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

Submission to the Minister

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

To: 1) Dr Beamish, Assistant Secretary

2) Secretary General

3) Runaí Aire

Date: 21st December 2016

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1. Purpose of the Submission

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

(a) That the Minister determine that Condition 2(d) of the applicable aquaculture licence has been breached by the operator.

(b) That the Minister treat as discontinued the entitlement of Silver King Seafoods Ltd. (Subsidiary Company of Marine Harvest Ireland) to continue aquaculture operations under the provisions of Section 19(A)4 of the 1997 Fisheries (Amendment) Act.

2. Background

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

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

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

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

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

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

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

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

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

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

4. Meeting with the Company 14th March 2016

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

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

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

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

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

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

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

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

5. Department's Letter of 23rd June 2016

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

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

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

<u>Company Letter of 15th July 2016</u>

- ***"MHI asserts that the licence term attaching to T5/233 limiting the number of 'smolts' is anachronistic, legally and technically meaningless and its application is contrary to modern good salmon farming practice.***

- ***The irrefutable evidence arising from the benthic impact monitoring programme is that the stocking levels at this site are and have been comfortably within the site's 'biological assimilative capacity'. Thus it is a matter of fact that no significant environmental damage has been visited on the state's foreshore by MHI's actions. Surely this demonstrates clearly and in a quantifiable fashion that the company has been acting within the spirit of the regulatory system and thereby securing the public interest.***

- ***The department, armed with this data, can show any interested parties that it is effectively regulating the activity at the site and that it is ensuring the highest levels of environmental protection."***

Company's Letter of 19th July 2016

- *"It is the responsibility of the state and the department to take the necessary steps to keep the regulatory regime updated so that companies such as ourselves can carry out our business without being forced into impossible situations whereby we simply cannot operate without incurring the accusation of being in breach of certain inimical terms and conditions contained within the same aquaculture licence."*

- *"Given the economic importance of our activities to the localities in which we operate and the clearly demonstrable fact that we are not having any significant adverse environmental impact . . . "*

- *". . . there is a heavy burden of liability on the Minister and the department to maintain, and if necessary from time to time overhaul the regulatory regime so that the licence holders can operate without being forced into impossible situations never envisaged by the original legislation."*

- *". . . the delay in tackling this problem is reminiscent of the delays which led to the state being prosecuted by the EU in 1997 for failure to overhaul the licensing system to bring it into compliance with Natura 2000."*

7. Consideration of the Representations made by the Company.

Company Letter of 15th July 2016

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

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

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

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

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

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

Company Letter of 19th July 2016

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

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

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

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

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

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

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

Fish Movement Orders issued *(source Marine Institute)*

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

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

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

8. Engineering Report 8th June 2016

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

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

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

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

The following are the available options identified by the Division:

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

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

10. Do Nothing

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

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

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

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

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

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

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

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

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

A "do nothing" option cannot therefore be recommended.

11. Amendment of the Aquaculture Licence

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

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

Condition No 3.

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

Legislation

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

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

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

ii.

iii.

iv.

Licence Condition regarding amendment

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

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

The advice goes on to state however that

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

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

Conclusion

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

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

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

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

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

1. The excessive nature of the smolt input (105% excess).

2. The fact that the breach of the licence condition was subsequent to the Minister's refusal to facilitate an increase in smolt input in respect of the site.

3. The fact that the Company's operations at Inishfarnard are governed by Section 19(A)4 of the legislation means that a breach of the conditions pertaining to same has implications for the State in the context of the acceptance of the EU Commission of Section 19(A)4 as part of the Appropriate Assessment "Roadmap".

4. The commercial gain to the Company resulting from the unauthorised increase in smolt input was very significant and a failure by the Department to implement the legislation will undoubtedly act as an incentive to the Company and other operators to flout the law.

13. Recommendation

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

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

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

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

Submitted please for approval.

John Quinlan
Principal Officer
Aquaculture and Foreshore Management Division