

WILLIAM FRY

Our Ref 026536.0001.CKL/ESOC

13 January 2020

By email (info@alab.ie)

The Aquaculture Licences Appeals Board (ALAB)
Kilminchy Court
Dublin Road
Portlaoise
Co Laois
R32 DTW5

Submission pursuant to Section 44(2) of the Fisheries (Amendment) Act 1997 (the "Act")

Our Clients: Loch Garman Harbour Mussels Limited, TL Mussels Limited, Crescent Seafood Limited, WD Shellfish Limited, River Bank Mussels Limited and Fjord Fresh Mussels Limited

Dear Sirs

We refer to your letter of 12 December 2019 served in accordance with Section 44(1) of the Act and enclosing a notice of appeal of Birdwatch Ireland dated 8 October 2019 in relation to the decision of the Minister for Agriculture, Food and the Marine to grant, with variations, a number of aquaculture and foreshore licences to our clients.

By way of response, we enclose a submission on behalf of our clients, under Section 44(2) of the Act.

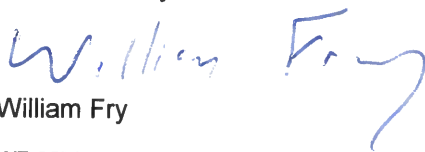
Our clients expressly reserve the right to make any and all further submissions to ALAB it deems necessary or appropriate, including but not limited to, any submissions relating to information obtained from responses received to any relevant FOI/AIE requests and/or submissions under Section 46 of the Act.

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Yours faithfully



William Fry

WF-25795876-1

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SUBMISSION TO THE AQUACULTURE LICENCES APPEALS BOARD ("ALAB") UNDER SECTION 44(2) OF THE FISHERIES (AMENDMENT) ACT 1997 (the "ACT")

13 JANUARY 2020

On behalf of the following companies collectively referred to as the Appellants:

TL Mussels Limited Clonard Business Park Whitemill Industrial Estate Wexford	Loch Garman Harbour Mussels Limited 84 Northumberland Road Ballsbridge Dublin 4	Crescent Seafood Limited Mytilus Ballaghblake Curracloe Wexford
WD Shellfish Limited Cornmarket Wexford	River Bank Mussels Limited Cornmarket Wexford	Fjord Fresh Mussels Limited Cornmarket Wexford

Site References:

**T03/030/1
T03/30A2, B, C, E & F
T03/046A, B & C
T03/047A, B & C
T03/049A, B, C, C1 & D
T03/52A & B
T03/55E
T03/077A
T03/083A
T03/085A
T03/099A**

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Introduction

1. This is a submission on behalf of the Appellants regarding a Notice of Appeal dated 8 October 2019 to ALAB by Oonagh Duggan, Assistant Head of Policy and Advocacy on behalf of BirdWatch Ireland (the "**BWI Appeal**"), against the decision by the Minister for Agriculture, Food and the Marine (the "**Minister**") to grant (with variations) various Aquaculture and Foreshore Licences for the bottom cultivation of mussels at various sites (the "**Decision**") namely, T03/030/1; T03/30A2, B, C, E & F; T03/046A, B & C; T03/047A, B & C; T03/049A, B, C, C1 & D; T03/52A & B; T03/55E; T03/077A; T03/083A; T03/085A; and T03/099A (collectively the "**Sites**") in Wexford Harbour, Co. Wexford. For reasons that are unclear, the BWI Appeal has been updated on the ALAB website with the result that it now appears to be limited to one site only, namely, T03/30E. For the avoidance of doubt, this submission is in respect of each and all of the Sites.
2. On 16 October 2019, the Appellants submitted various separate but related appeals (the "**Appeals**") to ALAB in respect of the Decision. The Appellants believe that the Decision is vitiated by a number of serious flaws, including, both errors on the part of the Minister in his assessment of the relevant criteria under Section 61 of the Act and, breaches of fundamental principles of public/administrative law (in how it was reached). The Appeals were 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 Appeals, receipt of which was confirmed by ALAB under cover of various letters dated 18 December 2019, are currently under consideration by ALAB.
3. This submission should be read in conjunction with the Appeals.
4. As outlined in further detail below, the Appellants believe that the BWI Appeal contains serious flaws including a failure to provide any form of relevant statutory analysis. Moreover, the Appellants consider that the BWI Appeal is highly subjective insofar as it fails to substantiate its position by reference to adequate objective or scientific sources.
5. In the interests of natural justice (and/or otherwise), the Appellants reserve the right to make any and all further individual or collective submissions to ALAB they deem necessary or appropriate, including any observations based on any further information or scientific studies, including responses received to any relevant Freedom of Information/Access to Information on the Environment requests.

The Appellants

6. The Appellants comprise six separate corporate entities involved in the bottom cultivation of mussels at the Site, pursuant to various individual licences. As set out in the Appeals, mussels have been farmed at the Sites for many years prior to the introduction of the relevant licensing regime and cannot be considered to be a relatively new activity.
7. Between the six entities, they collectively employ approximately 15 staff in the Wexford Harbour area.

The BWI Appeal

8. The BWI Appeal challenges the grant of aquaculture licences in the Wexford Harbour area. The basis for the appeal is that Annex II¹ Marine Institute Bird Studies: Wexford Harbour, the Raven and Rosslare Bay Appropriate Assessment of Aquaculture dated 28 July 2016 produced by Atkins Ecology (the "**Appropriate Assessment**") is both flawed and in breach of EU law given that this document does not exclude potential significant effects on the relevant conservation sites. Using the relevant Appeal Form, the BWI Appeal runs to around four and a quarter pages with no annexes/appendices.
9. The grounds of appeal section on pages 2-5 of the Appeal Form recalls the conservation objectives and interests for the relevant area as identified by the National Parks and Wildlife Service. In particular, the BWI Appeal identifies certain species of bird both with unfavourable conservation status and, also, with intermediate (unfavourable) status. The BWI Appeal refers to the conclusions of the Appropriate Assessment regarding the potential effect of mussel farming on one bird species and, also, notes that there is insufficient evidence to exclude significant impact on various other species. The BWI Appeal refers to the conclusion of the Appropriate Assessment noting that six different categories of research/surveys and studies are required.
10. The BWI Appeal concludes with nine separate paragraphs containing the comments of BWI staff on various aspects of the Appropriate Assessment.
11. As set out below, the Appellants have provided both general observations on the BWI Appeal and specific observations dealing with individual points raised in the BWI Appeal.

General Observations on the BWI Appeal

Central argument

12. The central argument of the BWI Appeal² is that the Decision should be set aside because the conclusion of the Appropriate Assessment is "fundamentally flawed" and in breach of two EU Directives. While it is difficult to isolate the exact flaws identified by the BWI Appeal, the main alleged concern appears to be that significant additional information is required in order to discern both the impact of mussel-related boat activity on the Red-breasted Merganser and, also, the effect of bottom mussel culture on various other bird species.³ However, the potential need for further work/research is not tantamount to a "fundamental flaw". If such work is indeed required, the status quo should be maintained given the suitability as endorsed by third parties, of Wexford Harbour for mussel cultivation. (See further below).
13. Regarding one particular bird species, the Appropriate Assessment refers to the possibility that the relevant boat activity "**may cause significant displacement impacts to the Red-breasted Merganser**". A possible negative

¹ This one of two annexes to the Marine Institute's Appropriate Assessment Summary Report of Aquaculture in the Slaney River Valley SAC (Site Code: 00781, Raven Point Nature Reserve SAC (Site Code: 000710), Wexford Harbour and Slob SPA (site code: (sic) 004076) and Raven SPA (site code: (sic) 004019) date August 2016.

² See page 1 of the BWI Appeal.

³ **Please note that any intertidal oyster culture impact on various bird species including the Golden Plover and the Little Tern is irrelevant since the Decision addresses mussel farming only.**

impact which needs to be confirmed by further research is utterly insufficient to prevent a long-standing commercial activity that has been deemed suitable by the relevant local authority (See below.)

14. In terms of the Greenland White-fronted Goose, the Scaup, Goldeneye, Red-breasted Merganser and Great Crested Glebe as well as intertidal mussel beds and high tide roosts, the Appropriate Assessment refers to "*potential impacts where the available evidence is not sufficient to rule out significant impacts beyond reasonable scientific doubt*". However, the BWI Appeal neglects to include the balance of that paragraph (page 123 of the Appropriate Assessment) which states "*However, this does not mean that all these impacts are considered to be very likely to occur*".

Section 61 of the Act

15. Under Section 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 the following (seven) separate 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,

(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."

16. The BWI Appeal fails to consider directly the relevant statutory criteria in Section 61 of the Act nor does it address the approach adopted by the Minister in analysing the seven criteria before granting the relevant licences.
17. Accordingly, the Appellants thus believe that ALAB would have robust grounds to reject the BWI Appeal on a jurisdictional basis alone.

Aquaculture in Wexford Harbour

18. The Appellants (and their predecessors) have farmed mussels at the Site/Wexford Harbour for many decades. 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/marine life.
19. The Sites and the wider Wexford Harbour waters are undoubtedly suitable for aquaculture and have been found as such by the Minister in granting the relevant licences and the relevant local authority. Indeed, the Wexford County Development Plan 2013 – 2019 (the "**County Development Plan**") states as follows: "*The [EU Shellfish Waters Directive (2006/113/EC)⁴, 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).⁵
20. Moreover, the Department of Agriculture, Food and the Marine's (the "**Department**") 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*".⁶
21. The suitability of the waters for aquaculture is also specifically 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*".
22. The BWI Appeal fails to introduce or submit any scientific evidence to challenge the suitability of the Sites for aquaculture including the farming of mussels.

Lack of statutory analysis

23. The BWI Appeal states that the "*Appropriate Assessment is ... in breach of the Birds and Habitats Directives*".⁷ Notwithstanding this, it fails to provide any form of statutory analysis or application of either Council Directive

⁴ 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).

⁵ See page 115 of the Wexford County Development Plan 2013-2019, available at <https://www.wexfordcoco.ie/sites/default/files/content/Planning/WexCoPlan13-19/Volume8.pdf>.

⁶ See <https://www.agriculture.gov.ie/media/migration/seafood/marineagenciesandprogrammes/nsipa/NationalStrategicPlanSusAquaDevel181215.pdf> at page 30.

⁷ Page 1.

92/43/EEC (the "**Habitats Directive**")⁸ or Council Directive 2009/147/EC (the "**Birds Directive**")⁹ to the relevant factual matrix. The statutory basis for these alleged breaches is therefore unknown.

24. In addition, the aim of both the Habitats Directive and the Birds Directive is conservation i.e. the relevant SPAs and SACs not returning same to what they may have been in the distant past.

Lack of support

25. The BWI Appeal fails to adduce any scientific evidence, independent or otherwise, to support the assertions it makes.
26. Furthermore, the BWI Appeal is silent on the potentially detrimental impact on wildlife/marine life in Waterford Harbour that would follow from the cessation of mussel cultivation in the areas the subject of the relevant licences. Research recognises that 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.¹⁰ Eutrophication would pose a significant threat to marine life with a consequent adverse impact on various bird species who would be deprived of a food source.
27. The Appropriate Assessment¹¹ (Chapter 11) highlights 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 Appropriate Assessment also highlights the enhancement to habitat heterogeneity caused by the mussel population¹² and states:

"In summary, it is our view, based upon the information presented above, that bottom mussel culture, at current levels, does have a positive role in ecosystem function in terms of nutrient and phytoplankton mediation as well as provision of habitat. The addition of more mussels to the system (with new applications) may have additional benefit in terms of reducing effects of eutrophication, and may further improve status in the outer parts of Wexford Harbour relative to the Lower Slaney waterbody; however, this remains to be determined/confirmed and is subject to availability of additional seed" (emphasis added).¹³

Specific Observations on the BWI Appeal

28. This section contains the Appellant's specific observations on certain aspects of the BWI Appeal.

⁸ As implemented into Irish law by the European Communities (Birds and Natural Habitats) Regulations 2011, SI No 477 of 2011.

⁹ See Footnote 8.

¹⁰ Lindahl and 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

¹¹ See Chapter 11.

¹² See pages 63 to 67.

¹³ Page 67.

Birds Case

"In 2007, Ireland was found guilty (sic) by the European Court of Justice in C-418/04 (the Birds Case) for failing to adequately transpose and implement the European Union Birds Directive and the European Union Habitats Directive ... The Birds Case is still open as Ireland has not completed all the activities required to meet the legal obligations of the Court." (Pages 1 and 2 of the BWI Appeal)

29. The Birds Case¹⁴ relates to consolidated infringement proceedings brought by the European Commission against the State primarily arising from the latter's failure to implement the Birds Directive and the Habitats Directive into Irish law fully and correctly. Although the Court of Justice of the EU ruled against the State in the Birds Case in 2002, it is factually incorrect and misleading to say that *"Ireland was found guilty"* and that *"the Birds Case is still open"* as the State has since adopted the necessary legislation.
30. Furthermore, to the extent that the Birds Case relates to the implementation of an EU Directive, it does not directly impact on either the Minister or ALAB's decision making in respect of a specific licence application.

Alleged decline in bird species

"Our interest lies in the conservation of birds and their habitats and addressing the 40% decline in waterbird species in the 20 years (such as those that frequent the Wexford Harbour and Slobs SPA) ... " (Page 2 of the BWI Appeal)

31. No scientific or other independent evidence is provided within the BWI Appeal to support the *"40% decline"* figure as being applicable to the Sites, which is the sole and exclusive focus of BWI's arguments. Aside from the lack of evidence as to the percentage decline, if any, of water bird species at the Sites, no evidence is offered to support a link between any decline in water bird species at the Sites and the on-going mussel farming.
32. The apparent decline in bird species nationally is likely due to a number of factors such as climate change. Migration patterns are changing so that birds no longer winter/summer in the same locations. Accordingly, a change in numbers in one area does not mean that overall numbers have decreased or increased.
33. In contradiction of this purported across the board decline, the Appellants would also point out that numbers of the White Egret bird, a species unknown at the Sites and in the wider Wexford Harbour up to several years ago, have grown exponentially at the Sites and in the wider Wexford Harbour in recent years.

Conservation interest of the SPAs

*"Several of the Conservation Interests of the SPAs including, but not limited to, Goldeneye, Bar Tailed Godwit, Knot have unfavourable conservation status according to the Conservation Objectives Supporting Document [**"COSD"**] (acronym added) while Red-breasted Merganser, Greenland White-Fronted Goose, Common Scoter, among others, have intermediate (unfavourable) conservation status"*

¹⁴ Case C-418/04 – European Commission v Ireland judgment dated 13 December ECR I – 10997.

34. The categorisations set out in the BWI Appeal do not accurately reflect those categorisations listed in the COSD. In particular, the Bar-tailed Godwit has an intermediate unfavourable status, as opposed to an unfavourable conservation status.

Appropriate Assessment

(Generally, Pages 3 and 4 of the BWI Appeal)

35. In accordance with the Article 6(3) of the Habitats Directive, the Appropriate Assessment was conducted. The BWI Appeal concludes that the Appropriate Assessment is incomplete and that significant additional information is required. The Appellants do not object to the carrying out of further independent scientific work that might be deemed necessary by the Marine Institute in order to address any outstanding issues within the Appropriate Assessment. However, the Appellants note that the BWI Appeal does not provide any support as to the requirement for further work to be carried under the Appropriate Assessment.
36. BWI fails to provide any support for its assertion that as the Appropriate Assessment failed to rule out a negative impact on birds and so no mussel farming activity should occur until and if any such effect is excluded. As stated above, if any such assertion were to be effective, it must be based on the relevant criteria in Section 61 of the Act. It is not.

Specific statements of BWI staff in respect of the Appropriate Assessment

(Generally, Pages 3, 4 and 5 of the BWI Appeal)

37. Regarding the statement (1 – 9) attributed to the BWI staff in the BWI Appeal¹⁵, the Appellants respond as follows:¹⁶

1. *"The Appropriate Assessment conclusion is inadequate, incomplete, unscientific, flippant and does not meet the standard of ensuring that, beyond reasonable doubt, there is no likelihood of significant impacts on conservation interests of the SPAs and SACs impacted by the aquaculture licences and is in breach of Article 6.3 of the Habitats Directive"* (Pages 3 and 4 of the BWI Appeal)

- 37.1 Further to paragraph 31, mussel cultivation activity in Wexford Harbour has been ongoing for in excess of one hundred years and it does not comprise of works, it is an activity. Many other developments which would impact on the SPA have taken place over that same period and the licences granted for mussel cultivation are not bringing into being, within the SPA, any works or activities which have not been carried out contemporaneously with variations in bird species and water bird numbers over an extended period. Wexford Harbour is not a pristine natural harbour which is being opened up to commercial activity for the first time. Indeed, it is a well-documented historical fact that Wexford Harbour was a substantial and extremely active commercial port for centuries. This activity reduced

¹⁵ See page 3 of the BWI Appeal.

¹⁶ Refer to points 1-7 on pages 3 and 4 where appropriate.

dramatically when this port closed to commercial activity. The Port of Wexford is currently experiencing nowhere near the level of boating activity which occurred in Wexford Harbour during its commercial shipping era.

2. *"The authors of the Appropriate Assessment Report state additional information is needed to complete their assessment and this has not been provided"* (Page 4 of the BWI Appeal)

37.2 See paragraph 31.

3. *"Significant impacts cannot be ruled out and these threaten the achievement of the conservation objectives of the sites"*

37.3 See paragraph 31.

4. *"the [sic] In case of Article 6(3) the aim is to avoid the authorisation of any plans or projects that could 'adversely affect the integrity of the site'*

37.4 See paragraphs 31 and 37.1.

5. *"In particular we are most concerned with potential impacts to the Red-breasted Merganser, Little Tern and Common Scoter: ... "*

37.5 The Appropriate Assessment does not provide a common finding in respect of the Red-breasted Merganser, Little Tern and Common Scoter.

37.6 In respect of the Red-breasted Merganser, the Appropriate Assessment provides that *"disturbance ... may cause significant displacement impacts"*. However, it goes on to caveat this statement as follows *"There is no site specific data available that can be used to address these questions, and we are not aware of any comparable studies in the literature that can be used"*.

37.7 While the BWI appeal refers to the *"very serious risk of population level impacts to Red Breasted Merganser from the activities in Wexford Harbour"*, this amounts to no more than a subjective assertion in circumstances where no supporting evidence is provided.

37.8 In respect of the Little Tern, the Appropriate Assessment provides that *"There is potential for significant disturbance impacts to the Little Tern breeding colony. **However, these can be avoided through an appropriate adaptive management strategy**"* (emphasis added).

37.9 In contrast to the Red-breasted Merganser and the Little Tern, the Appropriate Assessment lists the Common Scoter as occurring *"almost exclusively within the Raven (as defined)"* and states that *"We do not have any site-specific data on the response of Common Scoter to marine traffic in the Wexford Harbour area"*.

6. "The uncertainties listed in the appropriate assessment report for the range of species and the failure to rule out disturbance and displacement concerns to populations is a very serious concern ... "

37.10 See paragraph 31.

7. "We are also concerned that there has been inadequate assessment of how the SCIS for the SPAs use the mudflats and other habitats within the Slaney SAC (sic) due to the fact that IWeBs survey coverage has been (sic) limited at this site (sic) ... "

37.11 See paragraphs 31 and 37.1.

8. "Cumulative Impacts are not Adequately Assessed"

37.12 Due to the apparent lack of reliable/robust information on the scale of hunting activities in Wexford Harbour and environs, it is not possible to accumulate such information with an analysis of the relevant aquaculture activities and thereby assess potential cumulative impacts of the aquaculture activities in combination with, at least one other relevant activity. Accordingly, given the lack of relevant information, it is not possible for the BWI Appeal to assert that Article 6.3 of the Habitats Directive has been infringed.

9. "Little Tern"

37.13 The BWI Appeal states "vulnerability to disturbance by intertidal and subtidal aquaculture activity is unknown". For the avoidance of doubt, mussel cultivation is a sub-tidal aquaculture activity and does not involve boats, any other machinery or individuals landing on sand banks at any stage of the tide. Mussel cultivation is an activity which is carried out in waters suitable for the large mussel dredgers engaged in mussel cultivation.

37.14 The BWI Appeal further states that "the possibility of likely significant impacts on this species cannot be ruled out and therefore the conclusion of the appropriate assessment is open to challenge". Once again apart from what has been said above regarding mussel cultivation being subtidal and not involving any landing on sand banks, this activity which has been ongoing in Wexford Harbour for over 100 years. The Little Tern/other species have successfully survived in Wexford Harbour for over a century. There is a fundamental conceptual difference between assessing the impact of a development which is new to a successful ecological environment and monitoring the impact of an activity which has been ongoing contemporaneously with the thriving of that ecological environment for over 100 years.

37.15 For example, there may be species of marine life and bird species which would not exist or which would not be thriving in these areas were it not for the commercial mussel cultivation which has been carried on for over 100 years.

Conclusion

38. In conclusion, the BWI Appeal is speculative and unclear while also failing to take adequate account of the relevant statutory frameworks by which ALAB must consider the Decision.
39. Therefore, the Appellants request that ALAB dismiss the BWI Appeal in its entirety.

WF-25776407-6