

Murphy, CiaraM

From: Ohara, Mary (Alab)
Sent: 07 June 2019 16:39
To: Murphy, CiaraM
Subject: FW: GBASC Submission in relation to T06/202 Appeal
Attachments: MH_overstocking_documents_11.09.17_reduced(1).pdf; DCCAE and IFI Comment on Marine Institute Report on sea lice levels on marine salmon farms during February 2019 DCCAE.doc; GBASC submission to ALAB re MOWI Appeal.pdf

From: Billy Smyth [REDACTED]
Sent: 07 June 2019 16:32
To: Ohara, Mary (Alab)
Subject: GBASC Submission in relation to T06/202 Appeal

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Aquaculture Licences Appeal Board

To whom it concerns,

Attached is a submission from Galway Bay Against Salmon Cages in support of Minister Michael Creeds decision to treat as discontinued MOWI Licence T06/202.

Also attached are Documents supplied to GBASC by Friends of the Irish Environment which we have permission to use. We also attach a DCCAE document which was sent to DAMF on the 4th April 2019 requesting that three salmon farms be harvested out/shut down because of uncontrollable sea lice infestations since last November. DCCAE also had serious concerns about another salmon farm at Killary Harbour. Attached also is a Dail PQ by Cathrine Connolly TD.

Billy Smyth
Chairman, Galway Bay Against Salmon Cages.
[REDACTED]



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GALWAY BAY AGAINST SALMON CAGES



Aquaculture Licences Appeal Board,
Kilminchy Court,
Dublin Rd.
Portlaoise, Co. Laois.

7/06/2019

Galway Bay Against Salmon Cages (GBASC) Submission in support of Minister for Aquaculture, Food and the Marine Michael Creeds decision to discontinue the Silver Kings Limited/MOWI Licence T06/202 at Deenish Co. Kerry.

According to the Friends of the Irish Environment documents attached with this submission, it seems that Marine Harvest (MH)/MOWI are repeat offenders when it comes to overstocking/overharvesting at a number of their Irish salmon farming sites.

If Minister Creed had not taken any action against MH/MOWI for overstocking/overharvesting, he would have set a precedent whereby MOWI or any other salmon farming company could ever be sanctioned in the future for breaking the conditions of their licences, also it would be perceived by the public and rightly so, that MH/MOWI were ignoring the authority of our state agencies that are tasked to regulate them. Similarly if ALAB overturns the Ministers decision the same scenario will apply.

GBASC asks ALAB to reject the MH/MOWI appeal not to treat licence T06/202 as discontinued, for the reasons outlined above.

According to the MH/MOWI appeal document received by ALAB on the 9th May 2019, 385,000 juvenile salmon are worth 13.7 million euro, so if MH/MOWI had overstocked/overharvested by 121% then this stock would possibly be worth approximatly over 30 million euro.

GBASC wonder could consideration be given to the introduction of punitive financial penilties for breaking licence conditions as are contained in the Norwegian aquaculture regulations.

In reply to the MH/MOWI argument in their appeal document that tries to justify their overstocking/overharvesting on the lack of new salmon farm licences, we would like to point out that there are already 32,000 tonnes capacity salmon farming licences in the country and why would salmon farmers want more licences, when they failed to keep enough fish alive in 2018 to reach over 12,000 tonnes.

GBASC believe that Minister Creed and his department are totally justified in not renewing or granting any more salmon farming licences and the DCCAE document attached with this submission, plus the reply to the Dail PQ mentioned below, proves our point in this regard.

According to a reply from Minister Creed to Cathrine Connolly TD in a Dail PQ (Ref; 20261/19) on the 9/5/2019 there were, "15 notices to Treat due to elevated sea lice levels accross seven different sites. The sites are in Ardmore, Kilkieran Bay (1); Inver Bay (2); Ballinakill Harbour (1); Killary Harbour (1); Mulroy Bay (1); Lough Swilly (1);

Accelerated harvests were undertaken at three sites in the following bays:

Kilkieran Bay; Ballinakill Harbour; Inver Bay."

It seems to GBASC that sea lice on most Irish salmon farms, including the three MOWI operated ones mentioned above, are immune to all treatments and are now out of control and it is reprehensible that this situation was allowed to occur at the most critical time during the 2019 migrating wild salmon and sea trout runs, possibly resulting in further disastrous salmon and sea trout returns in future years to the rivers mentioned in the DCCAE document supplied. With less and less salmon and sea trout in rivers along our west coast as a result of sea lice infestations from salmon farms, this will have a negative effect on our tourist angling industry which is worth 836 million euro to the Irish economy and responsible for over 11 thousand jobs.

As saving the environment is now on every responsible persons mind, it is now time that ALL open sea cage salmon farming is closed down and moved to on land Closed Containment Systems (RAS) as a matter of urgency, in the meantime all farmed salmon smolts should be micro-tagged to aid traceability as with other farming enterprises, before they are transferred to sea cages.

ALAB, Please reject the MH/MOWI appeal.

On behalf of GBASC

Billy Smyth



PQ Ref: 20261/19

Reply By

12 noon on Wednesday 8th May

TD Asking

Catherine Connolly

Date for reply to Oireachtas

9/05/2019

To ask the Minister for Agriculture; Food and the Marine the actions being taken to control sea lice levels at salmon farm sites which are having an adverse effect on the successful survival of salmon and sea trout smolts or kelts; and if he will make a statement on the matter.

BRIEFING NOTE

1) Sea Lice Control Protocols

The control protocols for the management of sea lice are operated by the Marine Institute on behalf of the State. All stocks of fish are inspected by Marine Institute Inspectors on 14 occasions throughout the year. As part of this control strategy farm operators are required to undertake treatments to control lice infestation levels once certain trigger levels are reached.

Mechanical methods of delousing are currently used in combating instances of Sea Lice. In addition, several species of cleaner fish are used in Ireland as a method of controlling sea lice. The cleaner fish supplement their diet by removing and eating the lice. This biological method of control is very effective and can reduce the reliance on medicines to control sea lice.

All of the medicines used for lice control in Ireland are PoMs (prescription only medicines) which can only be used under Veterinary supervision and their use is regulated by the Health Products Regulatory Authority (HPRA). This was the case in the three instances cited in the reply to the PQ.

In certain circumstances treatments alone may not be the most appropriate strategy and in a number of limited circumstances an accelerated harvest may be required.

These protocols are more advanced than those operated in other jurisdictions for the following reasons:

- The inspection regime is totally independent of the industry.
- Data obtained as a result of inspection is published and made widely available.
- Treatment trigger levels are set at a low level.

The sea lice monitoring and control programme in Ireland has been acknowledged by the Environment Directorate (DG Environment) of the EU Commission as representing international best practice.

2) January to April 2019

Four monthly reports have issued by the Marine Institute to date in 2019. The reports indicate the issuance of 15 Notices to Treat due to Elevated Sea Lice levels across seven different sites. The sites are in Ardmore, in Kilkieran Bay (1); Inver Bay (2); Ballinakill Harbour (1); Killary Harbour (1); Mulroy Bay (1); Lough Swilly (1).

Accelerated harvests were undertaken at three sites in the following bays:

Kilkieran Bay; (December/January Report)

Ballinakill Harbour;

Inver Bay.

3) Correspondence from Department of Communications, Climate Action & Environment

There has been some controversy recently in respect of correspondence issued by the Department of Communications, Climate Action & Environment (DCCAE)

Following the recent standard dissemination of the Marine Institute's sea lice report for March 2019, DCCAE forwarded a series of specific queries to this Department in respect of the control of sea lice at specific aquaculture sites. These queries were formulated by both DCCAE and Inland Fisheries Ireland.

The Department referred the queries to the Marine Institute for assessment and comment. As part of their detailed and site specific response, the Marine Institute concluded that the measures taken by the salmon farms at each site have been effective in the control of sea lice infestation on farmed Atlantic salmon in the Spring period.

The detailed response of the Marine Institute was forwarded to DCCAE on 11 April.

4) Sea Lice Control – Transparency of Procedures

As indicated above the sea lice controls in Ireland are more advanced than those in other jurisdictions for the following reasons.

- The inspection regime is totally independent of the industry.
- Data obtained as a result of inspection is published and made widely available.
- Treatment trigger levels are set at a low level.

In addition to the above the Marine Institute publishes on an annual basis a National Survey of Sea Lice on Fish Farms in Ireland report.

ENDS



Kilcatherine, Eyeries, County Cork
<http://www.friendsoftheirishenvironment.org>

SUBMISSIONS TO THE MINISTER

BY THE PRINCIPLE OFFICER, AQUACULTURE AND FORESHORE MANAGEMENT
DIVISION, DEPARTMENT OF AGRICULTURE, FOOD, AND THE MARINE

RECOMMENDING TO TREAT AS
DISCONTINUED FOR OVERSTOCKING

THE ENTITLEMENT OF
MARINE HARVEST IRELAND
TO CONTINUE AQUACULTURE OPERATIONS

AT A

SMOULT HATCHERY IN LOUGH ALTON, DONEGAL
DATED 29 SEPTEMBER 2016

AND A

SALMON FARM AT INISHFARNARD, COUNTY CORK
DATED FEBRUARY 2, 2017

AND

THE MINISTER'S DECISION **NOT** TO DISCONTINUE
THE LICENCES

AS ADVISED BY THE SECRETARY GENERAL

Documents obtained under Access to Information on the Environment

Friends of the Irish Environment is a non-profit company limited by guarantee registered in Ireland.

It is a member of the European Environmental Bureau and the Irish Environmental Network.

Registered Office: Kilcatherine, Eyeries, Co Cork, Ireland. P75 CX53 Company No. 326985.

Tel & Fax: 353 (0)27 74771 Email: admin@friendsoftheirishenvironment.org

Directors: Caroline Lewis, Tony Lowes

Minister *Michael Covert*: I agree as per below.

The attached file concerns a breach of the conditions of a license for a hatchery facility in Donegal by Marine Harvest. I regret the delay in forwarding it to you.

The line division, in a detailed submission at blue tab A, recommends revoking the license – which would have very serious commercial consequences for the company. ASG Beamish recommends (blue tab B) that the matter be addressed by amendment of the license.

Having looked in some detail at the papers on the file (including the two letters from the company at green tabs 7 and 9), I agree with the latter recommendation, which seems the more proportionate action as argued in Cecil's submission.

You may wish to discuss before reaching a final decision on how to proceed.



Aidan O'Driscoll

23 September



ODriscoll, Aidan

From: Beamish, Cecil
Sent: 12 September 2016 14:40
To: ODriscoll, Aidan
Subject: RE: lough altan

Aidan,

There is no assessment of the impact on the environment, of the possible breach. I am not sure we are equipped to carry out such an assessment. It is also not clear that there was any impact and none appears to have been noticed/recorded. The apparent breach was detected after the fact in a post production inspection. Any impact, if there was one, would have passed at that stage.

To date the matter has been looked at legalistically from the perspective of an apparent breach of an important licensing condition limiting production.

We can discuss it en marge of MB tomorrow if you wish.

Regards,

Cecil

Cecil Beamish
Assistant Secretary
Department of Agriculture, Food and the Marine
National Seafood Centre
Cionakilty, County Cork
Ireland

Designated Public Official under Regulation of Lobbying Act, 2015

+353 238359510

cecil.beamish@agriculture.gov.ie

From: ODriscoll, Aidan
Sent: 12 September 2016 13:36
To: Beamish, Cecil
Subject: lough altan

Cecil

I have the very detailed submission on lough altan.

I may be missing the point in all the papers but I can't see any assessment of the impact – on the environment etc – of the breach. Do we have such an assessment?

Aidan

Aidan O'Driscoll
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ODriscoll, Aidan

From: ODriscoll, Aidan
Sent: 12 September 2016 13:36
To: Beamish, Cecil
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Ball, Siobhan

From: Quinlan, John
Sent: 07 September 2016 13:13
To: Beamish, Cecil
Cc: Hodnett, Kevin; Ball, Siobhan; ODriscoll, Aidan
Subject: FW: MHI Lough Altan file
Attachments: MHI.doc

Hi Cecil,

Thanks for this. I presume you intended the message for Kevin Hodnett and not Kevin Moriarty. On a matter of fact it is important to note that the Division's submission does not rely on the initial letter of admission from the company and explicitly addresses this issue. In accordance with legal advice it relies on the correspondence generated by the formal process to justify the recommendation.

On the matter of smolts, the company sought and obtained fish movement consents from the Marine Institute for smolts not parr so the evidence is in fact overwhelming. Exhaustive legal advice has also been obtained on all aspects of the case.

I agree fully that this is an important case with potentially significant implications for the company and also for the Department's licensing regime. I believe my submission is clear and detailed but if there is any aspect of the submission which it is felt requires further elaboration I would obviously be available to meet yourself, the Secretary General or the Minister at any time. I hope this is helpful

Regards
John

John Quinlan
Principal Officer
Aquaculture & Foreshore Management Division
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P85 TX47
Tel: 023-8859548
email: john.quinlan@agriculture.gov.ie

From: Beamish, Cecil
Sent: 07 September 2016 11:57
To: Quinlan, John; Moriarty, KevinR
Subject: MHI Lough Altan file

John, Kevin,
For your information and for file tracking purposes, I forwarded this file to the Secretary yesterday with the attached covering Submission.

Regards,
Cecil

Cecil Beamish
Assistant Secretary
Department of Agriculture, Food and the Marine
National Seafood Centre

Secretary General,

This matter relates to an apparent breach of an important Licensing Condition at an Aquaculture Instillation in Donegal. The key issues relate to what can be done about it in the context of the facts of the matter and the legislative options open to the Minister.

The detailed 15 page submission from Mr. Quinlan beneath examines the issues, options available and makes a clear considered recommendation for Ministerial revocation of the Licence.

This matter itself relates to an apparent breach of the Aquaculture licence held by Marine Harvest Ireland (MHI) for a hatchery facility at Lough Altan Co. Donegal. The licence, which was granted by the Aquaculture Licence Appeals Board, has a condition that *"the annual production of salmon smolts shall not exceed 2.5 million smolts"*. A Departmental inspection on 04/12/14 confirmed that the number of smolts produced in 2014, based on the written records, was 2.936 million an excess of 0.436 million.

On 11/11/2015 the company in an initial letter *"accepted and deeply regretted that this exceedance occurred"* and then went on to explain the circumstances which gave rise to this. Whilst generally accepting that an *"exceedance"* occurred the company explained the events which lead to the *"exceedance"* and simultaneously raised an issue as to whether all the fish exported from the site were smolts or *"parr"*, an earlier life stage, *"at the point of departure from the hatchery"*. There is no licence stipulation limiting the output of parr.

In a subsequent letter on 07/12/15, which legally represents the formal response that should be considered by the Minister in making any decision, the company withdrew its previous admission of overstocking. The company then argued that the fish were not fully *"smoltified"* when exported. The company at that point only accepted that their records were incorrect to record all the fish as smolts. The Department inspector contests the company view and stands over the recorded figures of 2.936 million smolts produced at the hatchery in 2014.

The issue is what to do and what can be done in relation to this matter.

Mr. Quinlan examined this matter in some detail and explored various options/possible actions under the legislation. Mr. Quinlan recommends that the Minister determine that there's been a breach of the licence conditions and that the Minister revoke the licence from the company.

Whilst I accept that the matter is of significance and that a *"do nothing"* option is not appropriate, I also accept that the current legislation does not provide the range of options one might like to consider to deal with such a situation.

However, I do have concerns about the recommendation to revoke the licence. My concerns relate to a number of matters.

Firstly, this is the first fully recorded/considered apparent breach of this licence, which has been in place since 2007. Secondly, and importantly, there is a question of proportionality associated with a decision to fully revoke the licence on an apparent first offence. Thirdly, the company has raised an argument about the facts of this case. Legal advice is that the State must engage with this argument about the actual live stage of some of the animals when they left the hatchery. Whilst this argument is in part rejected by the Department inspector and by the written records, it cannot be easily discounted by the State and might have some possibility of lending favour to the company in an Appeal/ legal challenge. Fourthly, the company has also presented a force majeure type argument, which it is fully accepted they should have brought to the Department at the time, but in any event might possibly have merit in assessing the matter and in law, particularly in a first breach. Fifthly, it seems to me that there are further two further actions not recommended in the attached submission which although not punitive should be considered to avoid a recurrence of this type of situation.

Considerations on Recommendation to revoke the Licence

The formal submission from the Division recommends revocation of the licence.

The legal advice (Tab 12) provided to date focuses largely on the procedures which would be appropriate if the Minister were to seek to revoke the licence. The legal advice recognises

The legal advice

On this respect the Department Engineering Inspector's written submission, on which much of this matter hangs, points to the difficulty of being precise on the smoltification process. Whilst it is clear that the Department engineer states in the documentation they were treated as smolts he also says that *"the exact degree of development of the fish that went to the Scottish sea farms would probably have varied through the time period leading up to departure from the Lough Altan unit (and possibly may also have changed during the short transfer period) and varied from fish to fish. What degree of smoltification applied to these particular fish when they left Lough Altan would be difficult to know at this remove"* Given that the whole issue hangs on whether or not more than 2.5M smolts were produced in the hatchery that year, and this *"smoltification"* argument is the main company argument in their formal response and would feature heavily in any ALAB appeal or judicial review, it seems to me that the Minister would need some much more expert and categorical scientific advice on this issue in order to determine a revocation. In addition, the State would somehow have to be able to convince ALAB or the High Court that more than 2.5M actual *"smolts"* left the hatchery rather than a mixture of smolts and parr. That evidence would have to relate to all production from the hatchery in that year and at this point there is no State visual verification that all production in 2014 were smolts, when leaving the hatchery. The company is stating that *"the fish in question were not fully "smoltified" at the point of departure from the premises and that strictly speaking they were still parr"*. The States case relies on company written records which the company now says were technically incorrect. Clearly much of the issue in any subsequent appeal to ALAB or in a Judicial Review would hinge on the definition of *"smolts"* which are undefined in the licence, and on the process of *"smoltification"*.

At a minimum in my view, if the Minister were minded to pursue revocation of the Licence, further legal advice

Criminal Proceedings against the company under S. 65 of the Act

This was one of the other avenues considered to address the issue. The legal advice received on this is clear set out in

Amendm

8 of the licence

Legal advice was also received on this possibility

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with Legal Services Division.

Renewal of the Licence

This licence falls for renewal in 2017 and the licence could possibly be amended if it is renewed to ensure much stronger and clearer provisions and definitions are introduced to ensure that production limits can be monitored in real time and any ambiguity about what is being produced should be removed from the licence provision. Clearly, this matter has thrown up a range of definitional issues in Licensing which will in any event have to be considered further.

Summary

There is an apparent significant breach of the licence production limit on this licence.

There is some ambiguity/lack of clarity on whether everything that was produced was smolts at the point of departure from the hatchery and this is the company's formal defence. It will, in my opinion, be hard to disprove the ambiguity so as to justify strong action, notwithstanding the clarity on the written records of production.

The Division rightly points out the importance of taking appropriate action when apparent and significant breaches of licence conditions occur. However, the legal options available to the Minister are limited and difficult to action.

The Division recommends Ministerial revocation of the licence.

I consider that there is an issue of proportionality in this action, particularly as it is the first breach of this 2007 licence which has fallen for consideration. Equally, the legal advice on

There is no legal advice on the strength of

At a minimum, if revocation were to be considered further, I would recommend that further legal advice on and expert scientific advice would be required on the smoltification issues, as this matter would be tested in the appeal/judicial review of any revocation decision the Minister might take. Indeed the issue of how the State could prove that what actually left the site were smolts would require to be addressed more comprehensively.

Finally, I feel that there are possibilities to amend the licence, which although not punitive, so as to introduce a stronger real time monitoring of production. In addition there are possibilities next year, when the issue of renewal of the licence comes up, to amend the licence to introduce a stronger real time monitoring of production and better definition of production.

It is accepted that these two actions may not be seen as adequate responses to the apparent breach in this case, but the Minister can only use legal options available and must act in a balanced way following due process.

Any necessary amendments to the aquaculture licensing framework arising from this matter, can be considered in the context of the upcoming licensing review.

Submitted for consideration and further discussion.

C Beamish 6/09/16

B

/k.

Dr. Cecil Beamish
Assistant Secretary General
06/09/16

Submission to the Minister

Licence T12/93-3 (Lough Altan)

From: John Quinlan, Principal Officer, Aquaculture & Foreshore Management Division

To: 1) Dr. Beamish, Assistant Secretary
2) Secretary General
3) Rúnaí Aire

Date: 8th July 2016

1. Purpose of the Submission.

To update the Minister on developments relating to the overstocking of the above site by the operator and to recommend that the licence held by the Operator be revoked by the Minister under Section 68 (1) (a) of the 1997 Fisheries (Amendment) Act. Comprehensive documentation supporting this recommendation is attached.

2. Background.

The licence in question (T12/93-3) is held by Comhlucht Iascaireachta Fanad Teoranta t/a Marine Harvest Ireland. The licence was issued by the Aquaculture Licensing Appeals Board (ALAB) with effect from 4th September 2007 and is of 10 years duration. The site is on land and acts as a hatchery for salmon. A specific condition of the licence states (Condition 11):

"The annual production of salmon smolts shall not exceed 2.5 million smolts."

A copy of the licence is attached (see tab 1).

A significant breach of this condition can be expected to have a negative impact on the environment as a result of greater intensification of smolts and increased discharges from the facility.

3. Engineering Reports.

An engineering report of 4th December 2014 (see tab 2) confirmed that the number of smolts produced in 2014 was 2.936618 million (an excess of 0.436618 million). This is a significant excess (17%). A further report submitted on 14th May 2015 (see tab 3) alluded again to the 2014 excess production.

4. Correspondence with the Company.

The Department forwarded the Engineering Reports to the Company on 26th May 2015 (see tab 4), seeking a response on the matter of overstocking. The Company did not respond to this correspondence and the matter was placed on the Agenda of the standard Department/Company Co-ordination Group Meeting held on 28/10/2015 (see tab 5). As will be seen the Company stated at the meeting that it's Technical and Quality Manager had only recently received the Department's Engineering Report from the Hatchery Manager and would respond to the issues raised as soon as possible. The Division issued a written reminder to the Licence Holder on 3rd November 2015 (see tab 6) requesting a written response to the issues raised in its letter of 26th May 2015.

5. Company's Letter of 11th November 2015.

The Company submitted its response in writing on 11th November 2015 (see tab 7). It is recommended that the letter be read in full. In essence the Company accepted that the overstocking in question had taken place and expressed regret for same. It appears that a salmon farm in Scotland was unable to take delivery of parr from the hatchery and therefore stocks were retained at the hatchery by Marine Harvest Ireland to facilitate the Scottish farm and protect MHI's exporting business with the customer. Accordingly, Marine Harvest Ireland made a commercial decision. In the letter of 11th November 2015 the Company states that the overproduction was not planned and that it was a once off event. The fact remains that, by its own admission the Company knowingly exceeded its stocking limitation by a significant degree for commercial reasons. The resultant overstocking was significant (17%) and represented significant commercial value to the Company. In view of the significant breach of the licence conditions and the open acknowledgement of same by the licensee the Department wrote to the Company on 27th November 2015 (see tab 8) formally advising the Company of the provisions of Section 68 (1) (a) of the 1997 Fisheries (Amendment) Act. The Company was advised that the Minister was considering revocation of the licence on foot of this breach. They were further advised that, in accordance with Section 68 (3) of the applicable legislation the Minister would consider any representation in relation to the Department's proposed action within 28 days of the notification.

6. Company's Letter of 7th December 2015.

The Company responded to the Department's letter of 27th November on 7th December 2015 (see tab 9) and effectively withdrew their previous admission of overstocking in earlier correspondence and stated inter alia ***"We were attempting to be as transparent as possible, but in light of your most recent correspondence we must now put it to you that we deny anything other than a technical breach in the condition, based on a well-intentioned but faulty input into the stock records for the site and the lack of definition in the licence or the inspectors reports as to what constitutes a smolt."*** In addition the Company now stated that the fish in question were not fully "smoltified" when exported to Scotland and therefore overstocking of smolts could not have occurred. The Company now regarded the breach of licence conditions as technical in nature only. It is the view of the Department that the breach is significant for the reasons set out hereunder. The Company's letter of 7th December 2015 outlines the employment created by the Company and revenue generated from sales etc. However, this is not a relevant consideration in the regulatory context.

7. Engineering Observations on Company's Correspondence.

On 15th December 2015 Aquaculture and Foreshore Management Division forwarded the two letters from the Company and relevant previous correspondence and documentation to the Department's Marine Engineering Division (MED) for observations.

A detailed response was received from MED on 23rd December 2015 (see tab 10).

Marine Engineering Division is standing over the accuracy of previous reports, in particular that a total of 2,936,618 smolts had been exported from Lough Altan in 2014. This gives an excess of 436,618 over the 2.5 million permitted under the terms of the licence. In relation to the Company's argument concerning "smoltification", Marine Engineering Division rejects this argument based on interaction with the Company (see copies of contemporaneous notes taken at the time of inspection and also based on the movement records supplied by the Marine Institute which refer to smolts). The voluminous material supplied by Marine Engineering Division including a copy of contemporaneous notes, provides conclusive evidence regarding the number of smolts exported and also the issue of "smoltification".

In all circumstances the facts of this case in relation to over-production are not in doubt for all the reasons outlined above. An important consideration is the findings of the Department's Marine Engineering Division that an overproduction of smolts has occurred. This finding by Marine Engineering Division is not based on the Company's admission but rather on their own examination of the relevant records.

8. Donegal County Council & Effluent Discharge Licence.

One of the potential consequences of overproduction at any aquaculture site is an increase in the level of effluent discharged from the site. In the case of the Lough Altan site the Department has been advised by Donegal County Council that the Licence Holder has

"been consistently in breach of their discharge licence conditions, especially in the 2nd half of the year, when fish biomass reaches a certain critical point".

Significantly Donegal County Council also advise that they

"have persistently asked them for an action plan which will address this, (including moving fish from the site earlier in the cycle), but they have cited economic reasons for not implementing the scale of treatment facilities which their current production rates would demand in order to achieve compliance".

The County Council also advise that

"If there is any mechanism within your aquaculture licence to limit production capacity, which will positively impact on compliance, we would welcome such a development". (see tab 11)

Compliance with the terms and conditions of the Effluent Discharge Licence issued to the Licence Holder is specifically dealt with in Condition No 1 of the Aquaculture Licence issued by ALAB.

Condition No 1 states as follows:

This licence shall remain in force only for so long as the fish farm complies with the planning permission granted by An Bord Pleanála on 28th August 2002 and subsequent planning permissions granted by Donegal County Council on 4th June 2002, 5th June 2002, 13th January 2003 and the Effluent Discharge Licence granted by Donegal County Council on 30th January 2004 (or a further such Licence granted by the said Council or by the Environmental Protection Agency).

9. Summary of Licence condition breaches.

The Licence Holder appears to have been in breach of Condition No. 1;

Condition No 1.

This licence shall remain in force only for so long as the fish farm complies with the planning permission granted by An Bord Pleanála on 28th August 2002 and subsequent planning permissions granted by Donegal County Council on 4th June 2002, 5th June 2002, 13th January 2003 and the Effluent Discharge Licence granted by Donegal County Council on 30th January 2004 (or a further such Licence granted by the said Council or by the Environmental Protection Agency).

However, it is not considered necessary to pursue this further as the issue of overstocking is at the centre of the breach of licence conditions and it is on this breach that the submission hereunder is submitted.

The Licence Holder is also in breach of Condition No. 11;

Condition No 11.

The annual production of salmon smolts shall not exceed 2.5 million smolts.

The Aquaculture Licence sets out in Condition No 8 the actions that may be taken by the Minister on foot of any breach of any condition specified in the licence. Condition 8 of the licence states as follows:

“Subject to the provisions of the Fisheries (Amendment) Act 1997 (as amended and substituted), the Minister may revoke or amend the Licence if he considers that it is in the public interest to do so, or if he is satisfied that there has been a breach of any condition specified in the Licence, or that the licensed area to which the Licence relates is not being properly maintained or in the event of water quality results or general performance at the licensed area not meeting the standards set by the said Minister and/or the Department of Communications, Marine and Natural Resources (hereinafter referred to as the Department).”

10. Actions for consideration on foot of the Licence Holder’s breaches of the Licence conditions.

As indicated above the basic facts of this case in relation to the overstocking issue are not disputed by the Company apart from the matter of “smoltification”. It will be noted that in its letter of 11th November 2015 the Company openly acknowledged that the overstocking had taken place and expressed regret. The Company’s argument in relation to “smoltification” is not tenable in view of the response provided by Marine Engineering Division and the supporting documentation provided by the Marine Institute, which clearly point towards the fish in question being described as smolts.

It can be reasonably stated therefore that the Company knowingly breached the terms and conditions of its licence to a substantial degree for clear commercial gain.

What remains to be considered is the action which the Department proposes to take in light of these facts. Any proposed action must in the first instance be based on the terms and conditions of the licence in question, the relevant provisions of the applicable legislation, and must be in the public interest.

The following are the available options identified by the Division:

1. Do nothing.
2. Initiate criminal proceedings against the Company in accordance with Section 65 of the 1997 Fisheries (Amendment) Act.

3. Amendment of the licence as provided for in Condition No 8 of the Licence (and by reference to Section 68(2) of the 1997 Fisheries (Amendment) Act). See in particular Section 13 in respect of available amendments.
4. Revocation of the licence as provided for in Condition No 8 of the Licence (and by reference to Section 68(1) of the 1997 Fisheries (Amendment) Act).

The Division has given full consideration to each of these options and has sought and obtained extensive legal advice from the Department's Legal Services Division in relation to the legislative options available. The four options are discussed in further detail below.

11. Do Nothing

The Department has an obligation to implement the State's aquaculture licensing regime in an impartial manner in accordance with the provisions of the applicable legislation. Aquaculture and Foreshore Management Division has, within the resources available to it, sought to monitor and police compliance with the terms of all aquaculture and foreshore licences issued. The 1997 Fisheries (Amendment) Act does not provide for an extensive suite of sanctions – short of revocation or criminal prosecution - to be used in line with the seriousness of breaching licence conditions. The legislative options open to the Minister are as set out in Section 10 above.

It has been argued by the Company that the breach of the relevant licence conditions was technical in nature only. This argument put forward in the Company's letter of 7th December 2015 has been accompanied by a detailed statement of the revenue generated by the Company and the employment created by it. The Company's arguments in relation to revenue and employment are not in doubt. However, as with any other business, the Company must conduct its activities in accordance with the law. The applicable legislation and the terms and conditions of the licence held by the Company make the consequences of overstocking very clear and the Company can be reasonably expected to be fully aware of its obligations as set out in the licence and the legislation on which it is based. The licence in question relates to the operation of a hatchery which, it is argued, is of huge importance to the Company's overall operations in Ireland. This fact places an even greater onus on the Company to operate the hatchery in accordance with the licence issued so as to protect its business.

From a licensing perspective, there is always a strict separation between the Minister's role as regulator and the Ministerial duty to promote the sustainable development of the industry. This situation is essential in view of the dual role of the Department as regulator and developer in respect of the industry. In the current circumstances, while it can be argued that the development of the industry will be affected adversely by any sanction against the Company, the overriding obligation of the Department is to take action in accordance with the obligations set out in the legislation. Anything less than this will seriously undermine the State's regulatory system in relation to marine aquaculture. The long term effect which this would have on the development of the industry is as serious as it is obvious. In this regard the recent Supreme Court Decision in the State's appeal of a High Court Case on mussel seed availability (*Cromane Seafoods Ltd & Others –v- The Minister for*

Agriculture, Food and Fisheries & Others) has explicitly pointed to the "overarching legal duty" of the Minister to comply with and implement EU law. It has long been asserted by Environmental NGO's and others that the State's regulatory regime in respect of Marine Aquaculture is implemented inadequately. The EU Commission has twice opened a Pilot Case against the State in respect of sea lice controls, for example. For its part the Department has always provided robust responses to these assertions and has successfully defended the regulatory regime. To that extent, dealing vigorously with significant breaches of licence conditions constitutes the discharge of both regulatory and developmental responsibilities which must be a crucial consideration, in the public interest.

It is clear that the Company took a commercial decision to knowingly breach the conditions of the licence. The reasons cited by the Company cannot be considered "force majeure" in the normal accepted meaning of that term. (In the recent past the Company has used "force majeure" to seek to justify other unauthorised activity). The legislation, and the upholding of same, is clearly in the public interest of all aquaculture operators. The Company avails of an enhanced bilateral communication facility with the Department's Licensing Division due to its overwhelming prominence in the industry. This takes the form of regular scheduled bilateral coordination meetings with agreed detailed agendas. This group has met on at least 20 occasions and it would be fair to say that the Department has emphasised the need to comply with licence conditions at all times during these meetings. The operator, by virtue of its dominant role in the industry, its administrative and technical resources and its participation in the Coordination Group meetings is acutely aware of the importance the Department attaches to compliance with legislation.

It should also be noted that a number of Parliamentary Questions have been received in respect of this and related cases. In all the circumstances, it is clear that to do nothing is not an option which is desirable or, indeed, available in any meaningful way to the Department in this case. Furthermore it is considered that action such as a letter of admonishment to the company will be tantamount to doing nothing and will be seen as such by the company, by other stakeholders and by the general public. This would seriously undermine the integrity of the regulatory process.

12. Criminal Proceedings against the Company under Section 65 of the Act.

Criminal proceedings have not been initiated in recent years, if ever, in respect of breaches of licence conditions. The Division sought the advice of the Department's Legal Services Division in relation to institution of criminal proceedings as provided for in Section 65 of the Act.

The legal advice received

Having regard to the above legal advice the initiation of criminal proceedings is not recommended.
(see tab 12 for copies of Legal advice received)

13. Amendment of the licence as provided for in Condition No 8 of the Licence.

There are a number of options available to the Minister by which the licence can be amended.

- a. Amendment by invoking Condition 8 of the Licence
- b. Amendment pursuant to Section 68(2) of the 1997 Act
- c. Amendment pursuant to Section 70 of the 1997 Act
(Section 70 provides for the amendment by the Minister of a licence in circumstances where the licensee themselves seek a review of their licence)
- d. Amendment pursuant to Section 18 of the 1997 Act
(Section 18 of the Act allows for amendment of a licence in circumstances where the licensee has entered into a third party agreement on a date after the licence has become operative)
- e. Amendment pursuant to SI 466 of 2008
(SI 466/2008 governs the control of dangerous substances in aquaculture)

Each of the options above has been considered and it is clear that options c, d and e are not appropriate in this instance as they do not address the specific breach of the licence condition under consideration. These options are however dealt with in detail in the legal advice dated 26th May 2016 (see tab 12).

Options a and b are dealt with in detail below.

Condition No. 8 of the Aquaculture Licence provides for the amendment (or revocation) of the licence where there has been a breach of any of the conditions of the licence.

"Subject to the provisions of the Fisheries (Amendment) Act 1997 (as amended and substituted), the Minister may revoke or amend the Licence if he considers that it is in the public interest to do so, or if he is satisfied that there has been a breach of any condition specified in the Licence, or that the licensed area to which the Licence relates is not being properly maintained or in the event of water quality results or general performance at the licensed area not meeting the standards set by the said Minister and/or the Department of Communications, Marine and Natural Resources (hereinafter referred to as the Department)."

The Division has given extensive consideration to the possible amendment of the licence. One of the options considered was a reduction of the maximum production allowed for under the terms and conditions of the licence. Such an amendment would seek to counteract the effects of over production in 2014 and possibly help to address environmental repercussions of the over production. The legal advice received has high

legislation and indeed it is not clear how the Department would proceed in a feasible manner with this option.

The legal advice available to the Division is that :

It should be noted that an amendment to the licence under the provisions of Section 68(2) of the Act would require compensation to the Licence Holder under Section 68(5) of that Act. It would obviously not be appropriate to facilitate compensation to the Licence Holder for any amendment made on foot of a breach of the Licence conditions. The legal advice received is that any

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12). Notwithstanding that compensation under Section 68(5) of the 1997 Act is not required if the amendment is pursued by virtue of Condition 8 of the Licence, the other provisions of the 1997 Act which apply to all amendments of licences will equally apply to an amendment under Condition 8 of this licence. The Department's Legal Services

Arising from the above legal advice it is understood that the requirements on the Minister would be as follows:

1. The Minister is required to demonstrate that the amendment is in the Public Interest.

2. The amendment must not be punitive in nature.
(Any reduction in production capacity on foot of an earlier breach of a licence condition would almost certainly be construed as a punitive measure).
3. Any proposed amendment will require advance consultation with the Licence Holder including formal notification as set out in Section 68(3)(b) of the Act and also clear indication of the nature of the amendment contemplated by the Minister.
4. Section 68(3)(c) of the Act stipulates that the "Minister shall consider any representations in relation to a proposed revocation or amendment made to the Minister by the Licensee". (It is highly unlikely that the License Holder would agree to any reduction in the production capacity currently provided for by the licence).

Summary.

The legislation in this case is not clear in relation to an amendment of the licence which would reduce production capacity on foot of the 2014 breach of the maximum production capacity allowed for under Condition No. 11 of the Licence. The 1997 Act has been drafted to allow for circumstances where the Aquaculture Licence Holder would be compensated for any amendment to the Licence by the Minister and ideally the amendment might be by consensus. However proceeding in this manner is not considered viable for a range of reasons including, but not necessarily limited to the following:

- Possible difficulty in achieving the necessary downward calibration of output to accurately counteract the effects of overproduction in 2014.
- Achieving the calibration to counteract this effect will at best restore the status quo ante and could be seen (probably would be seen) as providing a measure of incentive to breach licence conditions on the basis that the worst outcome for the company would be that they are no worse off than if they had complied with the licence. This would undermine the post-licence monitoring and compliance regime of the Department which is definitely not in the public interest.
- Securing consensus from the company within a reasonable timeframe could be challenging, to say the least.
- The possible perception by other stakeholders that the integrity of the licensing system was not maintained by the Department and was negotiated downwards in consultation with the licensee in a manner not provided for in applicable legislation.
- Achieving a sustainable balance between rectifying the effects of the overproduction and the legislative requirement that the decision not be seen as punitive would be very difficult to achieve.
- The possible/probable public perception that the Department is failing to deal vigorously with a significant breach of licence conditions and thus failing to adequately discharge both the regulatory and developmental responsibilities of the Department.

Condition No 8 of the licence provides for an amendment of the licence where there has been a breach of any condition of the licence. It cannot have been intended that the Licence Holder would be entitled to compensation for action taken by the Minister on foot of a breach of any of the Aquaculture Licence conditions. The following advice of the Department's Legal Services Division is relevant:

In all the circumstances and in view of the apparent inability of the 1997 Fisheries (Amendment) Act to cater for an amendment of the Aquaculture Licence in circumstances where there has been a breach of the licence conditions it is not recommended that an amendment of the Aquaculture Licence be made (See tab 12 for copies of all Legal Advice).

14. Revocation of the Licence under Section 68 of the Act

Legislative Framework.

Section 68 of the 1997 Fisheries (Amendment) Act deals with the revocation or amendment of Aquaculture Licences.

Section 68(1)(a) of the Act sets out the circumstances in which the Minister may consider the revocation of an Aquaculture Licence.

"68.—(1) Subject to subsection (3) and section 69(2), the Minister may, in his or her discretion and, subject to subsection (5), without compensation to the licensee, revoke an aquaculture licence if the Minister—

(a) is satisfied that there has been a breach of any condition specified in the licence,"

Section 68(3) of the Act sets out the minimum notice to be afforded to the Licensee, the need to advise the Licensee of the reasons for possible revocation and also requires the Minister to consider any representations made by the Licensee on foot of the notice.

Section 68(3) states as follows:

"68 (3) The following shall apply in relation to the revocation or amendment of an aquaculture licence:

(a) the Minister shall not revoke or amend the licence unless and until he or she has given by post to the licensee not less than 28 days notice in writing stating that the Minister has under consideration the revocation or amendment, as the case may be, of the licence;

(b) the notice shall also state—

(i) where it states that the Minister has under consideration the amendment of the licence, the specified amendment under consideration and the grounds on which it is so under consideration, or

(ii) where it states that the Minister has under consideration the revocation of the licence, the grounds on which the revocation is under consideration;

(c) the Minister shall consider any representations in relation to a proposed revocation or amendment made to the Minister by the licensee before the expiration of the notice."

The Division, as outlined in Section 5 above, wrote to the Licence Holder on 27th November 2015 (see tab 8) formally advising the Company of the provisions of Section 68 (1) (a) of the 1997 Fisheries (Amendment) Act and that consideration was being given to the possible revocation of the licence. In addition the letter advised that in accordance with Section 68 (3) of the Act, the Minister would consider any representation in relation to the Department's proposed action within 28 days of the notification. The Department's Legal Services Division has confirmed

The Licence Holder wrote to the Department on 7th December 2015 (see tab 9) in response to the Department's letter of 27th November 2015. As already outlined in Section 6 above, the Licence Holder withdrew the admission of overstocking previously made in their letter of 11th November 2015 and stated inter alia:

"We were attempting to be as transparent as possible, but in light of your most recent correspondence we must now put it to you that we deny anything other than a technical breach in the condition, based on a well-intentioned but faulty input into the stock records for the site and the lack of definition in the licence or the inspectors reports as to what constitutes a smolt."

In response to the Department's notice that it was considering the possible revocation of the licence as a consequence of the overstocking in 2014, the Licence Holder now contended that the process of smoltification had not yet concluded for all the stock and that as the licence was silent on the stocking of parr the breach of condition No 11 was *"technical in nature and concerned the use of incorrect terminology"*.

The Licence Holder also advised that there had been *"no breach in the water abstraction or discharge consents, and so therefore no negative environmental consequences arose as a result of this incident"*

15. Consideration of the representations made by the Licence Holder.

Section 68(3)(c) of the Act obliges the Minister to give consideration to the representations made by the Licence Holder.

Sec 68(3)(c) "the Minister shall consider any representations in relation to a proposed revocation or amendment made to the Minister by the licensee before the expiration of the notice."

16. Consideration of the response of the Licence Holder in relation to the overstocking issue.

The overstocking in this case came to light on foot of an inspection of the aquaculture site by the Department's Marine Engineering Division (Sections 3 and 4 of this submission refer). The Licence Holder's representations of 7th December were forwarded to the Marine Engineering Division for consideration. The detailed response received from MED on 23rd December 2015 (see tab 10) stands over the accuracy of previous reports, in particular that a total of 2,936,618 smolts had been exported from Lough Altan in 2014. This gives an excess of 436,618 over the 2.5 million permitted under the terms of the licence.

Significantly, the Department's Engineer in his report of 17th December 2015 (see tab 10) notes that *"the unit was already in breach of its smolt production limit by early November 2014 before the export in question took place"*. Production at this time stood at 2,609,636.

In relation to the Company's argument concerning "smoltification", the Department's Marine Engineering Division has rejected this argument based on interaction with the Company (see copies of contemporaneous notes taken at the time of inspection and also based on the movement records supplied by the Marine Institute which refer to smolts). The voluminous material supplied by Marine Engineering Division including a copy of contemporaneous notes provides significant evidence in support of the Department's position.

In addition, although the Licence Holder's letter of 11th November 2015 predates the formal process outlined above, the Department in all reasonableness, cannot be blind to its significance i.e. that the Company admitted to the overstocking.

17. Consideration of the Licence Holder's comments in relation to water abstraction and discharge consents.

As will be clear from the supporting documentation, the licence issued by ALAB contains the following condition:

This licence shall remain in force only for so long as the fish farm complies with the planning permission granted by An Bord Pleanála on 28th August 2002 and subsequent planning permissions granted by Donegal County Council on 4th June 2002, 5th June 2002, 13th January 2003 and the Effluent Discharge Licence granted by Donegal County Council

on 30th January 2004 (or a further such Licence granted by the said Council or by the Environmental Protection Agency).

In this context it is worth noting communication from Donegal County Council indicates concerns on the part of the Council in relation to breaches of the Licence Holders discharge licence condition. This would seem to contradict the assertion in the Company's letter of 7th December 2016 (see tab 9) which states:

"no breach in the water abstraction or discharge consents, and so therefore no negative environmental consequences arose as a result of this incident"

As indicated in Section 9 above, it is not considered necessary to pursue this further as the issue of overstocking is at the centre of the breach of licence conditions and it is on this breach that the submission hereunder is submitted.

18. Conclusion

The facts in relation to this issue can be summarised as follows:

- a. The Department's Marine Engineering Division carried out a scheduled inspection on the 4th December 2014 (see tab 2) and found evidence of overproduction. (The Licence Holder had in fact exceeded the annual production limits before the Scottish export event referred to in their subsequent correspondence).
- b. The company in their letter of 11th November 2015 (see tab 7) referred to the overproduction of smolts and advised:
"It is accepted and deeply regretted by the company that this exceedance occurred"
- c. The Licence Holder, when advised that the Department was giving consideration to the revocation of the Aquaculture Licence wrote again to the Department on 7th December 2015 (see tab 9) and withdrew their earlier acceptance of overstocking and redefined it as a ***"technical breach"***
- d. The Department's Marine Engineering Division reviewed its records (see tab 10) on foot of the MHI letter of 7th December 2015 (see tab 9) and has advised that it stands over the accuracy of the December 2014 report "that a total of 2,936,618 smolts had been exported from Lough Altan in 2014" and
 - The contemporaneous notes of the Department's Engineers meeting with the site manager confirm the overproduction figures.
 - The Fish Health Unit of Marine Institute records have confirmed that the paperwork accompanying the export from Lough Altan to Scottish Sea Farms in November 2014 described them as smolts.

- e. The policy options available to the Department have been identified in the following terms:
- Do nothing.
 - Initiate criminal proceedings against the Company in accordance with Section 65 of the 1997 Fisheries (Amendment) Act.
 - Amendment of the licence as provided for in Condition No 8 of the Licence (and by reference to Section 68(2) of the 1997 Fisheries (Amendment) Act). See in particular Section 13 in respect of available amendments.
 - Revocation of the licence as provided for in Condition No 8 of the Licence (and by reference to Section 68(1) of the 1997 Fisheries (Amendment) Act).
- f. For all the reasons set out above it is considered that the initiation of criminal proceedings under Section 65 of the Act and the amendment of the licence as provided for under the Act are not viable options.
- g. The "do nothing" option is analysed in Section 11 above and is not recommended for the reasons set out therein.
- h. The option remaining to the Minister is to revoke the licence in accordance with Section 68(1) of the Act for the reasons set out in Section 14 above.

19. Recommendation

Having regard to all of the above, it is recommended:

1. That the Minister determine that a breach of Condition 11 of the applicable Aquaculture Licence has occurred as described above.
2. That the Minister revoke the above licence under the provisions of Section 68(1) of the 1997 Fisheries (Amendment) Act for the following reason:
 - Breach of Condition 11 of the applicable Aquaculture Licence which states "the annual production of salmon smolts shall not exceed 2.5 million smolts".

Submitted please for approval.



John Quinlan
Principal Officer

Aquaculture and Foreshore Management Division

8/
7/
16

✓ PSM



The attached case file refers to what appears to be a significant breach of the stocking limit for smolts by Marine Harvest at a site in Beara Co Cork. You will recall that we recently had another similar case with the same company at another location.

The notes from Cecil Beamish and John Quinlan on the attached file set out the evidence in this case in relation to overstocking, which seems clearcut. However it is also apparent that we have a difficulty in that the license specifies that the stocking limits relates to "smolts" and it is not straightforward to prove that the overstocked fish were technically smolts. Our licensing system also seems to lack any scalable penalties, making it difficult to determine a proportionate penalty to the offence.

In the light of the above, the attached notes set out two possible courses of action – discontinue the license or amend the license, if possible. I agree with ~~the latter approach~~ but think we should also seek a meeting with the company at the most senior level to set out very clearly how seriously we view these issues.

For approval by / discussion with Minister


Aidan O'Driscoll

30/1/17

x Agreed 

Secretary General;

Re: Marine Harvest (Silver King Seafood Ltd) – Salmon Farm – Inishfarnard, Coulagh Bay,
Beara, Co. Cork.

Introduction

This matter relates to an apparent breach of an important licensing condition at a salmon farm in Beara, Co. Cork, operated by Silver King Seafood Ltd, a subsidiary of Marine Harvest. The key issue relates to what can be done about it in the context of the facts of the matter, the issues related to these facts and the legal position.

The detailed submission attached from Mr. Quinlan examines the issues, the options available, the legal position and makes a clear recommendation. That Submission deserves to be read in full. That submission recommends that the Minister determine that the relevant licence condition has been breached and that the Minister treat as discontinued the entitlement of Silver King Seafood's Ltd to continue aquaculture operations at the site. This submission also addresses the issues.

The matter which has arisen relates to an apparent breach of a maximum stocking level condition of the aquaculture licence under which the company is operating. That licence condition stipulates that " *the number of smolts to be stocked at the site should not in any event exceed 400,000* ". The licence itself has passed its end date and the company has applied for renewal. The Fisheries Amendment (Act) of 1997 provides that in these circumstances the applicant is entitled to continue the aquaculture authorised by the licence, subject to the terms and conditions of the licence, until the renewal application is decided upon.

Consideration of the issue

In considering the issue there are two separate aspects that should be considered:

(A). Can the apparent breach be proven and could the State in a legal challenge/appeal satisfy a legal burden of proof that more than 400,000 "smolts" as against 400,000 "fish" were inputted to this farm in March 2014 and/or that there were more than 400,000 "smolts" on this farm at some point.

(B) If the Minister is satisfied that the apparent breach actually occurred, what is the appropriate action to take in the context of the legislative framework and the legal "entitlement" the farm is currently operating under.

The apparent breach of the licence condition

The specific condition of the licence on which the apparent breach occurred stipulates inter alia, that "the number of smolts to be stocked at the site should not in any event exceed 400,000." A Departmental inspection report on 8th June 2015 an actual standing stock on the farm at that time indicated a standing of 503,344 fish, weighing 2,114 tonnes (average weight 4.2kg). The fish at this point were not smolts hence this is not central to the specific breach that is at issue. However, the inspection also reported that company stocking records received on the day of inspection showed that "in March 2014, 820,614 smolts with an average weight of 0.09kg was inputted onto the site" the report also stated that "no smolts were added to the site since March 2014". The question of whether or not a breach of the relevant licensing condition in relation to the maximum number of smolts on the site occurred hinges on the Engineering Division report.

The company position

The main elements of the company's initial response on 29/11/16 (Tab 4) said:

"The licence refers to smolt stocking events not exceeding 400,000. The licence does not contain any condition concerning how many salmon, that are not smolts, may be kept on the site at any point in time. I would suggest that the Marine Institute, who are the Ministers advisors on scientific and background matters be consulted in terms of explaining the different stages of a salmon's lifecycle and in particular the very short-lived and distinct "smolts" phase.

Marine Harvest had two separate silver salmon stocking inputs into this site during the period of interest, neither of which concerned fish at the "smolt" stage in their life cycle. Further neither of the stocking events involved fish transfers exceeding 400,000 fish. On this basis we strongly contend that we have not breached the licence terms concerning smolt stocking and therefore no remedial action is required.

2 |The confusing and biologically incorrect phraseology employed in this licence highlights the recurring drafting problem we have all encountered, whereby inconsistent, contradictory and technically meaningless terms and conditions have found their way into many of the salmon farming licences issued over the years.

.....In this particular instance we do not believe that we breached any of the licensed terms as they are written and thus we are of the view that no remedial actions are called for at this point in time."

Departmental Inspection Report Review

Following the company letter the Marine Engineering Division reviewed their earlier inspection report and stated:

"Based on the above MED confirm that they are satisfied that the number of stock input to the site in March 2014 (820,604 smolts) exceeded the permitted number (400,000); and that this clearly represents a breach of condition 2 (d) of the licence."

The Marine Engineering Division Review (MED) Report went on to say:

"Marine Harvest Ireland argue in their letter dated 29th January 2016 that the fish were not in fact smolts (as referred to in the licence) and that therefore they are not in breach of condition 2 (d). They suggest that advice be sought from the Marine Institute in regard to the difference between smolt and post smolt/salmon stage. MED comment that this advice should be sought as a technical/legal interpretation may be needed should any legal case be pursued in relation to the matter. MED have taken the view that all fish referred to can reasonably be regarded as smolts in the context of the licence in this instance."

Further Company response

In a further letter of 15th June 2016 the company recall *"a series of explanations demonstrating that Marine Harvest Ireland was not actually acting in breach of the licence terms and conditions..."* Other correspondence in a range of letters from the company argue that the licences are outdated etc and comment on the need for review etc. However, as Mr Quinlan points out the issue falls to be determined under the legal provisions in place.

Assessment of the issues in relation to the apparent breach

The issues around whether or not there was a breach of the maximum "smolt" numbers condition can be assessed in the following way. The fish moved to the Inishfarnard site, from the hatcheries in Lough Altan & Pettigo which are only licensed to produce smolts. However the exact definition of a "smolt" is hard to come by and the boundaries of the smolt stage seem to be hard to be precise about. For the purposes of this case there is no legal definition of a smolt. One description on the Marine Harvest website describes smolts as less than 100 grammes. The first 400,000 fish moved out of the hatchery were described in the movement order as having an average weight of 95g and therefore some of the fish would have been on the boundary or over the MHI boundary description of a smolt. The next tranche of 280,000 fish were average weight of 85 g.

The company records on file, for inputs to the farm, recorded the number of fish inputted and the weight of those fish. The records do not describe the fish as smolts or otherwise.

The company records describe the average weight of fish on the site in March as 90g and in April at 147g. What is clear is the fish grow rapidly to post smolt stage once on the farm, the issue is how many were smolt or post smolt before April and can that be determined in the absence of a legal definition of a smolt.

The Engineering Report takes the numbers and weights of inputted fish from the company records and then describes them as smolts. The Engineering Division review of their earlier report reaffirms their view that these were smolts but says that advice should be sought on the question of whether or not they were or were not all smolts *"as a technical/legal interpretation may be needed should any legal case be pursued in relation to the matter. MED have taken the view that all fish referred to can reasonably be regarded as smolts in the context of the licence in this instance"*. In short, The Engineering Division (MED) have simply taken a "reasonable" view that the fish were smolts, from the historic company records. The Engineering Inspection was some 15 months after the date of inputting the fish. There was not or cannot now be any physical inspection/verification to confirm exactly what life stage some or all of the fish inputted were at, at the date of input to the farm. For the breach to have occurred more than 400,000 of the fish inputted would have to be "smolts" at some point on or after March 2014. Much hinges on these points.

What is probable is that if a punitive decision is taken against the company on the basis that the 400,000 "smolt" limit was exceeded, the company will, most likely, contest this legally and the outcome of that case will centre on whether or not the State can prove that the fish inputted were "smolts" and only "smolts". The burden of proof will fall on the State to prove that more than 400,000 of the fish on the farm were "smolts" at some point in March 2014 or thereafter. Whilst there are on the face of it good reasons to suspect that more than 400,000 smolts were on the farm at some point, it might be a different thing to prove it, particularly without a legal definition of a smolt. Accordingly, it is arguable that it might be very hard to prove that case to the satisfaction of the Court.

Consideration of the appropriate action to take

If the Minister is satisfied that a breach occurred then the issue of the appropriate action to take arises. In considering this the situation it is complicated by the fact that the date for expiry of the licence was in 2007, the company has applied for renewal of the licence but this has not yet been determined. The company is therefore operating the farm under the 1997 Act which allows it to continue to operate on the same terms and conditions as set out in the licence, pending determination on the renewal application. The issues arising from the legal position are set out in the legal advices at Tab 11 and in Mr. Quinlan's submission.

Mr Quinlan's submission beneath considers the options and recommends discontinuing the entitlement to continue salmon farming on the site. It is undoubtedly an issue that the

governing legislation does not provide for graduated sanctions. Given that there is at a minimum an element of uncertainty about the apparent breach, and that there is no other recorded breach of this licence, it seems to me that there is a significant issue of proportionality about an action to close the farm in all the circumstances. Any such action could undoubtedly be challenged on the State's ability to approve the "apparent" but denied breach and would also most likely be challenged on proportionality grounds. It could not be discounted that the State would be taking on a significant element of exposure in taking such an action in all the circumstances.

What seems clear from this case is that there is a problem in that the drafting of the licence condition is not as clear as it could be in that the maximum young fish stocking limit in this licence is not well drafted in specifying "smolts". If the provision were drafted on the basis of the maximum number of fish that could be inputted of not more than a certain weight, this would be more easily and objectively monitored and enforced. A redrafted condition in those terms coupled with a requirement for the pre notification of the Marine Engineering Division on each input event would allow for clear, real time, enforcement of the licence objective. Such an amendment would be in the public interest. The legal advices attached set out a complicated situation in relation to amending the "expired" licence. What is clear is that no such amendment can be done as a "punitive" measure. However, there does seem to be scope for amendment in the public interest where due process is followed and the company are in agreement. Any such course of action would need to be developed with Legal Services Division to ensure the state is not exposed.

Clearly in any event the form of the licence can be amended if a decision is made at a future date to renew the licence.

Summary

There is an apparent significant breach of the "smolt" stocking limit on this licence. That is an important Licence condition. There is no dispute about the number of "fish" inputted and that number exceeded the "smolt" limit number. There is a dispute over whether the fish inputted in March 2014 were "smolts" or not. It is even possible that some were and some were not. The net issue is were there more than 400,000 smolts on this farm at some point in March 2014 or thereafter. The fact that there were more than 400,000 fish on the farm on or after March 2014 does not determine the issue. The company argues that they did not breach the condition. The company argues that the fish inputted were not at "the smolt stage in their life cycle". The State records (Marine Institute Fish Movement Approval Notices) and the company records simply record the number of fish and their average weight. The Department inspection, some fifteen months after the event, simply transcribed the number of fish inputted from the company records and takes the view that they were all smolts. There was no physical inspection or verification at the time the fish were inputted to the farm or in the subsequent year. It is on that basis that the question of the "apparent" breach arises and that the judgement must be made on the matter.

For the State to take action on the apparent breach and overcome the burden of proof that it would be required to meet to prove its case when challenged, a decision is required that the State can prove the breach. This seems challenging to me especially as the Engineering Division agree with the company that further separate scientific inputs would be required on the difference between smolt and post smolt salmon stage in order to prove in any legal case that more than the fish inputted in March 2014 were "smolts" at that point or thereafter. It is hard to see how scientific advice could be given by an external party at this stage which would have adequate precision to stand up to legal challenge. It is inevitable that counter scientific advice would be given by some other expert witness on behalf of the company.

If the Ministers judgement were that the apparent breach could not be legally sustained, the issue of punitive action would not arise. If the Minister is unsure about the issue and felt further outside scientific input would help that could be sought. However, such outside scientific input could only be theoretical/hypothetical and could not provide definite verification of what exactly was inputted in March 2014.

If the Ministers view is that a breach occurred then the question is what action to take. The options under the legislation are limited and punitive action effectively comes down to removing the farms entitlement to operate, in the absence of graduated sanctions under the legislation. Mr. Quinlans submission sets out a reasoned case as to why that action should be pursued to discontinue the company's right to continue aquaculture operations on the site.

Taking all the aspects of the case, I differ on the recommended approach given all the circumstances. Firstly, there is the disputed facts about whether or not a breach occurred and the difficulty as I see it that the State would have in a legal challenge/appeal in meeting the necessary burden of proof on the matter. Secondly, it is reasonable to expect a strong challenge that the action to close the farm is disproportionate, given that even if the breach were proven/accepted this would be a first breach of a licence condition relating to this farm. It is, in my view, questionable whether or not removing the entitlement to operate in all the circumstances could be successfully defended in a challenge. At an absolute minimum there is a possibility that the challenge would succeed and the State would potentially be exposed.

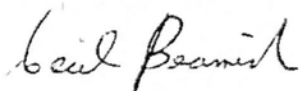
In any event, the situation is not satisfactory and the case highlights the problem with the way in which the licence condition is drafted. It would be in the public interest to endeavour to amend this condition, either in this licence, or in any renewal licences or in both, to simply set a limit on the number of "fish" below a certain weight that could be inputted so that in this way or some similar formulation it would be possible to achieve the essence of the intention in the original licence. It would seem desirable to also consider further requiring the company to pre-notify the State where young fish are being inputted to enable clear real time verification that fish input limits are being reflected. Any action along

these lines would need to be developed in close co-ordination with Legal Services Division given the complex legal situation in this case.

Decision Sought

Submitted for consideration, discussion if sought, and Ministerial decision on

- A. Whether or not he is satisfied that the breach occurred .
- B. Which course of action to take, in the event that he is satisfied that a breach occurred.



C Beamish

6/01/2017

Recommendation to treat as discontinued the entitlement of Silver King Seafoods Ltd (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act. (T5/233 - Inishfarnard)

Submission to the Minister

From: John Quinlan, Principal Officer, Aquaculture & Foreshore Management Division

To: 1) Dr Beamish, Assistant Secretary

2) Secretary General

3) Runaí Aire

Date: 21st December 2016

1. Purpose of the Submission

To update the Minister on developments relating to the overstocking of the above site by the operator and to recommend:

- (a) That the Minister determine that Condition 2(d) of the applicable aquaculture licence has been breached by the operator.
- (b) That the Minister treat as discontinued the entitlement of Silver King Seafoods Ltd. (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act.

2. Background

The licence in question (T5/233) was held by Silver King Seafoods Limited, a wholly owned subsidiary of Marine Harvest Ireland. The tenure of the licence concluded with effect from 15th February 2007 and as a renewal application has been received by the Department the relevant aquaculture activity is governed under the provisions of Section 19(A)4 under the 1997 Fisheries (Amendment) Act which states:

“A licensee who has applied for the renewal or further renewal of an aquaculture licence shall, notwithstanding the expiration of the period for which the licence was granted or renewed but subject otherwise to the terms and conditions of the licence, be entitled to continue the aquaculture or operations in relation to aquaculture authorised by the licence pending the decision on the said application.”

It is the view of the Aquaculture and Foreshore Management Division (AFMD) that condition 2(d) of the applicable licence has been breached by the operator. The full text of the relevant licence is attached at **TAB 1**. Condition 2(d) of the licence states:

“the stock of fish in the cages shall not exceed such quantity as may be specified by the Minister from time to time, the number of smolts to be stocked at the site should not in any event exceed 400,000. Licensed stocking densities are not to be exceeded and will be subject to inspection at any time by the Department of the Marine;”

3. Engineering Reports and Company response of 29th January 2016

An Inspection Report from Marine Engineering Division (MED) dated 8th June 2015 identified a total of 820,604 smolts inputted to the site in March 2014 which exceeded the permitted smolt stocking (400,000 smolts) by 420,604 (105% excess). The report also states that on the date of inspection the actual standing stock was 503,344 (26% excess). The MED Report also pointed to a likely harvest from the site in excess of the permitted limit of 500 tonnes. However the recommendation to the Minister is based solely on the breach of Condition 2(d) of the aquaculture licence relating to the stocking of smolts as cited above. A copy of the MED report is attached at **TAB 2**. The Engineering Report was forwarded to the Company on 6th January 2016. The Company was advised that remedial actions necessary on foot of the Engineering Report should be completed within 2 weeks of the letter that issued. The text of the letter is attached at **TAB 3**. On 29th January 2016 the Company responded and queried the accuracy of the MED Report in respect of the type of fish stocked (smolts-v-salmon). The letter also asserted that no harvesting took place from the site. The full text of the Company letter is attached at **TAB 4**. The key reference in the Company's letter is as follows:

“The licence refers to smolt stocking events not exceeding 400,000. The licence does not contain any condition concerning how many salmon, that are not smolts, may be kept on the site at any point in time. I would suggest that the Marine Institute, who are the minister's advisers on scientific and biological matters be consulted in terms of explaining

the different stages of a salmon's lifecycle and in particular the very short-lived and distinct 'smolt' phase.

Marine Harvest Ireland had two separate silver salmon stocking inputs into this site during the period of interest, neither of which concerned fish at the 'smolt' stage in their life cycle. Further, neither of the stocking events involved fish transfers exceeding 400,000 fish. On that basis we strongly contend that we have not breached (sic) the licence term concerning smolt stocking and therefore no remedial action is required."

On foot of the Company response and other previous contacts with the Company, MED reviewed its Inspection Report and confirmed that the overstocking did in fact relate to smolts. The full text of MED's review dated 18th February 2016 is at TAB 5.

4. Meeting with the Company 14th March 2016

The Department convened a meeting with the Company which was held on 14th March 2016. The purpose of the meeting was to afford the Company an opportunity to outline further its position on overstocking in respect of Inishfarnard and also another site at Deenish which will be the subject of a separate submission. At the meeting the Department provided an overview of its position, including the Engineering Report of 8th June 2015. The Department noted the Company's response contained in its letter of 29/01/2016. The Company also made the following points at the meeting:

- The existing licences do not reflect the current reality of fish production.
- Production at the site represents best practice and no negative environmental effects have resulted from the stocking.
- The question of whether the fish inputted were actually smolts is a matter best decided by the Marine Institute as the Minister's advisors on biological and scientific matters.

The Company pointed towards its repeated request for a modernisation of licences to reflect current production techniques and they alluded to public comments by the Minister on the need for modern licences.

The Company interpreted the licence as 400,000 smolts per year. The Company emphasised that no environmental damage had occurred as a result of the stocking.

The Department pointed to the text of condition 2 (d) of the licence which stated:

"the stock of fish in the cages shall not exceed such quantity as may be specified by the Minister from time to time, the number of smolts to be stocked at the site should not in any event exceed 400,000. Licensed stocking densities are not to be exceeded and will be subject to inspection at any time by the Department of the Marine;"

It was the Department's view that the language was clear and unambiguous. The Department acknowledged that it was not aware of environmental damage resulting from the overstocking but while this was welcome it was not directly relevant to the issue at hand. It was the Department's view that the inputting of 820,604 smolts was a major breach of the licence condition above which

could not be ignored. The text of the Department's Summary Report of the meeting is attached at **TAB 6**.

5. Department's Letter of 23rd June 2016

On 23rd June 2016 the Department wrote formally to the Company advising it that consideration was being given to the Company's entitlement to engage in aquaculture operations pursuant to Section 19(A)4 of the 1997 Fisheries (Amendment) Act. The overstocking in relation to smolts was cited as the reason for this action. Full text of the Department's letter of 23rd June 2016 is attached at **TAB 7**.

6. Company Letters of 15th July 2016 (incorrectly dated June by the Company) and 19th July 2016

In response to the Department's letter of 23rd June 2016 the Company wrote to the Department on 15th July 2016, setting out a series of general complaints concerning the licensing system. The full text of the Company's letter is attached at **TAB 8**. On 19th July 2016 the Company submitted a further letter containing what it described as supplementary information. The full text of the Company's letter is attached at **TAB 9**. The following arguments put forward by the Company have emerged from the two pieces of correspondence received (letter of 15th July 2016 and letter of 19th July 2016):

Company Letter of 15th July 2016

- *"MHI asserts that the licence term attaching to T5/233 limiting the number of 'smolts' is anachronistic, legally and technically meaningless and its application is contrary to modern good salmon farming practice.*
- *The irrefutable evidence arising from the benthic impact monitoring programme is that the stocking levels at this site are and have been comfortably within the site's 'biological assimilative capacity'. Thus it is a matter of fact that no significant environmental damage has been visited on the state's foreshore by MHI's actions. Surely this demonstrates clearly and in a quantifiable fashion that the company has been acting within the spirit of the regulatory system and thereby securing the public interest.*
- *The department, armed with this data, can show any interested parties that it is effectively regulating the activity at the site and that it is ensuring the highest levels of environmental protection."*

Company's Letter of 19th July 2016

- ***"It is the responsibility of the state and the department to take the necessary steps to keep the regulatory regime updated so that companies such as ourselves can carry out our business without being forced into impossible situations whereby we simply cannot operate without incurring the accusation of being in breach of certain inimical terms and conditions contained within the same aquaculture licence."***
- ***"Given the economic importance of our activities to the localities in which we operate and the clearly demonstrable fact that we are not having any significant adverse environmental impact . . ."***
- ***". . . there is a heavy burden of liability on the Minister and the department to maintain, and if necessary from time to time overhaul the regulatory regime so that the licence holders can operate without being forced into impossible situations never envisaged by the original legislation."***
- ***". . . the delay in tackling this problem is reminiscent of the delays which led to the state being prosecuted by the EU in 1997 for failure to overhaul the licensing system to bring it into compliance with Natura 2000."***

7. Consideration of the Representations made by the Company.

Company Letter of 15th July 2016

Aquaculture Licences are issued by the Department subject to the provisions of the 1997 Fisheries (Amendment) Act, the 1933 Foreshore Act (where appropriate) and applicable EU legislation, including the EU Birds and Habitats Directive and the EU Directive on Public Participation and Decision Making (Aarhus Convention). Licensing decisions must be taken in accordance with legislation and licence conditions must also reflect legislative requirements. The licence in question states clearly in Condition 2(d):

"the stock of fish in the cages shall not exceed such quantity as may be specified by the Minister from time to time, the number of smolts to be stocked at the site should not in any event exceed 400,000. Licensed stocking densities are not to be exceeded and will be subject to inspection at any time by the Department of the Marine;"

The Company's argument that the licence condition is ***".....anachronistic, legally and technically meaningless and its application is contrary to modern good salmon farming practice"*** is not directly relevant as the Company, in common with all operators, is obliged to conduct its business fully in accordance with the licence it holds. The legislation permits operators to seek to have any licence reviewed by the Minister if desired. In 2010 the Company sought a review of this licence to facilitate the input of smolts beyond the cap as set out in the licence. This request was refused by the Minister. When the Minister's decision was conveyed to the Company on 28th April 2010, the Company, in its response stated that ***"It is respected that a clinical interpretation of these licences***

and their wording is applied". It is clear therefore that in 2010 the Company understood and "respected" the strictures of Condition 2(d). It is worth noting that when the Company subsequently breached this condition, one of the arguments put forward by the Company was that it interpreted the licence as 400,000 smolts **per year**. The previous correspondence from the Company, cited above, shows that they did not hold this interpretation in 2010. The email correspondence of 29th April 2010 is at **TAB 10**.

The Company's assertion that no negative environmental impact has arisen as a result of its actions is also not directly relevant. The fact that no negative environmental impact has been reported to date does not of itself mean that no negative impact has occurred. It is axiomatic that an increase of 105% in the smolt input must have an environmental impact. In any event the capping level set out in the licence is clearly stated and was acknowledged as such by the Company in 2010. Regardless of the scientific aspects of the matter, the licence condition in respect of smolt input is clear and it is not open to the Company to breach this condition. It should also be noted that a future review of the licence to facilitate the Company's action would require public and statutory consultation as well as the provision of an Environmental Impact Statement by the Company.

The Company's statement that the Department could "**.....show any interested parties that it is effectively regulating the activity at the site and that it is ensuring the highest levels of environmental protection**" if it were to facilitate the Company's action in relation to smolt input shows a lack of understanding by the Company of the aims and objectives of the legislation and the role of the Department in implementing same. The legislation is designed to protect the public interest which includes the legitimate commercial interest of licence holders and also, crucially, the wider public interest in the sustainable development of the industry. All stakeholders will have the reasonable expectation that the State will implement the legislation as it currently stands. It should be noted also that the well-being of the industry as a whole ultimately depends on public acceptance of the integrity of the State's licensing regime and the post-licensing monitoring and compliance of the industry.

Company Letter of 19th July 2016

In its supplementary letter the Company lays heavy emphasis on what it considers to be the State's obligation to regularly update the regulatory regime. It is reasonable to presume that, by this, the Company means that the State should update the applicable legislation to take account of technological advances in the industry and the opportunities thereby available to the Company to increase its production output. Here, also, the Company seems to demonstrate a somewhat myopic approach to the legislation. The assumption by the Company that updated legislation would inevitably lead to the Department authorising increased production is optimistic in view of the enhanced public awareness of environmental protection and the high level of interest group density all of which would inevitably impact on legislative reform.

In addition, regardless of the Company's criticism of the current legislation, it is important to note that the recent Supreme Court decision in the State's appeal of a High Court case on mussel seed availability (*Cromane Seafoods Ltd & Others –v– The Minister for Agriculture, Food and Fisheries &*

Others [2013] IEHC 288) explicitly pointed to the “**overarching legal duty**” of the Minister to comply with and implement EU law.

The Company also alludes to the economic importance of its activities. From a licensing perspective, there is a presumption of a strict separation between the Minister’s role as Regulator and the Ministerial duty to promote the sustainable development of the industry. This separation of functions is essential in view of the dual role of the Department as regulator and developer in respect of the industry. In the current circumstances, while it can be argued that the development of the industry will be affected adversely by any sanction against the Company, the overriding obligation of the Department is to take action in accordance with the obligations set out in the legislation. Anything less than this will seriously undermine the State’s regulatory system in relation to marine aquaculture. The long term effect which this would have on the development of the industry is as serious as it is obvious. To that extent, dealing appropriately with significant breaches of licence conditions constitutes the discharge of both regulatory and developmental responsibilities which must be a crucial consideration, in the public interest.

At the Department’s meeting with the Company on 14th March 2016 the Company indicated that it did not dispute the figures cited by the Department’s Marine Engineering Division concerning smolt inputs for the above site (see **TAB 6**). However, the Company disputed whether the smolt inputs in question were actually in breach of the licence. This view is reiterated by the Company in its subsequent correspondence with the Department. However, it contradicts the view expressed by the Company in its correspondence of 29th April 2010 following the Minister’s decision not to approve the Company’s request to increase smolt input and indeed the text of the original Marine Harvest request of 22nd February 2010 which stated inter alia: ***“We would like the Dept. to consider whether we could stock each of our sites at Inishfarnard and Deenish with 800,000 smolts this Spring of 2010, instead of the annual stocking of 400,000 smolts at these sites as outlined in their licences”*** (see **TAB 10**). The Company’s position on the matter is clearly not consistent. In essence it can be reasonably stated that the Company applied for a review of its licence in 2010 to facilitate increased smolt input. The Minister having considered all aspects of the application refused the application. However, notwithstanding the Minister’s decision, the Company subsequently overstocked the site.

The Department’s position, by contrast, is that the language of condition 2(d) of the applicable aquaculture licence is clear and unambiguous and that the inputting by the Company of 820,604 smolts was a major breach of the licence condition which cannot be ignored.

Outside of its two formal responses to the Department of 15th July 2016 and 19th July 2016 the Company has raised, as an argument, that the fish inputted to the site were not in fact smolts and were in fact salmon. This argument was put forward at the Department’s meeting with the Company on 14th March 2016. In this regard the Company’s records and the records of the Marine Institute concerning fish movement clearly show that the origin of the fish inputted to the site were the Company’s hatcheries at Lough Altan and Pettigo, both of which are licensed for the cultivation of smolts only. See table below. Here, also the Company’s argument does not stand up.

Fish Movement Orders issued (source Marine Institute)

Movement date	Origin	Destination	No Fish
26/2/14 – 26/3/14	Lough Altan	Inishfarnard	400,000
16/3/14 – 26/3/14	Pettigo	Inishfarnard	280,000
16/3/14 – 26/3/14	Lough Altan	Inishfarnard	120,000
21/04/14 – 30/4/14	Lough Altan	Inishfarnard	6,000

Given that both Lough Altan and Pettigo are licensed only to produce smolts there is no doubt in relation to the status/classification of the fish introduced to the site at Inishfarnard. In addition it is important to note that records supplied by the company to the Department's Marine Engineering Division by e-mail on 8th June 2015 confirm the closing count for salmon at the site to be 820,604 at the 31st March 2014. The same record confirms a Nil opening count for 1st March 2014. This is significant in that it clearly shows that all 820,604 smolts had to have been introduced to the site in the **twenty seven day** period between the 1st and 26th March 2014.

In light of the above facts it will be necessary for the Department to give immediate consideration to what action it proposes to take. Any action must be based on the terms and conditions of the licence in question, the relevant provisions of the applicable legislation, and must be in the public interest. An added complication in this case is the fact that the site is operated under the provisions of Section 19(A)4 of the legislation.

8. Engineering Report 8th June 2016

While the facts of the case concerning the input of smolts are clear in relation to the number of smolts inputted (820,604) and the actual standing stock at the time of inspection (503,344), and the figures in question are not disputed by the Company the same Engineering Report does contain an error in relation to a separate and unrelated matter, the depth of the nets cited. The Engineering Report shows the net depth to be 10 metres but in fact it appears the net depth was greater than this. This error was discovered in the course of a separate and subsequent calculation of fish density versus cage size. It is considered likely that the Company will allude, in the event of an appeal, to this error in the Engineering Report and thereby seek to cast doubt on all aspects of the Inspection Report. However it is the view of Aquaculture and Foreshore Management Division, supported by legal opinion, that this error in the Engineering Report with regard to the depth of the nets in question is not of sufficient magnitude or relevance to undermine the legal basis for the current recommendation in this submission (See legal advice of 6-12-16, **TAB 11**). In any event stocking records supplied by the company to the Department's Marine Engineering Division by

e-mail on 8th June 2015 identify the closing stock at 31st March to be 820,604 as referred to above (see TAB 5)

An important consideration here in addition to the essential facts relating to the number of smolts which are not disputed by the Company and the consequent breach of Condition 2(d) of the licence is the significant knock-on effect for the regulation of the Aquaculture Industry across the industry should no action be taken due to an error of this nature in a technical report.

9. Actions for consideration on foot of the Licence Holder's breaches of the Licence conditions

The following are the available options identified by the Division:

1. Do Nothing
2. Seek to amend the licence
3. Treat the entitlement of Silver King Seafoods Ltd (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations as discontinued, under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act.

The Division has given detailed consideration to each of these options and has sought and obtained extensive legal advice from the Department's Legal Services Division in relation to the legislative options available. The three options are discussed in detail below.

10. Do Nothing

The Department has an obligation to implement the State's aquaculture licensing regime in an impartial manner in accordance with the provisions of the applicable legislation. Aquaculture and Foreshore Management Division has, within the resources available to it, sought to monitor and police compliance with the terms of all aquaculture and foreshore licences issued. The 1997 Fisheries (Amendment) Act does not provide for an extensive suite of sanctions, short of revocation, to be used in line with the seriousness of breaching licence conditions.

As set out above, the Company has brought forward a number of arguments in support of its position and the Department's response to these has also been set out in Section 7 above. The Company has accepted the figures on smolt input as identified by Marine Engineering Division. There can be little doubt that increasing the permitted smolt input by 105% is a very serious breach. The Company took this action following a previous refusal by the Minister to permit an increase in smolt input. There is a danger that stakeholders and the general public may see the Company's actions as a challenge to the State's licensing regime. Failure by the Department to square up to this

challenge will seriously undermine public confidence in aquaculture licensing. It should also be noted that the Company's actions in this case cannot be considered a "once off" transgression in view of the Minister's recent determination that the Company had breached the stocking levels at its Lough Altan Hatchery.

An additional issue in this case is the statutory entitlement to operate which applies given that operations are subject to Section 19(A)4 of the 1997 Fisheries (Amendment) Act (see Section 2 above). Section 19(A)4 is the means by which most of Ireland's aquaculture industry (shellfish and finfish) has continued to function while the "Appropriate Assessment" procedure has been rolled out in respect of NATURA bays. The continued applicability of Section 19(A)4 has not been without controversy as environmental NGO's have asserted that it allows aquaculture operators to continue to function without a licence (and the environmental impact analysis that goes with consideration of licences). However the State has successfully argued that the continued applicability of Section 19(A)4 is essential to the survival of the industry pending completion of the "Appropriate Assessment" process. The EU Commission has, at least tacitly, accepted this position following confirmation from the national authorities that no new licences would be issued or existing licences renewed until a full "Appropriate Assessment" is available for the NATURA bays in which the aquaculture in question takes place. It is clear however that a breach of licence conditions by any operator while operating under Section 19(A)4 weakens the whole basis for this measure and lends substantial credence to the NGO argument. If NGO's, via the Courts, or via approaches to the EU Commission succeeded in having Section 19(A)4 overturned on the basis that it is not policed adequately by the State there would undoubtedly be serious consequences for both the finfish and shellfish industry. It is reasonable to argue, and no doubt would be argued by NGO's, that the facility provided by Section 19(A)4 places an enhanced obligation on the State to ensure compliance by operators.

Legal Services Division has indicated that aquaculture activity governed by Section 19(A)4 of the legislation is operating by reference to what amounts to an extension of the licence previously held (see **TAB 11**). For this reason, although the legislation as it stands is open to a number of interpretations, it is the view of Legal Services Division that, to the extent practicable, the legislative facilities available to a licence holder should also apply to a holder of Section 19(A)4 entitlement. In this regard, it must be acknowledged that Section 19(A)4 was not designed to take into account the circumstances surrounding Inishfarnard (and indeed other cases of a similar nature). However, the Department must cope as best it can with the existing legislation and cannot ignore complexities that arise from the current legislation. Whether the facilities available under the legislation can extend to an actual amendment of an out of date licence is undoubtedly open to argument.

As already stated in Section 7 above, there is always a strict separation between the Minister's role as Regulator and the Ministerial duty to promote the sustainable development of the industry. This situation is essential in view of the dual role of the Department as regulator and developer in respect of the industry. In the current circumstances, while it can be argued that the development of the industry will be affected adversely by any sanction against the Company, the overriding obligation of the Department is to take action in accordance with the obligations set out in the legislation. Anything less than this will seriously undermine the State's regulatory system in relation to marine

aquaculture. The long term effect which this would have on the development of the industry is as serious as it is obvious. In this regard the recent Supreme Court Decision in the State's appeal of a High Court Case on mussel seed availability (Cromane Seafoods Ltd & Others -v- The Minister for Agriculture, Food and Fisheries & Others) has explicitly pointed to the "overarching legal duty" of the Minister to comply with and implement EU law. It has long been asserted by Environmental NGO's and others that the State's regulatory regime in respect of Marine Aquaculture is implemented inadequately. The EU Commission has twice opened a Pilot Case against the State in respect of sea lice controls, for example. For its part the Department has always provided robust responses to these assertions and has successfully defended the regulatory regime. To that extent, dealing vigorously with significant breaches of licence conditions constitutes the discharge of both regulatory and developmental responsibilities which must be a crucial consideration, in the public interest.

The representations made by the Company to the Minister on foot of the Department's letter of 23rd June 2016 (see TAB 7) have been carefully considered by the Division as set out in paragraph 7 above. It is clear that the Company took a decision to knowingly breach the conditions of the licence. The reasons cited by the Company cannot be considered "force majeure" in the normal accepted meaning of that term. (The Company has in the past used "force majeure" to seek to justify other unauthorised activity). The legislation, and the upholding of same, is clearly in the public interest of all aquaculture operators. The Company avails of an enhanced bilateral communication facility with the Department's Licensing Division due to its overwhelming prominence in the industry. This takes the form of regular scheduled bilateral coordination meetings with agreed detailed agendas. This group has met on at least 20 occasions and it would be fair to say that the Department has emphasised the need to comply with licence conditions at all times during these meetings. The operator, by virtue of its dominant role in the industry, its administrative and technical resources and its participation in the Coordination Group meetings is acutely aware of the importance the Department attaches to compliance with legislation.

It should also be noted that a number of Parliamentary Questions have been received in respect of this and related cases. In all the circumstances, it is clear that to do nothing is not an option which is desirable or, indeed, available in any meaningful way to the Department in this case. Furthermore it is considered that action such as a letter of admonishment to the company will be tantamount to doing nothing and will be seen as such by the company, by other stakeholders and by the general public. This would seriously undermine the integrity of the regulatory process.

A "do nothing" option cannot therefore be recommended.

11. Amendment of the Aquaculture Licence

Although the recommendation in this submission is that the Minister withdraw the entitlement enjoyed by Silver King Seafoods Limited (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations under Section 19(A)4 of the 1997 Fisheries (Amendment) it should be noted that Condition No 3 of the Aquaculture Licence provides for an amendment to the licence where the

Minister considers that it is in the public interest to do so or if he is satisfied that there has been a breach of any condition specified in the licence.

Condition No 3.

"The Minister shall be at liberty at any time to revoke or amend this licence if he considers that it is in the public interest to do so or if he is satisfied that there has been a breach of any condition specified in the licence or that the fishery to which the licence relates is not being properly maintained. Any such revocation or amendment shall be subject to the provisions of Section 15 of the Fisheries (Consolidation) Act 1959"

Legislation

Sections 68 and 70 of the 1997 Fisheries Amendment Act are the relevant provisions dealing with any amendments to the licence that might be considered in this case. The Division has sought the advice of the Legal Services Division of the Department in this regard and is advised that the "1997 Act does not provide for an amendment to the aquaculture licence in the circumstances prevailing in this case (See TAB 11). The legal advice addresses the fact that the operator is currently operating under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act and is as follows:

[REDACTED]

The legal advice goes on to confirm that any proposed amendment to an aquaculture licence operating under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act should be treated in the same way as an amendment to an extant licence under the 1997 Fisheries (Amendment) Act.

[REDACTED]

Having considered the applicability of the 1997 Fisheries (Amendment) Act to a possible amendment on foot of the breach of the licence conditions the legal advice as set out below, is that the Act does not allow for an amendment as any type of punitive measure whatsoever:

[REDACTED]

ii.

[REDACTED]

iii.

[REDACTED]

[REDACTED]

[REDACTED]

iv.

[REDACTED]

[REDACTED]

Licence Condition regarding amendment

Condition No 3 of the Aquaculture Licence quoted above does however set out the circumstances in which the Minister may amend the aquaculture licence:

"there has been a breach of any condition specified in the licence or that the fishery to which the licence relates is not being properly maintained".

The advice goes on to state however that

[REDACTED]

any proposed amendment pursuant to Condition No 3 of the License:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It should be noted also that any decision to amend the aquaculture licence will subject be to all the legislative requirements of Section 68 of the Act together with subsequent Public and Statutory consultation processes, appeal processes etc and that the outcome of such processes cannot be prejudged.

Conclusion

Given that the Minister is precluded from amending the licence in any fashion that could be seen as punitive it is difficult to see how any amendment to the conditions of the Aquaculture Licence (now operation under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act) could be seen as any form of sanction against the company for the breach of Condition 2(d) of the licence (which sets out the maximum stocking densities permissible under the terms and conditions of the licence).

The 1997 Fisheries (Amendment) Act does not permit the amendment of a licence as a sanction against the licensee but Condition 3 of the licence does provide for an amendment of the licence where the Minister is satisfied that there has been a breach of any condition specified in the licence. Any such amendment is however subject to the legislation. It would appear therefore that an amendment is possible on the basis of Condition 3 of the licence, but the amendment cannot be punitive. An amendment in this particular case is simply not viable as it cannot be by way of punitive sanction. Since there is no other reason to amend the licence other than as some sort of punitive sanction this course of action is not viable.

Amendment of the licence is therefore not recommended in the circumstances.

12. Withdrawal of the entitlement to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act

As will be seen above, amendment of the licence is not recommended in this case for reasons of clear public interest. What remains therefore, is the option of treating as discontinued the statutory entitlement to engage in aquaculture operations provided for by Section 19A(4) of the 1997 Act. There is no doubt that withdrawal of the consent to operate will have the effect of extinguishing the Company's activity in relation to this site. It should be noted however, that the Company's application for renewal of the licence will still be operative and will be processed in the normal way. It is considered that withdrawal of the entitlement to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act, is not only appropriate in this case given all of the circumstances, but also necessary in view of the seriousness of the breach in question having regard to the following:

1. The excessive nature of the smolt input (105% excess).
2. The fact that the breach of the licence condition was subsequent to the Minister's refusal to facilitate an increase in smolt input in respect of the site.
3. The fact that the Company's operations at Inishfarnard are governed by Section 19(A)4 of the legislation means that a breach of the conditions pertaining to same has implications for the State in the context of the acceptance of the EU Commission of Section 19(A)4 as part of the Appropriate Assessment "Roadmap".
4. The commercial gain to the Company resulting from the unauthorised increase in smolt input was very significant and a failure by the Department to implement the legislation will undoubtedly act as an incentive to the Company and other operators to flout the law.

13. Recommendation


Having regard to all of the above, it is recommended:

1. That the Minister determine that a breach of Condition 2(d) of the applicable aquaculture licence has occurred as described above.
2. That the Minister treat the statutory entitlement of Silver King Seafoods Ltd (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act as discontinued for the following reason:

- Breach of condition 2(d) of the applicable aquaculture licence with states:-

"the stock of fish in the cages shall not exceed such quantity as may be specified by the Minister from time to time, the number of smolts to be stocked at the site should not in any event exceed 400,000. Licensed stocking densities are not to be exceeded and will be subject to inspection at any time by the Department of the Marine;"

Submitted please for approval.



John Quinlan
Principal Officer
Aquaculture and Foreshore Management Division

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**DCCAE and IFI Views and requirements - Marine Institute Report
on sea lice levels on marine salmon farms during February 2019**

“From June through to February, a figure of 2.0 egg bearing female lice (ovigerous lice) is used as a trigger level for treatment. From March through to May, a figure of 0.5 egg bearing female lice (ovigerous lice) is used as a trigger level for treatment.”

Ardmore & Creevin Sites

The November sea lice report records elevated sea lice levels at the Ardmore site in Kilkieran Bay which would have resulted in a notice to treat instruction being issued by the Marine Institute. In the December/January sea lice report, elevated sea lice levels were again recorded at this site resulting in another notice to treat instruction being issued.

Bay	Kilkieran Bay	Kilkieran Bay	Donegal Bay	Donegal Bay
Site	Ardmore (Ovigerous)	Ardmore	Creevin (Ovigerous)	Creevin
Nov-18	1.62	23.52	1.48	6.15
Dec 18/Jan 19	0.63	25.36	1.97	10.95
Feb-19	1.29	25.07	4.37	28.26

As a result of these instructions, ovigerous or total mobile lice levels were not reduced by the time of the February inspection. Total mobile lice levels have remained at over 20 lice per fish for three successive months. This extremely high mobile lice count will result in a large number of ovigerous egg bearing lice developing in March, during the critical period when wild salmon and sea trout runs take place. Under the Department of Agriculture, Fisheries and Food “Strategy for Improved Pest Control in Irish salmon farms, 2008”, it was proposed that a feature of the strategy to enhance the control of sea lice infestations on Irish salmon farms should be the creation of a “real time” management regime. This regime was intended to vigorously deal with failures to control sea lice infestations on a case-by-case basis. The lice management regime is designed to bring progressively tougher actions to bear on the infestation to ensure the highest possible level of compliance. If after a number of attempts, satisfactory control has not been achieved, the cell may move to recommend accelerated harvesting. **DCCAE requires that accelerated harvesting should now be enacted at the Ardmore site due to the inability to control sea lice since November 2018.**

Similarly, after elevated lice levels were recorded the Creevin site in Donegal Bay in the December/ January inspection, a notice to treat was issued and elevated lice levels, more than double those recorded in the previous month, were recorded in February. **DCCAE requires that accelerated harvesting should take place at this site before the onset of wild salmonid smolt runs.**

Fraochoilean Site, Ballinakill Bay

The Fraochoilean site in Ballinakill Bay was fallow in November 2018 and Atlantic Salmon, 2018 S1/2 were present in January 2019. By February 2019, ovigerous lice levels had increased three fold and total mobile lice levels of over 50 lice per fish were recorded. This is an unprecedented increase in sea lice levels over a two month period and **DCCAE requires that accelerated harvesting should commence immediately at this site.** This site is within 3km of the Dawros river and has been the subject of accelerated harvesting on two previous occasions due to inability to control sea lice. **DCCAE/IFI are concerned that fish with a pre-existing lice population may have been moved to this site in December / January and require confirmation of same.**

	Fraochoilean (Ovigerous)	Fraochoilean
Nov-18	Fallow	Fallow
Dec 18 / Jan 19	0.67	9.44
Feb-19	2.15	50.08

Rosroe Site, Killary Harbour

It should be noted that following an appeal to the Aquaculture Licence Appeals Board the licence issued to the company received by fisheries on the 4th February 2000 at this site under Special conditions 4 (e) specifically stated that average levels of egg-bearing lice shall be kept as close to zero as possible but shall not exceed 0.3 lice per fish during the critical period of February to May and a level of 0.9 per fish during other periods of the year. Therefore the thresholds for this site are lower and controls should be more stringent.

Sea lice levels have increased progressively at the Rosroe site since November 2018 and DCCAE requires immediate action by DAFM to effectively control lice prior to the salmon and sea trout smolt run from the National Salmonid Index Catchment on the river Erriff.

	Rosroe (Ovigerous)	Rosroe
Nov-18	1.27	9.39
Dec 18 / Jan 19	0.71	4.81
Feb-19	0.63	15.99

The months of March, April and May are the critical period for salmon and sea trout smolt migration to sea and sea lice trigger levels are lower during this period to protect migrating smolts. It is therefore critical that lice levels are adequately controlled at all salmon farm sites during this critical period to prevent lice induced mortality of wild salmonids. DCCAE and IFI are particularly perturbed that lice levels in these key bays around the coast and in particular in the Connemara wild sea trout fisheries from Louisburgh to Galway bay are at such a high level during the critical period. This period is when the important juvenile salmon and sea trout migrate to sea either as small smolts or as recovering kelts and need an environment as free of juvenile lice as possible.

This is why it has always been stressed that minimising lice levels coming into winter is the best method of preventing lice explosions in spring. Unfortunately for the rivers in the Killary (Delphi and the Erriff) and Ballinakill bay (the Kylemore or Dawros river system) and Kilkerrin bay - Gowla and Invermore systems it is clear that high lice levels existed during the smolt run. As sea trout live and feed in the bays around the coast this augurs very poorly for a successful survival of sea trout smolts for 2019.

DCCAE requires an urgent update (by 12 April 2019) on what action the Department of Agriculture Food and the Marine is taking to resolve these situations and a response to our requirements set out above, which relate to our statutory responsibilities for the conservation of salmon and sea trout.

Denis Maher

[Denis Maher | Principal | Head of Inland Fisheries Division](#)



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