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Your Ref AP34, AP38-40/2019
Site Ref T03/030A2, T03/030B, T03/030C, T03/030E, T03/030/1, T03/099A

1 May 2024

By post and email (info@alab.ie)

Secretary to the Board
Aquaculture Licences Appeals Board
Kilminchy Court
Dublin Road
Portlaoise
Co. Laois
R32 DTWS

Re: Appeals against decisions of the Minister for Agriculture, Food and the Marine to grant with variations an Aquaculture Licence to TL Mussels Limited for the bottom cultivation of mussels on Sites T03/030A2, T03/030B, T03/030C, T03/030E, T03/030/1, T03/099A on the foreshore at Wexford Harbour (the "Appeals")

Our client – TL Mussels Limited

Dear Secretary

We refer to your letter dated 16 April 2024 in response to our letter of 28 March 2024 together with earlier correspondence including, but not limited to, our letter of 29 September 2023 (all correspondence having been exchanged by email).

For ease of reference, we adopt the definitions set out in prior correspondence.

We note the request that any further correspondence relating to the judicial review proceedings entitled *An Taisce -v- ALAB & Ors [2024] IEHC 60* should be directed to Philip Lee Solicitors and we do not propose to address these proceedings in this letter. We fully reserve our client's position in respect of those proceedings.

For the avoidance of doubt, this correspondence should be treated as a submission pursuant to the Section 46 Request dated 31 January 2024. In its consideration of this submission, we would further refer the Board to our client's grounds of appeal as set out in the Notice of Appeal dated 16 October 2019 (including appendices thereto) and *inter alia*, the submissions of the Marine Institute dated 20 September 2023.

Section 56 of the Fisheries (Amendment) Act 1997 ("Section 56")

In the letter of 16 April 2024, the Board refers to its obligation under Section 56 to,

"as far as practicable, ensure that appeals are dealt with and determined expeditiously and that are steps are taken to avoid unnecessary delays."

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The letter goes on to attempt to qualify this obligation by reference to "*the general obligation placed on the Board to determine appeals expeditiously is qualified by the words "as far as practicable", and by subsection (3) which allows for the extension of the periods within which an appeal shall be determined, having regard to "the particular circumstances of [that] appeal."*

Our client is deeply concerned by this contradictory qualification in circumstances where the Board has, in its letter of 31 January, indicated that it has "*provisionally*" formed the view that the Appeals should be dismissed, in circumstances where postponing the determination of the Appeals for a lengthy period is contrary to the Board's "*statutory objective to ensure that appeals are determined expeditiously*".

This contradiction is further highlighted by the number of extensions sought by the Board to make a determination in respect of the Appeals. While our client has requested a single extension, as detailed in the Board's recent correspondence, the Board has sought six extensions amounting to a period in excess of four years.

Pre-judgment

At the outset, our client is extremely concerned that the choice of language used by the Board in its letter of 31 January demonstrates a likely pre-judgment of the issue on the part of the Board, so that the ultimate outcome of the appeal(s) has been set in stone and rendered a *fait accompli*. Our client expressly reserves its position in this regard, where its entitlements to natural and constitutional justice are at stake and having regard to what appears to be an attempt to summarily determine its appeal, in a manner which would have very serious adverse consequences for our client's commercial operations and its employees.

Requirement for an Appropriate Assessment

Notwithstanding its statutory obligation to do so, the position seemingly being adopted by the Board is that it [the Board] is unable to complete an appropriate assessment at this time. It does not indicate that the completion of an appropriate assessment is impossible, but instead identifies a clear path to same being achievable.

The suggestion that to implement the work programme identified in the KRC Report is "*beyond [the Board's] remit*" is misguided and indicates a confusion as to the statutory role and obligations of the Board.

As you should be aware, an assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned.¹

The Habitats Directive, which is transposed into Irish law by the (European Communities (Birds and Natural Habitats) Regulations 2011) provides that

"the improvement of scientific and technical knowledge is essential for the implementation of this Directive; whereas it is consequently appropriate to encourage the necessary research and scientific work"

¹ Case C-304/05 *Commission v Italy* [2007] ECRI-7495, paragraph 6

and

"an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future"

Lack of and incomplete information available to the Board

The KRC Report has identified information gaps which would hamper the undertaking of an appropriate assessment at this juncture. For ease of reference, each information gap identified by KRC is listed at Appendix 1 hereto.

KRC concluded that data inadequacies were such that potential impacts of applications could not be assessed adequately to remove all reasonable scientific doubt as to the effects of the works on the SPA concerned. To do so would have been contrary to EU Directives and ECJ case law.

The data inadequacies include those related to species numbers and trends, species distribution within the site, and behaviour in relation to existing activities. KRC recommended that it was *'impossible to assess the potential impacts thoroughly even now, as much of the inadequacies apparent in the 2016 Appropriate Assessment remain'*.

KRC further recommended that, until a detailed programme of original field research is undertaken, it is not possible to assess the potential impacts of the proposed aquaculture activities to meet the requirements of an AA.

KRC was retained by the Board as an expert to assist it in relation to ecological matters pertaining to the appeals, particularly with regard to the Board's discharge of its appropriate assessment functions. It is clear from the KRC Report that it has concluded that information needed to close the gaps in the ecological information *can* be provided by further studies, so as to enable the Board to conduct a lawful appropriate assessment in respect of the appeals.

In light of this, the explanation provided by the Board for being unable to postpone the determination due to its obligation to determine the appeals expeditiously, as a statutory obligation, is incredulous in circumstances where:

- 1) the Board is responsible for a delay in excess of four years;
- 2) the Board has provided no explanation as to why it delayed such actions for four years; and
- 3) the Board has a statutory obligation to bring the environmental assessments up to date and ensure that the baseline has not changed. The obligation to ensure the appropriate assessment is completed is on the decision maker irrespective of the costs and time associated with same.

The KRC Supplementary Report also concluded that a further study is required.

The Marine Institute's Appropriate Assessment of Aquaculture in Slaney River Valley SAC and Raven Point Nature SAC notes that the mussel cultivation may be having a positive impact on Wexford Harbour

" In summary, it is our view, based upon the information presented above, that bottom mussel culture, at current levels, does have a positive role in ecosystem function in terms of nutrient and phytoplankton mediation as well as provision of habitat. The addition of more mussels to the system (with new applications) may have additional benefit in terms of reducing effects of eutrophication, and may further improve status in the outer parts of Wexford Harbour relative to the Lower Slaney waterbody; however, this remains to be determined/confirmed and is subject to availability of additional seed."

From evidence identified by our client, it is clear that mussel farming can have significant positive benefits when accommodated and licensed, while still ensuring that adequate protection of European sites is maintained, through appropriate best practice and mitigation measures, where necessary. In this regard, we would draw your attention to a report prepared by Interreg in conjunction with the European Regional Development Fund (**see Appendix 2**). As set out at Slides 9 and 18 of this report, mussel farming can both significantly reduce amounts of nitrogen and phosphorous from the water while the environmental impacts of mussel farming are close to zero.

The ecological and associated economic value attributed to the role of mussels in the reduction of nitrogen and phosphorous in Irish waters are set out in detail in a joint report prepared by NUI Galway and the Whittaker Institute (**see Appendix 3 – see pages 32 - 33**). The other point to note is that the mussels are providing top down control of phytoplankton and driving the ecosystem away from eutrophication. The cost of remediating a bay that has become eutrophic is huge and prolonged (e.g. Lough Neagh).

At **Appendix 4**, we attach a copy of a document sent to Bord Iascaigh Mhara on 5 May 2022. In particular, we would draw the Board's attention to the section headed "*Environmental Services Provided by Mussel Farming in Wexford Harbour*" which acknowledges the positive impact that mussels in Wexford Harbour have on removing nitrogen and phosphate, and the huge cost of using alternatives means to remove the same quantities.

We would also refer the Board to the draft Fishery Nature Plan 2023 – 2027 (the "**Plan**"), developed by the Bottom Grown Mussel Consultative Forum in conjunction with Bord Iascaigh Mhara to address potential risks to protected series and habitats (**see Appendix 5**). Specifically, Section 4 of the Plan details the protective measures that will be taken to minimise any possible adverse environmental impact.

For the information of the Board, we also attach WaterBlitz 2022 Report prepared by DCU Water Institute (**see Appendix 6**) and in particular refer to the findings at pages 6 and 9 which address the issue of water quality in Wexford.

The KRC Report and the Supplementary KRC Report all conclude that further information is required. Specifically, the KRC report demonstrates that with proper information, it is possible for a decision-maker such as the Board to properly discharge its primary function of determining appeals substantively, while at the same time discharging obligations imposed by the Habitats Directives in respect of ensuring the integrity of European sites. In all of these circumstances, the decision of the Board to proceed with the determination of the Appeal is arbitrary, irrational and unreasonable; in addition, it is entirely prejudicial to our client's position.

The Board is predetermining that the cultivation of mussels is having a negative impact on the ecosystem when information to the contrary exists and where the Board's own external advisors, have stated that "*a further study is required*" which should explicitly "*consider the broader ecosystem and certainly the potential positive ecosystem services for inter alia nutrient cycling*". Moreover, the Board appears to have

given no consideration to the impact of the judgment of the Court of Justice of the European Union (CJEU) in the case of *Eco Advocacy v An Bord Pleanála* (Case C-721/21), where the CJEU has held that where measures incorporated into the design of a project which do not have the aim of reducing the negative effects of that project on the site concerned, but are standard features required for all projects of the same type, cannot be regarded as indicative of probable significant harm to that site. This will require a thorough screening exercise to determine that an AA is actually required.

Mussel cultivation in Wexford Harbour – a historical tradition

The shellfish and mussel industry history for Wexford Harbour is important from a national and European perspective. Wexford is the birthplace for the bottom mussel industry and the mussel industry was well established in Wexford Harbour in the 19th Century and continued through the out the 20th Century.

Initially in the 18th and 19th century native oyster beds were the foundation of the shellfish industry in the southeast and this gave way in the late 19th century to mussels and the establishment of the mussel industry particularly in the latter part of the 20th century to the present day.

A timeline of the history of mussel farming in Wexford Harbour is setting out at **Appendix 7**.

Economic and employment impact

To refuse the Appeal in the absence of full information will have a detrimental impact on both the commercial and economic activity of Wexford Harbour.

The mussel sector makes a significant contribution to the economy of Wexford. The companies that operate and own the mussel dredgers in Wexford would be classified as Small and Medium Enterprises (SME's) and between 2020 and 2022, they collectively produced an average of 2,845 tonnes of mussels which generated average revenues and cashflows of just over €3.5m per annum for the local economy. This revenue is earned from abroad as the mussels are exported mainly to Holland and France. As the main raw material, mussel seed is also sourced in Ireland, this €3.5m provides a significant boost to Wexford trade surplus and stimulates consumer spending in Wexford.

In terms of wages and employment, there are 41 people employed directly on the boats. However many more local people are employed indirectly, to transport the mussels to Europe, and to provide food and boat provisions, marine accessories, diesel, repairs and maintenance, dry docking etc for the dredgers with the vast majority of revenue spent in the local community every year.

One also has to factor in the economic multiplier effect. This is the proportionate increase or decrease in final income that results from an injection or withdrawal of spending. Bord Iascaigh Mhara has informed our client that an appropriate multiplier effect is 1.6 which, when applied would result in a decrease of in excess of €5m of consumer spending in the local economy. This would have a serious negative impact on Wexford.

Further, the withdrawal of the licences would have also seriously impact the investment of over €25m made by these SME's in acquiring state of the art mussel dredgers and on the mussel beds. Wexford depends on Foreign Direct Investment to generate jobs and employment, and should the licences be revoked without any significant scientific evidence to support this decision, would send a very poor message to anyone else seeking to invest in Wexford in the future.

Section 47 of the 1997 Act and Regulation 42 of the European Communities (Bird and Natural Habitats) Regulations 2011 (“Section 47”)

Section 47 of the 1997 Act provides as follows:

*“47.—(1) Where the Board is of the opinion that any document, particulars or other information is or are necessary for the purpose of enabling it to determine an appeal, it **shall** serve on a party or on any person who has made submissions or observations to the Board in relation to the appeal a notice—*

(a) requiring the party or person, within a period specified in the notice (being not less than 14 days beginning on the date of service of the notice) to submit to the Board such documents, particulars or other information as are specified in the notice, and

(b) stating that, if the documents, particulars or other information is or are not received by the Board before the expiration of the specified period, the Board will, after the expiration of that period and without further notice to the party or person, pursuant to section 48, determine the appeal.”

[emphasis added]

Regulation 42(3) of the 2011 Regulations provides as follows:

“(3) At any time following an application for consent for a plan or project, a public authority may give a notice in writing to the applicant, directing him or her to—

(a) furnish a Natura Impact Statement and the applicant shall furnish the statement within the period specified in the notice, and

(b) furnish any additional information that the public authority considers necessary for the purposes of this Regulation.”

Having regard to section 47(1), it is clear that the Board, through its own agent, KRC, has determined that additional information is necessary for the purpose of enabling the Board to determine the appeal. In those circumstances, where the Board has decided that it will not gather the information itself but where KRC has determined that the information can be obtained *via* further studies, the Board is under a mandatory obligation under section 47(1) to seek that further information.

Regulation 42(3) also provides the Board with a specific power to seek further information to enable it to undertake an appropriate assessment before determining the appeal.

It is entirely insufficient for the Board's letter of 31 January to simply discount the obtaining of further information which its expert has identified by saying that it would not be “feasible” to expect licence applicants to undertake the work programme identified in the KRC report and to supply information arising from same to the Board by way of further information requests. With respect, that is precisely why section 47(1) and Regulation 42(3) are at the Board's disposal. In addition, a section 47/Regulation 42(3) request should require an analysis of whether the *Eco Advocacy* judgment requires a reassessment as to whether the risk of impacts on European sites can be screened out at the Stage 1 AA stage.

In light of all of the above, it simply cannot be said that the Board has acted in an “*appropriate, fair and reasonable manner*” and any suggestion that it has is without merit.

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The Board seems to be willing to abrogate its statutory obligations by failing to require our clients to provide the information which KRC says can be provided, where the Board has determined that it is beyond its own capabilities to gather such information itself.

The Board is selecting when its statutory obligations apply in its favour and is making determinations in the absence of full information which have wider implications far beyond our client's business and the consequent real risk of infringement of our client's rights, including *inter alia* a right to livelihood.

In order to satisfactorily address the information gap identified and accepted by the Board and to allow the Board make an informed decision on the potential scope of the impact of aquaculture in Wexford Harbour, our client calls upon the Board to invoke its power under Section 47 to direct it, and the other appellants, to carry out the necessary studies to determine the Appeal.

The letter of 31 January notes that none of the submissions received in respect of the KRC Supplemental Report gave any indication that the work recommended by the Board's expert was being undertaken or planned. With respect, this is a complete mischaracterisation of the position. In seeking submissions on the KRC Supplemental Report, the Board never raised any query as to whether our clients would undertake the studies identified by its expert.

Our client hereby confirms that it is willing to accept the Board's direction pursuant to Section 47 to conduct further surveys and necessary information gathering, to be agreed in conjunction with KRC and the Board.

Third Party Submissions regarding the Appeal

Our client requests that should any third party lodge submissions in accordance with the 1 May deadline that our client be furnished with a copy and afforded an opportunity to respond if necessary.

Oral Hearing

Finally, we await hearing from you in relation to our client's request for an oral hearing and expect that in light of the issues arising, the Board will convene an oral hearing into the issues arising on our client's appeal.

Please acknowledge receipt of this correspondence.

Yours faithfully

A handwritten signature in black ink that reads "William Fry LLP". The signature is written in a cursive, slightly slanted style.

William Fry LLP

Appendix 1

Information Gaps in KRC Reports

Report	Information Gap	Page number
KRC report	2016 Appropriate Assessment has "very significant data gaps on species numbers and trends, species distribution within the site and behaviour in relation to existing activities".	2
KRC report	Re waterbird data- insufficient analysis due to inadequate number of good quality counts during the relevant period.	9
KRC report	Trends generated from the long-term data set are necessary to detect long-term changes.	10
KRC report	Insufficient data analysis for modelling population trends for individual species at this site.	16
KRC report	Absence of contemporary multi-year low-tide count data from the site.	19
KRC report	Most comprehensive study on the potential effects of aquaculture on waterbird populations in Ireland was restricted to oyster culture and its concomitant use of trestle structures, and there have been relatively few studies of the effects of bottom-culture Mussel cultivation on inter-tidal flats.	21
KRC Report	2016 Appropriate Assessment explicitly does not assess potential cumulative, in-combination impacts which is a requirement for a full and complete AA.	25
KRC report	2016 Appropriate Assessment states that there are likely to be "significant impacts arising from the cumulative impact of hunting pressures in combination with impacts from aquaculture activities" but data was not available for the assessment.	25
KRC report	The direct loss of habitat of sufficient quality and quantity and displacement due to anthropogenic factors inevitably has mostly negative rather than positive effects- site-specific studies are required to provide the scientific evidence base to prove an absence of negative effects beyond reasonable doubt.	26

KRC report	2016 Appropriate Assessment was mostly based on desk-review and it did not rule out the potential for 'likely significant effects' and was unable to assess the cumulative impact which "could only be prepared when there is a reasonable level of certainty about the likely impacts arising from the activities being assess, which is not the case for the present assessment" (p. xiv). The assessment of cumulative/in-combination impacts is a requirement of Article 6.3 of the Habitats Directive.	26
KRC report	2016 Appropriate Assessment indicated potential impacts where the evidence indicates a high likelihood of significant impacts occurring in the case of bottom mussel culture on (a) Red-breasted Merganser, and (b) Little Tern. In the case of the former whilst the Appropriate Assessment indicates the impact based on predicted displacement, the population-level consequences are unknown. They suggest, in the case of Little Tern, that appropriate adaptive management strategies may mitigate potential impacts- it is clear that this needs to be properly evaluated to assess the potential impacts of bottom mussel aquaculture activities on these QI species.	26
KRC report	2016 Appropriate Assessment identified potential impacts where the available evidence is not sufficient to rule out significant impacts beyond reasonable significant doubt. The uncertainty associated with this means that a complete Appropriate Assessment is not possible.	27

Appendix 2

Accessed here: <https://www.imanageshare-eu.com/pd/AtKxd0wFfoS>

Appendix 3

Accessed here: <https://www.imanageshare-eu.com/pd/33xV51Fyn0J>

Appendix 4

Accessed here: <https://www.imanageshare-eu.com/pd/3IUwIhQMXOy>

Appendix 5

Accessed here: <https://www.imanageshare-eu.com/pd/6kRjQIMQiO>

Appendix 6

Accessed here: <https://www.imanageshare-eu.com/pd/cmFO0t7uum>

Appendix 7

History of the Mussels and the Dredger Fleet in Wexford Harbour

Year	Event
1845	Act Passed that allowed the Commission of Fisheries could grant licences for oysters. There may have been a pre-1870 oyster licence.
1884	Mussels were added to the act. The extended Lett family continued to fish the harbour for mussels through the 20th century and traded in fresh mussels.
1959	Fisheries Act
1964	Lett & Company Ltd started experimenting with cooked mussel meats and jarring them.
1965	Lett and Company Ltd set about securing a factory. At this point the Slaney Mineral plant and a shed alongside it were being used to process some mussels.
1967	Lett and Company Ltd mussel processing plant opened in Batt St Wexford Town. At this time there were berths for 15 cots. Mussels were cooked and meats jarred.
1967-8	6 mussel boats commissioned with inboard engines. 24.5 feet long: St Quentin, Mallard, The Claire, Mussolini, St. Catherine and one other.
1967, 1969 and 1970	BIM, Dept. of Marine and Lett and Company Ltd. explored the best relay areas.
1968-69	Lett and Company Ltd. started to blast freeze some mussels on trolleys and then packed into bags.
1968-1974	Scallans working grounds with cots and small wooden hull boats.
1970's	Processing of mussels also took place at Kilmore Quay for a few years. But the vast majority of processing occurred in the Lett and Company Ltd. factory.
1970	The Countess built in Cork and brought in by Ryans.
1972	Mussels from East Coast relayed into Harbour in bags.
1973	'Lena Jozina' the first dredger in Ireland was brought in by Letts.
1974	First transplant of seed from East Coast to Wexford Harbour by 'Lena Jozina' (23 loads (40T each) 1200-1300T in total.
1975	Wexford Mussel Fishermen's Association was formed. Noel Scallan was Chairman and Sean Ryan Secretary. Renamed to the Wexford Mussel Growers Association in

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	1990's but have reverted to the old name since.
1977	'Sea Maid' Ryans
1977	'Naomh Caith' Noel Scallan sold on in 1978 to Waterford
1978	Lett and Company Ltd. brought in the 'Zeemiew'
1978	Lett and Company Ltd. started to experiment with half-shell mussels.
1978	'Vertrouwen 1' brought in by Lett and Co.
1979	'Vier Gebroeders' brought in by Ryans
1979	'Geertruide brought' in by Lett and Co.
1979	Test on growing of pacific and native oysters
1979	Sea Maid to Billy Gaynor
1979	'Lena Jozina' sold to Noel Scallan, sold to Waterford in 1993
1980	Fisheries Act
1982	'Vertrouwen II' brought in by Lett and Company Ltd.
1984	'The Rapid'- Billy Gaynor
1985-1990	The height of the processing factory run by Lett and Company Ltd. 370 people employed mainly full-time in the factory
1986	'Enterprise I' brought in by Lett and Co.
1987	'Ostrea' brought in
1989	'Ostrea' sold to Billy Gaynor
1989	'Cornelia' brought in by Ryans
1994	'Vertrouwen II' sold to Noel and Albert Scallan.
1992	'Vier Gebroeders' sold to Noel and Paddy Cullen
1992-3	'Cornelia' sold to John Foley (left the harbour)
1993	'Jana Maria' brought in by Ryans
1993	'Lena Jozina' sold to Waterford mussel co-op
1996	'Olive Rachel' Flor Sweeney brought in from Holland
1996	'Crescent Warrior' brought in by Crescent Seafoods Ltd.
1997	'Janny' bought by Billy Gaynor off John Lett.
1998	'Laura Anne' brought into Wexford by Alex Mc Carthy for use by John Lett
1998	'Noordster' brought in by Flor Sweeney from Holland
2000	'Ebenezer' brought in by Crescent Seafoods Ltd.
2005	'Branding' brought in by Crescent Seafoods Ltd.

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2005	'Edenavle' bought by the Ryans. New boat with stern dredges
2005	'Hibernia' bought by Riverbank mussels.
2005	'Laura Anne' purchased by Scallans and still in operation
2007	'Cecilia' brought in by Loch Garman Harbour Mussels Ltd.
2011-2012	'Vertrouwen II' sold on by Scallans.