

**An Bord Achomharc Um Cheadúnais Dobharshaothraithe  
Aquaculture Licences Appeals Board**



**Notice of Appeal Under Section 40(1) of Fisheries (Amendment) Act 1997 (No.23)**

**APPEAL FORM**

**Please note that this form will only be accepted by REGISTERED POST or handed in to the ALAB offices**

Name of Appellant (Block Letters)	ELAINE MCGOFF on behalf of AN TRÍSCÉ		
Address of Appellant	Tailors Hall, BACK Lane, Dublin 8		
Eircode			
Phone		Email	
Mobile			

**FEES**

Fees must be received by the closing date for receipt of appeals	Amount	Tick
An appeal by an applicant for a licence against a decision by the Minister in respect of that application	€380	
An appeal by the holder of a licence against the revocation or amendment of that licence by the Minister	€380	
An appeal by any other individual or organisation	€150	<input checked="" type="checkbox"/>
Request for an Oral Hearing* (fee payable in addition to appeal fee) *In the event that the Board decides not to hold an Oral Hearing the fee will not be refunded	€75	<input checked="" type="checkbox"/>

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**SUBJECT MATTER OF THE APPEAL**

please see attached document

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RL 5507 6751 91E

Site Reference Number: - (as allocated by the Department of Agriculture, Food, and the Marine)	T03/038A
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Appellant's particular interest in the outcome of the appeal:

We are a prescribed body

Outline the grounds of appeal (and if necessary, on additional page(s) give full grounds of the appeal and the reasons, considerations, and arguments on which they are based):

see attached document

Signed by the Appellant



Date

01-06-23

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This notice should be completed under each heading and duly signed by the appellant and be accompanied by such documents, particulars or information relating to the appeal as the appellant considers necessary or appropriate and specifies in the Notice.

Aquaculture Licences Appeals Board,  
Kilminchy Court,  
Dublin Road,  
Portlaoise,  
Co Laois.  
R32 DTW5

Delivered by registered mail and emailed to:  
info@alab.ie

[01/02/2023]

**Appeal pursuant to Section 40 of the Fisheries (Amendment) Act 1997  
Aquaculture Licences in Wexford Harbour.**

To Whom It May Concern:

**Matters under appeal:**

An Taisce is making this appeal against the decision, or decisions, to grant approval for T03/038A & T03/095A applications in Ballyteige Bay in Wexford for which notification of decisions were received by An Taisce on the 3rd January 2023, and which were both advertised in Wexford People on the 10th January.

We have made an electronic transfer with fees for both the licence appeals, and we additionally wish to request an Oral Hearing on this matter. This appeal is equally applicable to both licences: T03/038A and T03/095A

**1. Context for the Appeal**

An Taisce made a detailed submission on these licence applications which was submitted to DAFM on the 14/12/21. **This appeal should in general be read in tandem with our original submission, which outlined our arguments in detail.** This appeal letter builds on those issues and sets out our arguments now in the context of the failure of the decision to address those matters.

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**Directors:** Phillip Kearney (Chair), Trish O'Connell (Vice-Chair),  
Stuart McCaul (Secretary), Aoife O'Gorman (Treasurer), Hugh O'Reilly, John Sweeney

In its earlier submission, An Taisce outlined that the proposed aquaculture project lies within Ballyteige Burrow SPA, and had potential ex situ impacts on neighbouring SPAs, including Bannow Bay SPA and Tacumshin Lake SPA.

We commented on multiple failings and inadequacies in the information furnished to support the conduct of an Appropriate Assessment by the Minister as the Competent Authority, in both the SAC and SPA report respectively. Our main concerns in this regard were:

- a. Uncertainty expressed throughout the SPA Report on the potential impacts on bird species which were SCIs of Ballyteige Burrow SPA, or neighbouring SPAs
- b. Reliance on an **arbitrary** 15% threshold of overlap with Qualifying Interest, QI, habitats and constituent community types.

We clearly outlined that:

- Given the manifold instances of identified probable impact on SCIs, and a catalogue of uncertainty in regard to impacts highlighted in our submission it was our considered opinion that the licensing of the proposed oyster aquaculture projects would be in contravention of Article 6(3) of the Habitats Directive.

Despite this, the licensing authority has seen fit to licence these sites. As such, An Taisce would appeal this decision based on the rationale outlined below. This appeal will be very much framed in the context of the precautionary principle and the requirement for legal certainty, and we will demonstrate how we believe that the Minister failed to adequately take account of the legal requirements in this regard, leading to a decision which we submit is in contravention of Article 6(3) of the Habitats Directive.

## **2. Legal Framework**

### **2.1 Uncertainty and the Precautionary Principle**

The European Commission guidance document<sup>1</sup> on the Habitats Directive clearly outlines the implications of taking the precautionary approach:

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<sup>1</sup> 2021. [Commission notice Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6\(3\) and \(4\) of the Habitats Directive 92/43/EEC](#)

*"Like all EU environmental legislation, the Habitats Directive is based on the precautionary principle, i.e. that absence of scientific evidence on the significant negative effect of an action cannot be used as justification for approval of this action. When applied to Article 6(3) procedure, the precautionary principle implies that the absence of a negative effect on Natura 2000 sites has to be demonstrated before a plan or project can be authorised. **In other words, if there is a lack of certainty as to whether there will be any negative effects, then the plan or project cannot be approved.**" [our emphasis]*

This is echoed in the Departmental guidance document for Irish planning authorities<sup>2</sup>, in which they make clear that the onus is on the decision maker to rigorously apply the precautionary principle:

*"A precautionary approach is fundamental and, in cases of uncertainty, it should be assumed the effects could be significant."*

*"It is important that the NIS applies the precautionary principle and the focus of the statement should be on demonstrating objectively, with supporting evidence, that there will be no adverse effects on the integrity of the Natura 2000 site. Where this cannot be demonstrated, adverse effects must be assumed and the Statement must reflect that. "*

Despite this, uncertainty is catalogued throughout the report titled 'Appropriate Assessment of Aquaculture in Ballyteigue Burrow SPA August 2020' [**SPA report**], as outlined in our original submission. It is clear from the SPA Report that this aquaculture activity could adversely impact on a number of SCIs of nearby SPAs, particularly Grey Plover, Brent Geese and Wigeon.

The requirement for certainty when carrying out an Appropriate Assessment has been clearly fleshed out in case law. It is now very well established in law that approval can only be granted for plans and projects when it has been established beyond all reasonable scientific doubt that the subject proposal will not adversely impact any Natura 2000 sites. In Case C-258/11, *Sweetman & Others v An Bord Pleanála & Others*, the CJEU held that:

*"authorisation for a plan or project ....may therefore be given only on condition that the competent authorities ....are certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where **no reasonable scientific doubt remains as to the absence of such effects**"[emphasis added].*

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<sup>2</sup> [Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities](#)

In *Kelly v An Bord Pleanála & Ors*. [2013 No 802 J.R.], with reference to *Commission v Spain* c-404/09, the High Court held in para. 36 that the competent authority must carry out an AA for a plan or project in light of the best scientific knowledge in the field and that the final determination of the competent authority must include complete, precise and definitive findings. The case repeated the conclusion of the CJEU at para. 44 in Case C-258/11, namely that an AA:

*"cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt."*

This test has not only been established in Irish law but further developed in recent case law, with reference to the Kelly judgment, in *Connelly v ABP* [2018] IESC 31 (paras. 8.15 & 8.16) and *Foley v EPA & Ors* and *Hayes v EPA & Ors* [2022] IEHC 470 (para. 118).

There are a number of instances throughout the SPA Report which highlight that this level of certainty has not been achieved, raising significant questions on the lawfulness of the decision which has been made by the Minister to licence these aquaculture farms.

### 3. Ecological Risks

#### 3.1 Impacts on Grey Plover

##### Established Science

The SPA report clearly catalogues that Grey Plover, an SCI of Ballyteige Bay SPA, will be completely excluded from areas occupied by oyster trestles. This conclusion is based on a number of published and unpublished studies:

*"7.4 Grey Plover appears to be **completely excluded** from areas occupied by oyster trestles. This was first demonstrated in the data from the trestle study and has been further supported by subsequent monitoring work at Dungarvan Harbour (Gittings and O'Donoghue, 2015, 2018a, 2018b and 2019). "[our emphasis]*

And the SPA report catalogues that this exclusion would clearly lead to displacement impacts on Grey Plover:

*"7.20 Grey Plover is one of the species that shows the strongest negative response to oyster trestle cultivation, and it appears to be completely excluded from areas occupied*

*by oyster trestles. Therefore, it is highly likely that development of the aquaculture sites in Ballyteige Bay will cause some level of displacement impact to Grey Plover.* " [our emphasis]

This is logical, given that the SPA report outlines that the subsites which are proposed for licensing cover approximately 60% of the intertidal habitat, the habitat upon which the Grey Plover depends. Therefore, it follows logically that if Grey Plover are excluded from 60% of their habitat it would lead to significant displacement impacts:

*"7.20 Analysis of Grey Plover densities in the low tide counts indicates that they were fairly evenly spread across the intertidal habitat in Ballyteige Bay, apart from the lower part of the bay (subsite 00L05), and the flock mapping data appears to support this pattern. The subsites containing the aquaculture sites hold around 60% of the intertidal habitat within Ballyteige Bay, so the subsite occupancy figure used for the displacement calculations may be a reasonable estimate of the overall mean subsite occupancy across the season."*

### **Conclusions Drawn**

Despite this finding, the Appropriate Assessment Conclusion Statement by Licensing Authority for Aquaculture Activities in Ballyteigue Burrow SAC and SPA [**Conclusion Statement**] seeks to rely on population data to discount this clearly catalogued risk:

*"9.1 There is likely to be a measurable displacement impact to Grey Plover, and this may be significant when potential displacement due to disturbance is considered. It should, however, be noted that the population trend data for Grey Plover does not show any evidence of impacts from increasing levels of oyster trestle culture over the period 2008-2016. On this basis, it is likely the displacement impact will be substantially lower than the calculated impacts for the two sites assessed (4.6-4.9%)."*

And

*"The positive short and long-term population trends in the Ballyteigue Burrow SPA (38% and 59% respectively) relative to the overall negative trend of the national population of Grey Plover (-54%) are presented. These lines of evidence provide a good indication that this SCI will not be significantly affected by the proposed aquaculture activities."*

The lack of reliable data on aquaculture activities within the bay was clearly outlined in the SPA Report:

*"6.3 Very little information on the history of aquaculture activity in Ballyteige Bay was received for this assessment. Aerial imagery indicates that oyster trestle cultivation activity has been taking place in Ballyteige Bay since at least 1995. We understand that, **prior to 2005, four operators were active, but since 2005 only a single operator has been active.** Production data received indicates an increase in production from 2008 to 2013, with a slight decrease after 2015"*[our emphasis]

As such, it would seem that there was significantly more aquaculture pressure prior to 2005, than there is since then. Indeed, it seems that aquaculture dates back as far as the 1980s, with the applicant in the case of T03/38 clearly outlining on his application form that he has been aquaculture farming in this area since the early 80s.

### **Reliability of the data**

This time period is notable, as although the SPA Report indicates that production has increased between 2008 and 2013, while Grey Plover populations also increased, it seems that the extent and number of aquaculture farmers operating in the bay has decreased significantly prior to that time period. No information is provided on that production in the documentation, but we would highlight that production and trestle area is not necessarily correlated. That is, while Grey Plovers are excluded from oyster trestle area, it does not necessarily follow that increases in production on existing trestles will alter the exclusion pressure on those birds. Indeed the increase in Grey Plover numbers may be attributable to a decrease in the area of oyster trestle coverage, potentially with bird numbers increasing again on foot of a number of oyster farms ceasing production in the bay prior to 2005. As such, it is our considered opinion that to jump to a conclusion of negligible impact on a legally protected SCI bird species based on such a weak association is scientifically flawed. Particularly, in light of the very clear scientific evidence highlighting time and time again that Grey Plover are, indeed, excluded by Oyster trestles. As such, we would strongly refute the scientific robustness of this statement:

*"2.57 Aquaculture production at Ballyteige Bay showed an increasing trend across this period. Therefore, if aquaculture in Ballyteige Bay was having a negative impact on waterbird populations we would expect decreasing trends in waterbird populations at Ballyteige Bay relative to the national trend."*

We would highlight the well-known scientific mantra that correlation does not equate to causation, and to rely on a spurious trend to undermine established science for the purposes



of an Appropriate Assessment is extremely problematic, both scientifically and legally. We would also highlight the statement in the SPA report which acknowledges the simplicity of the assessment, when compared to what is used as standard.

*"2.58 The above represents a very simple analysis. More complex methods of investigating population trends using GLM to impute missing counts and GAM to model smoothed trends are widely used in analyses of waterbird population trends. However, these were not used by NPWS (2014a) at Ballyteige Bay due to the variable level of I-WeBS coverage."*

The statement in the NPWS Ballyteige Burrow SPA (004020) Conservation objectives supporting [document](#) - [Version 1] is also very relevant in terms of the reliability of population fluctuations. It outlines that:

*"Grey Plover – numbers of this wader species can be highly variable between years, sometimes halving or doubling between successive seasons. At national and all-Ireland scale this species has shown a progressive decline in numbers across the long-term (Boland & Crowe, 2012; Crowe & Holt, 2013).*

## **Summary**

In summary, there is a very clear statement of potential impact on Grey Plover, the science has repeatedly demonstrated that this species is excluded by Oyster trestles. While there has been a trend of increasing population of Grey Plovers in recent years, in tandem with ongoing aquaculture operations, the robustness of this causal relationship must be called into question, and irrespective, this does not negate the very significant risks outlined throughout the SPA Report of impacts on Grey Plover. As such, it is incumbent on the decision maker, in this case ALAB, to fully apply the requirements of Article 6(3) of the Habitats Directive, as outlined in Section 2, and reach the only logical conclusion which remains, which in our view is that it is impossible for a decision maker to conclude, in light of the evidence provided, beyond reasonable doubt that the integrity of the site will not be impacted, and that there will be no significant negative impacts on Grey Plover.

## **3.2 Impacts on Brent Geese**

### **Potential Impacts**

The potential impacts to Light-bellied Brent Goose [**Brent Geese**] are clearly outlined throughout the SPA Report:

*"3.2 Light-bellied Brent Goose... make significant use of subtidal and/or intertidal habitat in Ballyteige Bay. The aquaculture activities covered in this assessment will affect 3.3 ha of intertidal and subtidal habitat and have the potential to cause significant changes to habitat structure and/or food availability, and/or because disturbance impacts to the SCI species. Therefore, the activities being assessed could potentially have significant impacts on SCIs that use subtidal and/or intertidal habitat.*

"

*"7.18 The highest overall predicted displacement impacts are for Light-bellied Brent Goose and Wigeon (6-7%) and Grey Plover (5%), with predicted impacts under 3% for all other species."*

While Brent Geese can have a variable response to Oyster trestles, depending on the location, the established science clearly demonstrates that in the Bannow Bay area they showed strong negative association with trestles. The SPA report outlines that:

*"7.6 Light-bellied Brent Goose showed a variable response pattern in the trestle study with neutral/positive patterns of association at some sites, and negative patterns at other sites. **At Bannow Bay, Light-bellied Brent Goose were only recorded on two of the four trestle study counts and they showed strongly negative patterns of association with trestles on both of these counts.** This species often feeds on the algae that attaches to the trestle bags and at some sites large numbers can be present on the trestles on the ebb/flood tides to exploit this food source. However, this behaviour appears to be rare at Bannow Bay (Gittings and O'Donoghue, 2016a)."* [our emphasis]

*"7.19 ...At Ballyteige Bay, the small size of the aquaculture sites may limit their potential exploitation by Light-bellied Brent Goose and Wigeon due to disturbance from husbandry activities."*

While there is uncertainty about the quantum of disturbance on the Brent Geese:

*"7.19 ....Overall, while the predicted displacement impacts for Light-bellied Brent Goose and Wigeon are relatively high, there is uncertainty about whether oyster trestle cultivation will have any net displacement impact on Light-bellied Brent Goose at*

*Ballyteige Bay. If a net displacement impact occurs, the predicted displacement impact is likely to be a significant overestimate of the likely displacement impact."*

there is a categorical and unambiguous conclusion of potential impact in the SPA Report:

**"10.6** *This assessment for the Ballyteige Burrow SPA concluded that there is potential for full occupation of the aquaculture sites to cause significant (Light-bellied Brent Goose and Grey Plover), or the potential for such impacts cannot be discounted beyond reasonable scientific doubt (Golden Plover, Lapwing, Black-tailed Godwit and Bar-tailed Godwit).<sup>3</sup>"*

### **Incorrect Conclusion Drawn**

Despite this, the Conclusion Statement outlined that:

*"In the case of Light-bellied Brent Geese the worst-case scenario impact was predicted to be significant:*

- This is highly likely to be an over-estimation of impact;*
- That the population trend for this species in Ireland in the long-term has been strongly positive (96% increase); and*
- The population has increased by 35% at Ballyteige Burrow SPA in the last decade. **Light-bellied Brent Geese using the areas are well habituated to aquaculture activity and generally undisturbed by it.** Light-bellied Brent Goose will forage and roost amongst and on top of the oyster cultivation structures (trestles and bags) on almost all tides. "[our emphasis]*

It is incredibly concerning from both a scientific and legal perspective that the Conclusion Statement baldly states that Brent Geese are undisturbed by aquaculture activity, while all the evidence points to the opposite (citation 7.6 above), and given that in the licencing area Brent Geese showed strongly negative patterns of association with oyster trestles, and that they are unlikely to utilise the trestles for foraging in that area (see 7.19 above). This is quite simply a gross misrepresentation of the available data by the Licensing Authority, with no scientific basis on which to base that claim.

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<sup>3</sup> Note the MI identified an error in this sentence on their behalf, but it does not relate to Brent Geese, so the part of the statement referring to them stands as written.

In regard to the likelihood that it is an overestimation of potential disturbance, we would remind ALAB that as the decision maker that they are obliged to abide by the precautionary principle, and unless the risk can be evidentially discounted then it has to be assumed to be credible, and as such licensing cannot proceed. As outlined in Section 2 in the Commission guidance:

*"In other words, if there is a lack of certainty as to whether there will be any negative effects, then the plan or project cannot be approved."*

To be clear, we are of the view that the lack of certainty on potential impacts on Brent Geese has been clearly elucidated throughout the SPA Report, with no mechanism or data provided to remove reasonable doubt, and as such this advice from the Commission stands and the plan or project cannot be lawfully approved.

### **Waterbird Occupancy Data**

Additionally, we would question what data the following statement from the SPA Report is based on, as it does not appear to be underpinned with rigorous scientific logic:

*"7.19 .... It also seems certain that the figure for the waterbird occupancy of the subsites containing the aquaculture sites is a large overestimate of the mean waterbird occupancy levels of these subsites."*

We would draw ALAB's attention to the following statements from the SPA Report, outlining how their methodology could in fact have led to underestimates for occupancy, which in turn would underestimate the disturbance impact:

***"2.62 The subsite occupancy values used in the analyses are based on a very small number of counts (2- 4 counts) from a single season. For this reason, we have used the maximum, rather than the mean, subsite occupancy values. However, this may still underestimate overall occupancy levels across seasons, as illustrated by the following analysis of data from Bannow Bay.***

***2.63 At Bannow Bay, counts from three seasons were used for an updated displacement analysis (Gittings and O'Donoghue, 2017) with four counts being carried out in each season. Table 2.1 compares the number of annual peak subsite occupancy values in the two subsites that were used for the***

*displacement analyses that were greater than the overall mean subsite occupancy values across all three seasons. For all species except Light-bellied Brent Goose, there were some annual peak subsite occupancy values that were less than the overall mean. Across all species, 20% of the annual peak subsite occupancy values were less than the overall mean across all seasons. **Therefore, even with the use of maximum, rather than mean, subsite occupancy, there is still a significant risk of underestimating overall subsite occupancy levels across seasons.*** [Our emphasis]

## **Summary**

In summary, what we have is evidence that in this area Brent Geese are disturbed by Oyster trestles, and logically a fourfold increase in trestle area will undoubtedly impact on the species. The SPA Report outlines that they are unlikely to utilise the trestles in this area, and the SPA Report concludes that licensing of this area could lead to significant disturbance of the Brent Geese. In our considered opinion, there is no lawful way for these sites to be licenced given the evidence presented in the SPA Report, and the decision under appeal is clearly in contravention of Article 6(3) of the Habitats Directive.

## **3.3 Impacts on Wigeon**

### **Potential Impacts**

Wigeon is an SCI of the Tacumshin Lake SPA, with a wintering population which utilises the site in question. Similar to both Grey Plover and Brent Geese, significant displacement impacts for this species were catalogued throughout the SPA Report:

***"10.14** There is potential for full occupation of the aquaculture sites to cause significant displacement impacts to this species within the Ballyteige Burrow SPA."*

### **Paucity of Data**

We acknowledge that the impacts of oyster aquaculture on Wigeon are not fully understood as a result of little information being available about the impact of oyster trestles on Wigeon, and because the Trestle Study much cited throughout the documentation did not record enough Wigeon to accurately catalogue their response to oyster trestles, as outlined in the SPA report:

*"7.9 The other species included in this assessment are: Shelduck, Wigeon, Golden Plover, Lapwing and Black-tailed Godwit. These species were not recorded in sufficient numbers in the trestle study to carry out formal analyses of their association with trestles across sites."*

*"7.11 The trestle study only produced limited data for Wigeon, with a neutral/positive pattern of association at one site, and a negative pattern at another site. This species can feed on the algae that attaches to the trestle bags."*

### **Incorrect Assumptions**

However, we note that the authors of the SPA Report appear to seek to capitalise on the uncertainty of impact to underline how the impact may not be as great as predicted in the SPA Report:

*"7.19 As discussed above, Light-bellied Brent Goose has a variable response to oyster trestle cultivation and may benefit from oyster trestle cultivation at some sites where it is able to exploit algae growing on the oyster bags as a food resource. This may also apply to Wigeon, although we have very limited evidence for this species about its interactions with oyster trestle cultivation...."*

*Overall, while the predicted displacement impacts for Light-bellied Brent Goose and Wigeon are relatively high, there is uncertainty about whether oyster trestle cultivation will have any net displacement impact on Light-bellied Brent Goose at Ballyteige Bay. If a net displacement impact occurs, the predicted displacement impact is likely to be a significant overestimate of the likely displacement impact."*

And:

*"10.14 There is potential for full occupation of the aquaculture sites to cause significant displacement impacts to this species within the Ballyteige Burrow SPA. However, there is a high level of uncertainty about the likelihood of this impact as this species may not be adversely affected by oyster trestle cultivation."*

This logic is then reflected in the Conclusion Statement drafted by the Licensing Authority:

*"9.2 The predicted displacement impacts to Light-bellied Brent Goose (6.7-7%) and Wigeon (6.7-7%) are significant. However, there is a high level of uncertainty about this prediction due to the variable nature of their responses to oyster trestle cultivation,*

*and the likely significant overestimation of sub-site occupancy levels in the displacement calculations."*

### **Obligations on Decision Maker**

As outlined above, and in Section 2, it is incumbent on the decision maker to apply the precautionary principle, and this should be interpreted to mean:

*"A precautionary approach is fundamental and, in cases of uncertainty, it should be assumed the effects could be significant."*

As such, the apparent logic of the Minister that uncertainty of impact should lend itself to a favourable licensing outcome is not in keeping with the necessary precautionary principle. If in doubt about the potential impact, the decision maker must assume it will be a significant impact, and make their decision accordingly in keeping with their stringent and very clear obligations under Article 6(3) of the Habitats Directive.

### **Waterbird Occupancy Data**

Additionally, we would reiterate the same point we made in regard to Brent Geese in relation to the presumed overestimate of sub-site occupancy levels, and again highlight that it would appear from other statements in the SPA Report that in fact that opposite is true, and the bird occupancy figure it is likely to be an underestimate, which in turn would lead to underestimates for the disturbance impact. As such, this argument has no substance.

### **Summary**

In summary, again we have an SCI bird species to which the licencing of this area poses a significant potential risk, and in our considered opinion, there is a distinct paucity of data in the SPA Report which would allow for the decision maker to conclude beyond reasonable doubt that there will be no adverse impact on this protected species. As such, it is our view that licensing cannot proceed lawfully for these licences.

## **4. Mitigation Measures**

It should be noted that the Mitigation Measures provided in the Conclusion Statement in no way ameliorate the potential impacts which have been identified in the SPA Report:

*"• A licence condition will require full implementation of the measures set out in the draft Marine Aquaculture Code of Practice prepared by Invasive Species Ireland (e.g. <http://invasivespeciesireland.com/cops/aquaculture> ).*

- *The movement of stock in and out of the SAC/SPA should adhere to relevant fish health legislation.*
- *A licence condition requiring strict adherence to the identified access routes over intertidal habitat will apply to any licences issued in order to minimise habitat disturbance.*
- ***A licence condition will require that all operators shall adhere to any recommendations that may arise in order to avoid adverse impacts on the integrity of the SAC/SPA.***
- *The source of seed and any changes to the source of seed are to be approved by the Department of Agriculture, Food and the Marine in advance.*
- *The Aquaculture and Foreshore Licences contain terms and conditions which reflect the environmental protection required under EU and National law."*

With the bolded mitigation measure potentially the most relevant for bird impacts. However, given that it is the very existence of the aquaculture activity itself which is potentially disturbing, there are no recommendations which can alleviate that impact, short of a refusal to licence the site. It is our considered opinion, based on the evidence put forward in the SPA Report, that the only plausible protection would be to refuse to licence the two oyster farms.

## **5. Summary Recommendation**

It is imperative that the decision makers in ALAB are fully cognizant of their obligations in regard to legal certainty and the application of the precautionary principle (as laid out in Section 2) when making their decision on these licences under appeal. It is our view that these sites cannot be lawfully licensed based on the arguments catalogued above, and in our original submission. We strongly dispute the overall conclusion in the Conclusion Statement:

**"13.1** *Having considered the conclusions and recommendations of the Appropriate Assessment process, the Licensing Authority is satisfied that, from a Natura 2000 perspective, a decision can be taken in favour of licensing proposed aquaculture operations in Ballyteigue Burrow SAC/SPA, subject to the mitigation measures referenced above. Accordingly, **the Licensing Authority is satisfied that the proposed licensing of aquaculture in the Bay is not likely to significantly and adversely affect the integrity of Ballyteigue Burrow SAC/SPA.**"*[our emphasis]



We would highlight the following paragraph from the judgment in *Connelly v ABP* [2018]<sup>4</sup> IESC 31, again highlighting the stringent obligations in regard to certainty:

*"8.15 Thus, it seems to me as a result of the foregoing analysis that the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. **However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached.** This is apparent from the above passages from *Kelly* and the European case law therein cited.*

*8.16 The analysis in *Kelly* shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required. First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, **where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.**" [our emphasis]*

There is a very clear procedure, with certain steps which are required in order for the relevant authority to conclude that a project will not adversely impact on the integrity of a European site, as outlined in both *Kelly v An Bord Pleanála & Ors.* [2013 No 802 J.R.] and in more recent case law such as *Connelly v ABP* [2018]. We are of the view that the Minister, in making his decision, did not, and indeed could not, ascertain that no scientific doubt remained, as described in the third step outlined in the citation above. There is simply no scientific evidence of such a threshold being reached, or in the words of the *Connelly v ABP* judgment, there is no '*specific scientific findings which allow that conclusion to be reached*'.

Therefore, it is our considered opinion that ALAB does not have the necessary evidence in front of them to make a legally robust decision in favour of these licences under appeal. We submit that granting of these licences would be a clear and blatant non-compliance with Article

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<sup>4</sup> <https://www.casemine.com/judgement/uk/5da02c544653d058440f99a5>

6(3) of the Habitats Directive, and will leave ALAB open to legal proceedings should they grant licences for these sites.

Is mise le meas,

A handwritten signature in black ink, appearing to read 'Elaine McGoff', written in a cursive style.

Elaine McGoff,  
Natural Environment Office,  
An Taisce – The National Trust for Ireland