



# **Aquaculture Licences Appeals Board**

## **Conclusion Statement**

### **Appeal Ref No. AP1/2024**

#### **Appeal description:**

Appeal against the decision of the Minister for Agriculture, Food and the Marine to revoke an aquaculture (fish culture) licence to Frank Burke for the cultivation of Rainbow Trout on Site Ref T09/084 in Raford, Kiltulla, Athenry, Co. Galway.

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## 1.0 General Matters / Appeal Details

### 1.1 Licence Application and Minister's Decision

Appeal Ref.	Site Ref.	Applicant Name	Licence Type	Minister's Decision	Date of Minister's Decision
AP1/2024	T09/084	Frank Burke	Cultivation of Rainbow Trout (non-expiry)	Revocation of an Aquaculture Licence (previously a Fish Culture Licence)	06 December 2023

### 1.2 Appeal Details

Appeal Ref.	Site Ref.	Date Appeal Received:	Location of Site Appealed
AP1/2024	T09/084	09 January 2024	Raford, Kiltulla, Athenry, Co Galway

### 1.3 Name of Appellant(s):

Appeal Ref.	Site Ref.	Oral Hearing Requested	Name and address of Appellant
AP1/2024	T09/084	Yes	Frank Burke, Raford Trout Farm, Raford, Kiltulla, Athenry, Co Galway

### 1.4 Grounds for Appeal

In the appeal, the Appellant stated that there was no procedural fairness; unfair treatment; poor communication; impact on livelihood and future and earnings on a business that the Appellant has heavily invested in the business and had no breaches in the course of over three decades.

#### 1.4.1 Detailed issues of the Appeal

This is an appeal against the revocation of a Fish Culture Licence issued in 1981 under the Fisheries (Consolidation) Act of 1959. The revocation was carried out accordance with Section 69(2)(a) of the Fisheries (Amendment Act of 1997).

The Appellant states that he was awarded a fish culture licence in **1981** and ran the operation until late 2019 when it fell into partial disuse as some of the fish tanks and infrastructure required routine maintenance. The Appellant began to reduce stock and planned for a registered civil contractor to carry out the works in **2020**. However, with the advent of Covid 19, the maintenance had to be put on hold and at the same time the key market for restaurants and hospitality were shut down for a large block of time, which closed off the primary customer trade of the farm. In addition, the Appellant was in isolation due to health concerns.

In **2022**, the maintenance plans were put on hold as the Appellant had to restock the farm as his clients were actively requesting stock for restaurants around Galway city. It was only at this time he became aware that the regular supplier of fish meal for the farm had ceased trading and it was difficult to source an alternative supplier. A decision was then made to carry out works on the farm, which were

completed in **2023**. The Appellant also found a new supplier (Inland Fisheries Ireland) who applied for permission to supply fingerlings and meal for the farm.

The Appellant states that he has fully complied with his subscriptions owed under the licence with the most recent payment having been made to DAFM in December 2023. The Appellant states he took reasonable and practical measures to restore the farm and continue operations.

The Appellant detailed communication he had with the Department as follows:

- The Department had communicated with him on **23 February 2022** to indicate that as the farm had laid dormant for over two years, that the Minister would revoke the licence due to inactivity. The Appellant states that he advised the Department, both orally and in writing, of the above facts regarding the farm and made it clear that he wished to preserve and continue the licence.
- The Appellant's daughter-in-law spoke to Mr James (Jim) O'Donnell (DAFM), who encouraged that the Appellant's son could seek a licence in his name and such an application would be granted in two weeks. Mr O'Donnell had outlined that the licence would die with the Appellant and they were being given a great opportunity. Mr O'Donnell advised that his job objective was to achieve compliance with the Common Fishery Policy rules and that the current licence held by the Appellant was too unrestrictive for compliance purposes, and that the updated aquaculture licences contain terms and conditions which reflect the environmental protection required under EU and National Law.
- Mr O'Donnell wrote again to the Appellant by letter dated 09 August 2023, which was not received by the Appellant for some time and to which the Appellant responded, to the email address provided in the letter, on **06 September 2023**. The Appellant also requested that his Eircode be included in future responses as there are several people with the same name living in his community. In the email of 6 September, the Appellant requested to meet with the Department at the site to show them all the repair work that was carried out to restore the farm, but no response was received, until he received the revocation of his licence on 19 December 2023.

The Appellant also outlined the following:

- The Appellant had received a Fish Culture Licence and had never agreed to move to an Aquaculture Licence and had only recently become aware that such Licences exist.
- The Appellant has not been put on notice that any new conditions were attached to his original Fish Culture licence and has not received evidence of same.
- The Appellant did not believe the cesser is applicable to his farm or licence, given that his licence was granted under the provision of Section 15 of the 1959 act and not the 1997 Act as mentioned notice. He was not briefed on any "use it or lose it" clause that was applicable to his original licence.
- The Minister has never personally contacted him to inform him of any proposed revocation or any amendment to any licence before publishing the notice - see Section 68.3 which complements Section 69 of the 1997 Act.

- The Appellant does not consider that the two-year rule is applicable to him and even if it was, he believed he had exceptional circumstance for a temporary cessation of activity in Covid.
- The loss of the licence will have a profound consequence on his livelihood and the fish farm that he has built since the 1980's and wants to continue to operate now that he is back to full health. He states that he has a constitutionally protected right to earn a livelihood and enjoys signification protection to that right. He believes that he has been unfairly treated by the Department. Following receipt of the cancellation letter, he applied to the Department, under the Freedom of information, for a full copy of his file and file notes as to the communication to date has been uninformative and secretive and provided him with no clarity of what was going on.
- The Appellant also had communication with the Foreshore Management Division who advised that there was an inspection on his farm in June, but he did not receive any notice of any planned inspection or any reports relating to the inspection.

The Appellant concludes by stating that he understands that entitlement to a licence is one which cannot be removed trivially or without very substantive attention to fair procedures, detail and in accordance with clear process and procedure. To date the Appellant feels that there have been errors in all of these areas and he respectfully requests for a full review of his file to avoid any judicial reviews in the future.

## 1.5 Name of Observers

No observers are noted in respect of this appeal

## 2.0 Minister's File

The Minister's file was requested on **29 January 2024** and received by ALAB on 12 February 2024. The file contained the following:

1. Submission to Minister
2. Copy of the Licence
3. Registered Letters to Mr. Frank Burke dated 9 August 2023 and 19 December 2023
4. MED 2023 Inspection
5. Med 2021 Inspection
6. Certificate of Revocation
7. Proof of Delivery of Registered Letter
8. Notice of Revocation to Applicant

To note that the Minister made no submission on the appeal, save for the clarifications in respect of the receipt of correspondence from the Appellant noted in Section 3.1.4

### 2.1 Details form the Minister's File

#### Submission to the Minister:

The submission to the Minister states that a Fish Culture Licence No. 71 was granted to the Appellant on **03 November 1981** for the cultivation of rainbow trout at Raford, Athenry, Co. Galway and that the licence did not have an expiration date.

It further states that correspondence issued to the licensee (i.e. the Appellant) on **09 August 2023**, advising him that revocation of the licence was under consideration and requesting any submission that the licensee wished to make on his behalf. It stated that no response was received from the licensee.

#### Technical Consultation:

This formed part of the submission to the Minister, and it stated that the Department' Engineering Division confirmed on **20 July 2023** that there was no aquaculture activity on the site, and it appeared the site had not been used for some years. Marine Engineering Division had previously visited the site on **13 December 2021** and had noted that the "facility is in poor condition and does not appear to have been operating for some time".

#### Department Communication:

Email sent to the Aquaculture and Foreshore Management Division (AFMD) on **18 June 2021** from Pete Donlon, Aquaculture Development Officer, BIM, enquiring if the aquaculture site T09/084 was still operational.

AFMD requested, on **18 June 2021**, for Marine Engineering Division (MED) to carry out a site visit to establish if the site was still operating. MED visited the site on 13 December 2021 and confirmed to DAFM on 21 February 2022 that the site was not operational stating "while there is some water flowing through the site, the facility is in poor condition and does not appear to have been operating for some time".

AFMD contacted MED on 05 July 2023 and stated that the Licensee had been in touch with them on **10 March 2022** and he had stated that he wanted to continue with aquaculture at the site. AFMD further stated that they were considering revoking the licence on the grounds that the licence was not active and requested a site inspection to confirm that no aquaculture activity was taking place. MED reverted to AFMD on 20 July 2023 stating that an inspection was carried out on the site on **19 July 2023** and stated, "There is no aquaculture activity on site, and it appears the site has not been used for some years".

#### Issuing of Revocation:

The Notice of the Decision to revoke the Licence was issued to the Appellant on **19 December 2023**.

### 3.0 Board's Deliberations

The Board considered this appeal at the meetings held on 26 January 2024, 01 March 2024, 28 March 2024, 11 April 2024, 01 May 2024, 30 May 2024, 1 July 2024 and 25 July 2024. The Board agreed that the main issue was to decide if the Minister had acted reasonably in making the decision to revoke the licence and whether, accepting that the aquaculture activities had ceased for a period of two years, the Appellant had provided exceptional reasons for the cessation. Therefore, there is no requirement for an Appropriate Assessment, AA Screening or a Technical Advisor Report.

#### 3.1.1 Board's Jurisdiction

At the meeting of the 01 March 2024, it was discussed that as the appeal is a revocation of a licence pursuant to Section 69(2), that the Board would need to establish if it had jurisdiction.

The Board determined that it had jurisdiction to determine the appeal on the following basis:

1. Mr Burke was issued an open-ended fish culture licence in 1981 under section 15 of the Fisheries (Consolidation) Act, 1959 (the “1959 Act”). Section 15(4) of the 1959 Act, referred to in the appeal submission, previously provided the means by which the Minister may revoke a fish culture licence. However, section 15 has since been repealed in full.
1. Section 75 of the Fisheries (Amendment) Act 1997 (the “1997 Act”) provides that a former fish culture licence is now by operation of law deemed to be an aquaculture licence granted under the 1997 Act.
2. Section 40 of the 1997 Act allows a person “aggrieved ... by the revocation ... of an aquaculture licence” to appeal against the revocation.
3. Section 69(2)(c) does expressly state that “The determination of the Minister is final”. However, given the plain language of Section 40(1), and the fact that both the Minister per their letter of 19 December 2023 and the Appellant are proceeding on the basis that ALAB does have jurisdiction, ALAB have determined to proceed on the basis that it does and should continue to process and determine the matter.

### 3.1.2 Board’s Request for information

Having considered the appeal, the Board decided that further information was required, and a section 47 notice issued to both the Minister and to the Appellant requesting any evidence of communication between the parties within 28 days of the 9 August 2023 and the 6 September 2023, along with any other communication that the parties may deem to be relevant to the appeal. The deadline date for provision of the information was 15 April 2024.

The section 47 notices issued on 14 March 2024 and a response was received from the on 19 March 2024 and from AFMD on 8 April 2024.

### 3.1.3 Appellant’s response

The Appellant provided on **19 March 2024**, a full copy of his DAFM file, containing some 108 pages, which he had obtained under a Freedom of Information request.

The Appellant also highlighted several issues in another document in relation to the documents received and those not released under the FOI request as follows:

1. The Appellant stated that the Department failed to consider his response (of **6 September 2024**, which was sent via email to Mr Jim O’ Donnell in AFMD) or act on it in any way or engage in direct communication with him or provide an acknowledgement letter.
2. In relation to the site visit of **13 December 2021**, the Appellant states that that the repairs to the farms and maintenance works were carried out in **2023** prior to the decision being made by DAFM; they failed to re-visit the site even though the Appellant had requested this.

3. Regarding the statement of Sinead McSherry (DAFM) of 09 November 2023 as to whether DAFM had been unsuccessful in making contact with the Appellant and if the registered letter was accepted, the Appellant states that DAFM did not provide an acknowledgement letter and failed to enter into discussions with him.
4. In the Appellant's email of **6 September 2023**, he requested that his Eircode be updated as there was another person of the same name in the area who had previously opened his letter, but DAFM failed to action his request.
5. The publication of the advert in the Connacht Tribune. The Appellant states that this advert was to be posted on 21 December 2023, however, the Appellant purchased the paper on that day and other dates after this date, but he is of the opinion that it was never printed.
6. The email threads state that the notice of the revocation was to be published in *Iris Oifigiúil* and the Appellant is of the opinion that he should have been made aware of any public announcement about his land and his business.
7. The Appellant identifies an email from Ms Patricia Buss, DAFM dated **14 March 2022** in which the Appellant's email and letter of 10 March was acknowledged by AFMD and the wish of the Appellant's was to confirm that the present arrangement at Raford Fish Farm could continue. The Appellant understood from this that the matter was dealt with as there was no expiry or conditions on his licence.
8. The Appellant refers to the fees that he needs to pay and that he was to be set up for fees in 2012 but this was not taken up again by DAFM until 2018 and that his fees are up to date including the invoice received in November 2023.
9. An AA draft report (dated 11/2022) and a Draft AA Screening Report for T09/084 were not released under FOI as per DAFM, the records contain matters relating to the deliberative process and release of such records could have a significant adverse effect on the performance by the FOI body of any of its functions relating to management. The Appellant queried as to why an AA report would be conducted by DAFM on his land without his knowledge.

#### 3.1.4 DAFM's response

The Department provided a response on **08 April 2024**. In the letter it stated the following:

1. The Minister for Agriculture, Food and the Marine made a determination in respect of this licence on 6 December 2023.
2. On 29 January 2024, ALAB notified the Minister that an appeal had been lodged and requested the Ministerial file under Section 43(1) of the Act. The Department provided this information on 12 February 2024.
3. As outlined in the Ministerial submission, correspondence issued to the Licensee on 9 August 2023 advising that revocation of the Licence was under consideration and requesting any submissions that the Licensee wished to make on his behalf.



4. The licensee had twenty-eight days to reply. No response to this correspondence was received by the Department within the twenty-eight-day period and the Minister proceeded to determine that the licence should be revoked.
5. Following this decision, in December 2023, the Licensee advised the Department that he had responded by email to the 09 August 2023 correspondence.
6. This email was not received by the Department. It was stated that ‘Our IT systems indicate the email in question was marked as spam and blocked by Government security networks. The Department has no access to this system and there are no warnings to the Department when emails are blocked by the system.’
7. There was no further correspondence between the Department and the Licensee following the issue of the letter by the Department and the Minister’s determination.

#### 4.0 Initial Review and Recommendation of the Board Members

The Board noted the information received from the Appellant and the Department, including the more detailed file supplied by the Appellant, which contained two emails that the Appellant submitted to the Department at 16:59 and at 17:06 on **6 September 2023**. In one of the emails, the Appellant stated that the letter that the Department had sent him was only received a few days previously as it had no Eircode and it had been dropped to another family in the area with the same name. The Appellant also stated that the site was operational and licence payment was up to date and requested a site inspection. In the later email (17:00) the Appellant supplied his Eircode.

The Board decided at their meeting on 11 April 2024 to not to confirm the Minister’s decision and to instead substitute its decision on the matter for that of the Minister as the Minister’s decision was deemed unreasonable due to ‘miscommunications, poor administrative process’ and a failure to fully consider the context of the Covid pandemic on the operation of the business.

However, to have absolute clarity on the issue of the two emails sent by the Appellant, the Board determined that contact should be made with the Department to get them to verify if they received the two emails that the Appellant sent on 06 September 2023.

An email issued to the Department on behalf of the Board on 08 May 2024 requesting the Department to verify if they received both emails sent by the Appellant on 06 September 2023. The Department responded on **09 May 2024** stating that the Department did not receive any correspondence from the licensee during that period (i.e. 06 September 2023).

#### 5.0 Conclusion

The Board considered the Appeal, the file received from the Department and the Department’s response of 08 April 2024 (response to Section 47 letter) and the 9 May 2024 (clarification email) and made a determination not to revoke the Licence for the following reasons:

1. The Minister’s decision was deemed unreasonable due to ‘miscommunications, poor administrative process’ and a failure to fully consider the context of the Covid pandemic

on the operation of the business. In particular ALAB noted the failure of the Minister to include the Appellant's Eircode on correspondence, leading to a delay in the Appellant receiving correspondence, and non-consideration of the Appellant's Submission of 06 September 2023, given an issue with the Government's IT server; and

2. It is also recorded that the Minister made no submission objecting to the appeal; and
3. Taking into account the reasons for cessation of the aquaculture activities outlined in the Appeal and summarised at 1.4.1 herein, the Appellant has demonstrated exceptional reasons why the aquaculture activities had ceased and the Board was satisfied that it was appropriate in the exercise of its discretion not to revoke the Licence."

Aquaculture Licences Appeals Board

05 September 2024