



Office of the Minister for Agriculture, Food and the Marine, Dublin 2.

Oifig an Aire Talmhaíochta, Bia agus Mara, Baile Átha Cliath 2.

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

19 December 2019

Re: AP1/2019 – Appeal against the notice of Ministerial decision of the Minister for Agriculture, Food and the Marine under the provisions of Section 68(1) and Section 19A(4) of the Fisheries (Amendment) Act 1997, in respect of the entitlement to continue Aquaculture Operations under the provisions of Section 19A(4) of the Act for the culture of Salmon in cages at a site east of Deenish Island, Ballinskelligs Bay, Co. Kerry, T06/202 held by Silver King Seafoods Limited, a wholly owned company of Comhlucht Iascaireachta Fanad Teoranta (Mowi Ireland), Fanad Fisheries, Kindrum, Fanad, Letterkenny, Co. Donegal

Dear Ms O'Hara,

The Minister has asked me to refer to the Board's letter of 17th May 2019 concerning the appeal by Mowi Ireland against the Minister's decision to treat as discontinued the Statutory entitlement of Silver King Seafoods Limited (a wholly owned Company of Comhlucht Iascaireachta Fanad Teoranta (Mowi Ireland)) to continue aquaculture operations under the provisions of Section 19A(4) of the 1997 Fisheries (Amendment) Act. The Court ordered a Stay on this in view of the Judicial Review proceedings initiated by the Company in respect of the Minister's decision. As you know this Stay was lifted on Monday 2nd December 2019.

I enclose for the consideration of the Board observations from the Department in accordance with Section 44(2) of the Act.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Graham Lennox". The signature is written in a cursive style with a large initial 'G' and a long, sweeping tail.

Graham Lennox
Private Secretary

Appeal by Mowi Ireland against a Ministerial decision 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

Observations submitted by the Department of Agriculture, Food and the Marine under Section 44 (2) of the Fisheries (Amendment) Act 1997.

1. These observations are submitted to ALAB on foot of the above appeal and address the specific points raised by the Appellant in the appeal application. The Board's attention is respectfully drawn to the detailed submissions made to the Minister in relation to the decision to treat as discontinued the entitlement of the Appellant to continue operations under the provisions of Section 19A(4) of the 1997 Fisheries (Amendment) Act. This documentation was forwarded to ALAB on 11 December 2019.
2. It is noted that the Appellant has asked ALAB to:
 - “1. Substitute for the Minister’s Determination that there was a breach of condition 2(e) of the Licence, its own decision that there has been no such breach;***
 - 2. Substitute for the Minister’s Determination to discontinue Mowi Ireland’s statutory entitlement to continue aquaculture operations at the Deenish Site pursuant to Section 19(A)4 of the Fisheries Act, its own decision that Mowi Ireland’s statutory entitlement is continuing; and***
 - 3. Substitute for the Minister’s Determination to discontinue Mowi Ireland’s statutory entitlement to continue aquaculture operations at the Deenish Site pursuant to Section 19(A)4 of the Fisheries Act, its own decision to amend the Licence to provide for the control of production by reference to a maximum Standing Stock Biomass (“SSB”), otherwise known as a Maximum Allowable Biomass (“MAB”).”***
3. ***“Substitute for the Minister’s Determination that there was a breach of condition 2(e) of the Licence, its own decision that there has been no such breach”***

The Department would respectfully refer the Board to the detailed submission made to the Minister with relevant supporting documentation outlining the nature and extent of the breach in question. Specifically the Board's attention is drawn to the fact that the Appellant does not deny the harvest figures in question.

It is the Department's view that the breach is manifestly obvious, is supported by the applicable engineering reports, is acknowledged by the Appellant and is based on figures actually supplied by the Appellant.

Furthermore the breach represents an excess of 121% in the stock permitted to be harvested from the site.

4. ***“Substitute for the Minister’s Determination to discontinue Mowi Ireland’s statutory entitlement to continue aquaculture operations at the Deenish Site pursuant to Section 19(A)4 of the Fisheries Act, its own decision that Mowi Ireland’s statutory entitlement is continuing”***

It is the consistent view of the Department that the Minister's decision 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, is warranted by the undisputed facts of this case and is proportionate having regard to the very significant excess in the stock harvested (121% excess).

5. ***“Substitute for the Minister’s Determination to discontinue Mowi Ireland’s statutory entitlement to continue aquaculture operations at the Deenish Site pursuant to Section 19(A)4 of the Fisheries Act, its own decision to amend the Licence to provide for the control of production by reference to a maximum Standing Stock Biomass (“SSB”), otherwise known as a Maximum Allowable Biomass (“MAB”)”***

The Department would respectfully draw the Board's attention to the fact that the Appellant currently operates under the provisions of section 19A(4) of the Fisheries (Amendment) Act 1997. The Department has not to date received an application from the Appellant to amend the applicable licence to reflect harvesting by reference to Maximum Allowable Biomass (MAB). In addition, the Appellant has to date not submitted the Environmental Impact Statement necessary to support such a request.

It is the strong view of the Department that a capping mechanism on harvesting based on tonnage harvested is viable and is the basis on which the finfish industry generally in Ireland operates and is regulated. This view is supported by the Marine Institute.

Notwithstanding this fact, the Department has no objection in principle to moving towards MAB as a means of capping harvesting. However, such a move will represent a significant material change to each licence and therefore will require both public and statutory consultation as well as the submission of Environmental Impact Statements. The optimal time for such a transition is when an individual licence is under consideration for renewal. For one operator such as the Appellant to choose to depart from the capping mechanism prescribed in its licence is not alone unilaterally a breach of the individual licence, but an undermining of the entire scheme of regulation of the industry.

The conversion from the current capping mechanism for harvest/production based on annual tonnage to a mechanism based on MAB will require the development of a reliable conversion protocol/metric. In addition, the MAB would need to be calculated to reflect the current licence conditions at all currently licensed sites. Such a protocol/metric would need to be objective, transparent and independently validated. It is the view of the Department that the Marine Institute is the most appropriate body to prepare such a protocol/metric. It should be noted also that such a protocol/metric should be subject to consultation and peer review. The Department would also be of the view that the conversion to MAB would represent a significant and material change to a licence and require an Environmental Impact Statement.

Detailed arguments set out by the Appellant in its appeal

“PRELIMINARY [LEGAL] OBJECTIONS TO THE MINISTER'S DETERMINATION”

6. *“Minister does not have the power to discontinue Mowi Ireland’s statutory entitlement to continue aquaculture operations at the Deenish Site”*

The Department notes that the Appellant has appealed this matter to ALAB under Section 40 of the Fisheries (Amendment) Act 1997, as amended.

The Department notes the Appellant's sole submission in their Notice of Appeal regarding the Minister's alleged lack of authority to treat as discontinued their entitlement to engage in aquaculture.

That submission is that *“there is no express provision in the Fisheries Act that allows the Minister to bring an end to the statutory entitlement contained in section 19A(4), nor is there any basis for implying such a power.”*

In the first place, if one were to follow the Appellant's argument, there would be no express power in the Fisheries (Amendment) Act 1997 for the Appellant to appeal to ALAB the decision referred to above. Nevertheless, the Appellant has lodged their appeal. Moreover, the Appellant refers in their Notice of Appeal to judicial review proceedings. Those proceedings, which included a submission regarding the above construction of Section 19A(4), have been stayed at the instance of the Appellant for the express purpose of appealing this matter to ALAB. Accordingly, it is clearly the view of the Appellant that the discontinuation of their entitlement to operate is an appropriate decision of the Minister to be appealed to ALAB. This is notwithstanding the absence of any express provision in the Fisheries Act to appeal the Minister's decision to bring an end to their statutory entitlement under Section 19A(4).

Second, and notwithstanding the absence of any ALAB appeal, there are two further possible outcomes which would arise, should the Appellant's strict interpretation of Section 19A(4) be adopted:

- (a) First, if the Minister is without **any** power to enforce the conditions of an expired licence by which the appellant is bound by under Section 19A(4), then any operator acting under Section 19A(4) can continue operating indefinitely (or until their renewal), and with absolute impunity. Indeed, there would be little reason for the express inclusion in Section 19A(4) of the phrase '*subject otherwise to the terms and conditions of the licence*' because there would be no mechanism by which non-compliance with those terms and conditions could be acted upon. The Department submits that any plain reading of Section 19A(4) does not disclose an intention by the Oireachtas to permit those operating under Section 19A(4) to operate with absolute impunity and without any power on the Minister to respond to a failure to comply with "*the terms and conditions of the licence.*"
- (b) The second possible outcome of the Appellant's interpretation of Section 19A(4) is that any failure to adhere to the terms and conditions of the licence would **automatically – by operation of Statute** – remove the operator's entitlement to engage in aquaculture.

Because a strict interpretation of Section 19A(4) would not provide for any intervening Ministerial determination of a breach of licence conditions, the entitlement to operate would immediately extinguish once the terms of the expired licence were breached. This is because the statutory entitlement is, read strictly, granted by Statute rather than by any Licensing Authority. No power is granted to any Licensing Authority to consider whether or not a breach has occurred, and to afford the right to the operator to make representations as to the alleged breach.

In order to ensure procedural fairness for aquaculture operators (such as the Appellant) acting under Section 19A(4) of the 1997 Act, the Department has afforded such operators the same procedural rights afforded to extant licensees under Section 68 of the 1997 Act. This is reflected in the comprehensive submissions previously made by the Appellant in the course of the Minister's determination that they had breached the terms of their expired licence, submissions with which the Minister equally comprehensively engaged. Should the Appellant's construction of Section 19A(4) be adopted, no such procedural rights or engagement under Section 68 (including a right of appeal under Section 40) could be provided.

Finally, the Department notes that the above position adopted by the Minister has been clearly endorsed by the High Court, in *Murphy's Irish Seafood v MAFM*, [2017] IEHC 353. It is clear from the judgment in *Murphy's Irish Seafood* that the Court concluded that an operator under Section 19A(4) of the 1997 Act must be treated as equivalent to a licensee under Section 68 of that Act, for the purposes of requiring appropriate procedural fairness to be afforded to such operators.

7. *“Breach of the requirements of the Fisheries Act”*

In arriving at his decision the Minister took into account matters specifically raised with the Appellant by the Department as well as matters adduced by the Appellant in its various responses to the Department. The Appellant’s assertion in its appeal that the Minister considered matters not raised with the Appellant are wholly without foundation.

The Department would respectfully draw the Board’s attention to the detailed submission to the Minister. In relation to the Appellant’s assertion regarding where the actual harvesting took place, it is the strong view of the Department that the Appellant’s argument is not tenable. The Appellant’s argument disregards the fact that condition 2(e) of the applicable licence refers only to harvest and is not specific to the location of such harvest. In any event it is unanswerable that the Appellant removed fish from the Deenish site for the purpose of harvesting and therefore Deenish was a harvest site. Moreover, it is significant that the Appellant did not apply for a Fish Movement Order from the Marine Institute. Such an order is required where an operator is to move live fish from one location to another for ‘ongrowing’. The Appellant did not apply for such an Order in this case as it is clear that any movement from the Deenish site was for the sole purpose of harvesting. The Appellant’s assertion that this does not represent harvesting is simply not credible.

In relation to the Appellant’s argument that there was no evidence of an increase in effluent discharged from the site as a result of the number of stock harvested, it is noted that the Appellant has referenced Benthic Reports in this regard. The Department is advised by the Marine Institute that Benthic impacts are only one indicator of adverse environmental and other impacts. Other matters that should be considered include:

- i. Impacts of activities on seafloor habitats and species, (under Monitoring Protocol No. 1 for Offshore Finfish Farms- Benthic Monitoring)
- ii. Chemical treatments considered in line with the information specified in Regulation 4 of the European Communities (Control of Dangerous Substances in Aquaculture) Regulations 2008 (SI 466 of 2008).
- iii. Residues in fishes – ensuring that requirements of EU Residues Directive (96/23) are adhered to such that animal and animal products pose no threat to consumers and that good practices are adhered to on farms.
- iv. Nutrients derived from the finfish operations and subsequent water quality status (under WFD and Monitoring Protocol No. 2 for Offshore Finfish Farms- Water Quality Monitoring)
- v. Fish health status – also status/adherence to fish health management plans and relevant legislation.

- vi. Sea lice status – interactions and risk to wild salmonids. Performance of farm sites as it relates to Monitoring Protocol No. 3 for Offshore Finfish Farms- Sea Lice Monitoring and Control and DAFM strategy for improved pest control on Irish salmon farms 2008.
- vii. Hydrodynamic (dispersion) modelling as it relates to sediments, chemotheraputents, sea lice and other pathogens.
- viii. Natura sites and conservation features (habitats, birds and species incl. Salmon) likely to interact with the proposed/existing activities.
- ix. Alien species - risks and potential interactions.
- x. Escapes - risks and interactions with wild species.
- xi. Interactions with other users, fisheries, recreational etc.
- xii. Litter – Descriptor 10 under Marine Strategy Framework Directive

The Appellant appears to be stating that in the absence of a negative environmental impact on the environment by reference to benthic and water column monitoring, the Minister should not be permitted to revoke or be deemed to have revoked the entitlement to continue to operate under Section 19A(4). The Department does not accept this.

If the argument put forward by the Appellant was accepted no action could be taken against operators who breached condition 2(e) unless and until actual damage to the environment was detected and established, by which time it would be too late.

In relation to the reference to public interest made by the Appellant the Board's attention is respectfully drawn to the detailed submissions made to the Minister.

It is clearly in the public interest that the Department enforce licences issued to operators in order to uphold the integrity of the State's regulatory regime in respect of food production from the marine environment. It is not in the public interest that operators should be permitted to interpret the terms and conditions of their licences in a manner which is contrary to the natural and ordinary meaning of such terms and conditions in order to obtain a commercial advantage. A failure or perceived failure by the Department to properly enforce licence conditions would provide an incentive for further non-compliance by the Appellant and perhaps non-compliance by other operators within the sector. Failure by the Department to enforce licence conditions would be anti-competitive as it has the potential to afford a significant commercial advantage to the non-compliant operator. The maintenance and development of Ireland's food exports is dependent on an acceptance by the general public and authorities in other jurisdictions of the efficacy of Ireland's regulatory regime. For this reason, it cannot be said that for the Department to ignore a very significant breach of licence conditions is in the public interest.

Conclusion

1. The Department is strongly of the view that all appropriate procedures and regulations were complied with fully by the Minister in making the determination to treat as discontinued the entitlement of the Appellant to continue operations under the provisions of Section 19A(4) of the 1997 Fisheries (Amendment) Act.
2. The Appellant's argument that the Minister considered matters that they did not have an opportunity to address is not supported by the facts and is rejected by the Department.
3. The Appellant's argument that its actions in breaching condition 2(e) did not give rise to environmental damage based on Benthic Reports is rejected for reasons outlined above.
4. The Appellant's arguments that the public interest is not served by the Minister's determination to treat as discontinued the entitlement of the Appellant to continue operations under the provisions of Section 19A(4) of the Fisheries (Amendment) Act 1997, is rejected for the reasons outlined above.
5. The Appellant's argument that a "***simple amendment to the terms of the Licence to allow for the application of a MAB would have regularised the Deenish Licence and would facilitate internationally recognised sustainable farming practices***" is rejected for the reasons outlined above and is also an admission by the Appellant that its actions were not in accordance with the conditions of its licence.
6. The Department would respectfully refer the Board to the observations made herein and to the detailed submissions made to the Minister.

ENDS