

AQUACULTURE LICENCES APPEALS BOARD

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

Appeal Reference Number: **AP44/2019**

DETERMINATION

WHEREAS an appeal having been made to the Aquaculture Licences Appeals Board ("**the Board**") pursuant to Section 40 of the Fisheries (Amendment) Act, 1997 (as amended and substituted) ("**the Act**") by Loch Garman Harbour Mussels Ltd. ("**the Appellant**" and "**the Applicant**") against the decision of the Minister for Agriculture, Food and the Marine ("**the Minister**") to **GRANT** (with variations) an Aquaculture Licence to Loch Garman Harbour Mussels Ltd., on site ref: T03/085A for the bottom cultivation of mussels on a site on the foreshore at Wexford Harbour, Co. Wexford ("**the Site**").

AND WHEREAS the Board in considering the appeal took account of the appeal, the file provided to it by the Minister, the reports of the Board's Technical Advisor and the matters set out at Section 61 of the Act, including the following:

- (a) the suitability of the place or waters at or in which the aquaculture is or is proposed to be carried on for the activity in question,
- (b) other beneficial uses, existing or potential, of the place or waters concerned,
- (c) the 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 on the economy of the area, in which the aquaculture is or is proposed to be carried on,
- (e) the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna, and
- (f) the effect or likely effect on the environment generally in the vicinity of the place or water on or in which that aquaculture is or is proposed to be carried on-
 - (i) on the foreshore, or

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

The Board considered this appeal at a series of board meetings from when the appeal was received to the determination date, including meetings on the following dates: 14 November 2019, 10 December 2019, 31 January 2020, 26 February 2020, 22 April 2020, 06 August 2020, 12 December 2020, 29 April 2021, 22 July 2021, 21 September 2021, 25 November 2021, 13 January 2022, 10 February 2022, 12 May 2022, 14 July 2022, 23 November 2022, 15 December 2022, 26 January 2023, 02 March 2023, 06 April 2023, 25 May 2023, 23 June 2023, 28 July 2023, 28 September 2023, 27 October 2023, 14 December 2023, 26 January 2024, 01 March 2024, 28 March 2024, 11 April 2024, 01 May 2024, 30 May 2024, 01 July 2024, 25 July 2024, 06 September 2024, 26 September 2024, 13 November 2024, 12 December 2024, 14 January 2025, 25 February 2025 and 21 March 2025.

The Board in considering the appeal took account of the appeal, the file provided to it by the Minister, the reports of its Technical Advisors and the submissions made during the course of the appeal including the following documents:

1. The August 2016 Department of Agriculture, Food and the Marine (DAFM) '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 Slobs SPA (site code 004076) and Raven SPA (site code 004019)' and Annex I & II to this report (the Marine Institutes 'Report supporting Appropriate Assessment of Aquaculture in Slaney River Valley SAC (Site Code: 000781) and Raven Point Nature Reserve SAC (Site Code: 000710)' and the Atkins 'Marine Institute Bird Studies Wexford Harbour, the Raven and Rosslare Bay: Appropriate Assessment of Aquaculture'),
2. The DAFM 'Updated Appropriate Assessment Conclusion Statement' (report undated),
3. The KRC Ecological Technical Advisor's Report to ALAB dated 01 June 2023,
4. The KRC Supplementary Report dated the 05 December 2023,
5. The KRC Gap Analysis Report (revision) dated 26 September 2024,
6. The KRC correspondence dated 30 January 2025 confirming that the conclusions of the Gap Analysis Report are still applicable to the assessment of the actual and proposed activities the subject of the remaining live appeals before ALAB,
7. The ALAB Technical Advisor's Interim Report dated 21 March 2024,

8. The submissions received in response to the Section 46 Notice issued on the 31 January 2024,
9. The ALAB Technical Advisor's Screening for AA Report for site T03/085A dated 14 February 2025 and
10. The ALAB Technical Advisor's Final Report dated 19 February 2025.

GROUND OF APPEAL

The grounds of the appeal are summarised as follows:

1. The Minister was mistaken in his assessment under Section 61 (a) of the Fisheries Act (1997) as the waters are suitable for mussel cultivation.
2. That the Minister was mistaken in his assessment under Section 61 (c) of the Fisheries Act (1997), as the granting of the entire licence areas as applied for would not affect the integrity of local Natura 2000 sites and that reducing the area granted for mussel cultivation may actually have negative environmental impacts.
3. The Minister was mistaken in his assessment under Section 61 (d) of the Fisheries Act (1997) that the reduced developments would benefit the local economy as it will negatively affect the applicant's business, as well as other local businesses.
4. The Minister was mistaken in his assessment under Section 61 (e) of the Fisheries Act (1997) as mussels have a positive ecological impact on the relevant ecosystem, improve biodiversity and act as a control mechanism for eutrophication in the Harbour, as detailed in the Aquafact report (2019) submitted with the appeal.
5. The appellant disputes the accuracy of taking 15% as the allowable rate of disturbance for a habitat within an SAC, they also state that the rate of disturbance is not continuous.
6. That the EU guidance specifies that a level of more than 25% of an SAC has to be designated as unfavourable to the conservation objectives before the Conservation Status is deemed "Unfavourable – Bad" and that the licensing of aquaculture in an area does not necessarily mean the status of the habitat becomes unfavourable. No other EU state has interpreted the regulations in this manner according to the appellant.
7. Mussels play a positive role in the ecosystem of Wexford Harbour, are historically a part of that ecosystem and help act against eutrophication in Wexford Harbour.
8. The appellant submits that the NPWS carried out a three-day study on white fronted geese and disturbance by mussel boats but never produced a report. The appellant claims BIM carried out a similar survey at the same time looking at the same species and found a positive impact on the birds due to the presence of the mussel boats.

9. That the Minister has incorrectly assessed the intertidal extent in Wexford Harbour and that the bathymetric data used in the Ministers assessment was incorrect or inaccurate. They state the figure used of 1,400 hectares of intertidal area is an over-estimate.
10. The Minister was mistaken in his assessment under Section 61 (f) of the Fisheries Act (1997) that there was a reason to reduce the total area due to potential impacts on the environment.
11. The Minister made errors under some fundamental principles of Public/Administrative law when assessing these licences by:
 - Failing to give adequate reasons for his decision, specifically why a reduction in size was granted rather than the total area as applied for.
 - Breaching the right of the applicant to be heard by not allowing them an opportunity to rebut evidence against them and respond to the Minister’s preliminary conclusions, in this case, that the size of the sites applied for should be reduced.
 - Failing to exercise proportionality/abusing discretionary powers by incorrect interpretation of the EC Guidelines of a 25% allowance of the habitat area of an SAC for activities that may be damaging to the habitat and that a scientific assessment on the habitat and ecosystem due to the removal of the mussels should have been carried out.
 - Breaching the applicant’s legitimate expectations that the Minister honour a commitment to the procedures they will follow. The applicant claims that as they had no indication from the Minister of an adverse result and relations with the Minister were at all times positive that there was an implied representation by the Minister that the applicant would be consulted on and given the right to make submissions on any proposed decision by the Minister.

ENVIRONMENTAL IMPACT ASSESSMENT

An Environmental Impact Assessment (EIA) must be carried out by the Board in respect of an appeal of:

- (a) aquaculture of a class specified in Regulations 5(1)(a), (b), (c) or (d) of the Aquaculture (Licence Application) Regulations 1998 as amended,
- (b) intensive fish farming of a class specified in Annex II of the EIA Directive 2011/92/EU as amended by Directive 2014/52/EU which the Board determines would be likely to have significant effects on the environment.

The proposed aquaculture the subject of the appeal is not of a class specified in Regulations 5(1)(a), (b), (c) or (d) of the Application Regulations.

In addition, it is not “intensive fish farming” for the purposes of Annex II of the EIA Directive.

As the aquaculture activity, the subject of the appeal before the Board, is not of a class of project specified in the 1998 Regulations and/or Annex II of the EIA Directive, there is no requirement to carry out a screening for EIA or an EIA and the Board agreed with the conclusions of its Technical Advisor as set out in the Final Report dated 19 February 2025.

SCREENING FOR APPROPRIATE ASSESSMENT

The Board considered the aquaculture proposed in the Application for an Aquaculture Licence under the requirements of the European Communities (Birds and Natural Habitats) Regulations 2011 and the Habitats and Birds Directives (2009/147/EC and 92/43/EEC)(“the Birds and Habitats Directives”).

Loch Garman Harbour Mussels Ltd. in its response, dated 1 May 2024, to ALAB’s Section 46 request, dated 31 January 2024, submitted that a thorough screening exercise is required to determine that an Appropriate Assessment is actually required for the proposed aquaculture.

The Board’s Technical Advisors undertook a screening for Appropriate Assessment for the Aquaculture Licence Site T03/085A, the results of which are presented in the T03/085A Screening for Appropriate Assessment Report dated the 14 February 2025.

The Board’s Technical Advisor also completed the Wexford Harbour Appeals Technical Advisor’s Final Report dated the 19 February 2025.

The Board agreed with the findings of both the T03/085A Screening for Appropriate Assessment Report and the Wexford Harbour Appeals Technical Advisor’s Final Report that an Appropriate Assessment is required as it cannot be excluded, on the basis of objective scientific information, that the proposed aquaculture, individually or in combination with other plans or projects, will have a significant effect on the following European sites: Slaney River Valley SAC, Wexford Harbour and Slobs SPA, Seas off Wexford SPA, Raven SPA, Lady’s Island Lake SPA, Saltee Islands SPA, Keeragh Islands SPA and the Mid-Waterford Coast SPA.

Mussel culture impact on water quality

In particular, having regard to Sections 8 of the Wexford Harbour Appeals Technical Advisor’s Final Report dated the 19 February 2025 and Steps 1 and 3 of the T03/085A Screening for Appropriate Assessment Report dated the 14 February 2025 the Board agrees with and adopts the Technical Advisor’s assessment and conclusions that any potential reduction in water column nutrient levels in Wexford Harbour associated with the bottom cultivation of mussels cannot be considered grounds to negate the obligations to carry out an Appropriate Assessment as required

under Article 6(3) of the Habitats Directive 92/43/EEC because the potential impacts of the proposed aquaculture on European Sites are not materially affected by water quality issues.

The potential impacts in relation to Appropriate Assessment are physical disturbance and habitat loss, increased suspended sediment concentrations and visual impacts and above water noise disturbance i.e. the potential impacts on European Sites which trigger the requirement for an Appropriate Assessment arise regardless of any beneficial impact that mussel culture may have on water quality.

APPROPRIATE ASSESSMENT

The Board noted the August 2016 Department of Agriculture, Food and the Marine (DAFM) '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 Slobs SPA (site code 004076) and Raven SPA (site code 004019)', Annex I and II to this report (the Marine Institutes 'Report supporting Appropriate Assessment of Aquaculture in Slaney River Valley SAC (Site Code: 000781) and Raven Point Nature Reserve SAC (Site Code: 000710)' and the Atkins 'Marine Institute Bird Studies Wexford Harbour, the Raven and Rosslare Bay: Appropriate Assessment of Aquaculture') and the DAFM 'Updated Appropriate Assessment Conclusion Statement' (report undated).

The Board noted the KRC Ecological Technical Advisor's Report to ALAB dated 01 June 2023, the KRC Supplementary Report dated the 05 December 2023, the KRC Gap Analysis Report (revision) dated 26 September 2024 and the KRC correspondence dated 30 January 2025 confirming that the conclusions of the Gap Analysis Report are still applicable to the assessment of the actual and proposed activities the subject of the remaining live appeals before ALAB. The Board agrees with the assessments of its Technical Advisor and KRC and, in particular, that based on the available information and having regard to the identified data gaps it is not possible to assess the potential impacts of the proposed aquaculture activities to meet the requirements of an appropriate assessment.

The Board considered that the Appropriate Assessment as carried out by the Marine Institute and Atkins on behalf of DAFM for Aquaculture Activities in Wexford Harbour in relation to Special Protected Areas ("SPA"), and to Special Areas of Conservation ("SAC") was incomplete and does not rule out beyond reasonable scientific doubt the potential impact of the proposed aquaculture either individually or in combination with other plans or projects on each of the Natura 2000 sites likely to be affected.

Having regard to all of the foregoing, based on the available information and having regard to the identified data gaps, the Board finds that it cannot be established beyond a reasonable scientific doubt that the proposed aquaculture at T03/085A is not likely to have significant effects, either individually, or in combination with other plans or projects, on the conservation objectives of the Slaney River Valley SAC, Wexford Harbour and Slobs SPA, Seas off Wexford SPA, Raven SPA, Lady's Island Lake SPA, Saltee Islands SPA, Keeragh Islands SPA and the Mid-Waterford Coast SPA and as such, the proposed aquaculture could adversely affect the integrity of these European Sites either individually or in combination with other plans or projects.

Natura Impact Statement (NIS)

The Board considered whether to request an NIS from the licence Applicant with a view to addressing the identified data gaps and further to the submissions made by Loch Garman Harbour Mussels Ltd. in its response, dated 1 May 2024, to ALAB's Section 46 request.

Having regard to Section 11 of the Wexford Harbour Appeals Technical Advisor's Final Report dated the 19 February 2025 and given the time and state agency input required to produce an NIS, the Board determined that it is not appropriate to request an NIS from the Applicant at this time as this would involve a foreseeable delay of up to 3 to 4 years and given the Board's duty under Section 56 of the Fisheries (Amendment) Act 1997 to ensure that appeals are dealt with and determined expeditiously and that all steps are taken to avoid unnecessary delays.

The Board is of the opinion that an NIS addressing the identified data gaps is necessary to enable it to complete an Appropriate Assessment, however, such an NIS is not necessary to enable the Board to determine this appeal on the basis of the information available. Therefore, the Board considered that a request under Section 47 of the Act or Regulation 42 of the European Communities (Bird and Natural Habitats) Regulations 2011 for such an NIS was not necessary to enable the Board to determine the appeal. Further, notwithstanding the licence Applicant's indication that it would be prepared to conduct further surveys and necessary information gathering further to a Section 47 request, the Board still had concerns that it would not be feasible to expect the licence Applicant to provide such an NIS as significant resources and the involvement of government bodies, such as the NPWS and experts in the design and implementation of the work programme would appear necessary given the nature and extent of the programme of work needed to address these deficiencies. In any event, the Board considered postponing the determination of this appeal for a period of up to 3 to 4 years would be contrary to the Board's statutory objective to ensure that appeals are determined in accordance with Section 56 of the Act.

The Board recognises that the appeal was lodged in 2019. However, the time taken in the processing of the appeal has involved an iterative step by step process addressing complex issues which have warranted careful and detailed consideration, including the engagement of technical experts to prepare reports to advise on various matters as well as affording parties to the appeal, observers and statutory consultees the opportunity to make submissions at various stages. These submissions then had to be reviewed and considered. The consideration of the appeal necessitated several extensions of the period within which they could be determined for the as set out in the extension letters which issued in the course of the appeal on 10 February 2020, 10 November 2020, 6 May 2021, 25 May 2022, 20 December 2022, 29 June 2024 and 13 March 2024, 27 September 2024 and 18 December 2024.

Oral hearing

The Board further considered whether to convene an oral hearing pursuant to Section 49 of the Fisheries (Amendment) Act 1997 and decided not to exercise its discretion to do so as the identified data gaps could not be addressed by way of an oral hearing.

Procedural Matters

The Board also considered the following procedural issues raised in the submissions made by Loch Garman Harbour Mussels Ltd. in its response, dated 1 May 2024, to the Section 46 Request dated 31 January 2024.

With respect to the concerns raised regarding prejudgment, the purpose of the Section 46 request (and previous Section 46 Request dated 29 June 2023) was to ensure that the parties to the appeal were:

- (i) informed of the Board's concerns with respect to the deficiencies in the scientific data for Wexford Harbour and the timeframe required to collect and analyse that data and its provisional decision on the appeal; and
- (ii) given two opportunities, consistent with the requirements of natural and constitutional justice and fair procedures, to make submissions before making a final determination on the appeal.

With respect to the Board's role, as a public authority it is required to carry out an appropriate assessment. However, it is not the Board's function to carry out surveys and studies to obtain the data and information necessary to enable that assessment to be lawfully carried out. For the reasons set out above, it is not considered appropriate to request the Applicant to prepare an

NIS in the circumstances of this appeal. The submission that there is an obligation on the Board to ensure the appropriate assessment is completed irrespective of the costs and time associated with same is not accepted.

DETERMINATION

For the avoidance of doubt, the Board agreed with the findings of the Wexford Harbour Appeals Technical Advisor's Final Report dated 19 February 2025.

The Board has determined the appeal on the grounds that:

The Site is not suitable for the proposed aquaculture in terms of Statutory status, potential Ecological impacts, Environmental effects, Effect on man-made heritage and under Appropriate Assessment, for the reasons set out in the Wexford Harbour Appeals Technical Advisor's Final Report dated the 19 February 2025.

Primarily this site is not suitable for the proposed aquaculture given the nature and extent of the information required to enable an AA to be carried out under the requirements of the Birds and Habitats Directive and that based on the information currently available and in the absence of an NIS addressing the identified data gaps, it cannot be established beyond a reasonable scientific doubt that the proposed aquaculture, either individually or in combination with other plans and projects, would not adversely affect the integrity of the relevant European Sites.

Having considered all the foregoing, the Board determined at its meeting of 21 March 2025 pursuant to Section 40(4)(b) of the Act, to **REFUSE** an Aquaculture Licence to the applicant at Site T03/085A.



ALAB

An Bord Achomhairc Um
Cheadúnais Dobharshaothraithe
Aquaculture Licences Appeals Board


Dated this *21st* day of *March*

2025

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



Authorised Signatory



Authorised Signatory

