

FISHERIES (AMENDMENT) ACT 1997 (AS AMENDED AND SUBSTITUTED)

Appeal Reference Number: **AP4/1-2/2023**

DETERMINATION

WHEREAS an appeal having been made to the Aquaculture Licences Appeals Board (“**the Board**”) pursuant to Section 40 of the Fisheries (Amendment) Act, 1997 (as amended) (“**the Act**”) by Mr Jim Hurley and by An Taisce (“**the Appellants**”) against the decision of the Minister for Agriculture, Food and the Marine (“**the Minister**”) to **GRANT** an Aquaculture Licence to Ballyteigue Oysters Ltd to cultivate pacific oysters using bags and trestles on Site T03/038A on the inter-tidal foreshore in Ballyteigue Bay, Co Wexford.

AND WHEREAS the Board in considering the appeal took account of the appeal, the file provided to it by the Minister, the report “Ballyteigue Bay: Appropriate Assessment of Aquaculture” by Atkins Ecology on behalf of the Marine Institute, dated February 2020 (“**the SPA AA Report**”), the Report “Report supporting Appropriate Assessment of Aquaculture in Ballyteigue Burrow SAC” by Aquafact International Services Ltd on behalf of the Marine Institute, dated April 2021 (“**the SAC AA Report**”), the Appropriate Assessment Conclusion Statement by the Department of Agriculture, Food and the Marine titled “Appropriate Assessment Conclusion Statement by Licensing Authority for aquaculture activities in the Ballyteigue Burrow Special Area of Conservation (SAC) (Natura 2000 Site Code 000696) and the Ballyteigue Burrow Special Protection Area (SPA) (Natura 2000 Site Code 004020)”, dated November 2022 (“**the AA Conclusion Statement**”), the “Technical Advisor’s Report – Shellfish Appeals” by KRC Ecological on behalf of ALAB dated 26 September 2023 (“**the ALAB TA Report**”), the compilation report of the Board’s external scientific consultant, Aster Ltd, dated 19 June 2024 (“**the Aster Report**”), and the “AA Conclusion Statement” of the Board’s external scientific consultant, Aster Ltd, dated 19 June 2024 (“**ALAB AA Conclusion Statement**”), and matters set out at Section 61 of the Act (as amended and substituted), including the following:-

- (a) the suitability of the place or waters at or in which the aquaculture is or is proposed to be carried on for the activity in question,
- (b) other beneficial uses, existing or potential, of the place or waters concerned,
- (c) the statutory status, if any, (including the provisions of any development plan, within the meaning of the Local Government (Planning and Development) Act, 1963 as amended) of the place or waters,
- (d) the likely effects of the proposed aquaculture, revocation or amendment on the economy of the area in which the aquaculture is or is proposed to be carried on,
- (e) the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna, and

- (f) the effect or likely effect on the environment generally in the vicinity of the place or water on or in which that aquaculture is or is proposed to be carried on-
 - (i) on the foreshore, or
 - (ii) at any other place, if there is or would be no discharge of trade or sewage effluent within the meaning of, and requiring a licence under section 4 of the Local Government (Water Pollution) Act, 1977, and
- (g) the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters.

The Board considered the appeal at its meetings on the **2 March 2023, 6 April 2023, 25 May 2023, 23 June 2023, 28 July 2023, 28 September 2023, 23 November 2023, 14 December 2023, 26 January 2024, 1 March 2024, 28 March 2024, 11 April 2024, 1 May 2024, 30 May 2024, 1 July 2024, 25 July 2024, 6 September 2024 and 26 September 2024.**

GROUNDINGS OF APPEAL

The following is a summary of the main issues raised by the appellants

1. **Precautionary Principle and Uncertainty:**

It was argued that there is insufficient certainty regarding the project's impacts, and the precautionary principle has not been adequately applied.

2. **Failings in Appropriate Assessment (AA):**

Inadequacies in the AA were identified, including uncertainty (due to poor data) in relation to impacts on bird species and overreliance on the 15% overlap threshold with habitats.

3. **Risks to conservation status of these following birds were raised:**

Grey Plover: Likely significant displacement of Grey Plovers due to disturbance from trestles was highlighted, with an inability to conclude no significant impact beyond reasonable doubt.

Brent Geese: It was noted that Brent Geese are disturbed by oyster trestles, and a four-fold increase in trestle area will likely impact this species significantly.

Wigeon: Uncertainties about displacement impacts on Wigeon were pointed out, requiring the precautionary principle to be applied due to limited evidence.

4. **Waterbird Occupancy Data Underestimation:**

The claim of overestimation of bird numbers in the SPA/AA was challenged, suggesting it is actually an underestimation, thus necessitating the use of the precautionary principle.

5. **Mitigation Measures Ineffectiveness:**

The proposed mitigation measures were argued to be inadequate in addressing potential impacts on birds and habitat disturbance.

6. Unacceptable Precedent:

Concerns were raised that the applications set an unacceptable precedent as Ballyteigue Burrow is not designated for shellfish waters and has high ecological value.

7. Inadequate NIS Reports and Minister's Decision:

The Minister's decision was contended to be based on incomplete information, failing to fully address in-combination impacts on water quality and other ecological factors.

ENVIRONMENTAL IMPACT ASSESSMENT

The Board considered the project proposed in the Application for an Aquaculture Licence under the requirements of the Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012 and the EIA Directive (2014/52/EU). The Board has concluded that the proposed project falls outside the requirements for conducting an environmental impact assessment as this type of shellfish aquaculture is not deemed "intensive" so does not require an environmental impact assessment report under the Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012.

The Board is satisfied that the project was not likely to have significant direct or indirect effects at the Site on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under the Habitats and Birds Directives;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape; and
- (e) the interaction between the factors referred to in points (a) to (d) will not have significant effects on the environment, including the factors listed in (a) to (d) by virtue of, inter alia, its nature, size or location.

APPROPRIATE ASSESSMENT

Two Appropriate Assessments (AA's) were carried out.

1. Aquafact undertook AA screening for the Ballyteigue SAC on behalf of the Marine Institute (Aquafact, 2020). They concluded that impacts on habitats are within tolerable limits and would not directly impact the Natura 2000 sites Conservation Objectives. This conclusion was accepted by The ALAB TA Report and the Aster Report.

2. Atkins Ecology Report (2020) The Atkins SPA AA Report assessed the potential impacts of aquaculture sites on the Ballyteigue Burrow SPA and other connected SPAs.

They concluded in summary that;

Grey Plover: Displacement impacts are unlikely to be significant based on observed positive population trends.

Light-bellied Brent Goose & Wigeon: Significant displacement is possible, but there's high uncertainty as these species may not be adversely affected by oyster cultivation.

On this basis they dismissed significant impact from this licence application on Ballyteigue Burrow SPA and Ex situ impacts on Tachumshin lake SPA

The ALAB TA Report and the Aster Report as well as the ALAB AA Conclusion Statement disagreed with Atkins' conclusions on the basis that as per Case C-258/11/Sweetman & others v An Bord Pleanala & others, the Court of Justice of the European Union (CJEU) held that authorization for a plan or project "may therefore be given only on condition that the competent authorities... are certain that the plan or project will not have lasting adverse effects on the integrity of the site." The many inadequacies highlighted in the Appropriate Assessment (AA) are so significant that the conclusions are unreliable.

However, in the case of this appeal, in respect of T03/038A, the Aster Report notes that the bird data upon which the Atkins report relies was collected post existence of the farm which has been in place since the 1980s. No baseline bird data exists.

DETERMINATION

Board has determined the appeal on the grounds that:

1. Existence of this farm predates the SPA designation 1990, the Nature Reserve designation 1987 and the Fisheries Act 1997.
2. Given the lack of data on bird use of the estuary before this aquaculture was put in place there is no evidence of significant negative impact upon which to refuse permission.
3. Granting permission will enable more control as the boundaries will be defined and the operator will be subject to husbandry recommendations and other constraints as per licence conditions.

Having considered all the foregoing and the information contained in the ALAB's TA Report, the Aster Report as well as the ALAB AA Conclusion Statement the Board determined at its meeting on 26th September 2024 pursuant to Section 40 (4) (b) of the Act, to **CONFIRM** the decision of the Minister to **GRANT** an Aquaculture Licence to the Applicant at Site T03/038A.

Dated this 20th day of September 2024

The affixing of the Seal of the
AQUACULTURE LICENCES APPEALS BOARD
was authenticated by:-



Deputy Chairperson



Authorised Signatory