaries, complained that the public meeting should have taken place before the application was made. He did not attend the public meeting.

[28] On August 17, 2017, DFA informed KCS that the development plan submitted would have to be revised, and that a scoping report would have to be completed (the scoping would include the aforementioned public meeting).

[29] On November 22, 2017, KCS submitted its revised Application Package, including the Development Plan along with its Baseline Assessment Report Addendum, Boundary Amendment Addendum and its Scoping Report.

[30] On December 4, 2017, DFA confirmed receipt of KCS's request for an aquaculture boundary amendment with respect to AQ#1039 and advised that the application would proceed to the internal review stage of the renewal process.

### **Legislative framework:**

[31] Boundary amendments are governed by s.49 of the *Act*:

**49** The Review Board shall, with respect to marine areas not designated as aquaculture development areas, make decisions with respect to

(a) an application for an aquaculture licence or aquaculture lease;

(b) where an existing aquaculture licence or aquaculture lease authorizes the production of shellfish or aquatic plants but not finfish species, an application to amend the aquaculture licence or aquaculture lease to authorize the production of a finfish species; and

c) an application to amend an aquaculture licence or aquaculture lease to change the boundaries of an existing aquaculture site if the change results in an increase in the area of the aquaculture site. 2015, c. 19, s. 9.

This section brings this matter to the Board.

[32] However, the Administrator appointed under the *Act* is empowered to make some decisions without the necessity of proceeding with the full process and ultimate involvement of the Review Board:

**54A (1)** The Minister shall appoint an employee of the Department to act as Administrator and make decisions with respect to

(a) applications for aquaculture licences or aquaculture leases in designated aquaculture development areas only;

(b) applications for aquaculture licences for land-based aquaculture sites;

(c) applications to amend aquaculture licences or aquaculture leases except those applications referred to in clauses 49(b) and (c); .....

[33] Thus, an application such as the one currently before the Board, **must** go through the formal Board process, including the steps leading up to it.

[34] In order to reach a decision on an application, the Board must consider eight factors as set out in s. 3 of the regulations:

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;

(e) the other users of the public waters surrounding the proposed aquacultural operation;

(f) the public right of navigation;

(g) the sustainability of wild salmon;

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquaculture operation;

[35] Although the application in the case does not involve any change whatsoever of gear, species, farm stock, farm methods, or infrastructure, the legislation requires KCS to go through the same lengthy process as it would if it was applying for an entire new operation as opposed to simply bringing its boundaries into compliance.

[36] It is notable that the section 3 factors refer to “the proposed operation”. Applying the factors in this case, which does not contemplate a new “operation”, does result in an awkward and cumbersome fit for what actually entails drawing an invisible line on the water around an operation that has been in place since 2004. ” Operation” is not defined in either the *Act* or *Regulations*, and this process is not included in the category of administrative amendments. However, KCS is clearly required by statute to go through the process and apply the eight factors to the facts of the case. The statutory requirements follow:

### **Consultations on adjudicative amendment application**

**14 (1)** On receipt of a completed application for an adjudicative amendment, the Minister must appoint an employee of the Department to undertake consultations with any of the following as required under the laws of the Province or of Canada with respect to the application:

- (a) a department or agency of the Government of Nova Scotia;
- (b) a department or agency of the Government of Canada.

**(2)** In addition to any required consultation referred to in subsection (1), the Minister may appoint an employee of the Department to undertake consultations with any person, group of persons or organization that the Minister considers necessary in the circumstances.

[37] Bodies consulted by DFA in this case included:

1. Fisheries and Oceans Canada
2. Canadian Food Inspection Agency
3. Transport Canada
4. Environment and Climate Change Canada
5. Nova Scotia Environment
6. Nova Scotia Department of Agriculture
7. Nova Scotia Community, Culture and Heritage
8. Nova Scotia Department of Lands and Forestry
9. Nova Scotia Department of Fisheries and Aquaculture (Inland Fisheries)
10. Office of Aboriginal Affairs (Now L'Nu Affairs)

[38] Mr. Nathan Feindel is the Manager of Aquaculture Development and Marine Plant Harvesting with DFA. He testified that the consultation process involved an ongoing dialogue with the various network partners, in particular with the Federal Department of Fisheries and Oceans (DFO). There was a series of communications between DFA and DFO beginning in March 2018 until December 2020, resulting in DFO's Initial Letter of Advice, dated October 11, 2019, attaching the Canadian Science Advisory Secretariat report dated August 2019 (the "CSAS Report") and DFO's Addendum Letter of Advice dated December 1, 2020.

[39] As part of the network consultation, on March 20, 2018, the application documents were provided to the Office of Aboriginal Affairs (OAA, now Office of L'Nu Affairs.) That office is the government department which advises all departments on Mi'kmaq consultation. It advised DFA that consultation with the Mi'kmaq was not necessary, as "„there was no new equipment, species, harvesting methods, yield, or structural change associated with the project".

[40] Ultimately, all network consultations were finally completed, with none of the network partners having any issues with the proposal. A summary of the outcomes is attached as Appendix "A" to these reasons.

[41] On February 5, 2021, following completion of the internal review, DFA submitted the application to the Review Board. The lengthy delay from the time from KCS submitting the application, to referral to the Review Board, was apparently the result of difficulty in getting response from some of those bodies, as well as requests for further information from some of those bodies. Dealing with DFO was particularly time consuming. The delay was certainly unreasonable, however the process, and the regulations, were new.

### **Review Board proceedings:**

[42] Parties to the proceedings are Kelly Cove Salmon Ltd., the Nova Scotia Department of Fisheries and Aquaculture, and the intervenor, Dr. Gregory Hemming. Parties are entitled to call witnesses, present documentary evidence and examine and cross examine witnesses.

[43] Anyone who can show in an unsworn application that satisfies the Board that they are "**substantially and directly affected by the hearing**" can become an intervenor, and thereby a party. Similar language is employed in most legislation and practice rules in many fields of litigation and is certainly not unique to the Nova Scotia fisheries and aquaculture regulatory regime. The rationale for the restriction is set out in the decision of Leblanc, J., in *Specter v Nova Scotia* 2011 NSSC 333, stated:

"In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, "person aggrieved", "person directly affected", or "direct and personal interest". What matters is the interpretation that is given to these phrases. This necessarily involves a textual, contextual, and purposive analysis of the applicable legislation. Involved in this interpretation is the concern of courts that an overly broad interpretation will allow mere "busybodies" to flood the courts with litigation challenging public decisions."



[44] This Board does not consider the unsuccessful intervenors (St. Mary's Bay Protectors (SMBP), Ecology Action Centre (EAC), and Healthy Bays Network (HBN)) in this case to be 'busybodies'. However, their interest was in opposition to marine open pen aquaculture in general (as can be seen from much of the material that they eventually put before the Board as members of the public) and not focused in any way on this site or the impact of a boundary amendment.

[45] Without becoming a party, a member of the public can otherwise participate. The regulations permit members of the public, who may not be "substantially and directly affected by the hearing" to give a sworn oral statement at the conclusion of the hearing, or to submit an unsworn written statement. Such individuals do not have the legislated status of a "party", in that they are not able to call witnesses, or participate in examination or cross examination of witnesses. They may, however, be questioned by the parties if they make an oral statement.

[46] Dr. Hemming was granted intervenor status by decision dated March 25, 2021. In Dr. Hemming's application, he stated that he was "rewilding" his property, and that his property was on the shores of the Annapolis Basin and located approximately 2.5 km from the farm. He said that the Rattling Beach boundary amendment would impact on his rewilding project. He therefore claimed that he would be "substantially and directly affected".

[47] However, shortly after the Board granted intervenor status to Dr. Hemming, Mr. Robert Grant, solicitor for KCS, pointed out that in fact, Dr. Hemming's property was actually some 14.5 km away from Rattling Beach. Nonetheless, having reached a decision based on Dr. Hemming's (unsworn) application, the Board was prepared to allow Dr. Hemming to continue to act as an intervenor, where his location, and any possible impact would be subjected to his sworn evidence, and that of any other witnesses that he might choose to call. As it was, neither the location, or possible impact on his "rewilding project", was ever addressed by any of his witnesses in the course of the hearing, nor did he himself file an affidavit or testify, although he was present throughout (discussed below).

[48] An intervenor application was filed on behalf of St. Mary's Bay Protectors (SMBP) by Gwen Wilson. SMBP, a community group with a general interest in opposition to open pen aquaculture, formed in response to lease options in St. Mary's Bay. On March 19, 2021, the SMBP application was rejected. Ms. Wilson also submitted a request to make an oral sworn statement at the hearing but was not present when called during the hearing.

[49] Healthy Bay Network (HBN) also filed an intervenor application. HBN, located out of Pleasantville on the south shore of Nova Scotia, said that it represents various community organizations across the province, united in opposition to open pen aquaculture. They showed no specific or implicit "substantial and direct affect" of the proposed boundary expansion of the KCS site; they were concerned with the broader concept of open pen farms. Their application for intervenor status was rejected on March 24, 2021. Mr. Ronald Neufeld of Protect Liverpool Bay Association (PLBA) later filed an affidavit purported to be in support of Dr. Hemming's submissions as an intervenor. Mr. Derek Purcell of HBN also subsequently filed a written submission. Neither addressed Dr. Hemming's location or issue or mentioned Dr. Hemming.

[50] The Ecology Action Centre's (EAC) Simon Ryder Burrige applied for intervenor status. While it expressed a broad interest in open pen aquaculture, it did not establish a substantial and direct connection to the KCS site, or particularly, to the boundary amendment. Its application was rejected on March 24, 2021. Mr. Ryder Burrige later filed his own affidavit ostensibly "in support of" Dr. Hemming who had been give party status; he also provided a written public submission. He made no reference to Dr. Hemming, Dr. Hemming's farm location, or Dr. Hemming's rewilding concern in his affidavit, rather mostly just expressed the EAC general opposition to open pen salmon farms.

[51] It is essential to point out that the role of this Board is not to provide a platform for general opposition to, or support of, open pen aquaculture in general. Rather, we must consider **this** application (KCS / Rattling beach farm) in relation to **this** site, and the impact, if any, of changing the lease boundary. To this question, and this question only, we must apply the eight factors set out in S..3 of the regulations. There may be many other actual or potential lease / licence sites within the coastal waters of the province, with varying characteristics. Some may be suitable, some unsuitable. There may be many potential operators, of varying experience, knowledge, infrastructure, and skill sets. But to repeat, in this hearing we must consider the merits of the Rattling Beach boundary amendment, and more particularly, the potential impact of **this** boundary amendment application. At the end, we must decide whether to allow the amendment, and allow the farm to continue to operate as it has since 2004, or reject the application, thereby requiring it to contain its entire infrastructure within the lease boundary as originally drawn in 1994. Unfortunately, much of the evidence and argument on the current application was not so focused, but will be addressed.

#### **Application of the eight factors:**

[52] The simple answer to each of the eight factors, is really to paraphrase the answer provided to DFA by OAA; as there are no new equipment, species, harvesting methods, yield, or structural change associated with the project, there can be no impact of the boundary expansion on any of the factors.

[53] However, since so much information gathering and evidence has now been laid before the Board, and since we are required by statute to consider the eight factors, we will do so in some detail. In so doing, we will also consider whether reducing the size of the farm would have any impact. We must keep in mind that there are only two answers: either we allow the amendment, or refuse it, thereby resulting in a smaller lease than what has been utilized since 2004.

#### **a) The optimum use of marine resources:**

[54] The utilization of this small section of the Annapolis Basin has been in place since 2004, without challenging or in any way restricting other uses. To put some perspective on it, the boundary amendment would officially extend the site boundary a further 160 m into the 23,000 m long Annapolis Basin (from the tidal power plant at the mouth of the Basin, to Rattling Beach), without changing a mooring or cage position.

[55] The use of the site to efficiently produce thousands of kg of food is surely an optimum

use of the small portion of the Annapolis Basin. Salmon farming converts feed to food much more efficiently, and with a much smaller footprint, than does, for example beef production.

[56] We conclude that the re-drawing of the boundary to encompass the infrastructure represents the optimum use of marine resources.

**b) The contribution of the proposed operation to community and Provincial economic development**

[57] The evidence of Jeffrey Nickerson establishes that the farm as currently operated, makes a considerable contribution to the economic well-being, in particular to the town and region of Digby. The parent company, Cooke Aquaculture, employs 205 full time, year-round Nova Scotians on its several leases in Nova Scotia. It has an annual Nova Scotia payroll of ten million dollars, and approximately 10% of its overall return relates to the Digby operation. Jobs include feed and maintenance technicians, fish health and environmental management professionals, technical support and administrative positions. KCS's operations in the Annapolis Basin represent approximately 30% of the value brought over to the Digby wharf. KCS also employs and contracts with a variety of local suppliers including divers, mechanics, boat repair facilities, hardware providers, welders, heavy equipment operators, crane operators, marine suppliers, distribution companies, environmental consultants, electricians, boat brokers, boat builders, engine suppliers, hotels, restaurants and ferries. It also employs people at the feed manufacturing facility in Truro, which supplies its Nova Scotia and New Brunswick farm operations. Mr. Nickerson testified that KCS contracts with three hatcheries in Nova Scotia for the supply of Atlantic salmon smolts and Rainbow/Steelhead trout (one of the three hatcheries supplies only trout), and also works with the Millbrook First Nation Fish Hatchery.

[58] To allow the application will allow this economic contribution to continue. There was no evidence on behalf of the other parties as to the impact of refusing the application, although Mr. Nickerson did speak to the inevitable reduction in production (from 20 cages down to three or four) if it was necessary to move the farm operations entirely inside of the original lease boundaries,. It is easy to conclude that the result would at best, reduce the economic contribution, and at worse, make it unviable.

[59] We are satisfied that this farm does make a genuine contribution to community and Provincial economic development.

**c) Fishery activities in the public waters surrounding the proposed aquacultural operation;**

[60] As noted above, the only evidence of any interference with other fishery operations at this site was the occasional entanglement of lobster gear with mooring lines, and KCS assisted fishers with clearing gear. KCS does not, in any way, prohibit any other type of fishing within the utilized area, and no objection was raised by any fishers, whether by intervention, written, or oral statement.

[61] The Board is satisfied that this farm does not cause any significant negative impact to other fishery activities.

**d) The oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation:**

[62] Section 4 of the Development Plan addresses in detail the oceanographic and biophysical characteristics of the public waters surrounding the farm, including the wind conditions, waves, tides, currents, salinity, temperature, oxygen, bathymetry, baseline monitoring and site design. This site would be considered a high energy site, and KCS is experienced with operations of such sites.

[63] All conditions are continuously monitored in real time, in person and remotely, and reported as required. The DFA Environmental Monitoring Program (EMP), explained by Jessica Feindel, DFA Manager of Aquaculture Operations, monitors marine finfish operations and examines the relationship between the operation and surrounding marine environment. The EMP is a risk-based program to monitor the impact of organic deposition on the sea floor (e.g. the fecal matter and waste feed from the farm).

[64] Ms. Feindel explained that the EMP reviews data to ensure that the conditions below the pens are monitored to ensure that oxic conditions are maintained on the sea floor beneath the cages. As this site has been in operation for many years, the Board has the advantage of seeing, not only what should occur, or might occur, but what has occurred. Ms. Feindel testified that the Rattling Beach farm has experienced only two hypoxic conditions between 2004 and 2020, once in 2011 and once in 2017. She had no concern, as the farm immediately corrected the issue that had caused the conditions. In 2011, it replaced the netting material, thereby reducing the organic debris accumulated during net cleaning. It also began to use remotely operated ROV's to ensure net cleaning occurred more regularly.

[65] The later incident was the result of a broken feed hose, which was repaired. The farm also implemented staff training, equipment, and practices to allow earlier detection.

[66] There was no evidence before the Board to indicate that reducing the farm operation to fit the original 1994 boundaries would have any impact, other than reducing the size of the footprint.

**e) The other users of the public waters surrounding the proposed aquacultural operation;**

[67] Other users include recreational boaters, kayakers, and fishers. Although the site is described as Rattling Beach, there is no actual "beach" near the site; the bottom drops off rapidly from the shoreline.

[68] The Kwilmu'kw Maw-klusuaqn (KMKNO) filed a written submission. The KMKNO works on behalf of most of the Nova Scotia Mi'kmaq communities in negotiations and consultation with the federal and provincial governments. Its involvement, and particularly that of the Bear River community, was said to relate to traditional harvesting within the area of the proposed boundary. The details of the consultation issue will be dealt with below. However,

there is no evidence that harvesting, whether by Mi'kmaq or any other fishers have been disrupted by the use of the site by KCS since the onset of operations in 2004.

[69] KMKNO also referenced the use of beaches along the Annapolis Basin as summer campsites. However, there is no "beach" area near the Rattling Beach site, as the shoreline follows the contours of the adjacent hillside and drops off precipitously.

[70] KMKNO also referred to possible archeological artifacts on the site, however it did not advert to any evidence that would suggest the presence of the cages would interfere with any archeological material, as the only portion of the infrastructure that touches the seabed are the mooring anchors.

[71] The St. John / Digby ferry operates from a wharf nearby, and when the amendment was first proposed, the ferry operators expressed concern. However, those concerns were alleviated when they realized that the farm itself, including infrastructure, would not expand beyond its actual operations over the years.

[72] There has been no evidence presented to suggest that the amendment of the boundary to incorporate the farm as it has existed since 2004, would have any impact on other users. Nor is there any evidence to suggest that refusing the application, thereby reducing the size of the physical farm operation, would be beneficial. The Board is satisfied that other users of these water will not be negatively impacted by this boundary amendment.

#### **f) The public right of navigation**

[73] Transport Canada was consulted as part of the network agency review process. Transport Canada reported there had been no issues with the current farm location and no issues with the proposed alteration to its boundaries to accommodate the existing infrastructure. As noted, the operators of the Digby / St. John ferry initially expressed concern, however, they had initially understood the action infrastructure would be expanded. In the result, with no changes actually occurring, there are no longer any concerns.

[74] We conclude that allowing the farm to continue as it is presently located will have no impact on the public right of navigation.

#### **g) The sustainability of wild salmon:**

[75] While evidence was heard on all of the eight criteria, the focus of dispute was the sustainability of wild salmon. Within that element, the concerns addressed were primarily risk of "sea lice" and other pathogens potentially contaminating a wild salmon population, and escaped farm salmon introgression with wild salmon.

[76] In his final written submission on behalf of the applicant, Mr. Robert Grant summarized the position of KCS:

"The evidence before the Board strongly supports the conclusion that neither the Rattling Beach Farm nor the proposed amendment to the lease boundaries at Rattling

Beach will pose a risk to wild salmon or to the sustainability of wild salmon. Kelly Cove submits the evidence supports the following conclusions:

- (a) There is no population of wild salmon likely to come into close enough proximity to the Rattling Beach Farm to be affected by it;
- (b) The infrastructure, procedures and training for the Rattling Beach Farm operation are effective in keeping farmed fish within its pens, from introduction to harvesting, thereby mitigating risk of introgression with wild salmon, if they are present;
- (c) Salmon sea lice are historically not a problem at Rattling Beach and there is an array of treatments and management tools available to address potential infestations;
- (d) Given that the cycle for farmed salmon at this Farm coincides with that of wild salmon (if they are present), the risk associated with sea lice is exceedingly low;
- (e) Farmed fish are vaccinated and healthy when they are introduced to the Farm and are carefully monitored by veterinarians throughout their growth for prevention and treatment of disease. The risk of transmittal of disease to wild salmon, if they are present, is exceedingly low.

[77] Sea lice are a parasite of sorts, that exist in the wild salmon population. They particularly pose a risk to smolts, who's small body mass makes them more vulnerable. They are typically present on wild salmon, and they require a marine environment to thrive. When wild salmon leave the salt water to spawn in freshwater rivers, they lose the sea lice.

[78] Much of this issue must necessarily be addressed by way of expert opinion evidence. The limits regarding the admissibility of expert opinion are reflected in the law of evidence, common law, statute and by way of civil procedure rules in most jurisdictions It is also addressed directly in the *Act*:

**30 (3)** A party is not entitled to present the evidence of an expert witness at an adjudicative hearing unless

- (a) the evidence is in the form of a report that includes the expert's name, address and qualifications, along with a statement of the substance of the expert's proposed evidence; and
- (b) the party has provided the evidence to the Review Board and each of the other parties as required by subsection (5).

[79] Jonathan Carr was called to offer expert opinion evidence "on behalf of" intervenor Gregory Hemming. Mr. Carr's qualifications were not challenged, and his report was properly tendered. Mr. Carr is employed by the Atlantic Salmon Federation as Vice president of Research and Environment and is well qualified to provide expert opinion on the potential

impact of open pen salmon on the wild salmon population. His affidavit contained the expert opinion prepared by himself and Dr. Sutton, also of the Atlantic Salmon Federation.

[80] In his written document Mr. Carr expressly limited his opinion to three issues:

1. What impacts, if any, has the farm had on Atlantic salmon?
2. Will the **continued operation** of the farm impede wild Atlantic salmon recovery efforts?
3. Are there steps the applicant could take to avoid or mitigate impacts on wild salmon in the event that the application is approved?

[81] We note, again, that we are not here to address the “continued operation” of this farm. We are here to consider what might be the impact of the boundary amendment, considering the eight factors. It is notable that Mr. Carr (although well qualified to offer opinion evidence on salmon farming, and its potential impact on wild salmon), did not address this issue directly, nor did he address the specific concern expressed by his ostensible client, Dr. Hemming, in his successful intervenor application (Dr. Hemming's rewilding of his property some 14.5 km from the Rattling Beach site). Nor does Mr. Carr address the actual subject of this application, i.e. whether the impact of allowing or refusing this boundary amendment would impact wild salmon population. Rather, he spoke primarily to the “continued operation” of the farm.

[82] In cross examination, Mr. Carr agreed that before any attempts were made at salmon aquaculture in the basin, the Bear and Annapolis Rivers were almost entirely devoid of a wild salmon population. By 1994, the population was so low that it was not sustainable.

[83] He acknowledged that commercial salmon fishing was abolished in the area, and was eventually, recreational, and Indigenous fishing, but the salmon did not return to the rivers.

[84] He agreed that regarding the Basin, there were other probable factors that impacted the presence of salmon in the basin and feeder rivers. He agreed that the increased acidity of the rivers, from acid rain, coupled with the naturally acidic soil in the area would affect the salmon presence. He acknowledged that the tidal power dam at the mouth of the Annapolis River impeded / prevented salmon return as did agricultural runoff from the numerous farms in the area. He acknowledged that until it ended in May 2018, commercial salmon fishing, particularly off Greenland and the Faroe Islands had had a massive impact on the wild salmon population. He agreed that IUU (illegal, unauthorized, unregulated) fishing continued to impact the Atlantic salmon population.

[85] His expert opinion relies extensively on international research, on open pen salmon farming in general. His desired remedy would seem to be stopping open pen aquaculture operations altogether, or alternatively, imposing conditions on the operator. His views are reflective of the position of unsuccessful intervenor applicants Mr. Neufeld and Mr. Ryder – Burrige of the Ecology Action Centre. As noted, both Mr. Neufeld and Mr. Ryder–Burrige filed affidavits ostensibly in support of Dr. Hemming. Dr. Hemming did not file an affidavit himself, nor did he testify.

## Sea lice

[86] According to Mr. Carr, sea lice on farm salmon could potentially contaminate wild salmon which pass in the vicinity of the Rattling Beach pens, either as mature salmon, returning in the fall to the Annapolis or Bear River to spawn, or as smolts returning from the rivers to the sea in the spring. He relies heavily on studies done in Norway, which is a world leader in salmon aquaculture. The industry in Norway produces approximately € 6.5 billion in revenue annually, and a single farm will often be larger than all of the existing farm sites in Nova Scotia, combined. He agreed in cross examination that the Norwegian farms are located in close proximity to each other, in the confines of the narrow Norwegian Fjords, such that wild salmon travelling to or from rivers would have to pass multiple farm sites to reach their destination. He also agreed that the various farm sites in Norway would, at any given time, contain different growth stages of the fish, from smolt to adult.

[87] He did not dispute, and acknowledged, that KCS stocked smolt in all of their cages at the site in the spring of the year, and that the stock remained there until harvest, approximately 18 months later. He also agreed that when those smolt were initially placed in the cages, they were coming from a freshwater environment, where they had been grown, and they would therefore be lice free. Any subsequent contamination would have to be by way of transfer from wild fish on the journey to spawn in the rivers. In the result, at least in the spring of year one, there would be no risk of contamination from farm fish to wild smolt leaving the rivers on the way to the sea.

[88] When the farm fish were approaching maturity the following spring, any wild smolt leaving the rivers could be vulnerable to lice which may have later been transferred to the farm fish from wild fish. However, he agreed that the very powerful tidal flow from the Annapolis Basin to the Bay of Fundy, through the “gap” would tend to move any wild smolt through quickly, reducing the opportunity for contamination. Mr. Carr acknowledged that there was likely only a “low chance” that smolts returning to the sea from the Annapolis Basin would be contaminated by sea lice from the pens.

[89] The return of wild salmon (if any) to the rivers generally occurs in the fall. In year one of the farm fish, the wild salmon would potentially introduce sea lice to the farm salmon. In year two, any wild smolt leaving the rivers could potentially be contaminated by lice from farm fish, but this would typically take place in late fall, when the lice on both wild and farm fish would be lower as a result of lower water temperatures. The evidence is that the wild fish reaching the ocean would eventually become contaminated with lice count much heavier than those monitored on the Rattling Beach farm.

[90] KCS uses cage monitoring to control sea lice infestation.

[91] Dr. Anthony Snyder is an aquatic animal health veterinarian with DFA. Dr. Snyder stated in his affidavit that KCS’s FMP, sets the tolerance limit for lice contamination. It was approved by DFA, and sets out the action threshold for sea lice as follows: (a) April, May and June: 0.5 female adult louse per fish; (b) July – September: one adult female louse per fish; and (c) October – December: 0.5 female adult louse per fish. This tolerance level is actually much more conservative than that required by DFA, and is much, much lower than the counts in mature wild salmon, over 14 per fish.



[92] KCS monitors and is required to report counts on a weekly basis, from April 1 until January 15. In the event that the tolerance limits are exceeded, interventions used, (in order of effectiveness success) include (a) mechanical treatments such as fresh water, warm bath water or high-pressure water (hydolicer) to remove the lice from the fish, (b) in-feed treatments, all of which need to be approved by Health Canada for use; and (c) harvesting.

[93] Interventions must be approved by DFA.

[94] KCS is also considering the use of lumpfish as a cleaner fish in the pens (the use of lumpfish is being considered in the future, but, although in use in Newfoundland, it has yet to be approved for use in Nova Scotia).

[95] Dr. Snyder also stated in his affidavit that other farm practices to control impact of lice and other pathogens include, in addition to the monitoring program, a multi-factorial approach to address finfish pests including control of stock and density, ensuring proper space between the farms and good husbandry. The three-month fallow period between harvest and restocking the farm also mitigates against sea lice as there is no host in the pen.

[96] Dr. Snyder stated in his affidavit that the stocking density on this site is 25 kg. / m (3) and meets the Nova Scotia standard. He also states that the cage array of 20 is suitable for this site.

[97] The intervenor states in its closing submissions that, at the time of the hearing, KCS was experiencing a sea lice infestation at the Rattling Beach site. That is not correct.

[98] Mr. Nickerson stated in his direct evidence, that shortly before the hearing, KCS's Victoria Beach farm experienced an increase in sea lice. KCS notified DFA and consulted with its veterinary staff to implement a treatment plan to address the sea lice. The treatment plan began with enhanced monitoring, followed by an in-feed treatment. At the time of the hearing, KCS was about to use its \$15 million treatment vessel to utilize a warm water bath to remove the sea lice from the fish at Victoria Beach. The lice would be removed, collected, and disposed of at an onland compost facility.

[99] In the event that treatment was unsuccessful, the fish would be harvested.

[100] At the same time, as a precaution, KCS intensified its sea lice monitoring at the Rattling Beach site.

#### **Introgression of escaped farm salmon with wild salmon:**

[101] The farm is stocked with smolt bred from the St. John River strain. One expressed concern by Mr. Carr, is with the potential impact of introgression of farm salmon into wild salmon as a result of "escapees" from the cages. KCS has had minimal events of possible escapes; on one occasion, a hole was seen in the site of one of the pens, however, they quickly had staff on site to repair the damage.

[102] On another occasion, a seal was found within the outer containment net, but outside of the cage itself. No damage was seen to the cage, and there was no indication of any escapes. Here again, KCS uses state of the art mitigation, which appears to be successful. KCS uses containment engineering as well as age monitoring to avoid such losses. They now use a steel lined netting twine to prevent seals simply chewing through the cage, and as noted, they also use an outer “containment” net. They have remotely viewed cameras, operating 24 hours a day.

[103] KCS maintains detailed sanitation practices, both in transferring fish when stocking, and in harvesting the fish.

[104] They are already intending to begin a genetic tracing approach in 2023 (recommended as an option by Mr. Carr, who apparently didn't realize this), where the farm fish is identified before being transferred to the cages. This will enable source identification of any possible escapees, or introgression, in fish offsite. Mr. Carr notes that it is a practice followed in the State of Maine, where Cooke Aquaculture operates the majority of salmon farms. Mr. Carr strongly supports this practice, although he agrees that it needs to be accompanied by river monitoring, which does occur in Maine, but has yet to be undertaken in Nova Scotia. Such a practice would have to be approved by DFO.

[105] As with health management of its farm stock, the actions in this regard are not entirely altruistic – healthy fish are needed for healthy production levels, as are fish quantities. There is no motivation for a good fish farmer to take a casual approach to managing quantity and quality of its product.

[106] And the mitigation practices are not simply left up to the devices of KCS. As testified by Dr. Snyder and Jessica Feindel, the Province actively regulates and monitors this and other farms in the province.

[107] The operator is required to produce a farm management plan. The FMP regulatory requirements contain very extensive, detailed provisions, controlling the farm operations:

### **Farm Management Plan and record of amendments**

**5 (1)** An aquaculture licence holder must prepare a Farm Management Plan in accordance with these regulations.

**(1A)** Before the initial stocking of their aquaculture site, an aquaculture licence holder must notify the Minister that they have prepared their Farm Management Plan, and make it available for review and approval by the Minister.

**(2)** An aquaculture licence holder must keep a record of any amendments to their Farm Management Plan, to be provided as required as part of an audit under Section 38.

## **Required content for Farm Management Plan**

**6 (1)** A Farm Management Plan must include any information required by the Minister, including sections for all of the following:

- (a) fish health management, in accordance with Section 9;
- (b) environmental monitoring, in accordance with Sections 10 to 13;
- (c) farm operations, in accordance with Section 14;
- (d) containment management, in accordance with Section 15, for holders of aquaculture licences for finfish in marine aquaculture sites.

**(2)** Each procedure contained in a Farm Management Plan must include any of the following that apply with respect to that procedure:

- (a) critical control points;
- (b) critical control limits;
- (c) details about how the procedure is to be monitored;
- (d) details about corrective actions to be taken.

**(3)** The Minister may establish minimum requirements for the procedures referred to in subsection (2)

## **Adherence to Farm Management Plan**

**8** An aquaculture licence holder must adhere to the procedures contained in their Farm Management Plan and must keep records that

- (a) verify adherence to the procedures; and
- (b) demonstrate that effective action was taken at critical control points.

## **Fish health content**

**9 (1)** The fish health section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective management of fish health at an aquacultural operation, including all of the following:

- (a) for a holder of an aquaculture licence for shellfish, shellfish husbandry;

(b) for a holder of an aquaculture licence for finfish, all of the following:

- (i) finfish husbandry and welfare,
- (ii) veterinary care and disease surveillance practices,
- (iii) culling and mass stock depopulation practices;

(c) biosecurity measures;

(d) general emergency measures, other than culling or mass stock depopulation practices.

**(2)** In addition to the procedures required by subsection (1), the fish health section of a Farm Management Plan for an aquacultural operation in which trout or salmon is farmed at a marine aquaculture site must include procedures for managing sea lice.

**(3)** The holder of an aquaculture licence for finfish in a marine aquaculture site must prepare an updated fish health section of their Farm Management Plan for approval for each production cycle, at a time determined by the Minister.

### **Environmental monitoring content for finfish in marine aquaculture site**

**10 (1)** For a holder of an aquaculture licence for finfish in a marine aquaculture site, the environmental monitoring section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective environmental monitoring of the site, including all of the following:

- (a) processes for measuring oxyc conditions within the boundaries of the site and at any other locations determined by the Minister;
- (b) the monitoring schedule and associated process for reporting results;
- (c) sampling locations for each monitoring event;
- (d) processes for assessing and reporting on the stocking levels associated with monitoring events;
- (e) a mitigation plan.

**(2)** Any information resulting from the environmental monitoring procedures required by subsection (1) must be submitted by the aquaculture licence holder to the Minister on annual basis, at a time determined by the Minister.

**Farm operations content**

**14** The farm operation section of a Farm Management Plan must include any information the Minister requires to ensure the responsible operation of an aquacultural operation, including information and procedures that are consistent with industry best practices relating to all of the following:

- (a) storing and disposing of feed, fuel, lubricants and chemicals;
- (b) removing and disposing of accumulated refuse and decommissioned farm supplies and equipment;
- (c) retrieving any gear or debris from the aquacultural operation that has broken loose;
- (d) interactions with wildlife;
- (e) maintaining the site in good order;
- (f) noise.

**Containment management content**

**15** The containment management section of a Farm Management Plan for a holder of an aquaculture licence for finfish in a marine aquaculture site must include information and procedures related to all of the following:

- (a) operating procedures that limit the risk of a breach;
- (b) processes for installing and maintaining infrastructure in place to limit the risk of a breach;
- (c) responses to breaches;
- (d) areas of potential impact if a breach occurs;
- (e) management of the site if unusual events or severe weather occurs;
- (f) schedules for reporting all of the following:
  - (i) initial farm stocking,
  - (ii) inventory levels during production,

(iii) audits of the containment management system;

(g) proof of a professional engineer's approval of the design of the structures in place for containment management;

(h) a finfish marking plan.

[108] There has been no evidence before the Board that would suggest that there has been any breach of the FMP conditions required, and in fact, all of the evidence is that it has been fully compliant. It has been pro-active, and has invested heavily, to follow international best practices.

### **Precautionary principle (Spraytech SCC)**

[109] Mr. Carr, particularly in cross-examination, accepts and approves of all mitigation efforts taken by KCS. However, he states in his written summary:

There is insufficient information provided to **conclusively determine** whether the existing farm has had or is currently having a negative impact on wild Atlantic salmon. Based on available information, it is reasonable to conclude the farm has likely had a negative impact on wild Atlantic salmon, the magnitude of which remains unknown.

[110] The intervenor argues that this reflects the "precautionary principle", as referred to by the Supreme Court of Canada in **114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)**, [2001] 2 S.C.R. 241, 2001 SCC 40 and it should be applied, and that the KCS application should be refused.

[111] In **Spraytech**, the Court was considering the jurisdiction of a municipality to impose a pesticide control bylaw. While not weighing the application of the principle, it agreed that it could justify the municipal intervention into pesticide control. The Court stated:

The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[112] The precautionary principle does not prohibit development; it requires mitigation measures even in an absence of "full scientific certainty" of "serious or irreversible damage".

[113] In this case, despite Mr. Carr's ongoing reliance on what he describes as "absence of evidence", we note the oft-stated concept that it is impossible to prove a negative. Aside from that, the Board has heard an abundance of evidence that even before regulatory and statutory change (and since), this site has been well managed, and indeed, has strong mitigation efforts in place. All farms are closely regulated and monitored by professional staff at DFA. As well, we remind, again, that what is proposed here is only a boundary change to incorporate what has been in place over the years.

[114] In this case, Mr. Carr has produced no evidence that the dimensions of the Rattling Beach farm as it now sits, without any change in its infrastructure or production, will have any impact on any local salmon population. He has shown however, the possibility of a risk to salmon by the presence of any salmon farm. We find that appropriate mitigation is in place to deal with potential damage.

[115] The Board is satisfied that the re-drawing of the lease boundaries will have no impact on the sustainability of wild Atlantic salmon.

**h) The number and productivity of other aquaculture sites in the public waters surrounding the proposed aquaculture operation;**

[116] There is one other salmon site in the basin, the "Port Wade" site, also operated by KCS. There are also clam and rockweed lease and licenses. More recently, the Bear River First Nation was awarded four or five experimental oyster leases in the Annapolis Basin. There is no evidence to suggest that these leases could be impacted in any way by allowing the Rattling Beach boundary to be expanded.

[117] In its submissions, the intervenor argues that KCS has been in "serious violation" of its licence for 17 years; in the result the application should be refused. Approval, he argues, leaves KCS unaccountable (paragraph 98, Intervenor submissions). With respect, that is very much an overstatement. In fact, the sole "violation" has been openly and transparently operating outside of the site boundaries (primarily by mooring location), without any apparent impact on other users. Moreover, in his focus on open pen aquaculture in general rather than this application in particular, the intervenor has failed to address any impact of such a violation, on wild salmon populations.

[118] Not only has the operation been openly operating outside its lease boundaries since 2008, KCS has been attempting to move forward an application for boundary amendment when the Province decided that all equipment should be within the original lease boundaries.

[119] Its cage arrays, numbers and stocking volumes have satisfied the Province and have been approved at every stocking event.

[120] KCS acknowledges that it is operating outside its lease boundaries; It is what brings this matter to the Board. It has been attempting to amend since 2008 and its efforts were repeatedly postponed by the Province. It has on the other hand, throughout its operations, fully complied with the requirements of its FMP and has set its own high standards.

## Duty to consult the Nova Scotia Mi'kmaq

[121] Was there a duty to consult in this case? The foundation and nature / extent of the duty was described by the Supreme Court of Canada, in **Haida Nation v. British Columbia (Minister of Forests)**, [2004] 3 S.C.R. 511, 2004 SCC 73

“The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates **conduct that might adversely affect it**: “ (emphasis added)

[122] The duty was again articulated in **Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council**, 2010 SCC 43 (CanLII), [2010] 2 SCR 650

The Court reiterated the elements of the duty:

The Court in *Haida Nation* answered this question as follows: the duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” (para. 35). This test can be broken down into three elements: 1) the Crown’s knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

The Court went on to consider the issue of the crown conduct:

“The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy”.

[123] As noted above, as part of the network consultation, on March 20, 2018, DFA provided the application documents to the Office of Aboriginal Affairs (OAA) (now L’Nu Affairs). That office advised that “Aboriginal consultation is necessary on amendments to existing projects only when the crown anticipates new or novel impacts (established or potential) on Aboriginal or treaty rights. No new equipment, species, harvesting methods, yield, or structural change is associated with this proposed boundary amendment, therefore OAA does not recommend consulting with the Mi’kmaq on Aquaculture Boundary Amendment Application 1039”.

[124] In accordance with that advice, the Province did not initiate formal consultation.

[125] However, that is not to say that KCS did not engage the Mi’kmaq.



[126] Mr. Jeffery Nickerson is the Business Development Manager with KCS. In his affidavit, he describes several informal contacts with Bear River First Nation. In his affidavit, he details direct contact with First Nations:

As detailed in section 5.1.7 of Kelly Cove Salmon's Application Package filed in support of this application, the Bear River First Nation, Acadia First Nation and Annapolis Valley First Nation are located near the Rattling Beach farm. In January 2018, I attended the annual Sea Farmers Conference at The Hotel Halifax. The conference was organized by the Aquaculture Association of Nova Scotia. I am (and was at the time) the vice president of the Association. Several First Nations were in attendance with both Eskasoni First Nation and Waycobah First Nation speaking of their interest and experience in aquaculture. Also in attendance was Chief Dee Potter of Bear River First Nation. During the lunch break, I introduced myself to Chief Potter and we had a short discussion. I told her there could be ways our organization and her community could work mutually together, such as helping to market some of their product through our distribution network, and/or advising and assisting them if they pursued aquaculture in the area. She mentioned they were interested in farming oysters in the Annapolis Basin and St. Mary's Bay. They have since acquired several oyster leases. I also offered salmon to Bear River First Nation for ceremonies as we have done over the years for other First Nations. We ended the conversation with an agreement to meet in the future, but, despite a number of attempts, I have not been able to successfully contact her to arrange the meeting.

I had a similar conversation with then Chief Googoo of Waycobah First Nation at the SeaFarmers Conference. Since then, we have developed a relationship with Waycobah First Nation where we provide expertise on marine cage farming and processing their trout. Additionally, we market all of their trout for them. In return, they have taught us much about the Mi'kmaq culture and traditions. I also met Chief Gerald Toney of Annapolis Valley First Nation at the SeaFarmers Conference. As with Chief Potter, I told him that there could be ways for us to work together. Chief Toney and I planned to meet again to continue our discussion. Chief Toney also agreed to meeting with me to discuss the application and Kelly Cove Salmon's operations in Nova Scotia. More recently, my colleague Ms. Hewitt advised me, and I verily believe, that she emailed Chief Potter's office on or about February 12, 2019 and stated that Kelly Cove Salmon would like to meet to discuss the application and Kelly Cove Salmon's operations in Nova Scotia. On or about February 19, 2019, Ms. Hewitt received a reply from Chief Potter's office which stated, "I'll be in touch with a date as soon as one becomes available. I will say that right now we are quite busy with the end of the fiscal year fast approaching". Ms. Hewitt advised me, and I verily believe, that on or about, February 12 and 14, 2021, she called Chief Robinson to discuss Kelly Cove Salmon's operations in Nova Scotia. We have received no response. At no time since Kelly Cove Salmon has been operating at Rattling each has the Bear River First Nation, the Acadia First Nation or the Annapolis Valley First Nation contacted Kelly Cove Salmon with comments or concerns "

[127] Nothing further was heard from any First Nations community directly, or from the KMKNO, until April 1, 2021, in the form of correspondence from Ms. Twila Gaudet, Director of

Consultation for the KMKNO, to Mr. Robert Ceschiutti, Manager of Licensing and Leasing with DFA . She stated:

“The purpose of this letter is to request consultation under the *Terms of Reference Mi'kmaq-Nova Scotia – Canada Consultation process* . It has been brought to our attention that Kelly Cove Salmon Ltd. have been operating unlawfully outside it's intended boundary for the past 15 years in the Annapolic Basin . Therefore in this case, where the boundary ammendment will allow this ongoing operation which has impeded traditional harvesting and the exercising of \mi'kmaq rights in that location and surronuding area , consultation should have been initiated on this aquaculture lease as well.. The basin has always served as an important resource to the Mi'kmaq. Bear River Community who continue to utilize the area for traditional practices. Also, the Mi'kmaq continuously state their concerns regarding threats to our wild stock, including risk of exposure to contagious disease, virus , and parasites when it comes to operations such as Kelly Cove Salmon Ltd. Thus consultation is expected and required and the boundary amendment should not be approved.”

[128] On April 26, 2021, Mr. Ceschiutti responded, explaining that as there were no changes in current production levels, species harvested, gear in use, or location to occur, there could be therefore no new anticipated adverse impacts to established or credibly asserted Aboriginal or treaty rights, and that consultation was not required.

[129] Nothing further was heard from the KMKNO until August 26, 2021, just prior to the scheduled hearing of August 31. Ms. Gaudet, in a letter to the Board, reiterated her concerns and asked that the application be denied until meaningful consultation has taken place, and that a declaration be made by the Board as to their “unlawful operation” (although outside of the regulated time limit for public written comments, in the circumstances, Ms. Gaudet's letter was placed on the record as a written public comment).

[130] The hearing date was adjourned, due to an unforeseeable event effecting one of the panel members, and was reconvened on November 15, 2021.

[131] KMKNO filed a further written comment with the Board on November 1, 2021. Ms. Gaudet stated that if the farm operations continue, all Mi'kmaw will be negatively affected, particularly Bear River. She again refers to traditional harvesting, and the use of beach areas on the basin. She speaks of the traditional porpoise harvest, and the underwater archeology at the site. As noted above, there is no beach area at the Rattling Beach site. Basin porpoise have been classified as endangered, and there is no porpoise harvest in the basin.

[132] As noted, impact on underwater archeology would not be impacted, as only the anchors actually contact the seabed.

[133] She also references concern about impact on the health of other species. There is no evidence before the Board that other species will be impacted by simply re-aligning the boundary.

[134] The Board agrees that in this case there was a knowledge of the history of First Nations, particularly Bear River, in the basin, and the rivers flowing into it. However, as was stated in advice from OAA, acting as the provincial government body with expertise on the issue of consultation, there was no Crown conduct, anticipated or real, that might impact the rights that existed.

[135] If, however, we are wrong in that regard, and there was a duty to consult, that duty was met, although perhaps not in a formal sense.

[136] In *Haida Nation*, McLachlin, C.J. described the content of the duty, when a duty is found to exist.

“The content of the duty, however, varies with the circumstances, as discussed more fully below. **A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties.** The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty. “

[137] We conclude that in the facts of this case, the duty was on the low end of the scale, and notice was sufficient. That “notice” took the form of Mr. Nickerson’s (and later his office) discussions and engagement with Chief Robinson, and was supplemented by the public meeting held by the applicant (who do not have a duty to consult), and also by the transparent and very publicly accessible information on the application. Certainly, direct contact with the KMKNO would have been preferable, in a formal sense, but the contact was made directly with the Chief of the First Nations community which could be most impacted by any adverse activity. It was open to Chief Robinson, at that time, to reach out to the KMKNO to press for formal consultation, and we do not fault her for not doing so.

[138] We therefore conclude that there was non-duty to consult, as the mere redrawing of the lease boundary could not be seen to have any potential adverse impact on First Nations’ rights. If we are wrong in that regard, we conclude that consultation was at the very low end of the scale, and notice was sufficient to meet that duty.

[139] We also note that the impacts alleged by the KMKNO are vague, and non-specific as to potential adverse impacts on Aboriginal rights. For example, it does not explain how this ongoing operation has impeded traditional harvesting, and the exercise of traditional rights. Ms. Gaudet asserts that “it was brought to her attention”, that Kelly Cove has been operating “unlawfully” outside its boundaries for the past 15 years. We have no information as to who, what, or how, the matter was brought to her attention just prior to April 1, 2021.

[140] Finally, we note that her concerns relate to what she considers prior and continuing breaches, not “novel adverse impacts. Such breaches, if any, do not generate a duty to consult (*Haida Nation, supra.*).

## Public written comments

[141] Public comments were received from:

- (a) Andre Thiffault dated March 9, 2021;
- (b) Ronald Neufeld dated April 24, 2021;
- (c) Derek Purcell on behalf of Healthy Bays Network dated April 25, 2021;
- (d) Simon Ryder-Burbidge on behalf of the Ecology Action Centre dated April 25, 2021;
- (e) Wendy Watson on behalf of the Association for the Preservation of the Eastern Shore dated August 9, 2021; and
- (f) Twila Gaudet, Director of Consultation on behalf of Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO") dated November 1, 2021.

[142] Mr. Thiffault lives adjacent to the property. He was concerned with noise, fish escapes, "massive fish die-offs", antibiotics, and a site offensive to tourists' views. He suggested that KCS followed the rule, only when they knew they were being watched. He wanted the operation removed. However, the evidence at the hearing negated most of those concerns. We note we have heard no concerns expressed by the many tourism operators in the area, including from Digby Pines Resort, one of the prime tourist facilities in Nova Scotia. We can appreciate that noise can certainly be a factor, but have heard almost no evidence on that factor, other than a complaint at the Port Wade site, where KCS agreed to make an adjustment to its blower, and we trust that DFA and KCS will keep a close eye and make best efforts to mitigate noise where possible.

[143] Mr. Neufeld, in addition to his three-volume affidavit, also filed a written comment. He argues that there is little, if any, economic benefit to Nova Scotia from the farm. He describes his own personal observation of sea lice at the Port Wade site, pointing to two incidents since 2012 confirming sea lice. The evidence heard in the course of the hearing noted above counter his concerns with sea lice. He speaks to fish escapes and says that escapes from Rattling Beach have been devastating to the Bear River wild salmon. He refers to a television documentary. His comment is entirely factually incorrect; as noted above, since 1994, long before salmon were ever farmed at Rattling Beach, Atlantic Salmon were almost non-existent in Bear River, and there is no evidence, even from Mr. Carr, or any other sworn witness, of any "massive fish escape".

[144] In addition to his affidavit filed "on behalf of" Dr. Hemming, Mr. Ryder – Burr ridge of the Ecology Action Centre, also filed written comments. Again, part of the concerns expressed were in relation to non-compliance with lease boundaries. As noted repeatedly, in the course of the hearing, and in this decision, that is what brings us here.

[145] In his written comment, Mr. Snyder-Burr ridge attempts to introduce his "expert" opinion on several issues. As noted above, admissibility of expert opinion evidence is restricted. Section 30 (3) (a) and (b) of the regulations (noted above) set criteria on the admissibility of expert opinion. In addition, the general rules of evidence apply, that is, that expert opinion evidence can only be provided by an individual who qualified. (such as Mr. Carr). Mr. Ryder Burr ridge, although very focused on the plight of wild salmon in general, is not qualified to give expert opinion evidence.

[146] Mr. Ryder Burridge also takes issue with the process, which excluded EAC from intervenor status. He states:

” In our view, a submission like that which follows is not necessarily easily put together by individual citizens, communities or other local entities near open net-pen aquaculture sites. Such reviews can be timely, costly or out-of-reach for many who might wish to bring constructive arguments to bear. This is a role that the EAC adopts on behalf of concerned citizens and communities who care deeply about the natural environment in Nova Scotia, but who cannot fully participate in processes like this one due to time or resource constraints “

[147] With respect, there is nothing to prevent EAC or any other body or individual from offering support to a party / intervenor. Indeed, that appears to have happened in this case, by way of “piggy-backing” on Dr. Hemming's status. It is notable that nowhere in evidence offered on behalf of Dr. Hemming is his name even mentioned nor is his particular concern, and he did not file an affidavit or testify. He also did not explain the “mistake” in his application, regarding his property distance from the Rattling Beach farm.

[148] Mr. Ryder Burridge also expresses concerns regarding willingness / ability of DFA to apply and enforce the requirements of the act and regulations.

“The ARB must consider the multi-year noncompliance of AQ#1039 as part of its assessment of the optimum use of marine resources and reject the proponent’s application for lease expansion until such time as proper regulatory enforcement protocols and site re-alignments have taken place. “

[149] With respect, the evidence before the Board clearly establishes that KCS has been pressing to correct the lease boundary since 2008, and that is what brings us here. As well, the evidence makes it abundantly clear that DFA has reporting requirements, and professional staff who are fully engaged in ensuring proper operation of all aspects of this and other farms throughout the province.

[150] Mr. Derek Purcell of HBN filed a written comment. He acknowledged the information and documents available on the webpage and appreciated the transparency.

[151] He expressed a concern regarding the noise. He did say that when he visited the area and spoke to some local residents, they were not concerned about noise, but did say perhaps they were just used to it. He asks that a “releasable” condition be attached to the FMP, regarding noise, and quantification. The issue of noise is not a matter than could be affected by allowing a new line to be drawn on the water. However, as noted, we do suggest that KCS and DFA ensure that noise is minimized to the extent possible.

[152] Mr. Purcell goes on to express concerns regarding the lease boundary violations, and that the application be refused until these violations are resolved. Again, we emphasize that the precise reason that we are here, is to consider the boundary issue, which KCS has been trying to address since 2008.

[153] Mr. Purcell then wanders into the field of expert opinion. He is not qualified to offer

expert opinion, nor does his opinion meet the statutory requirements. He goes on to attack DFO practice in protecting Atlantic salmon. While we do not agree that there is any issue whatsoever regarding those efforts (note the greatest delay in bringing this application forward was the detailed interaction with DFO), this request is well beyond the mandate of this Board. He also expresses concerns about the lack of data available to DFA in their review, but with respect, we have volumes of data before us to allow this Board to reach a conclusion.

[154] He also expresses concerns about cumulative effects of antibiotics, etc. in the basin, and again, the DFO threshold. We note the detailed evidence before the Board regarding use of chemical treatment of the fish, the approvals necessary, and the rarity of use. We also have detailed evidence regarding the mitigation efforts to control accumulation of debris beneath the cages (referred to above).

[155] He then discusses impact on wild salmon. We have reviewed above, the impact, and we agree that the mitigation efforts, and controls and limits set by DFA and other enforcement bodies, are reasonable.

[156] Wendy Watson Smith of the Association for Preservation of the Eastern Shore also filed a written statement. She challenged issues she has had with leases in Ship Harbour and Owls Head Harbour, and argues that the action of DFA / DFO into "potential organic loading, pesticides, and drugs on other fish stock in the Annapolis Basin. She maintains that DFA is not capable of regulating the industry. However, the evidence before the Board shows a highly regulated industry with ongoing, effective interaction with KCS.

[157] The Board is satisfied that there will be no negative, or any, impact of this amendment on any of the eight statutory conditions. As noted, to apply the conditions to a lease amendment which is in effect, re-drawing a line on the water, is a difficult fit. It has generated an enormous amount of material, which would be relevant to a case involving new activity.

[158] The application of Kelly Cove Salmon Ltd. for an amendment to the boundary of lease AQ#1039 is allowed.

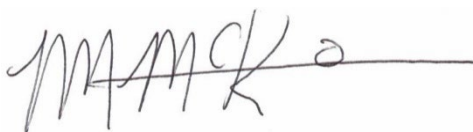
**DATED** at Halifax, Nova Scotia this **28th** day of **January**, 2022.



Jean McKenna, Chair



Richard Patterson, Board Member



Michael McKinnon, Board Member

**DISTRIBUTION:** Alison Campbell, Solicitor on behalf of the Department of Fisheries and Aquaculture  
Robert Grant, Solicitor on behalf of Kelly Cove Salmon Ltd.  
Sarah McDonald, Solicitor on behalf of Dr. Gregory Hemming

## SCHEDULE A

### SUMMARY OF NETWORK CONSULTATIONS

[i] The following are summaries of the individual network agency consultations DFA undertook regarding the adjudicative boundary amendment application for lease #1039. Please see the appendices outlined in Table 1 to review the associated documents related to each of the following network agency summaries.

[ii] **Fisheries and Oceans Canada (DFO)** reviewed the application according to their legislative mandate, which includes the Fisheries Act, Species at Risk Act (SARA), Oceans Act and applicable regulations. Some initial questions were raised in discussions by DFO requiring clarification from the applicant. These questions are outlined and addressed in KCS Addendum Report, which was provided to DFA and DFO for review. DFO completed its review and submitted a Letter of Advice (LOA) accompanied by a Canadian Science Advisory Secretariat (CSAS) Science Response. The LOA provided a summary of the results of DFO's risk assessment to inform of risks posed to fish and fish habitat and identify where additional avoidance and mitigation measures could be applied.

[iii] Clarification was required/requested by DFA on DFO's LOA and CSAS response. DFO submitted a modified table with responses and also submitted an Addendum to the LOA that provide additional context related to site specifics and DFO's review process.

[iv] The application was reviewed by various DFO sections to assess the following: the deposit of deleterious substances, serious harm to fish or fish habitat, and the killing, harming or harassing of aquatic species listed under SARA and the destruction of their critical habitat.

[v] The assessment by DFO was supported by a modelling exercise that described the "Predicted Exposure Zones for Deposits of Deleterious Substances". DFO's review was also supported by an assessment of "Fish and Fish Habitat" of the area based on their databases and expert knowledge to determine what fish and fish habitat were in the area and if it was susceptible to aquaculture effects. Finally, DFO looked at a number of "Pathways of Effects" that considered potential aquaculture related stressors and their potential effects on fish and fish habitat. These potential stressors included physical alteration of habitat structure, alteration in light, noise, release of nutrients and organic material, release of chemicals, release of farmed fish, and the release of pathogens and sea lice.

[vi] DFO determined that, because no critical habitat was identified in the predicted exposure zones, the Annapolis Basin and the proposed lease boundaries, it is unlikely that the residual negative effects will result in further serious harm to fish or fish habitat; or the killing, harming or harassing of aquatic species listed under SARA or the destruction of their critical habitat.

[vii] Based on DFO's assessment of the application; information, advice, and recommendations were provided to DFA which were considered by the department in a number of ways. DFO provided some recommendations which DFA referred to the applicant as information awareness recommendations for the applicant to consider to ensure they were compliant with



DFO's legislated mandate. This was accomplished by providing DFO's letter of advice and associated documents to the applicant. DFO also provided advice and recommendations to the DFA regarding sections of the Marine Finfish Farm Management Plan (FMP). The FMP for licence/lease #1039 (which is currently approved for implementation) will be re-reviewed by DFA after a decision on the application is made by the Nova Scotia Aquaculture Review Board (NSARB). DFO did identify that information which will reside in the FMP may have informed a more precise assessment of the residual risk of the application. However, DFO advised that the information was not needed as the residual risk was below the thresholds of unacceptable impacts. If the application is approved, DFA will work with DFO to ensure the advice and recommendations provided are appropriately incorporated into the FMP for licence/lease #1039. DFA also considered the advice, recommendations and information provided by DFO directly into DFA's review and recommendations to the board.

[viii] **Canadian Food Inspection Agency (CFIA)** reviewed the application and did not raise any questions with the proposed operation regarding their mandate. Transport Canada (TC) reviewed the application and identified concerns regarding the proximity to the ferry terminal and an expansion towards the terminal. DFA provided additional context and clarification to TC regarding the application and that the current configuration was not an expansion beyond what TC had reviewed through their Navigation Protection Program (NPP). TC confirmed with the applicant that the current gear configuration on site is what was approved in 2017 through TC's NPP and is currently marked accordingly. TC also followed up with the Princess of Acadia ferry operator and confirmed that there are no issues with the proposed amendment and no complaints had been received to date. TC concluded that there were no outstanding concerns with the proposed boundary amendment.

[ix] **Environment and Climate Change Canada (ECCC) –Canadian Shellfish Sanitation Program (CSSP)** reviewed this application and did not raise any questions with the proposed operation regarding their mandate. CSSP is not relevant to marine finfish applications.

[x] **Environment and Climate Change Canada (ECCC) -Canadian Wildlife Services Division (CWS)** reviewed the application and had comments requiring clarification. The additional information requested by CWS was provided by the applicant and DFA. Upon review of the additional information, CWS determined that there were no further comments.

[xi] Based on CWS's assessment of the application; information, advice, and recommendations were provided to DFA which were considered by the department in a number of ways. CWS provided some recommendations DFA referred to the applicant, which were an information awareness recommendation for the applicant to consider to ensure they were compliant with CWS's legislated mandate. CWS also provided advice and recommendations, which DFA will incorporate into the FMP, as necessary. The FMP for licence/lease #1039 (which is currently approved for implementation) will be re-reviewed by DFA after a decision on the application is made by the NSARB. If the application is approved, DFA will work with CWS to ensure the advice and recommendations provided are appropriately incorporated into the FMP for licence/lease #1039. DFA also considered the advice, recommendations and information provided by CWS directly into DFA's review and recommendations to the board.

[xii] **Nova Scotia Environment (NSE)** reviewed the application and did not raise any questions or concerns with the proposed boundary amendment with regards to their mandate.

[xiii] **Nova Scotia Department of Agriculture** reviewed the application and determined that due to the straightforward nature of the boundary amendment to the existing site, they did not have any concerns or objections with the application from an agricultural perspective.

[xiv] **Nova Scotia Communities, Culture and Heritage (CCH)** reviewed the application and did not have any archaeological concerns as no gear, notably anchors, will be moved to support the boundary amendment. It is advised that if any archeological artifacts are recovered or observed at any time, a Coordinator of Special Places Program at CCH should be contacted. This can be accomplished by incorporating a Standard Operating Procedure (SOP) for reporting to CCH, into the applicant's FMP.

[xv] **Nova Scotia Department of Lands and Forestry - formally Department of Natural Resources** reviewed the application and noted that the proposed expansion lies within the Department of Natural Resources' designated Significant Habitat for overwintering wildfowl. However, the Department indicated that due to the limited extent of this development, it should not impact the biodiversity interests of the Significant Habitat area.

[xvi] **Nova Scotia Department of Fisheries and Aquaculture - Inland Fisheries Division** reviewed the application but due to the marine environment where this site is located, the department did not have any concerns from an inland fisheries perspective.

## **SUMMARY OF CONSULTATIONS WITH THE MI'KMAQ OF NOVA SCOTIA**

[xvii] Nova Scotia Department of Fisheries and Aquaculture provided the application and associated documents to the Office of Aboriginal Affairs (OAA) for their review to provide advice to DFA on requirements regarding consultation with the Mi'kmaq of Nova Scotia. It was recommended that consultation with the Mi'kmaq was not necessary for the aquaculture boundary amendment application #1039 as no new equipment, species, harvesting methods, yield or structural change are associated with the proposal.