

**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)		FJORD FRESH MUSSELS LIMITED	
Address of Appellant		CORNMARKET, WEXFORD	
Phone:	See Cover Letter	Email:	See Cover Letter
Mobile:	See Cover Letter	Fax:	See Cover Letter

Fees

Fees must be received by the closing date for receipt of appeals	Amount	Tick
Appeal by licence applicant	€380.92	✓
Appeal by any other individual or organisation	€152.37	
Request for an Oral Hearing * (fee payable in addition to appeal fee) <small>* In the event that the Board decides not to hold an Oral Hearing the fee will not be refunded.</small>	€76.18	✓
(Cheques Payable to the Aquaculture Licences Appeals Board in accordance with the Aquaculture Licensing Appeals (Fees) Regulations, 1998 (S.I. No. 449 of 1998))		
Electronic Funds Transfer Details	IBAN: IE89AIBK93104704051067	BIC: AIBKIE2D

Subject Matter of the Appeal

Decision of the Minister for Agriculture, Food and the Marine in the matter of an Application under Section 10 of the Fisheries (Amendment) Act 1997 (the "Act") and Foreshore Act 1933 for authorisation for the bottom cultivation of mussels on the foreshore on a 53.6 ha site (T03/046B) (the "Site") in Wexford Harbour, Co. Wexford.

Site Reference Number:- (as allocated by the Department of Agriculture, Food and the Marine)	T03/046B
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Appellant's particular interest in the outcome of the appeal:

Fjord Fresh Mussels Limited (the "Appellant") has, both by itself and its predecessors in title, been active in the bottom cultivation of mussels at the Site for several years. It would be severely adversely affected by the Minister for Agriculture, Food and the Marine's (the "Minister") decision to vary the licence sought (the "Decision") by reducing the footprint of the Site from 53.6 ha to 35.67 ha.

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):

The Appellant considers that the Decision is legally flawed for two over-riding reasons:

- (1) The Minister has committed serious errors in his assessment of the relevant criteria under Section 61 of the Act.
- (2) The Minister has breached fundamental principles of public/administrative law in the Decision, both in terms of its substance and the procedure whereby it was reached.

Further details are included in the Submission.

Signed by appellant:

Michael Crowley

Date: 16/10/19

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

Fees must be received by the closing date for receipt of appeals

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.

DATA PROTECTION – the data collected for this purpose will be held by ALAB only as long as there is a business need to do so and may include publication on the ALAB website

Extracts from Act

40.—(1) A person aggrieved by a decision of the Minister on an application for an aquaculture licence or by the revocation or amendment of an aquaculture licence may, before the expiration of a period of one month beginning on the date of publication in accordance with this Act of that decision, or the notification to the person of the revocation or amendment, appeal to the Board against the decision, revocation or amendment, by serving on the Board a notice of appeal.

(2) A notice of appeal shall be served—

(a) by sending it by **registered post** to the Board,

(b) **by leaving it at the office of the Board**, during normal office hours, with a person who is apparently an employee of the Board, or

(c) by such other means as may be prescribed.

(3) The Board shall not consider an appeal notice of which is received by it later than the expiration of the period referred to in subsection (1)

41.—(1) For an appeal under *section 40* to be valid, the notice of appeal shall—

(a) be in writing,

(b) state the name and address of the appellant,

(c) state the subject matter of the appeal,

(d) state the appellant's particular interest in the outcome of the appeal,

(e) state in full the grounds of the appeal and the reasons, considerations and arguments on which they are based, and

(f) **be accompanied by such fee**, if any, as may be payable in respect of such an appeal in accordance with regulations under *section 63*, and

shall be accompanied by such documents, particulars or other information relating to the appeal as the appellant considers necessary or appropriate.

APPEAL UNDER SECTION 40(1) OF THE FISHERIES (AMENDMENT) ACT 1997

SUBMISSION BY FJORD FRESH MUSSELS LIMITED (T03/046B)

16 OCTOBER 2019

To:

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

Appellant:

**Fjord Fresh Mussels Limited
Cornmarket
Wexford**

Agent for Appellant:

**William Fry
2 Grand Canal Square
Dublin 2
D02 A342**

Appeal Against: Decision of the Minister for Agriculture, Food and the Marine

Determination Reference: T03/046

Applicant: Appellant

Date and Place of Publication of Notice of Decision: 17 September 2019 in the *Wexford People*

Summary

1. This is an appeal against a decision by the Minister for Agriculture, Food and the Marine (the "**Minister**") to grant a variation of the aquaculture licence for the bottom cultivation of mussels on the foreshore at site (T03/046B) (the "**Site**") in Wexford Harbour, Co. Wexford (the "**Decision**") to the Appellant. In the Decision, the Minister cites several positive impacts of the aquaculture activities carried out at the Site. Notwithstanding this, the Minister has decided to reduce the Appellant's licensed area from 53.6 ha to 35.67 ha, with potentially devastating impacts on the Appellant's business. Please see the Decision at **Annex 1**.
2. As outlined in further detail below, the Decision is vitiated by a number of serious flaws. Firstly, the Minister has committed serious errors in his assessment of the relevant criteria under Section 61 of the Fisheries (Amendment) Act 1997 (the "**Act**"). Secondly, the Minister has breached fundamental principles of public/administrative law in reaching the Decision, both in terms of its substance and the procedure whereby it

was reached. This appeal is supported by a report on mussel cultivation activities in Wexford Harbour dated 16 October 2019 by Aquafact, an environmental consultancy specialising in marine environments (the "**Aquafact Report**"). Please see the Aquafact Report at **Annex 2**.

3. The Aquaculture Licences Appeals Board ("**ALAB**") will also have received the Appellant's appeals against the Minister's decisions to vary the Appellant's licences in its adjacent sites (the "**Associated Decisions**" and the "**Associated Appeals**", respectively).
4. The Appellant encloses a summary of the Decision and Associated Decisions' effects on its and affiliated companies' sites at **Annex 3**, and a map of the relevant sites at **Annex 4**.
5. By the present appeal, the Appellant respectfully requests ALAB to exercise its power under Section 40(4)(c) of the Act to substitute its decision on the Appellant's licence application by granting the Appellant a licence over the entire portion of the Site of which it has hitherto carried on aquaculture activities, and in respect of which it has applied for a licence (the "**Total Area**"). In the alternative, the Appellant respectfully requests ALAB, under Section 40(4)(b) of the Act, to determine the Appellant's licence application as if it had been made to ALAB in the first instance, by similarly granting a licence over the Total Area.
6. Separately, for ease of administration and given the commonality of facts and issues arising, the Appellant requests ALAB, exercising its discretion under Section 42 of the Act, to join the present appeal with the Associated Appeals, including for the purpose of an oral hearing.

The Appellant

7. The Appellant is a wholly-owned subsidiary of River Bank Mussels Limited ("**River Bank**"), which is, in turn, a 100% owned subsidiary of ██████████, a Dutch company which is ultimately controlled by the ██████████ family. Another mussel cultivation enterprise, WD Shellfish Limited ("**WD Shellfish**"), is also a 100% owned subsidiary of River Bank. Two brothers, ██████████, are the directors of each of the three relevant companies, all of which are incorporated in the State. Based in the Netherlands, ██████████ are a third-generation family of mussel farmers.
8. ██████████ has 40 years' experience in the shellfish industry. He commenced working for the family business at the age of sixteen and, together with his brother, took over complete control on the death of his father in 1998. ██████████ has some 38 years' experience in the fishing industry. In 1999, the ██████████ brothers acquired another mussels business, ██████████. They have successfully integrated this company into their business and currently have ██████████ hectares of mussels under cultivation in the Netherlands. Both brothers attended fisheries school in the Netherlands and both have full skipper tickets. Since 2003, Michael Crowley has taken on the role of General Manager for the ██████████ Irish operations. He has 20 years' experience in the aquaculture industry.
9. The Government announced a new round of grants for mussel fishermen in 2004. River Bank engaged with this process and built a new mussel dredger for approximately EUR ██████████. ██████████. The Hibernia was delivered to Wexford in 2005. Due to the additional capacity,

River Bank decided to acquire two additional mussel farms (which had been in operation since the 1970s/1980s) and associated licences. For that purpose, WD Shellfish and the Appellant were formed.

10. On 9 March 2007, the Appellant purchased licences and mussel stock from Halcolm Merchants (Ireland) Limited. The licences relate to sites T03/046B, T03/046B and T03/046C in Wexford Harbour. The Appellant wishes to appeal against the Minister's decision regarding each of these licences.
11. Together, River Bank, WD Shellfish and the Appellant employ █████ full-time employees and █████ seasonal workers. The total annual average turnover of the group is approximately EUR █████.

Licence Application Process

12. The Appellant's previous licences, which were granted in 2003, were due to expire in 2013. On 9 March 2012, the Appellant applied to the Department of Agriculture, Food and the Marine (the "**DAFM**") for renewal of its licences. (Whereas, previously, the Appellant had one licence covering all its sites, the Minister decided during the 2000s to separate each licence into several sites, with one licence per site.)
13. Following its application for a licence renewal, the Appellant received no further correspondence from the DAFM until June 2018, when a public notice was published in the *Wexford People* listing all the relevant licence applications (including the Appellant's) and requesting submissions on those Applications within one month. The Marine Institute, the Inland Fisheries Institute, Wexford County Council and the Department of Heritage and the Gaeltacht (now the Department of Culture, Heritage and the Gaeltacht) each made submissions, of which the Appellant received copies from the DAFM on or about 12 October 2018. The Appellant submitted a response to those submissions to the DAFM on or about 31 October 2018.
14. During the consultation process, the Minister/DAFM gave no indication that he intended or was considering huge cuts to the areas under licence. Likewise, during and after consultation, there was no engagement with the Appellant regarding boundaries.
15. The Appellant received no further communication from the DAFM until September 2019, when the Decision and the Associated Decisions were published. In fact, the Appellant learned of the Decision in the 17 September 2019 edition of the *Wexford People* before it received any official correspondence from the DAFM. (See **Annex 5**).
16. It is disappointing and of serious concern that the Minister failed to respond to the Appellant's licence application, or even raise any queries or requests for further information, for a period of six years. When the DAFM/Minister did finally engage (albeit to a limited extent), the Appellant responded promptly. However, the DAFM/Minister again failed to communicate with the Appellant until the Decision was taken some eleven months later.

Substantive Grounds of Appeal

17. The Appellant's substantive grounds of appeal are, first, by reference to criteria (a) to (g) as set out in Section 61 of the Act and, second, by reference to fundamental principles of public/administrative law.
18. The Appellant submitted requests for information under the Freedom of Information Act 2014 ("FOI"), and requests for environmental information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 ("AIE"), in each case requesting information/environmental information relevant to the Decision, to various relevant public bodies on 8 October 2019. Notwithstanding that the FOI/AIE requests were made promptly following the notification of the Decision, given the statutory one-month deadline for appealing a decision of the Minister to ALAB under Section 40(1) of the Act, the Appellant has had to bring the present appeal before receipt of any responses to those requests. The Appellant therefore reserves the right to make any and all further submissions to ALAB it deems necessary or appropriate, including any submissions based on the responses received to those FOI/AIE requests.

Section 61 of the Act

19. Under Sections 61 (a) to (g) of the Act, the Minister, in considering a licence application, and ALAB, in considering an appeal against a decision of the Minister, must have regard to seven criteria. That section reads as follows:

"The licensing authority, in considering an application for an aquaculture licence or an appeal against a decision on an application for a licence or a revocation or amendment of a licence, shall take account, as may be appropriate in the circumstances of the particular case, of—

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

(ii) *at any other place, if there is or would be no discharge of trade or sewage effluent within the meaning of, and requiring a licence under section 4 of the Local Government (Water Pollution) Act, 1977, and*

(g) *the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters."*

20. It is difficult for the Appellant to make meaningful observations on the Minister's evaluation of these criteria, in the absence of a full statement of reasons for the Decision. While the Decision states that "*it is in public interest (sic) to grant a variation of the licences sought i.e. reducing the footprint of the site*", the Minister completely fails to justify this statement. The Decision, as it relates to the reduced area, is stated in almost entirely positive terms, and does not cite any adverse effects of the relevant activity. However, the Minister's apparent belief that granting a licence over the Total Area would be contrary to the public interest is unexplained. This defect is addressed more fully below under the heading "failure to give adequate reasons" (see paragraphs 82 to 90).

21. The Appellant considers that in taking the Decision the Minister erred in law and therefore requests ALAB to take account of the following submissions in relation to each of the statutory criteria.

(a) the suitability of the place or waters at or in which the aquaculture is or is proposed to be carried on for the activity in question

22. The Total Area, and the wider Wexford Harbour waters, are undoubtedly suitable for aquaculture and have been found as such by the Minister. The Wexford County Development Plan 2013 – 2019 (the "**County Development Plan**") states as follows: "*The [EU Shellfish Waters Directive (2006/113/EC)]¹, which aims to protect and improve shellfish waters in order to support shellfish life and growth] requires Member States to designate waters that need protection in order to support shellfish life and growth... There are four designated waters relevant to Wexford: Bannow Bay, Wexford Harbour Outer, Wexford Harbour Inner and Waterford Harbour" (emphasis added).²*

23. The Appellant and its predecessors have farmed mussels in the Total Area/Wexford Harbour since 'time immemorial'. During that time, the relevant waters have provided an exceptionally fertile ground for the cultivation of mussels while also supporting many other species of wildlife/sealife. Indeed, the DAFM's own *National Strategic Plan for Sustainable Aquaculture Development 2015* refers to Wexford Harbour as one of Ireland's "*5 major production areas for bottom mussel*".³

24. In mainland Europe, Wexford mussels enjoy a stellar reputation and attract a premium price. Geographic factors help to make the area especially well-suited to mussel farming. In particular, the shape of the seabed in the Harbour protects mussels from high seas, thereby minimising mortality. Wexford Harbour is sheltered from almost all sides against storms. It is only open to easterly winds – however, the sandbanks in the mouth of the

¹ As implemented into national law by the European Communities (Quality of Shellfish Waters) Regulations 2006 (SI No 268 of 2006) (as amended by SI No 55 of 2009 and SI No 464 of 2009).

² See page 115, available at <https://www.wexfordcoco.ie/sites/default/files/content/Planning/WexCoPlan13-19/Volume8.pdf>.

³ See <https://www.agriculture.gov.ie/media/migration/seafood/marineagenciesandprogrammes/nsipa/NationalStrategicPlanSusAquaDevel181215.pdf> at page 30.

Harbour provide protection against these. Mussels generally thrive in areas where salt and fresh water meet. The tides ensure that nutrients from both the Irish Sea and the River Slaney mix well.

25. The Aquafact Report concludes that Wexford Harbour is entirely suitable for mussel cultivation.
26. The suitability of the waters for aquaculture is also affirmed by the Minister in the Decision, where he states, at paragraph (a), that "*scientific advice is to the effect that the waters are suitable*". This conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence. There is, therefore, no reason for the Minister to reduce the total licensed area based on criterion (a).

(b) other beneficial uses, existing or potential, of the place or waters concerned

27. The Aquafact Report finds that the only other actual use of Wexford Harbour is for boating and that activity may be pursued notwithstanding the presence of mussel farms. For the purposes of mussel cultivation, other than mussels living on the seabed, there is little or no infrastructure in place on the seabed or emerging therefrom creating any visual or other impediments for other activities by the practice of bottom mussel cultivation.
28. The Minister was therefore correct to state, at paragraph (b), that "*public access to recreational and other activities is already accommodated by this project*", and at paragraph (g) that "*there are no issues regarding visual impact as the site to be utilised is for bottom culture*". This conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence. There is, therefore, no reason for the Minister to reduce the total licensed area based on criterion (b).

(c) the particular statutory status, if any, (including the provisions of any development plan, within the meaning of the Local Government (Planning and Development) Act, 1963 as amended) of the place or waters

29. The Appellant acknowledges and indeed relies upon the fact that the relevant waters are in a special area of conservation ("**SAC**") (or 'Natura 2000' site).⁴ The importance of mussel cultivation to the Site and the support of the listed habitats and species therein, is not in dispute. Indeed, this has been specifically recognised in the Decision (see paragraph (j)). In addition, the symbiotic importance of the relevant waters to mussel farming is recognised in the relevant local development plans.
30. The Aquafact Report concludes that the dynamic nature of the water flows in Wexford Harbour would mask any negative impact of mussel dredging.
31. As noted above, the County Development Plan states as follows: "*The [EU Shellfish Waters Directive (2006/113/EC)]⁵, which aims to protect and improve shellfish waters in order to support shellfish life and growth] requires Member States to designate waters that need protection in order to support shellfish life and growth...*

⁴ Regulation 3 of the European Communities (Conservation of Wild Birds (Wexford Harbour and Sloba Special Protection Area 004076)) Regulations 2012 (as amended) (SI No. 194/2012). Natura 2000 is a network of nature protection areas in the EU. This consists of SACs and special protection areas or SPAs under the EU's Habitats and Birds Directives.

⁵ As implemented in Ireland by the European Communities (Quality of Shellfish Waters) Regulations 2006 (S.I No 268 of 2006) (as amended by SI No 55 of 2009 and SI No 464 of 2009).

There are four designated waters relevant to Wexford: Bannow Bay, Wexford Harbour Outer, Wexford Harbour Inner and Waterford Harbour" (emphasis added).

32. The Wexford Town & Environs Development Plan 2009-2015 (which was extended until 2019)⁶ refers to the Wexford Wildfowl Reserve (the "**Reserve**") which is situated to the north-east of Wexford Harbour. This document states that "*the overall aim of the Council will be to promote a reasonable balance between conservation measures and development measures in the interests of promoting the orderly and sustainable development of Wexford Town*" (emphasis added).⁷
33. The maintenance of the status quo, i.e., granting the Appellant a licence over the Total Area, poses no threat to the maintenance of a reasonable balance between the conservation of the Reserve located to the north-east of the Site and the long-standing mussel cultivation activities in Wexford Harbour, which contribute positively to Wexford's economy and reputation.
34. At paragraph (i) of the Decision, the Minister states that "*the Licensing Authority's Conclusion Statement (available on the Department's website) outlines how aquaculture activities in these SAC's/SPA's [sic], including this reconfigured site, are being licensed and managed so as not to significantly and adversely affect the integrity of the Slaney River Valley SAC , the Raven Point Nature Reserve SAC , Wexford Harbour and Slobbs SPA and the Raven SPA*". This statement demonstrates an error of judgement on the part of the Minister. As will be described in further detail in the submissions under sub-section (e), it is not necessary for the Site to be "reconfigured" in order for the Appellant's aquaculture activities not to affect significantly and adversely the integrity of the relevant SAC. On the contrary, reducing the Appellant's licensed area may, in fact, lead to significant and adverse effects.

(d) the likely effects of the proposed aquaculture, revocation or amendment on the economy of the area in which the aquaculture is or is proposed to be carried on

35. At paragraph (c) of the Decision, the Minister states that "*the proposed development should have a positive effect on the economy of the local area*". The only way in which the Decision could be of benefit to the local economy is if it were a choice between the reduced licence, per the Decision, and no licence at all. However, this is not the case. In reality, the "proposed development", in the words of the Decision, will reduce economic activity. Put simply, the Minister has addressed the wrong question.
36. The Decision, which proposes to cut the Appellant's hectareage significantly, would have an adverse effect on the local economy. The Decision will inevitably result in much lower quantities of mussels being farmed and exported, with devastating effect on the Appellant's turnover, posing a very real threat to the viability of the Appellant's business. (This will also affect any corporation tax revenues generated by the State from the Appellant.)

⁶ <https://www.wexfordcoco.ie/planning/development-plans-and-local-area-plans/current-plans/wexford-town-and-environs-development>

⁷ See page 78, available at <https://www.wexfordcoco.ie/sites/default/files/content/Planning/WexfordTownPlan09-14/WexTown%26EnvsDevPlan2009Ch7-9.pdf>

37. The cessation of the Appellant's mussel farming activities would entail the disposal of fishing fleet in addition to cuts to employment. These effects will not only impact the Appellant and its employees directly but will also permeate throughout the wider Wexford economy.
38. Other than the Appellant and its employees, the economic effects of the Decision will be felt by persons in, at least, the following categories of activity:
- 38.1 electrical maintenance, repair and replacement of marine and shore-based plant and equipment;
 - 38.2 mechanical maintenance, repair and replacement of marine and shore-based plant and equipment;
 - 38.3 the fabrication and maintenance of dredges, dredging equipment and other custom-made equipment used in the industry;
 - 38.4 mussel dredgers, which ply a route into and out of Wexford Harbour and have helped maintain access to the Harbour, Wexford Boat Club and the Wexford Quays for visiting boats and increase confidence in the navigability of the harbour, despite its sand bars; and
 - 38.5 the haulage sector: at the very least, 50 – 100 lorries per annum come into Wexford to collect mussels for export. These hauliers must spend money in the Wexford economy which would be lost if the Appellant reduce its business activities at the Site.
39. Furthermore, the presence of the mussel fishing industry in Wexford town contributes to the enjoyment of tourists, who perceive Wexford as still a 'working' fishing location and not yet dominated by commercial development and idle leisure craft tied up in marinas (the Aquafact Report also notes that the cultivation of mussels has a positive economic impact.)
40. The Decision, if upheld, will have severe economic consequences which will exacerbate the problems exporters in the agri-food sector, such as the Appellant, would already have faced given the looming threat associated with the UK's planned withdrawal from the EU. Therefore, the Appellant fails to understand why the Minister, at paragraph (c) of the Decision, concluded that the development, as contemplated in the Decision, "*should have a positive effect on the economy of the local area*".
- (e) the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna**
41. The Aquafact Report underlines the ecological benefit of mussel cultivation in Wexford Harbour. It notes the long-standing positive contribution of such cultivation to the relevant ecosystem while also emphasising the control mechanism mussels exert on eutrophication. Finally, mussel beds in Wexford Harbour give rise to greater biodiversity – this benefit would be lost/greatly reduced by the Decision.

42. In reaching the Decision, the Minister appears to have determined that, in estuarine areas, only 15% of the relevant area should be licensed for mussel farming activities. The effect is to reduce significantly the Appellant's licensed area. The figure of 15% is referenced in the DAFM's (undated) Appropriate Assessment Conclusion Statement (the "**AACS**") for the Wexford Harbour and neighbouring SACs,⁸ which is referenced in paragraph (j) of the Decision. The figure of 15% appears to be based on a recommendation by the National Parks & Wildlife Service (the "**NPWS**") in its 2011 report, "*Slaney River Valley SAC (site code: 0781) Conservation objectives supporting document -marine habitats and species*".⁹
43. The NPWS's report states as follows: "*Significant anthropogenic disturbance may occur with such intensity and/or frequency as to effectively represent a continuous or ongoing source of disturbance over time and space (e.g., effluent discharge within a given area). Drawing from the principle outlined in the European Commission's Article 17 reporting framework that disturbance of greater than 25% of the area of an Annex I habitat represents unfavourable conservation status, this Department takes the view that licensing of activities likely to cause continuous disturbance of each community type should not exceed an approximate area of 15%. Thereafter, an increasingly cautious approach is advocated*" (emphasis added).¹⁰
44. The nature of mussel farming activity is crucial, in this context. The Appellant's mussels, as with all other bottom cultivators of mussels, are located on the seabed. While the amount of time spent physically farming the area is variable, there is no basis for concluding, as is implicit in the Decision, that the Appellant's activity is continuous or ongoing and that, consequently, any geographic threshold should apply. (The Aquafact Report contains a detailed description of the mussel cultivation process).
45. While the mussels are maturing, the Appellant carries out monthly sampling activities to check for growth or predation. Sampling involves one passage of the Appellant's vessel over the area where the mussels are lying. A dredge is towed to take a sample of mussels which, after inspection, is returned to the seabed.
46. Prior to harvesting, mussels may be shifted from one area to another, more productive, area. This may be done either to increase meat content or because of predation in the first area. Moving a bed of mussels normally means the Appellant's vessel is active on a site for seven or eight days over a two-week period. A normal fishing day during this time involves, at most, three to four hours' fishing.
47. When the Appellant harvests the mussels for sale, it 'fishes to order'. The orders normally require that fishing takes place on a Monday, Tuesday, Wednesday or Saturday. If market conditions are very good, the Appellant may fish on all four days; conversely, when things are slow, the Appellant may not fish any of the days. The Appellant normally fishes for one or two lorry-loads of mussels when harvesting. This activity takes approximately one hour to catch, so the dredger is out in the Wexford Harbour for under two hours.

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<https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/wexford/ConclusionStatementWexfordHbr110619.pdf>

⁹ https://www.npws.ie/sites/default/files/publications/pdf/000781_Slaney%20River%20Valley%20SAC%20Marine%20Supporting%20Doc_V1.pdf

¹⁰ Page 7.

48. Sales of mussels may take place from July right through to the following April. The Appellant only has a certain amount to harvest in a season, the activity is therefore 'market-driven'. It may fish over a long time, or the harvest may be concentrated and carried out in a short space of time. If the Appellant were to fish, say, 40 lorry-loads in a season, that would mean a maximum of 40 'harvesting trips' over nine months. On busy days, it may fish for two lorry-loads, which would reduce the total number of days 'on site' per year.
49. The mussels are in Wexford harbour for approximately two years from the time they are re-laid as seed mussels to when they are harvested for export. For the vast majority of this time, the mussels are simply growing in nature, and the Appellant's vessel is idle at the quayside. Please see the study "Hibernia Activity" at **Annex 6**, which shows how little time the Appellant's vessel spent active on dates requested for a bird study for the NPWS.
50. Therefore, there is no basis for concluding that the Appellant's mussel farming activity is "continuous or ongoing" or causes "continuous disturbance". Furthermore, there is no effluent discharge other than what the mussels themselves produce.¹¹
51. On the contrary, mussel farming is of significant benefit to the marine environment, particularly where other activities are undertaken nearby. Lindahl and Kollberg demonstrate that mussel farming is a very effective method of combatting eutrophication, an environmental hazard caused by nutrient leakage into marine waters from agriculture, rural living, sewage discharges and other human activities.¹²
52. The Appellant refers to Chapter 11 of the Marine Institute's *Report supporting Appropriate Assessment of Aquaculture in Slaney River Valley SAC (Site Code: 000781) and Raven Point Nature Reserve SAC (Site Code: 000710)*,¹³ which comprises Annex I to the Marine Institute's *Appropriate Assessment Summary Report of Aquaculture in the Slaney River Valley SAC (Site Code: 000781), Raven Point Nature Reserve SAC (Site Code: 000710) Wexford Harbour and Slob SPA (site code 004076) and Raven SPA (site code 004019)*¹⁴ (the "MIAA").
53. In that chapter, the authors note that mussels are historically part of Wexford Harbour's ecosystem and are considered a component of the mixed sediment community complex. It is also noted that mussels play an important role against eutrophication of the water in the harbour. The report also highlights the enhancement to habitat heterogeneity caused by the mussel population.¹⁵ Chapter II concludes as follows:

"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

¹¹ In fact, the Appellant notes that mussels, even without farming, naturally occur in Wexford Harbour.

¹² Odd Lindahl and Sven Kollberg, "How mussels can improve coastal water quality", BioScience Explained, Vol 5 No 1, dated 2008. See here: https://bioenv.gu.se/digitalAssets/1575/1575640_musseleng.pdf

¹³ <https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/AnnexIWexfordHarbourSACsAA270318.pdf>

¹⁴ <https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/WexfordHarbourNaturaSitesAASummary270318.pdf>

¹⁵ See pages 63 to 67.

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" (emphasis added).¹⁶

54. The clear and uncontroverted evidence is thus that mussel cultivation supports and contributes positively to the relevant SAC and its conservation objectives. Given the length of time that this activity has been carried on in a manner that has led to the designation of Wexford Harbour as part of an SAC/SPA and the positive impacts on its integrity since then, it makes no sense whatsoever to reduce the area in which mussel cultivation occurs. *A fortiori*, it makes absolutely no sense to carry out such a drastic reduction which will severely impact on the economic viability of the activity in question which is such a positive contributor to the harbour as well as to the local economy.
55. With regard to the assertion (quoted above) that adding more mussels is subject to availability of additional seed, the Appellant notes that the relevant seed does not need to be fished in the Irish Sea. Several operators re-lay seed from elsewhere or take seed from half-grown mussels (the Appellant also notes that such movements of shellfish must be approved by the Marine Institute). Therefore, the additional benefits highlighted in Annex I to the MIAA are not, in fact, "*subject to the availability of additional seed*" from Irish waters.
56. Furthermore, the European Commission's Reporting under Article 17 of the Habitats Directive, Explanatory Notes and Guidelines for the period 2013–2018 (the "**EC Guidelines**")¹⁷ indicate that devoting as much as 25% of an SAC to aquaculture is unlikely to affect that SAC's conservation status. In fact, the EC Guidelines do not necessarily apply a 25% 'limit' to aquaculture activities taking place within an SAC, as the Minister/NPWS seems to have inferred. The general evaluation matrix at Annex E of the EC Guidelines denotes an SAC's conservation status as 'Unfavourable – bad' if, *inter alia*, "*more than 25% of the area is unfavourable as regards its specific structures and functions*" (emphasis added). This means that if more than 25% of an SAC is considered unfavourable, then the entire area has an 'unfavourable' status.
57. Contrary to the apparent inference of the Minister/NPWS, this does not in any way imply that if more than 25% of an SAC is licensed to aquaculture, the entire habitat is unfavourable. The NPWS has therefore misinterpreted the EC Guidelines.
58. As far as the Appellant is aware, no other EU Member State has interpreted the EC Guidelines in this manner. It is also worth recalling that mussel farming activities have subsisted for several generations in Wexford Harbour, with positive environmental effects. Mussel and other shellfish beds are known for providing a habitat for a large number of species. For example, the Wageningen University & Research, a Dutch third-level

¹⁶ Page 67.

¹⁷ European Commission, "Reporting under Article 17 of the Habitats Directive, Explanatory Notes and Guidelines for the period 2013–2018, Final version – May 2017", available here: <https://circabc.europa.eu/sd/a/3ed9f375-227e-46cd-b3dd-1fc59cefcd/bd/Doc%20NADEG%2017-05-02%20Reporting%20guidelines%20Article%2017%20final%20April%2017.pdf>

institution, has conducted several studies in the western Wadden Sea, off the northern coast of the Netherlands, concluding that mussel farming creates a 'hot spot' for biodiversity¹⁸. (See also the Aquafact Report).

59. However, even assuming that the NPWS's reading of the EC Guidelines is correct (which the Appellant does not believe to be the case), the Appellant does not understand why (a) the NPWS felt the need to cut this 25% figure by almost half, to 15% or (b) more pertinently, why the Minister decided to adopt the NPWS's reasoning.
60. Regarding any disturbance to the population of birds at the Wexford Wildfowl sanctuary, throughout its time engaged in mussel farming activities in Co. Wexford, the Appellant has been aware of the Reserve, located to the north-east of the Site. The Appellant understands that, in 2008 or 2009, the NPWS had concerns about the potential effects of mussel farming on the local population of Greenland white-fronted geese living on the Reserve.
61. In/around 2009, the NPWS undertook a three-day study, whereby it monitored the behaviour of the geese before, during and after a day on which the Appellant fished for mussels. The Appellant understood at the relevant time that the NPWS was due to carry out further relevant studies and produce a report demonstrating its conclusion. However, this report never materialised. Separately, a bird specialist, Tom Gittens of the NPWS, contacted the Appellant and certain of its competitors around this time. Mr. Gittens requested data regarding the Appellant's vessel activities at Wexford Harbour on specific days, which coincided with bird counts carried out. The Appellant supplied all relevant data but received no response.
62. Around the same time, Bord Iascaigh Mhara ("**BIM**") hired its own photographer to conduct a similar exercise. The Appellant understands that BIM's report uncovered minimal effect, if any, on the relevant geese. The Appellant further understands that BIM has footage, and can produce this at a later stage if requested by ALAB (e.g., at an oral hearing). In fact, to the Appellant's knowledge, BIM's report showed that the geese in fact moved closer to the fishing activity when it was being conducted. To the best of the Appellant's knowledge, despite the findings of BIM's report, the NPWS report made no mention of it.

Coastal area

63. Separately, the Decision cites the AACS, which estimates the extent of intertidal habitat at approximately 1,400 hectares. The Appellant believes that this is a major over-estimate. The Appellant's coastal (i.e., non-estuarine) mussel beds are not intertidal. The Minister appears to have used erroneous maps to conclude that the relevant waters are intertidal.
64. The Appellant refers to paragraph 2.16 of Annex II to the MIAA, where it is stated that "*because of the rapidly changing nature of the mobile sandbanks at the mouth of the harbour, precise definition of tidal zones is problematic*" (emphasis added). At paragraph 2.18, the authors note that "*the configuration of sandbanks at the mouth of the harbour has, however, changed substantially since 2011 [when the satellite images were taken]*" and that "*upon ground-truthing undertaken by the GSI, the quality of the data in the inner part of the harbour was*

¹⁸ <https://www.wur.nl/en/Research-Results/Research-Institutes/marine-research/Research/Projects/PRODUS-Sustainable-shellfish-culture/Effects-on-nature.htm>

classified as unreliable or of limited reliability, due to high levels of turbidity at the time the image was captured. Despite these limitations, the GSI bathymetry data has been used for calculating levels of exposure of intertidal habitat at specified tidal levels" (emphasis added).

65. The MIAA, which the Decision reflects, has clearly acknowledged the deficiencies in the relevant bathymetry data. Furthermore, paragraph 2.17 refers to Wexford Harbour Chartlets prepared by Brian Coulter. When viewed, these chartlets clearly show that the Appellant has lost up to one metre of depth on the majority of the water in Wexford Harbour (where the vast majority of the Appellant's sites (and other sites) are based) due to the incorrect classification of the sites as intertidal.¹⁹
66. Furthermore, the AACS itself notes the discrepancies between mapping methods. See page 6, where it is stated that "*the extent of intertidal habitat mapped by the GSI method is estimated at approximately 1,400 ha, as opposed to 1,027 ha, calculated from the OSI maps*". The Geological Survey Ireland ("**GSI**") maps, which produce satellite-derived bathymetry data and used at page 46 of Annex II to the MIAA,²⁰ show the relevant intertidal area. These maps purport to show that the River Slaney is intertidal on spring tides between Wexford Quay and Ferrybank Quay. This is patently inaccurate. The Appellant knows, from its extensive local knowledge, that there are two to three metres of water in that area at a low spring tide.
67. Moreover, the Appellant understands that the GSI is itself concerned that its own data has been used. Please see enclosed an e-mail dated 15 October 2019 from the GSI to this effect at **Annex 7**, where the author states that the GSI "*deemed the results as not satisfactory for any application related to coastal mapping*". The Appellant fails to understand how the Minister could possibly have relied upon the GSI data, when the very organisation which produced the data has expressly acknowledged their unreliability.
68. As a mussel-farming enterprise working in the Wexford Harbour on a regular basis over several years, the Appellant knows that huge areas of its sites which are deemed intertidal are simply not intertidal. Given that the data are inaccurate in Wexford Quays, an area which should be very easy to assess, the Appellant does not understand why they were relied upon for the rest of the harbour. Given the potentially enormous consequences of the Decision its business, the Appellant finds it extremely concerning that the bathymetry analysis, upon which the Decision is largely based, is inaccurate and incorrect.
69. The Aquafact Report concludes the relevant environmental effects of mussel cultivation in Wexford Harbour are generally seen as positive.
70. In summary, the assessment of criterion (e) in the Decision and in the underlying documentation is based on flawed science and a flawed interpretation of science. To compound this error, the reasoning in the Decision cites only positive factors (see paragraphs (f), (h) and (k)). For example, paragraph (f) notes that "*shellfish have a positive role in the ecosystem function in terms of nutrient and phytoplankton mediation*". However, again, this

¹⁹ <https://wexfordharbour.info/iChart/index.html>

²⁰ <https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/AnnexIIWexfordSPAsAA270318.pdf>

conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence.

71. There is, therefore, no reason to reduce the Total Area based on criterion (e).

(f) the effect or likely effect on the environment generally in the vicinity of the place or water on or in which that aquaculture is or is proposed to be carried on—

(i) on the foreshore, or

(ii) at any other place, if there is or would be no discharge of trade or sewage effluent within the meaning of, and requiring a licence under section 4 of the Local Government (Water Pollution) Act, 1977

72. The Appellant's activities have no material adverse effects on the environment. No infrastructure is used in mussel farming. Mussels are not fed and nothing is introduced into the water. Simply put, mussels do not create pollution.

73. The Aquafact Report concludes that the ecological effects of mussel cultivation in Wexford Harbour are generally seen as positive.

74. At paragraph (j), the Decision cites the recommendations of the AACS and the MIAA as a basis for reducing the Total Area. However, neither of these documents points to significant effects on the local environment as a result of the Appellant's activities. Therefore, there is no reason for the Minister to reduce the Total Area on the basis of criterion (f).

(g) the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters.

75. The Appellant's activities have no material adverse effects on the man-made environment. Given the historical activity at the Appellant's sites, both before and after the first licences were issued, the Appellant is virtually certain that there are no archaeological elements on its sites.

76. The Appellant understands that an archaeological survey was or is being prepared for Wexford Harbour. As far as the Appellant is aware, BIM has put this work out to tender and surveys and studies have taken place. However, the Appellant is not aware of a final report, and understands that this report has not yet been completed.

77. That said, archaeological studies were carried out prior to grant of the original licence in 2003. In any event, the renewal applications should not require new archaeological surveys and, as far as the Appellant is aware, the applications for new sites are the only ones of relevance to the BIM-commissioned survey.

78. The Aquafact Report finds no predicted impacts on the man-made environment or its heritage value.

79. The Minister was therefore correct to state, at paragraph (e), that "*there are no effects anticipated on the man-made environment heritage of value in the area*". This conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence. There is, therefore, no reason to reduce the total licensed area based on criterion (g).

80. In addition to his failure to apply/interpret the criteria contained in Section 61 of the Act, the Minister has also breached fundamental principles of public/administrative²¹ law in several respects. As a Member of the Government, the Minister is obliged to follow fundamental public law principles.

(i) Failure to Give Adequate Reasons

81. The duty to provide reasons is a key principle of administrative law. In *Mallak v Minister for Justice, Equality and Law Reform*, the Supreme Court upheld this principle. Fennelly J, for the Court, found that this duty subsists, even where a public body has absolute discretion in its decision-making, and that "*the rule of law requires all decision-makers to act fairly and rationally, meaning that they must not make decisions without reasons*".²²

82. More particularly, public bodies such as the Minister are under a duty to give adequate reasons for their decisions. In the context of a planning decision, in the High Court case of *Mulholland v An Bord Pleanála*,²³ Kelly J outlined the requirement to give adequate reasons as follows:

"*The statement of considerations must therefore be sufficient to:-*

(1) give the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision.

(2) arm himself for such hearing or review.

(3) know if the decision maker has directed his mind adequately to the issues which it has considered or is obliged to consider.

(4) enable the courts to review the decision."²⁴

83. In a particularly pertinent case, *Deerland Construction v Aquaculture Licensing Appeals Board*,²⁵ Kelly J quoted the English case of *South Bucks County Council v Porter* where Brown LJ stated that the reasons for a decision "*must enable the reader to understand why the matter was decided as it was and what conclusions were reached on 'the principal important controversial issues', disclosing how any issue of law or fact was resolved*".²⁶ Kelly J went on to state that "*I do not accept that a pro forma recitation of the matters which are contained in ALAB's decision amounts to a compliance with its statutory obligation to state its reasons for such decision*". He concluded that an applicant should "*know from reading the decision the reasons for it*" (emphases added).²⁷

²¹ In this appeal, we use the terms "public law" and "administrative law" interchangeably.

²² *Mallak v Minister for Justice Equality and Law Reform*, [2012] IESC 59, paragraph 43.

²³ *Mulholland v An Bord Pleanála*, [2006] 1 IR 453, paragraphs 464 – 465.

²⁴ It is clear from the judgment of Hedigan J in *West Wood Club Limited v An Bord Pleanála and Dublin City Council* that, although that case related to a specific duty to give reasons under the Planning and Development Act 2000, "*Kelly J found that the existing jurisprudence regarding what is required for reasons to be considered as adequate at law continued to apply*". See *West Wood Club Limited v An Bord Pleanála and Dublin City Council*, [2010] IEHC 16, paragraph 54.

²⁵ *Deerland Construction v Aquaculture Licensing Appeals Board*, [2009] 1 IR 673.

²⁶ *South Bucks County Council v Porter*, [2004] WLR 1953 at paragraph 36.

²⁷ At page 44.

84. The Minister has several statutory powers under the Act and acts a "licensing authority" for the purposes of Section 7 of this legislation. Under Section 61 of the Act, the Minister is required, as stated above, to have regard to seven criteria in deciding a licence application. Each criterion entails the study and consideration of several factors, encompassing economic, ecological and other issues. Therefore, as far as the Appellant is aware, the Decision is, or at least should be, based on a consideration of a large body of scientific evidence. Therefore, the Appellant would have expected the Decision to shed at least some light on that consideration, to show why the Minister reached the Decision.
85. Instead, the Decision is no more than one page long. The operative part of the Decision, i.e., the portion purporting to show the reasons for the Decision, contains 12 terse statements. This is no more than a pro forma recitation of the factors considered in arriving at the Decision. The similarity between the wording of the Decision and the Associated Decisions (and indeed the wording of decisions addressed to other mussel farmers in the Wexford Harbour area) is striking. It is not possible for the Appellant to know, from reading the Decision, the reasons why it was reached, much less to understand the reasons for the Decision on the principal controversial issues (as required under the principle contained in *Deerland Construction*). In the language of the third limb of the extract from Kelly J's *Mulholland v An Bord Pleanála* judgment (see above), the Decision gives the Appellant no indication of whether the Minister has directed his mind adequately to the issues which he was obliged to consider.
86. Critically, the Minister's rationale, such as it is, simply answers the wrong question. The Decision sets out (albeit inadequate) reasons for granting a licence for a reduced area. However, it utterly fails to address the true question, which is why the Minister has not granted the licence for the Total Area, i.e., the area the subject of the original application. The Appellant expected to see an explanation of the rationale for reducing the area. However, any such explanation is missing from the Decision, save for an oblique reference to the "reconfigured site".
87. For example, reason (c) states that "[t]he proposed development should have a positive effect on the economy of the local area". As noted above, the Appellant considers that the "proposed development", as envisaged in the Decision (i.e., with a huge cut to its licensed area) will in fact have an adverse effect on the local economy. To compound the fact that the Minister has made a fundamental error of judgement of fact, there is no evidence in the Decision to support the conclusion that the "proposed development" as envisaged in the Decision will benefit the local economy.
88. Furthermore, the letter from the DAFM accompanying the licence fails to provide any information as to why the Minister reached the Decision.
89. In summary, the Minister has provided a wholly inadequate set of reasons for the Appellant to be able to understand why the Decision was reached.

(ii) Breach of the Right to be Heard

90. There is a broad duty on Irish public bodies, including the Minister, to give full information to parties such as the Appellant on a decision adverse to its (i.e., the Appellant's) interests which is in contemplation, and to give such party the opportunity to make the best possible case. Public bodies are required to inform persons such as the Appellant of defects in their cases, and to offer them the opportunity to address that difficulty. In *Mishra v Minister for Justice*, Kelly J held that fundamental fairness required that an applicant be given the opportunity to rebut a presumption of the Minister which was material to his decision to deny a citizenship application. More generally, *The State (McGeough) v Louth County Council* held that where a public authority adopts a principle or policy for deciding on an application, the applicant should be afforded "*the opportunity of conforming with or contesting such a principle or policy*".²⁸ Similarly, in a Privy Council case, *Mahon v Air New Zealand*, it was held that persons affected by decisions of public authorities (in that case, a tribunal) must have the opportunity to rebut evidence against them.²⁹
91. The Minister was thus required to provide the Appellant, in circumstances such as its application for a licence, with the opportunity to rebut evidence on which the Minister intended to rely in a decision. Such procedures are common in other areas of administrative law. To take one example, when the Competition and Consumer Protection Commission (formerly the Competition Authority) (the "**CCPC**") is minded to determine that a merger or acquisition³⁰ will result in a substantial lessening of competition (i.e., to block that merger or acquisition), its practice (although it is not legally required to do so) is to furnish the parties to the transaction with an assessment. The purpose of the assessment is to demonstrate the reasons why, in the CCPC's preliminary view, the merger or acquisition will have an anti-competitive effect and therefore not be in the public interest. Typically, the CCPC's assessment is based on econometric or other evidence which supports the preliminary conclusion. Furthermore, parties are given the opportunity to request an oral hearing, at which they are given the full opportunity to rebut the evidence on which the CCPC proposes to rely.³¹
92. At no stage prior to the Decision being published in the *Wexford People*, either during the public consultation process, or after stating its observations, was the Appellant provided with any indication of the Minister's preliminary or ultimate conclusion.
93. The Appellant's submission during the consultation process was by way of response to submissions made by various bodies in October 2018, as described above. The Appellant had no consultation with the Minister or the DAFM at any stage. In particular, the Appellant was not consulted on the proposed cuts or on where new licensed areas should be located. No reason was given as to why the Minister/DAFM decided the area (i.e., the shape) and location of the new sites.
94. The first time the Appellant was made aware of the Decision was on 17 September 2019, when the relevant notice appeared in the *Wexford People*.

²⁸ *State (McGeough) v Louth County Council* [1973] 107 LITR 13 at 28.

²⁹ *Mahon v Air New Zealand*, [1984] A.C. 808.

³⁰ As defined in Section 16 of the Competition Act 2002 (as amended).

³¹ See the CCPC's *Mergers and Acquisitions Procedures*, available at <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/04/CCPC-Mergers-Procedures-for-the-review-of-mergers-and-acquisitions.pdf>

95. The Appellant was very surprised to learn of the Minister's findings, and by the manner in which it did so. As noted above, the Decision is based on flawed reasons. However, to add insult to injury, the manner by which the Minister informed the Appellant and the procedures followed during the process, are in clear breach of the Minister's obligations under public law to provide the Appellant with the opportunity to respond to the Minister's preliminary conclusions.

(iii) Failure to Exercise Proportionality/Abuse of Discretionary Powers

96. In exercising its discretionary powers, a public body must abide by the principle of proportionality.³² It is also clear that a public body must not abuse those powers. It is clear from the *Wednesbury* judgment³³ that one of the ways in which a public authority may abuse its discretionary power is by taking irrelevant factors into account and/or not taking relevant factors into account.

97. The NPWS appears to interpret the EC Guidelines as recommending that, at most, 25% of an SAC should be allocated to activities which may be damaging to the relevant habitat. As stated above, this mis-interprets the EC Guidelines. All the EC Guidelines say is that if more than 25% of an SAC is considered unfavourable, then the entire area has an 'unfavourable' status (see above regarding Section 61(e) of the Act). However, even if the NPWS's interpretation was correct (which the Appellant strongly disputes), in order for the EC Guidelines to apply in the first place, it must be demonstrated that the activities are, in fact, damaging. As noted above, Lindahl and Kollberg, amongst others, have demonstrated that mussel farming activities are in fact beneficial to the marine environment. These benefits include the combatting of eutrophication. (See section 4 of the Aquafact Report).

98. Going one step further, again assuming that the NPWS's interpretation of the EC Guidelines is correct, even if mussel farming could be said to be damaging to the local habitat/marine environment (which the Appellant strongly disputes), reducing the licensed area to 15% of the SAC is draconian and wholly disproportionate. It is not clear to the Appellant why such a large reduction is merited. Indeed, this 'cut' appears somewhat arbitrary. The Appellant acknowledges that the NPWS's view is not binding on the Minister. Nonetheless, the Minister should have given due consideration to the merits of (a) the NPWS's interpretation of the EC Guidelines and (b) the NPWS's view that it is appropriate to reduce the licensed area from 25% to 15%. This is particularly true in circumstances where the evidence for the purported net environmental damage (i.e., damage from the mussel farming to the local habitat) is, at best, suspect and where mussel farming has been conducted at Wexford Harbour for several generations while producing environmental and other benefits. Instead, the Minister appears to have (a) blindly accepted the NPWS's interpretation of the EC Guidelines and (b) given a disproportionate weight to the NPWS's view, taking an upper limit for aquaculture of 15% of an SAC 'as read', notwithstanding the substantial evidence that a figure of 25% should be more than acceptable (and that the activity is not environmentally damaging in the first place).

99. The NPWS's view that the figure of 25% should be reduced to 15% is without scientific basis and appears to ignore the positive influence that mussel cultivation has had in the Site and in the wider Wexford Harbour over

³² *Barry v Sentencing Review Group and the Minister for Justice, Equality and Law Reform*, [2001] 4 IR 67.

³³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

decades. This reduction will likely bring about a drastic change, the impacts of which are entirely unknown. There is no suggestion that the proposed reduction could be said beyond reasonable scientific doubt to avoid adverse significant impacts. On the contrary, reducing the Site could not be said beyond reasonable scientific doubt not to adversely affect the integrity of the Site/SAC. Mussel cultivation in the area is long-established, and has been shown to have positive environmental impacts, in contrast with other forms of aquaculture such as fish farming. The European Commission's comments in this regard apply to aquaculture in general and the positive impacts of mussel cultivation necessitate a far more positive appreciation of its role in the biological functioning and maintaining and enhancement of the conservation objectives and interests in an SAC.

100. The Minister, based on the NPWS's view, proposes to remove large areas of mussel cultivation. The effects of this proposed removal have not been scientifically assessed. In circumstances where the mussel cultivation which subsisted at the Site for centuries led to the designation of the Wexford Harbour area, including the Site, as an SAC/Natura 2000 site and has continued to support this status since, the removal of mussel cultivation without scientific assessment should not be permitted.

101. The following extract from the Appellants' October 2018 response to consultation is highly relevant in this regard:

"In fact without our business and other mussel businesses being present in the harbour we feel that the environment and its marine life would be in serious jeopardy and we don't say that lightly given the increasing scientific evidence regarding the positive role shellfish play in the ecosystem. It's a costly process to remove nitrogen and phosphorus from the environment but it is even more costly to remediate an ecosystem that has collapsed due to severe eutrophic anoxia. The Department of Marine have a role not only in supporting aquaculture but in avoiding the serious ecosystem consequences that could occur if the IFI reasoning was to win out".

102. By analogy, at the Burren SAC, the grazing activity carried out by domestic animals has contributed to and continues to contribute to that area's conservation objectives by limiting the spread and cover of species that would otherwise be likely to deprive the listed habitats and species of light and space as well as nutrients. The drastic reduction of mussel cultivation and the periodic removal of excess nitrogen by the harvesting of same should not be enforced or compelled as to do so would be to risk a fundamental alteration of the balance within the SAC.

(iv) Breach of Appellant's Legitimate Expectations

103. The doctrine of legitimate expectations is a fundamental feature of Irish public/administrative law. In essence, the doctrine requires a public body such as the Minister honour a commitment as to the procedure(s) it will follow. The aim of the doctrine is partly to ensure legal certainty with regard to a public body's performance of its functions, and to ensure good administration³⁴. In *Glencar Exploration plc v Mayo County Council*,³⁵ Fennelly J in the Supreme Court stated the three principles of legitimate expectation. Firstly, a public authority must have

³⁴ See, for example, *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 which endorsed by the High Court in *Fakih v Minister for Justice* [1993] 2 IR 406.

³⁵ *Glencar Explorations plc v Mayo County Council*, [1992] 1 IR 84 at 162 – 163.

made a promise or representation, express or implied. Secondly, that representation must be addressed to identifiable group of persons, such that it forms part of the relationship between the authority and those persons. Thirdly, that representation must create a reasonable (or legitimate) expectation, to the extent that it would be unjust for the authority to resile from it.

104. The same approach was adopted by the High Court in *Lett & Co v Wexford Borough Council*, a case which, coincidentally, related to a compensation scheme for mussel fishermen in Wexford Harbour who suffered financial losses caused by the operation of a waste water facility. In that case, it was decided that the representation by the public body must relate to its exercise of a statutory power.³⁶
105. As documented above, the Appellant applied for its licence to be renewed in 2012. For six years, the Appellant had received no communication from the Minister or his officials regarding the licence application suggesting that any adverse finding was being considered. Relations with the Minister were, at all times, positive. There was thus an implied representation by the Minister that the Appellant would, at the very least, be consulted upon, and given the right to make submissions on, any proposed decision by the Minister. The Minister failed to process the Appellant's licence application expeditiously. The Appellant thus continued to farm the relevant sites for years, with no indication that an adverse decision was being contemplated.
106. The Appellant, together with some of its competitors who are also affected by similar decisions of the Minister (and have lodged separate appeals), comprise a clearly identifiable group of persons.
107. Finally, the Minister's implied representation gave no indication that there would be any reduction in the licensed area. At the very least, the Minister never gave any indication that a significant reduction, which poses a serious threat to the viability of the Appellant's business (and indeed of the other appellants) and their employees, was contemplated. Therefore, the Appellant (and the other appellants) had formed a legitimate expectation that their licences would be renewed in full.
108. It is also clear that the Minister's implied representation relates to a statutory function, namely the Minister's power to grant licences under Section 7 of the Act, in contrast with the facts of *Lett & Co* cited above.

Non-Exhaustive Nature of Claims

109. In addition to the factors outlined above regarding the Act and fundamental principles of public/administrative law, the Appellant reserves the right to make further submissions at an oral hearing and/or otherwise based on constitutional law, under the EU Charter of Fundamental Rights and/or under the European Convention on Human Rights.

³⁶ In that case, the purported payment of compensation was not under a statutory power. Therefore, it was held that no legitimate expectation had been formed.

Conclusion

110. In conclusion, the Decision is vitiated by errors of law both in the interpretation of the various criteria established by Section 61 of the Act and in the failure to follow key principles of administrative law.
111. Therefore, the Appellant requests ALAB to set aside the Decision and grant it the right to continue cultivating mussels at the Site.

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