



// February 2020

Ms. Mary O'Hara
Secretary to the Board
Aquaculture Licences Appeals Board
Kilminchy Court
Dublin Road
Portlaoise
Co. Laois

ACQU. LICENCES
A.
12 FEB 2020

PLEASE QUOTE REF NUMBER ON ALL CORRESPONDENCE

Our Ref: 2020/63199P /PM
Your Ref: AP1/2019

Dear Ms. O'Hara

I would like to acknowledge your recent correspondence dated 10th February 2020 to Minister Michael Creed regarding Marine Harvest Ireland (Site Ref: T5/233).

I will bring your correspondence to the Minister's attention as soon as possible. In the interim I have forwarded your correspondence for the attention of relevant Department officials.

Yours sincerely,

Graham Lennox
Private Secretary



OIFIG AN PHRÍOMH-ATURNAE STÁIT
CHIEF STATE SOLICITOR'S OFFICE

25th February 2020

Ms Mary O'Hara,
Secretary to the Aquaculture Licences Appeals Board
Aquaculture Licences Appeals Board,
Kilminchy Court,
Dublin Road,
Portlaoise,
Co Laois.
R32 DTW5

Your Ref.: NDU/RK/642316/73

Our Ref.: KH/2019/02589/

Contact: Kate Hoare
Direct Dial:
Kate_Hoare@csso.gov.ie

Re: Appeal of Marine Harvest Ireland
Our client: Minister for Agriculture, Food and the Marine

Dear Ms O'Hara,

We refer to your letter on behalf of the Board to the Minister, dated 10 February 2020.

It is proposed to provide submissions or observations within the period prescribed by your letter.

We take it that the appellant has been written to in similar terms. The Department would be grateful if you would furnish submissions or observations received from Silver King Seafoods Ltd. (Marine Harvest Ireland) if the Board considers that that is appropriate, we confirm that the Department has no objection to the Department's submissions or observations being furnished to the appellant.

Likewise, if the Board has any particular grounds for the view expressed in the second paragraph of the letter as to whether an appeal lies under Section 40 of the Fisheries (Amendment) Act 1997 the Department would be glad to be apprised of what they are.

Yours faithfully,


MARIA BROWNE
CHIEF STATE SOLICITOR





OIFIG AN PHRÍOMH-ATURNAE STÁIT
CHIEF STATE SOLICITOR'S OFFICE

3rd March 2020
Ms. Mary O'Hara
Secretary
Aquaculture Licences Appeals Board,
Kilminchy Court,
Dublin Road,
Portlaoise,
Co Laois.
R32 DTW5

Your Ref.: AP1/2019
Our Ref.: KH/2019/02589/
Contact: Kate Hoare
Direct Dial:
Kate_Hoare@csso.gov.ie

BY REGISTERED POST AND BY EMAIL
Email; Mary.Ohara@alab.ie.

Re: Appeal of Silver King Seafoods Ltd. T/A Mowi Ireland against the decision of the Minister for Agriculture Food and the Marine, dated 12 April 2019 relating to a site at Deenish, Co. Kerry to the Aquaculture Licences Appeals Board.
Your Ref: AP1/2019

Dear Ms O'Hara,

We refer to your letter on behalf of the Board to the Minister, dated 10 February 2020 and our letter of 25 February 2020.

Please find attached the detailed submissions/observations of the Minister in response to your request made pursuant to Section 46 of the Fisheries (Amendment) Act, 1997.

Yours faithfully,


MARIA BROWNE
CHIEF STATE SOLICITOR

**APPEAL OF SILVER KING SEAFOODS LTD. T/A MOWI IRELAND AGAINST
THE DECISION OF THE MINISTER FOR AGRICULTURE FOOD AND
MARINE, DATED 12 APRIL 2019 RELATING TO A SITE AT DEENISH, CO.
KERRY TO THE AQUACULTURE LICENCES APPEALS BOARD.**

**SUBMISSIONS OR OBSERVATIONS ON BEHALF OF THE MINISTER FOR
AGRICULTURE, FOOD AND THE MARINE PURSUANT TO SECTION 46 OF
THE FISHERIES (AMENDMENT) ACT 1997**

- 1 These submissions/observations are made in response to the letter of the Secretary to the Board to the Minister for Aquaculture Food and the Marine, dated 10 February 2020.
- 2 By that letter, the Secretary to the Board states: “It appears that the Minister’s determination is not a decision of the Minister on an application for an Aquaculture licence or the revocation or amendment of an Aquaculture licence within the meaning of Section 40 of the Fisheries (Amendment Act) 1997 (the “1997 Act”), and that the Board does not, therefore, have jurisdiction to consider or determine the appeal”.
- 3 The Board has not advised the Minister what led it to conclude that the Minister’s determination is not a decision of the Minister on an application for an aquaculture licence or the revocation or amendment of an aquaculture licence, within the meaning of section 40 of the Fisheries (Amendment) Act 1997 (the “1997 Act”), and that the Board does not, in consequence, have jurisdiction to consider or determine the appeal.

- 4 The Minister respectfully disagrees with that statement on the part of the Board, and considers that the appeal of Silver King Seafoods Ltd. is a valid appeal for the purposes of Section 40 of the Fisheries (Amendment) Act 1997 which the Board has jurisdiction to consider and determine.
- 5 The appeal of Silver King Seafoods Ltd. is against the decision of the Minister conveyed by letter of 12 April 2019 to Jan Feenstra, the Chief Executive Officer of Mowi Ireland that by reason of a breach of Condition 2(e) attaching to the licence the Minister has determined that the entitlement of Silver King Seafoods Ltd continue Aquaculture operations at the Deenish site under Section 19(A) before the 1997 (Amendment) Act has ceased.
- 6 Condition 2(e) is to be found in the licence agreement between the Minister for the Marine and Gaelic Seafoods Ltd. of 30 January 1995 relating to the Deenish site. That licence was renewed on 4 August 2004 for the period to 15 February 2007. The applicant applied for a renewal of the licence on or about 29 January 2007.
- 7 The application for a renewal of the Aquaculture Licence has not been determined and is still pending for reasons of which the Aquaculture Licences Appeals Board are fully cognisant and which go back to the measures that have been necessitated in the wake of the judgment of the European Court of Justice in *Commission v Ireland KC-418/04* in 2007, in which it was held that Ireland was not compliant with the Directives on the Protection of Birds and Habitats. Silver King Seafoods Ltd. has continued to operate at the Deenish site, pursuant to its statutory entitlement under Section 19A(4) of the 1997 Act, the licence held by it and its application for a renewal of that licence.
- 8 Section 19A(4) of the 1997 Act as inserted by the Sea Fisheries and Maritime Jurisdiction Act 2006 is as follows:

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 to aquaculture or operations in relation to aquaculture authorised by the licence pending the decision on the said application.

- 9 Section 19A(4) does not in itself contain a provision entitling the Minister to determine that the entitlement of the company in the position of Silver King Seafoods to continue Aquaculture operations under the provisions of Section 19A(4) or had ceased, but this arises by inference by virtue of the provisions of Section 68 of the Fisheries (Amendment) Act 1997, which entitles the Minister to revoke an Aquaculture Licence when satisfied that there had been a breach of any condition specified in the licence.
- 10 It is important to note that this interpretation of the legislation is consistent with the reasoning of the High Court in *Murphy's Seafood Ltd. and the Minister for Agriculture Food & the Marine* [2017] IEHC 353 of 1 June 2017. In that case, Ms Justice Baker did not accept the point made by the respondent that there was no power to revoke a licence under Section 19A (4), holding that the power of revocation of the Minister under Section 68 extended to those carrying on operations under Section 19A (4) subject to a compliance with the obligations to give reasons and the other statutory requirements of Section 68.
- 11 Having regard to the interpretation of the Act by the High Court in *Murphy's Irish Seafood v MAFM* it is clear that the Minister's determination to treat as discontinued the statutory entitlement of Silver King Seafoods Ltd. (a wholly owned Company of Comhlucht Iascaireacta Fanad Teoranta (Mowi Ireland)) to continue aquaculture operations under the provisions of Section 19A(4) of the 1997 Fisheries (Amendment) Act at a site at Deenish, Co. Kerry amounts to or is to be deemed a revocation for the purposes of Section 40 of the Act.

- 12 The judgment in *Murphy's Irish Seafood v MAFM* affirms the view that the Department has long held of the Minister's right to terminate an entitlement to continue Aquaculture or operations in relation to Aquaculture. The legal advice that the Minister has is consistent with the decision in *Murphy's Irish Seafood Ltd*. It has also long been the view of the Minister that an appeal would lie under Section 40 against the revocation of such an entitlement.
- 13 It is important to consider the provisions of Section 19A as a whole as well as the specific provisions of Section 19A(4). A licence does not cease to have effect on its expiration. Crucially, the aquaculture or operations in relation to aquaculture that are permitted by Section 19A(4) are those which are authorised by the licence which the person holding the licence has sought to renew, or further renew.
- 14 Section 40(1) is in itself broad terms.

"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."

- 15 A broad interpretation of Section 40(1) is further consistent with the references in sub-sections (4) and (6) to "the decision or action of the Minister".
- 16 The long title to the original Act: "An Act to amend and extend the laws relating to fisheries, to prohibit persons from engaging in Aquaculture except with and in accordance with a licence to establish a procedure for the granting, renewal, amendment and revocation of licences, to allow for appeals against *decisions relating to licences*, and for connected purposes". [Emphasis added].

- 17 Juxtaposing therefore Section 19A(4) on which the continued entitlement of many operators in relation to Aquaculture is predicated, and Section 40, it appears clear that an appeal does lie to the Aquaculture Licences Appeals Board in the circumstances here arising.
- 18 It may be relevant to point out that the Aquaculture Licences Appeals Board was the first named notice party to the judicial review proceedings instituted by Silver King Seafoods Ltd. (Record No. 2019JR 292). Silver King Seafoods Ltd.'s appeal to ALAB of 3 May 2019 featured prominently in the proceedings.
- 19 The appeal to the Board is referred to at paragraphs 33 and 64-69 of the statement of grounds of the applicant, and at paragraphs 59-62 of the grounding affidavit of Jan Feenstra sworn on 16 May 2019.
- 20 In the statement of opposition, it is specifically denied that ALAB does not have the power to determine an appeal in relation to a statutory entitlement under Section 19A (4); it is pleaded at paragraph 68 that the applicant has in the past appealed to ALAB in respect of Ministerial determination relating to its operation at Inishfarnard, which was operating under Section 19A(4) of the 1997 Act, an appeal that was not merely accepted, but actually granted by ALAB, which also amended the conditions to the licence as sought by Silver King Seafoods. Moreover, it is pleaded at paragraph 70 that ALAB had in the instant case accepted the applicant's appeal.
- 21 In the replying affidavit of John Quinlan, sworn 17 October 2019 on behalf of respondent, the Department set out its case that the appropriate remedy open to the applicant was by way of appeal to ALAB rather than judicial review, not least given the jurisdiction of ALAB to amend the licence (as it had been requested to do by the applicant as part of its appeal). It was pointed out at paragraph 88 of Mr

Quinlan's affidavit that Mowi (Ireland) had previously appealed the determination of the Minister to ALAB in respect of its Aquaculture licence at Inishfarnard, which at the time was operating under Section 19A (4) of the 1997 Act, an appeal in which the applicant was successful. The notice of appeal dated 8 January 2018 and the decision of ALAB dated 4 May 2018 were exhibited in Mr Quinlan's affidavit.

- 22 As pointed out in the Minister's opposition papers in the judicial review, and referred to above, on 1st May 2018 ALAB had upheld an appeal by Mowi against the decision of the Minister to amend the licence held by Mowi in respect of a site at Inishfarnard, Co. Cork. In this regard it should be noted that the Company's site at Inishfarnard was operating under the provisions of Section 19A(4) of the Act in precisely the same way as the site at Deenish. It is not clear, in the absence of any reasons adduced by the Board in its letter of 10th February 2020, why the appeal in respect of Deenish should be deemed by the Board not to fall within the scope of Section 40 of the Act having accepted that the appeal in respect of Inishfarnard did fall within the scope of Section 40.
- 23 The Department would also respectfully draw the Board's attention to the Determination of the Board dated 31st October 2012 to uphold the Minister's decision to grant a temporary amendment to the Deenish licence (which was operating in accordance with the provisions of Section 19A(4)). It will be seen therefore that ALAB has already accepted that a decision of the Minister in respect of this site while operating in accordance with the provisions of Section 19A(4) comes within the meaning of Section 40 of the 1997 Fisheries (Amendment) Act.

ENDS