

**NOTICE OF APPEAL UNDER SECTION 40(1) OF
FISHERIES (AMENDMENT) ACT 1997 (NO. 23)**



Appeal Form

**Please note that this form will only be accepted by
REGISTERED POST or handed in to the ALAB offices**

Name of Appellant (block letters)		TL MUSSELS LIMITED	
Address of Appellant		CLONARD BUSINESS PARK WHITEMILL INDUSTRIAL ESTATE WEXFORD Y35 H6FC	
Phone:	See cover letter	Email:	See cover letter
Mobile:	See cover letter	Fax:	See cover letter
Fees			
Fees must be received by the closing date for receipt of appeals		Amount	Tick
Appeal by licence applicant		€380.92	✓
Appeal by any other individual or organisation		€152.37	
Request for an Oral Hearing * (fee payable in addition to appeal fee)		€76.18	✓
* In the event that the Board decides not to hold an Oral Hearing the fee will not be refunded.			
(Cheques Payable to the Aquaculture Licences Appeals Board in accordance with the Aquaculture Licensing Appeals (Fees) Regulations, 1998 (S.I. No. 449 of 1998))			
Electronic Funds Transfer Details	IBAN: IE89AIBK93104704051067	BIC: AIBKIE2D	

Subject Matter of the Appeal

Decision of the Minister for Agriculture, Food and the Marine in the matter of an Application under Section 10 of the Fisheries (Amendment) Act 1997 (the "Act") and Foreshore Act 1933 for authorisation for the bottom cultivation of mussels on the foreshore on a 56.323 ha site (T03/99A) (the "Site") in Wexford Harbour, Co. Wexford.

Site Reference Number:-

T03/99A

(as allocated by the Department of Agriculture, Food and the Marine)

Appellant's particular interest in the outcome of the appeal:

TL Mussels Limited (the "Appellant") has, both by itself and its predecessors in title, been active in the bottom cultivation of mussels at the Site for several years. On or about 26 November 2015, the Appellant acquired all of the estate right title and interest of the former licensees of site T03/99 from its former operators. The Appellant's longstanding and sustainable business would be severely and adversely affected if (a) the Minister for Agriculture, Food and the Marine's (the "Minister") decision to vary the licence sought and previously held for the area in question (the "Decision") by reducing the footprint of the site from 56.323 ha to 11.9141 ha is not reversed and (b) the existing longstanding position which has supported the maintenance of the habitat and Natura 2000 site within which the bed is situated not be allowed to continue. The Appellant has been discharging the licence fees in respect of the site in question (previously numbered T03/030A) for many years. The Appellant has been operating on the basis that it had a legitimate expectation that such area would remain licensed to it while it continued to comply with the terms of the licences issued and that they would be renewed as necessary.

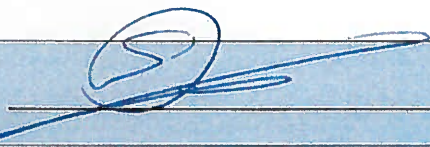
Outline the grounds of appeal (and, if necessary, on additional page(s) give full grounds of the appeal and the reasons, considerations and arguments on which they are based):

The Appellant considers that the Decision is legally flawed for three over-riding reasons:

- (1) The Minister has committed serious errors in failing to carry out an appropriate assessment of the relevant criteria under Section 61 of the Act.
- (2) The Minister has breached fundamental principles of public/administrative law in the Decision, both in terms of its substance and the procedure whereby it was reached.
- (3) The Decision is fundamentally and seriously wrong in substance and would risk the deterioration of the habitats and conservation interests of the relevant sites and the species and habitats therein which are dependent upon, and have acclimatised to, the mussel cultivation as carried out by the Appellant. This supports and is symbiotic with the species and the food chain supporting them within the Natura 2000 sites in question.

Further details are included in the submission.

Signed by appellant:



Date: 16th October 2019

**Please note that this form will only be accepted by
REGISTERED POST or handed in to the ALAB offices
Fees must be received by the closing date for receipt of appeals**

This notice should be completed under each heading and duly signed by the appellant and be accompanied by such documents, particulars or information relating to the appeal as the appellant considers necessary or appropriate and specifies in the Notice.

DATA PROTECTION – the data collected for this purpose will be held by ALAB only as long as there is a business need to do so and may include publication on the ALAB website

Fees must be received by the closing date for receipt of appeals

This notice should be completed under each heading and duly signed by the appellant and be accompanied by such documents, particulars or information relating to the appeal as the appellant considers necessary or appropriate and specifies in the Notice.

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Extracts from Act

40.—(1) 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.

(2) A notice of appeal shall be served—

(a) by sending it by **registered post** to the Board,

(b) **by leaving it at the office of the Board**, during normal office hours, with a person who is apparently an employee of the Board, or

(c) by such other means as may be prescribed.

(3) The Board shall not consider an appeal notice of which is received by it later than the expiration of the period referred to in subsection (1)

41.—(1) For an appeal under *section 40* to be valid, the notice of appeal shall—

(a) be in writing,

(b) state the name and address of the appellant,

(c) state the subject matter of the appeal,

(d) state the appellant's particular interest in the outcome of the appeal,

(e) state in full the grounds of the appeal and the reasons, considerations and arguments on which they are based, and

(f) **be accompanied by such fee**, if any, as may be payable in respect of such an appeal in accordance with regulations under *section 63*, and

shall be accompanied by such documents, particulars or other information relating to the appeal as the appellant considers necessary or appropriate.

**APPEAL UNDER SECTION 40(1) OF THE FISHERIES (AMENDMENT) ACT 1997
SUBMISSION BY TL MUSSELS LIMITED (T03/99A)
16 OCTOBER 2019**

To:

**The Aquaculture Licences Appeals Board
Kilminchy Court
Dublin Road
Portlaoise
Co. Laois
R32 DTW5**

Appellant:

**TL Mussels Limited
Clonard Business Park
Whitemill Industrial Estate
Wexford
Y35 H6FC**

Agent for Appellant:

**William Fry
2 Grand Canal Square
Dublin 2
D02 A342**

Appeal Against: Decision of the Minister for Agriculture, Food and the Marine

Determination Reference: T03/99A (previously T03/030A)

Applicant: Appellant

Date and Place of Publication of Notice of Decision: 17 September 2019 in the *Wexford People*

Summary

1. This is an appeal by TL Mussels Limited (the "**Appellant**") against a decision by the Minister for Agriculture, Food and the Marine (the "**Minister**") to grant a variation of the aquaculture licence for the bottom cultivation of mussels on the foreshore at site T03/99A (previously numbered T03/030A) (the "**Site**") in Wexford Harbour, Co. Wexford (the "**Decision**") to the Appellant. The Decision purports to reduce massively the licence area in which the Appellant and its predecessors have been carrying on the business of mussel cultivation over many years. More particularly, the Decision firstly summarily reduced the area by 20 hectares and thereafter, and notwithstanding that significant reduction, further reduced the remainder, with potentially devastating impacts on the Appellant's business. Please see the Decision at **Annex 1**.
2. As outlined in further detail below, the Decision is vitiated by a number of serious flaws. Firstly, the Minister has committed serious errors in his assessment of the relevant criteria under Section 61 of the Fisheries (Amendment) Act 1997 (the "**Act**"). Secondly, the Minister has breached fundamental principles of public/administrative law in reaching the Decision, both in terms of its substance and the procedure whereby it was reached. Thirdly, the Decision is fundamentally and seriously wrong in substance.
3. This appeal is 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 "**Aquafact Report**"). Please see the Aquafact Report at **Annex 2**.
4. The Decision is fundamentally flawed, as it purports to remove 20 hectares from the previously licensed area. This removal appears to be based on a development which may be carried out adjacent to Trinity Wharf. This development has not in fact been completed. Furthermore, no decision to grant permission has issued in respect of this development; if permission were to be granted, this permission would not in any way entitle the developer (whether carried out by a local authority, a commercial enterprise in partnership with the local authority or a private enterprise acting on its own behalf) to acquire, otherwise than by way of compulsory purchaser order/CPO or agreement, the rights of the Appellant.
5. The decision to grant an aquaculture licence cannot be used as a means of expropriating the rights of a licence holder and applicant for renewal in respect of an area which has long been used by it for its business. Planning permission, even if granted, cannot be used as a means of expropriating or limiting the rights of legitimate interests in the lands in respect of which a planning permission application or application for development approval has been made under the Planning and Development Acts 2000 to 2019. This applies *a fortiori* where, in the present case, no planning permission or development

approval has in fact issued. It is simply the case that an application has been made. The arbitrary reduction by an area far larger than but including the area that is the subject of such application would effect a massive reduction in the area of the Appellant's business and enterprise with no right to compensation. This would be contrary to the Appellant's constitutional rights and rights to its property and business as protected by the European Convention on Human Rights, the protocols thereto as applied in Ireland by the European Convention on Human Rights Act 2003 and by the EU Charter of Fundamental Human Rights.

6. The Aquaculture Licences Appeals Board ("**ALAB**") will also have received the Appellant's appeals against the Minister's decisions to vary the Appellant's licences in the adjacent sites, namely T03/030A2, T03/030B, T03/030C, T03/0301 (site D), T03/030E and T/03/030F (the "**Associated Decisions**" and the "**Associated Appeals**", respectively).
7. By the present appeal, the Appellant respectfully requests ALAB to exercise its power under Section 40(4)(c) of the Act to substitute its decision on the Appellant's licence application by granting the Appellant a licence over the entire portion of the Site, and in respect of which it has applied for a licence (the "**Total Area**"). In the alternative, the Appellant respectfully requests ALAB, under Section 40(4)(b) of the Act, to determine the Appellant's licence application as if it had been made to ALAB in the first instance, by similarly granting a licence over the Total Area.
8. Separately, for ease of administration and given the commonality of facts and issues arising, the Appellant requests ALAB, exercising its discretion under Section 42 of the Act, to join the present appeal with the Associated Appeals, including for the purpose of an oral hearing.

The Appellant

9. The Appellant and its predecessors in title (Lett & Co. Limited ("**Letts**") and the members of the Lett family) have farmed mussels in Wexford Harbour since 'time immemorial'; business records are available relating to the business back as far as 1897, and the Appellant has adduced documentary proof (see **Annex 3**). A chronology of the relevant history is set out below. The Appellant currently employs [REDACTED] and [REDACTED] staff [REDACTED] [REDACTED] in the farming and processing of mussels from Wexford Harbour and the mussel beds which are the subject of the licence application.

Licence Application Process

10. The Appellant holds seven licences in respect of mussel aquaculture in Wexford Harbour. The Appellant is the successor of Letts, which had long-established proprietary rights to the farming of mussels in the area in question. In addition, Letts had several licences held on foot of a Ministerial licence issued on following an application dated 7 October 1996. Although the ALAB decision on an appeal was set aside by the High Court, this revived the Minister's decision of 22 November 2006 to grant the relevant licence. While the current application remains pending, the Appellant has continued to farm mussels in site T03/030A (which in turn related to the same area previously referred to as 30A). We enclose certain correspondence establishing the position in this regard and in particular draw your attention to the letter dated 26 November 2008 from Letts to the Department of Agriculture, Food and the Marine (the "DAFM") setting out the position in relation to the licensed area in question. Please see **Annex 4**.
11. The Appellant sought renewal of its licence in 2017 (replacing an application by Lett & Co). Following its application for licence renewal, the Appellant received no further correspondence from the DAFM until October 2018, when the DAFM sent the Appellant a set of observations/objections from each of the Marine Institute, Inland Fisheries Ireland, the Department of Heritage and the Gaeltacht (now the Department of Culture, Heritage and the Gaeltacht) and Wexford County Council. The Appellant responded on or about 31 October 2018.
12. The Minister/DAFM gave no indication of the proposed cuts to the licence area and did not engage with the Appellant regarding boundaries. The Appellant received no further communication from the DAFM until September 2019, when the Decision and the Associated Decisions were published. In fact, the Appellant learned of the Decision in the 17 September 2019 edition of the *Wexford People* before it received any official correspondence from the DAFM. (See **Annex 5**).
13. It is disappointing and of serious concern that the Minister failed to respond to the Appellant's licence application, to even raise any queries or requests for further information, or to indicate reservations regarding the licence application. When the DAFM did finally engage (albeit to a limited extent), the Appellant responded promptly. However, the DAFM again failed to communicate with the Appellant until the Decision was taken some eleven months later.

Substantive Grounds of Appeal

14. The Appellant's substantive grounds of appeal are, first, by reference to criteria (a) to (g) as set out in Section 61 of the Act and, second, by reference to fundamental principles of public/administrative law.

15. The Appellant submitted requests for information under the Freedom of Information Act 2014 ("FOI"), and requests for environmental information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 ("AIE") to a number of relevant public bodies on 8 October 2019, in each case requesting information/environmental information relevant to the Decision. Notwithstanding that that the FOI/AIE requests were made promptly following the notification of the Decision, given the statutory one-month deadline for appealing a decision of the Minister to ALAB under Section 40(1) of the Act, the Appellant has had to bring the present appeal before receipt of any responses to those requests. The Appellant therefore reserves the right to make any and all further submissions to ALAB it deems necessary or appropriate, including any submissions based on the information contained in responses received to those FOI/AIE requests.

Section 61 of the Act

16. Under Sections 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 seven criteria. That section reads as follows:

"The licensing authority, in considering an application for an aquaculture licence or an appeal against a decision on an application for a licence or a revocation or amendment of a licence, shall take account, as may be appropriate in the circumstances of the particular case, of—

- (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."*

17. The Decision merely states the following:

"Determination of Aquaculture/ Foreshore Licensing application – T03/099A T.L Mussels Ltd., Clonard Business Park, Whitemill Industrial Estate, Wexford, has applied for authorisation for the bottom cultivation of mussels on the foreshore on an 56.323 ha site (T03/099A) in Wexford Harbour, Co. Wexford. The Minister for Agriculture, Food and the Marine has determined that it is in public interest to grant a variation of the licences sought i.e. reducing the footprint of the site from 56.323 ha to 11.9141 ha. In making his determination the Minister considered those matters which by virtue of the Fisheries (Amendment) Act 1997, and other relevant legislation, he was required to have regard. Such matters include any submissions and observations received in accordance with the statutory provisions. The following are the reasons and considerations for the Minister's determination to grant a variation of the licence sought: -

- a. Scientific advice is to the effect that the waters are suitable. The site is located in Wexford Harbour Shellfish Designated Waters. Mussels in these waters currently have a "B" classification;*
- b. The proposed development should have a positive effect on the economy of the local area;*
- c. All issues raised during Public and Statutory consultation phase;*
- d. There are no effects anticipated on the man-made environment heritage of value in the area;*
- e. Shellfish have a positive role in the ecosystem function in terms of nutrient and phytoplankton mediation;*
- f. There are no issues regarding visual impact as the site to be utilised is for bottom culture;*

g. No significant effects arise regarding wild fisheries;

h. The site is located within the Slaney River Valley SAC (Site Code: 00781), The Raven Point Nature Reserve SAC (Sited Code: 00710), Wexford Harbour and Slobs SPA (Site Code: 4076) and the Raven SPA (Site Code: 4019). An Article 6 Assessment has been carried out in relation to aquaculture activities in the SAC's/SPA's. The Licensing Authority's Conclusion Statement (available on the Department's website) outlines how aquaculture activities in these SAC's/SPA's, including this reconfigured site, are being licensed and managed so as not to significantly and adversely affect the integrity of the Slaney River Valley SAC , The Raven Point Nature Reserve SAC , Wexford Harbour and Slobs SPA and the Raven SPA.

i. Taking account of the recommendations of the Appropriate Assessment the aquaculture activity proposed at this (reconfigured) site is consistent with the Conservation Objectives for the SAC's/SPA's;

j. A licence condition requiring full implementation of the measures set out in the draft Marine Aquaculture Code of Practice prepared by Invasive Species Ireland;

k. The updated and enhanced Aquaculture and Foreshore licences contain terms and conditions which reflect the environmental protection required under EU and National law."

18. As can be seen from the above, the Minister has not given any reason for this Decision. While the Decision states that "*it is in public interest (sic) to grant a variation of the licences sought i.e. reducing the footprint of the site*", the Minister completely fails to justify this statement. The Decision, as it relates to the reduced area, is stated in almost entirely positive terms, and does not cite any adverse effects of the relevant activity. However, the Minister's apparent belief that granting a licence over the Total Area would be contrary to the public interest is unexplained.

19. Furthermore, no reasons exist for the arbitrary decision to reduce the long-established area in which the Appellant has been engaged in the aquaculture of mussels from 56.323 hectares to 11.9141 hectares, a reduction of some 79%. If, as it appears may have been the case, the Minister has firstly reduced the long-established area of the application by 20 hectares (due to the proposed marina development), he then appears to have applied a second arbitrary reduction of some 67.2% to the balance of the area. This is wholly contrary to the scientific assessment which has ruled out significant adverse impacts from the continuation of the long-established mussel farming. This activity has in fact

contributed to the favourable conservation objectives of the Natura 2000¹ sites in question and was there long before the sites were designated as such. The presence of mussel cultivation has contributed in a positive way, as is even recognised in the Decision, to the Natura 2000 sites.

20. In this regard, the Appellant refers to the following extract from Chapter 11 of the Marine Institute's *Report supporting Appropriate Assessment of Aquaculture in Slaney River Valley SAC (Site Code: 000781) and Raven Point Nature Reserve SAC (Site Code: 000710)*,² which comprises Annex I to the Marine Institute's *Appropriate Assessment Summary Report of Aquaculture in the Slaney River Valley SAC (Site Code: 000781), Raven Point Nature Reserve SAC (Site Code: 000710) Wexford Harbour and Slobbs SPA (site code 004076) and Raven SPA (site code 004019)*³ (the "MIAA"):

"Given the ability of large aggregations of bivalve molluscs to filter large volumes of water and remove excess phytoplankton (Dame and Olenin 2005 and references therein; Dame 2013) and enhance sediment denitrification (Pollack et al 2013; Kellogg et al., 2013, 2014; Smyth et al, 2015), it has been suggested that they would represent a realistic mitigation feature to control eutrophication of coastal waters (Dame and Olenin 2005 and references therein; Kotta et al 2004; Lindahl et al 2005; Gren et al 2009; Dame 2013; Bergstrom et al 2015; Marques et al 2013; Petersen et al 2015). Additionally, harvesting as a mechanism for removal of nitrogen from the system has also been postulated (Guyondet et al. 2014; Bergstrom et al. 2015) and promoted by Rose et al (2015). Given these observations, it is likely that in the Slaney River Valley SAC (i.e., Wexford Harbour) grazing by mussels (the majority of which are in culture), while not explicitly demonstrated, is likely an important potential control mechanism of eutrophication in the system (Shane O'Boyle, EPA, personal communication).⁴"

21. The clear and uncontroverted evidence is that mussel cultivation in fact supports and contributes positively to the Natura 2000 sites in question and their conservation objectives. Given the length of time that this activity has been carried on in a manner that has led to the designation of the sites and the positive impacts on their integrity since then, it makes no sense whatsoever to reduce the area in which mussel cultivation occurs. *A fortiori*, it makes absolutely no sense to carry out such a drastic

¹ A Natura 2000 site is a site designated either as a Special Area of Conservation or a Special Protection Area. <https://www.npws.ie/sites/default/files/general/Site%20Designation%20Process%2016%20Feb%202012.pdf>

² <https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/AnnexIWexfordHarbourSACsAA270318.pdf>

³ <https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/WexfordHarbourNaturaSitesAASummary270318.pdf>

⁴ See page 65.

reduction which will severely impact on the economic viability of the activity in question which is such a positive contributor to the Harbour as well as to the local economy.

22. In the absence of any robust reasons for the reduction which had been proposed, the Appellant is severely prejudiced in its ability to make meaningful observations on the Minister's assessment of these criteria and is left having to guess as to what reasons, if any, exist for the Decision. The Decision flies in the face of fundamental reason and common sense and appears to have wrongly conflated the existence of an application for approval to An Bord Pleanála, which expressly states in the grounding documentation that its aim is *inter alia* to minimise impacts on the shellfish industry, with the environmental impact.
23. The Decision to reduce the area the subject of the licence was made in error and is entirely unsupported by any factual or scientific reason. In fact, all of the reasons for the Decision are positive and support the grant of the licence for the Total Area, not just for the reduced area. Indeed, as correctly noted at paragraph (e) of the Decision: "*Shellfish have a positive role in the ecosystem function in terms of nutrient and phytoplankton mediation*".
24. ALAB is accordingly requested to take account of the following submissions in relation to each of the statutory criteria. Before doing so, the Appellant wishes to make a number of preliminary remarks.

Preliminary Remarks

25. In making the present appeal, the Appellant is at a severe disadvantage as none of the reasons given suggest any basis whatsoever for the significant reduction in the established and previously licensed area. In fact, all reasons support the grant of the licence for the area of the application. Furthermore, in the absence of any information as to how the reduction was arrived at in the Decision, the Appellant in this case cannot even determine if the Minister firstly reduced an area by reason of the proposed development of a marina which has not been granted development consent or approval. The Appellant believes this may have occurred but is left guessing in this regard. This is utterly inappropriate and results in the Appellant being grossly and severely prejudiced in its ability to appeal against the Decision.
26. A map titled Marina Options (see **Annex 6**) accompanied Wexford County Council's submissions to the DAFM (copied to the Appellant by the DAFM) and dated 28 May 2018 (the "**Council Map**"). The Appellant responded to these submissions by letter dated 31 October 2018 by reference to this map. A further map is enclosed (see **Annex 7**) (the "**Recent Map**") showing what would happen if the DAFM had agreed with every exclusion shown on the Council Map, despite the fact that the proposed marina was premature and would pose a severe risk to the integrity of the SAC. This reflects everything that

could possibly have been excluded to allow for other potential uses in a "worst-case scenario", in the event that the DAFM provided for all the reductions sought by Wexford County Council from the Site. It should be borne in mind that some of the areas shown in the Council Map were not in fact included in the area the subject matter of the historic licensed area which was the subject of the application.

27. The Recent Map shows that all of the areas the Council suggested should be removed from the licenced area and which are actually included within same, including the training walls of the River Slaney, comprise a maximum of circa 6.943 ha.
28. Bizarrely, in the Decision, the Minister appears (although the Appellant remains uncertain as to how this occurred in the absence of any meaningful reasons) to have not only deducted the entirety of all of the areas suggested in the Council Map from the mussel bed area, but also, without any basis and without any reference to the Appellant, appears to have removed a further 13.057 ha from the Site. This determination was made in the absence of any evidential basis and despite there being no suggestion of any alternative use for such an area.

Long-established use of mussel cultivation and aquaculture and presence in the Natura 2000 sites

29. It is essential to any consideration of the Appellant's licence application and any suggestion to reduce the areas covered by the application, to consider the adverse and unknown effects that such a reduction would have on the mussel cultivation which is a long-established contributor to the natural environment within the Natura 2000 sites. This is included in the list of factors to be considered by Section 61 of the Act as well as by virtue of the designation of the area within which the licence has been applied to be renewed as a Natura 2000 site and pursuant to the provisions of the Habitats Directive, the Birds Directive and the principles of environmental protection as embodied in the Treaty on the Functioning of the European Union which states as follows (replacing Article 174 of the Treaty of the European Union):

"Article 191

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,*
- protecting human health,*
- prudent and rational utilisation of natural resources,*

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,

- environmental conditions in the various regions of the Union,

- the potential benefits and costs of action or lack of action,

- the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

30. The Decision which, while ostensibly acknowledging and accepting the positive impact that mussel cultivation (being the long standing activity in respect of which the aquaculture licence has been sought) has in protecting, enhancing and maintaining the conservation objectives of the Natura 2000 sites and their integrity, proposes to reduce and restrict such activity to an area of only 21% of the previous licensed area (itself a small percentage of the Natura 2000 Site). This would, in all likelihood, effect a significant development by banning and removing such mussel cultivation (including the removal of

excess nitrogen from the benthic environment and the preservation of the chemical balance within it) and thereby facilitate the development of a marina and large shoreline development which is likely to have significant adverse environmental impacts and could not be said, beyond scientific certainty, to avoid adverse impacts on the Natura 2000 site in question. On the contrary, the scientific assessment of mussel cultivation within the area as carried out by Aquafact has demonstrated that the activity will not adversely affect the integrity of the Natura 2000 sites; the absence of such effects has been demonstrated in the scientific assessment.

31. ALAB should be mindful of the potential of negative impacts from the cessation and removal of ongoing mussel cultivation activities which have been carried out since at least the 19th century, in an area now designated as a Natura 2000 site. Mussel cultivation is natural and sustainable and involves no importation of artificial materials into the environment.
32. As against that, the suggestion that the licence should be significantly reduced to allow for the development of an unapproved marina would be entirely unjustified and premature. This is particularly true in the absence of any approval and appropriate assessment and environmental impact assessment. The marina, and associated development, would involve the importation of concrete and artificial structures, boats and structures which have been and will continue to be treated with chemicals and in particular anti-foul which are known to be contrary to conservation interests. The development would also entail light and noise pollution, leakage of fuels and other materials during refuelling of vessels and otherwise, generation of waste materials and significant and year-round interference with species.

Statutory 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

33. The Total Area, and the wider Wexford Harbour waters, are undoubtedly suitable for aquaculture and have been found as such by the Minister. The Wexford County Development Plan 2013 – 2019 (the "**County Development Plan**") states as follows: "*The [EU Shellfish Waters Directive (2006/113/EC)]⁵, 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...*

⁵ As implemented by the European Communities (Quality of Shellfish Waters) Regulations 2006 (S.I No 268 of 2006) (as amended by SI No 55 of 2009 and SI No 464 of 2009).

There are four designated waters relevant to Wexford: Bannow Bay, Wexford Harbour Outer, Wexford Harbour Inner and Waterford Harbour" (emphasis added).⁶

34. The Appellant and its predecessors have farmed mussels in the Total Area/Wexford Harbour since 'time immemorial'; the Appellant has documentary proof back as far as 1897 (copies of which are enclosed at **Annex 3**). 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/sealife. Indeed, the DAFM's 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".⁷
35. In mainland Europe, Wexford mussels enjoy a stellar reputation and attract a premium price. Geographic factors help to make the area especially well-suited to mussel farming. In particular, the shape of the seabed in the Harbour protects mussels from high seas, thereby minimising mortality. Wexford Harbour is sheltered from almost all sides against storms. It is only open to easterly winds – however, the sandbanks in the mouth of the Harbour provide protection against these. Mussels generally thrive in areas where salt and fresh water meet. The tides ensure that nutrients from both the Irish Sea and the Slaney River mix well.
36. The Aquafact Report concludes that Wexford Harbour is entirely suitable for mussel cultivation.
37. The Appellant is certified as an organic producer and has an MSC certificate in stewardship from the Aquaculture Stewardship Council, a global organisation. Furthermore, the Appellant's products are labelled 'Origin-Green'. These accolades are very difficult to obtain and maintain. The contrast between the Appellant's business and the development of a hotel, marina, shops and apartments in its impact upon the environment is stark, to say the least. The former is in harmony with a special area of conservation ("**SAC**") while the latter is the antithesis of what should be permitted in an SAC.
38. The suitability of the waters for aquaculture is also 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*". This conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence. There is, therefore, no reason for the Minister to reduce the total licensed area based on criterion (a).

⁶ See page 115, available at <https://www.wexfordcoco.ie/sites/default/files/content/Planning/WexCoPlan13-19/Volume8.pdf>.

⁷ See <https://www.agriculture.gov.ie/media/migration/seafood/marineagenciesandprogrammes/nspa/NationalStrategicPlanSusAquaDevel181215.pdf> at page 30.

(b) other beneficial uses, existing or potential, of the place or waters concerned

39. The Aquafact Report finds that the only other actual use of the Harbour is for boating although that activity may be pursued notwithstanding the presence of mussel farms. For the purposes of mussel cultivation, other than mussels living on the seabed, there is little or no infrastructure in place. No structures of any kind need to be placed on the seabed or emerge anywhere on the seabed. No visual or other impediments for other activities are created by the practice of bottom mussel cultivation.
40. In relation to the proposed construction of a marina with an associated development, this is the second time a marina has been proposed. On the previous occasion, the development never proceeded. Furthermore, such a development would produce significant adverse environmental impacts in the Natura 2000 sites concerned including pollution, disturbance of species, removal of the positive influence and effect of the mussel beds from the footprint of any such development (for which the Appellant would be entitled to compensation).
41. By reason of the harmful effects of the suggested development of a marina on the location in question (which is entirely within a designated Natura 2000 site and would impact on listed habitats therein and result in the permanent destruction of such habitats within such sites including under the footprint of the support piers and columns for the marina), such a development could not be regarded as a "beneficial use" and therefore cannot be taken into account under Section 61(b) as a reason to restrict in any way the licence sought by the Appellant.
42. In relation to any works to the training walls or other such like suggested by Wexford County Council, the Appellant confirms that it will (as it has always done) cooperate in maintaining the harbour. Any works will, as normal, likely be carried out in stages and the mussels in that area can be harvested in advance of those works. Accordingly, these works are not a reason to in any way limit the traditional mussel cultivation and the licence in those areas.
43. The Aquafact Report concludes that the only other actual use of Wexford Harbour is for boating but the two activities are not mutually exclusive.
44. The Minister was therefore correct to state, at paragraph (b), that "public access to recreational and other activities is already accommodated by this project", and at paragraph (g) that "there are no issues regarding visual impact as the site to be utilised is for bottom culture". This conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence. There is, therefore, no reason for the Minister to reduce the total licensed area based on criterion (b).

(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

45. The Appellant acknowledges and relies upon the fact that the relevant waters are located in an SAC (or 'Natura 2000' site).⁸ The importance of mussel cultivation to the Site, and the support of the relevant listed habitats and species therein, is not in dispute. Indeed, this has been specifically recognised in the Decision (see paragraph (h)). In addition, the symbiotic importance of the relevant waters to mussel farming is recognised in the relevant local development plans.
46. The Aquafact Report concludes that the dynamic nature of the water flows in Wexford Harbour would mask any negative impact of mussel dredging.
47. As noted above, the County Development Plan states as follows: "*The [EU Shellfish Waters Directive (2006/113/EC)]⁹, 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).*
48. The Wexford Town & Environs Development Plan 2009-2015 (which was extended until 2019)¹⁰ refers to the Wexford Wildfowl Reserve (the "**Reserve**") which is situated to the north/north-east of Wexford Harbour. This document states that "*the overall aim of the Council will be to promote a reasonable balance between conservation measures and development measures in the interests of promoting the orderly and sustainable development of Wexford Town*" (emphasis added).¹¹
49. The maintenance of the status quo, i.e., granting the Appellant a licence over the Total Area, poses no threat to the maintenance of a reasonable balance between the conservation of the Reserve located to the north/north-east of the Site and the long-standing mussel cultivation activities in Wexford Harbour, which contribute positively to Wexford's economy and reputation.

⁸ Regulation 3 of the European Communities (Conservation of Wild Birds (Wexford Harbour and Sloba Special Protection Area 004076)) Regulations 2012 (as amended). Natura 2000 is a network of nature protection areas in the EU. This consists of special areas for SACs and special protection areas or SPAs under the EU's Habitat and Birds Directives.

⁹ As implemented into national law by the European Communities (Quality of Shellfish Waters) Regulations 2006 (S.I No 268 of 2006) (as amended by SI No 55 of 2009 and SI No 464 of 2009).

¹⁰ <https://www.wexfordcoco.ie/planning/development-plans-and-local-area-plans/current-plans/wexford-town-and-environs-development>

¹¹ See page 78, available at:

<https://www.wexfordcoco.ie/sites/default/files/content/Planning/WexfordTownPlan09-14/WexTown%26EnvDevPlan2009Ch7-9.pdf>

50. At paragraph (h) of the Decision, the Minister states that "*the Licensing Authority's Conclusion Statement (available on the Department's website) outlines how aquaculture activities in these SAC's/SPA's (sic), including this reconfigured site, are being licensed and managed so as not to significantly and adversely affect the integrity of the Slaney River Valley SAC , the Raven Point Nature Reserve SAC , Wexford Harbour and Slobs SPA and the Raven SPA*". This statement demonstrates an error of judgement on the part of the Minister. As will be described in further detail in the submissions under sub-section (e), it is not necessary for the Site to be "reconfigured" in order for the Appellant's aquaculture activities not to affect significantly and adversely the integrity of the relevant SAC. On the contrary, reducing the Appellant's licensed area may in fact lead to significant and adverse effects.

(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

51. At paragraph (b) of the Decision, the Minister states that "*the proposed development should have a positive effect on the economy of the local area*". The only way in which the Decision could be of benefit to the local economy is if it were a choice between the reduced licence, per the Decision, and no licence at all. However, this is not the case. In reality, the "proposed development", in the words of the Decision, will reduce economic activity. Put simply, the Minister has addressed the wrong question.

52. The Decision, which proposes to cut the Appellant's hectareage by 79%, would have an adverse effect on the local economy. The Appellant employs 15 full-time employees in the Wexford region. The Decision will inevitably result in much lower quantities of mussels being farmed and exported, with devastating effect on the Appellant's turnover, posing a very real threat to the viability of the Appellant's business. (This will also affect any tax revenues generated by the State from the Appellant.)

53. The cessation of the Appellant's mussel farming activities would entail the disposal of fishing fleet in addition to cuts to employment. These effects will not only impact the Appellant and its employees directly but will also permeate throughout the wider Wexford economy.

54. Other than the Appellant and its employees, the economic effects of the Decision will be felt by persons in, at least, the following categories of activity:

54.1 electrical maintenance, repair and replacement of marine and shore-based plant and equipment;

54.2 mechanical maintenance, repair and replacement of marine and shore-based plant and equipment;

- 54.3 the fabrication and maintenance of dredges, dredging equipment and other custom-made equipment used in the industry;
- 54.4 mussel dredgers, which ply a route into and out of Wexford Harbour and have helped maintain access to the Harbour, Wexford Boat Club and the Wexford Quays for visiting boats and increase confidence in the navigability of Wexford, despite its sand bars; and
- 54.5 the haulage sector: at the very least, 50 – 100 lorries per annum come into Wexford to collect mussels for export. These hauliers spend money in the Wexford economy which would be lost if the Appellant reduces its business activities at the Site.

55. Furthermore, the presence of the mussel fishing industry in Wexford town contributes to the enjoyment of tourists, who perceive Wexford as still a 'working' fishing location and not yet dominated by commercial development and idle leisure craft tied up in marinas.

56. The Aquafact Report concludes that the economic effects of mussel cultivation are seen as positive, as the cultivation process provides employment.

57. The Decision, if upheld, will have severe economic consequences which will exacerbate the problems exporters in the agri-food sector, such as the Appellant, would already have faced given the looming threat associated with the UK's planned withdrawal from the EU. Therefore, the Appellant fails to understand why the Minister, at paragraph (b) of the Decision, concluded that the development, as contemplated in the Decision, "*should have a positive effect on the economy of the local area*".

(e) the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna

58. The Aquafact Report underlines the ecological benefit of mussel cultivation in Wexford Harbour. It notes the long-standing positive contribution of such cultivation to the relevant ecosystem while also emphasising the control mechanism mussels exert on eutrophication. Finally, mussel beds in Wexford Harbour give rise to greater biodiversity – this benefit would be lost or greatly reduced by the Decision.

Estuarine area

59. In reaching the Decision, the Minister appears to have determined that, in estuarine areas, only 15% of the relevant area should be licensed for mussel farming activities. The effect is to reduce significantly the Appellant's licensed area. The figure of 15% is referenced in the DAFM's (undated) Appropriate

Assessment Conclusion Statement (the "**AACS**") for the Wexford Harbour and neighbouring SACs,¹² which is referenced in paragraph (h) of the Decision. The figure of 15% appears to be based on a recommendation by the National Parks & Wildlife Service (the "**NPWS**") in its 2011 report, "*Slaney River Valley SAC (site code: 0781) Conservation objectives supporting document -marine habitats and species*".¹³

60. The NPWS's report states as follows: "*Significant anthropogenic disturbance may occur with such intensity and/or frequency as to effectively represent a continuous or ongoing source of disturbance over time and space (e.g., effluent discharge within a given area). Drawing from the principle outlined in the European Commission's Article 17 reporting framework that disturbance of greater than 25% of the area of an Annex I habitat represents unfavourable conservation status, this Department takes the view that licensing of activities likely to cause continuous disturbance of each community type should not exceed an approximate area of 15%. Thereafter, an increasingly cautious approach is advocated"* (emphasis added).¹⁴
61. It can be seen from the above that the type of activities which gave rise to the above quotation were activities giving rise to ongoing and continuous disturbance including discharge of effluent. Such discharge would, as a prime example, arise from the construction and ongoing operation of a marina with associated shore-based development. It is not, however, of any relevance to the cultivation of mussels which is a positive factor for the Natura 2000 site designation, does not give rise to ongoing disturbance and does the exact opposite of discharging effluent, instead absorbing materials that could otherwise upset the careful balance of nutrients etc. within the site. Therefore, in reaching the Decision, if based on the NPWS's report, the Minister has entirely misinterpreted what was sought to be avoided in the NPWS report.
62. It is worth recalling the nature of the mussel farming activity. All of the Appellant's mussels, as with all other bottom cultivators of mussels, are located on the seabed. While the amount of time spent physically farming the area is variable, there is no basis for concluding, as is implicit in the Decision, that the Appellant's activity is continuous or ongoing and that, consequently, any geographic threshold should apply. (The Aquafact Report contains a detailed description of the mussel cultivation process.)

¹²

<https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/wexford/ConclusionStatementWexfordHbr110619.pdf>

¹³ https://www.npws.ie/sites/default/files/publications/pdf/000781_Slaney%20River%20Valley%20SAC%20Marine%20Supporting%20Doc_V1.pdf

¹⁴ Page 7.

63. While the mussels are maturing, the Appellant carries out monthly sampling activities to check for growth or predation. Sampling involves one passage of the Appellant's vessel over the area where the mussels are lying. A dredge is towed to take a sample of mussels which, after inspection, is returned to the seabed.
64. Prior to harvesting, mussels may be shifted from one area to another more productive, area. This may be done either to increase meat content or because of predation in the first area. Moving a bed of mussels normally means the Appellant's vessel is active on a site for seven or eight days over a two-week period. A normal fishing day during this time involves, at most, three to four hours' fishing.
65. When the Appellant harvests the mussels for sale, it 'fishes to order'. The orders normally require that fishing takes place on a Monday, Tuesday, Wednesday or Saturday. If market conditions are very good, the Appellant may fish on all four days; conversely, when things are slow, the Appellant may not fish any of the days. The Appellant normally fishes for one or two lorry-loads of mussels when harvesting. This activity takes approximately one hour to catch, so the vessel is out in Wexford Harbour for under two hours.
66. Sales of mussels may take place from July right through to the following April. The Appellant only has a certain amount to harvest in a season, so the activity is market-driven. It may fish over a long time, or the harvest may be concentrated and carried out in a short space of time. If the Appellant were to fish, say, 40 lorry-loads in a season, that would mean a maximum of 40 'harvesting trips' over nine months. On busy days, it may fish for two lorry-loads, which would reduce the total number of days 'on site' per year.
67. The mussels are in Wexford harbour for approximately two years from the time they are re-laid as seed mussels to when they are harvested for export. For the vast majority of this time, the mussels are simply growing in nature, and the Appellant's dredger is idle at the quayside.
68. Therefore, there is no basis for concluding that the Appellant's mussel farming activity is "continuous or ongoing" or causes "continuous disturbance". Furthermore, there is no effluent discharge other than what the mussels themselves produce.¹⁵
69. On the contrary, mussel farming is of significant benefit to the marine environment, particularly where other activities are undertaken nearby. As noted above, the Appellant's products are certified. Lindahl

¹⁵ In fact, the Appellant notes that mussels, even without farming, naturally occur in Wexford Harbour.

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.¹⁶

70. The Appellant refers to Chapter 11 of the Marine Institute's *Report supporting Appropriate Assessment of Aquaculture in Slaney River Valley SAC (Site Code: 000781) and Raven Point Nature Reserve SAC (Site Code: 000710)*,¹⁷ which comprises Annex I to the Marine Institute's *Appropriate Assessment Summary Report of Aquaculture in the Slaney River Valley SAC (Site Code: 000781), Raven Point Nature Reserve SAC (Site Code: 000710) Wexford Harbour and Slob SPA (site code 004076) and Raven SPA (site code 004019)*¹⁸(the "MIAA").

71. In that chapter, the authors note 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 report also highlights the enhancement to habitat heterogeneity caused by the mussel population.¹⁹ Chapter 11 concludes as follows:

*"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).*²⁰

72. With regard to the assertion (quoted above) that adding more mussels is subject to availability of additional seed, the Appellant notes that the relevant seed does not need to be fished in the Irish Sea. Several operators relay seed from elsewhere or take seed from half-grown mussels. (The Appellant also notes that such movements of shellfish must be approved by the Marine Institute.) Therefore, the

¹⁶ Odd Lindahl and Sven 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

¹⁷

<https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/AnnexIWexfordHarbourSACsAA270318.pdf>

¹⁸

<https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/WexfordHarbourNaturaSitesAASummary270318.pdf>

¹⁹ See pages 63 to 67.

²⁰ Page 67.

additional benefits highlighted in Annex I to the MIAA are not, in fact, "*subject to the availability of additional seed*" from Irish waters.

73. Furthermore, the European Commission's Reporting under Article 17 of the Habitats Directive, Explanatory Notes and Guidelines for the period 2013–2018 (the "**EC Guidelines**")²¹ indicate that devoting as much as 25% of an SAC to aquaculture is unlikely to affect that SAC's conservation status. In fact, the EC Guidelines do not necessarily apply a 25% 'limit' to aquaculture activities taking place within an SAC, as the Minister/NPWS seems to have inferred. The general evaluation matrix at Annex E of the EC Guidelines denotes an SAC's conservation status as 'Unfavourable – bad' if, *inter alia*, "*more than 25% of the area is unfavourable as regards its specific structures and functions*" (emphasis added). This means that if more than 25% of an SAC is considered unfavourable, then the entire area has an 'unfavourable' status.
74. Contrary to the apparent inference drawn by the Minister/NPWS, this does not in any way imply that if more than 25% of an SAC is licensed to aquaculture, the entire habitat is unfavourable. The NPWS has thus misinterpreted the EC Guidelines. As far as the Appellant is aware, no other EU Member State has interpreted the EC Guidelines in this manner. It is also worth recalling that mussel farming activities have subsisted for several generations in Wexford Harbour, with positive environmental effects. Mussel and other shellfish beds are known for providing a habitat for a large number of species. For example, the Wageningen University & Research, a Dutch third-level institution, has conducted several studies in the western Wadden Sea, off the northern coast of the Netherlands, concluding that mussel farming creates a 'hot spot' for biodiversity.²² (See also the Aquafact Report.)
75. However, even assuming that the NPWS's reading of the EC Guidelines is correct (which the Appellant does not believe to be the case), the Appellant does not understand why (a) the NPWS felt the need to cut this 25% figure by almost half, to 15% or (b) more pertinently, why the Minister decided to adopt the NPWS's reasoning.
76. There is no basis whatsoever for the Minister to have, apparently, firstly reduced the Total Area by in excess of 20 hectares, far in excess of any area for which other activities have ever been suggested and then to apply an apparent further reduction of the remaining area by two-thirds which wholly

²¹ European Commission, "*Reporting under Article 17 of the Habitats Directive, Explanatory Notes and Guidelines for the period 2013–2018, Final version – May 2017*", available here: <https://circabc.europa.eu/sd/a/3ed9f375-227e-46cd-b3dd-1fc59cefcdcb/Doc%20NADEG%2017-05-02%20Reporting%20guidelines%20Article%2017%20final%20April%2017.pdf>

²² <https://www.wur.nl/en/Research-Results/Research-Institutes/marine-research/Research/Projects/PRODUS-Sustainable-shellfish-culture/Effects-on-nature.htm>

unjustifiably and unfairly has singled out the Appellant and this mussel cultivation licensed area for a massive reduction by some 79%. This is entirely unfair and arbitrary.

77. Regarding any disturbance to the population of birds at the Wexford Wildfowl sanctuary, throughout its time engaged in mussel farming activities in Co. Wexford, the Appellant has been aware of the Reserve, located to the north/north-east of its sites. The Appellant understands that, in 2008 or 2009, the NPWS had concerns about the potential effects of mussel farming on the local population of Greenland white-fronted geese.
78. In/around 2009, the NPWS undertook a three-day study,²³ whereby it monitored the behaviour of the geese before, during and after a day on which the Appellant fished for mussels. The Appellant understood at the relevant time that the NPWS was due to carry out further relevant studies and produce a report demonstrating its conclusion. However, this report never materialised. Around the same time, BIM hired its own photographer to conduct a similar exercise. The Appellant understands that BIM's report uncovered minimal effect, if any, on the geese. The Appellant further understands that BIM has footage, and can produce this at a later stage if requested by ALAB (e.g., at an oral hearing). In fact, to the Appellant's knowledge, BIM's report showed that the geese in fact moved closer to the fishing activity when it was being conducted. To the best of the Appellant's knowledge, despite the findings of BIM's report, the NPWS report made no mention of it.

Coastal area

79. Separately, the Decision cites the AACS, which estimates the extent of intertidal habitat at approximately 1,400 hectares. The Appellant believes that this is a major over-estimate. The Appellant's coastal (i.e., non-estuarine) mussel beds are not intertidal. The Minister appears to have used erroneous maps to conclude that the relevant waters are intertidal.
80. The Appellant refers to paragraph 2.16 of Annex II to the MIAA, where it is stated that "*because of the rapidly changing nature of the mobile sandbanks at the mouth of the harbour, precise definition of tidal zones is problematic*" (emphasis added). At paragraph 2.18, the authors note that "*the configuration of sandbanks at the mouth of the harbour has, however, changed substantially since 2011 [when the satellite images were taken]*" and that "*upon ground-truthing undertaken by the GSI, the quality of the data in the inner part of the harbour was classified as unreliable or of limited reliability, due to high levels of turbidity at the time the image was captured. Despite these limitations, the GSI bathymetry data has*

²³ <https://www.agriculture.gov.ie/seafood/aquacultureforeshoremanagement/aquaculturelicensing/aquacultureforeshorelicenceapplications/wexford/>

been used for calculating levels of exposure of intertidal habitat at specified tidal levels" (emphasis added).

81. The MIAA, which the Decision reflects, has clearly acknowledged the deficiencies in the relevant bathymetry data. Furthermore, paragraph 2.17 refers to Wexford Harbour Chartlets prepared by Brian Coulter. When viewed, these chartlets clearly show that the Appellant has lost up to one metre of depth on the majority of the water in Wexford Harbour (where the vast majority of the Appellant's sites (and other sites) are based) due to the incorrect classification of the sites as intertidal.²⁴
82. Furthermore, the AACS itself notes the discrepancies between mapping methods. See page 6, where it is stated that "*the extent of intertidal habitat mapped by the GSI method is estimated at approximately 1,400 ha, as opposed to 1,027 ha, calculated from the OSI maps*". The Geological Survey Ireland ("**GSI**") maps, which produce satellite-derived bathymetry data and used at page 46 of Annex II to the MIAA,²⁵ show the relevant intertidal area. These maps purport to show that the River Slaney is intertidal on spring tides between Wexford Quay and Ferrybank Quay. This is patently inaccurate. The Appellant knows, from its extensive local knowledge, that there are two to three metres of water in that area at a low spring tide.
83. Moreover, the Appellant understands that the GSI is itself concerned that its own data has been used. Please see enclosed an e-mail dated 15 October 2019 from the GSI to this effect at **Annex 8**, where the author states that the GSI "*deemed the results as not satisfactory for any application related to coastal mapping*". The Appellant fails to understand how the Minister could possibly have relied upon the GSI data, when the very organisation which produced the data has expressly acknowledged their unreliability.
84. As a mussel-farming enterprise working in the Wexford Harbour on a regular basis over several years, the Appellant knows that huge areas of its sites which are deemed intertidal are simply not intertidal. Given that the data are inaccurate in Wexford Quays, an area which should be very easy to assess, the Appellant does not understand why they were relied upon for the rest of the harbour. Given the potentially enormous consequences of the Decision its business, the Appellant finds it extremely concerning that the bathymetry analysis, upon which the Decision is largely based, is inaccurate and incorrect.

²⁴ <https://wexfordharbour.info/iChart/index.html>

²⁵ *Marine Institute Birds Study for Wexford Harbour, the Raven and Rosslare Bay*
<https://www.agriculture.gov.ie/media/migration/seafood/aquacultureforeshoremanagement/aquaculturelicensing/appropriateassessments/AnnexIIWexfordSPAsAA270318.pdf>

85. In summary, the assessment of criterion (e) in the Decision and in the underlying documentation is based on flawed science and a flawed interpretation of science. To compound this error, the reasoning in the Decision cites only positive factors (see paragraphs (e), (h) and (k)). For example, paragraph (e) notes that "*shellfish have a positive role in the ecosystem function in terms of nutrient and phytoplankton mediation*". However, again, this conclusion applies equally to the Total Area as to the reduced area over which the Minister now proposes to grant a licence.

86. There is, therefore, no reason to reduce the Total Area based on criterion (e).

(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

87. The Appellant's activities have no material adverse effects on the environment. No infrastructure is used in mussel farming. Mussels are not fed and nothing is introduced into the water. Simply put, mussels do not create pollution.

88. The Aquafact Report concludes that the ecological effects of mussel cultivation in Wexford Harbour are generally seen as positive.

89. At paragraph (h), the Decision cites the recommendations of the AACS and the MIAA as a basis for reducing the Total Area. However, neither of these documents points to significant effects on the local environment as a result of the Appellant's activities. Therefore, there is no reason for the Minister to reduce the Total Area on the basis of criterion (f).

(g) the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters

90. The Appellant's activities have no material adverse effects on the man-made environment. Given the historical activity at the Appellant's sites, both before and after the first licences were issued, the Appellant is virtually certain that there are no archaeological elements on its sites. The Appellant understands that an archaeological survey was or is being prepared for Wexford Harbour. As far as the Appellant is aware, BIM has put this work out to tender and surveys and studies have taken place.

However, the Appellant is not aware of a final report, and understands that this report has not yet been completed.

91. That said, archaeological studies were carried out prior to grant of the original licence. In any event, the renewal applications should not require new archaeological surveys and, as far as the Appellant is aware, the applications for new sites are the only ones of relevance to the BIM-commissioned survey.
92. The Aquafact Report finds no predicted impacts on the man-made environment or its heritage value.
93. At paragraph (h), the Decision cites the recommendations of the AACS and the MIAA as a basis for reducing the Total Area. However, neither of these documents points to significant effects on the local environment as a result of the Appellant's activities. Therefore, it is not open to the Minister to reduce the Total Area on the basis of criterion (f).

Fundamental Principles of Public/Administrative Law

94. In addition to his failure to apply the criteria in Section 61 of the Act correctly, the Minister has breached fundamental principles of public/administrative²⁶ law in several respects. As a Member of the Government, the Minister is obliged to follow fundamental public law principles.

(i) Breach of the right to be heard

95. There is a broad duty on Irish public bodies, including the Minister, to give full information to parties such as the Appellant on a decision adverse to its (i.e., the Appellant's) interests which is in contemplation, and to give such party the opportunity to make the best possible case. Public bodies are required to inform persons such as the Appellant of defects in their cases, and to offer them the opportunity to address that difficulty. In *Mishra v Minister for Justice*, Kelly J held that fundamental fairness required that an applicant be given the opportunity to rebut a presumption of the Minister which was material to his decision to deny a citizenship application. More generally, *The State (McGeough) v Louth County* held that where a public authority adopts a principle or policy for deciding on an application, the applicant should be afforded "*the opportunity of conforming with or contesting such a principle or policy*".²⁷ Similarly, in a Privy Council case, *Mahon v Air New Zealand*, it was held that

²⁶ In this appeal, we use the terms "public law" and "administrative law" interchangeably.

²⁷ *State (McGeough) v Louth County Council* [1973] 107 LITR 13 at 28.

persons affected by decisions of public authorities (in that case, a tribunal) must have the opportunity to rebut evidence against them.²⁸

96. The Minister was thus required to provide the Appellant with the opportunity to rebut evidence on which the Minister intended to rely in a decision. Such procedures are common in other areas of administrative law. To take one example, when the Competition and Consumer Protection Commission (formerly the Competition Authority) (the "**CCPC**") is potentially minded to determine that a merger or acquisition²⁹ will result in a substantial lessening of competition (i.e., to block that merger or acquisition), its practice (although it is not legally required to do so) is to furnish the parties to the transaction with an Assessment. The purpose of the Assessment is to demonstrate the reasons why, in the CCPC's preliminary view, the merger or acquisition will have an anti-competitive effect and therefore not be in the public interest. Typically, the CCPC's Assessment is based on econometric or other evidence which supports the preliminary conclusion. Furthermore, parties are given the opportunity to request an oral hearing, at which they are given the full opportunity to rebut the evidence on which the CCPC proposes to rely.³⁰
97. At no stage prior to the Decision being published in the *Wexford People*, either during the public consultation process, or after stating its observations, was the Appellant provided with any indication of the Minister's preliminary or ultimate conclusion. The first time the Appellant was made aware of the Minister's decision was on 17 September 2019, when the relevant notice appeared in the *Wexford People*.
98. Needless to say, the Appellant was very surprised to learn of the Minister's findings, and by the manner in which it did so. As noted above, the Decision is based on flawed reasons. However, to add insult to injury, the manner in which the Minister informed the Appellant and the procedures followed during the process, are in clear breach of the Minister's obligations under public law to provide the Appellant with the opportunity to respond to the Minister's preliminary conclusions.

²⁸ *Mahon v Air New Zealand*, [1984] A.C. 808.

²⁹ As defined in Section 16 of the Competition Act 2002 (as amended).

³⁰ See the CCPC's *Mergers and Acquisitions Procedures*, available at <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/04/CCPC-Mergers-Procedures-for-the-review-of-mergers-and-acquisitions.pdf>

(ii) Failure to Exercise Proportionality/Abuse of Discretionary Powers

99. In exercising its discretionary powers, a public body must abide by the principle of proportionality.³¹ It is also clear that a public body must not abuse those powers. It is clear from the *Wednesbury* judgment³² that one of the ways in which a public authority may abuse its discretionary power is by taking irrelevant factors into account and/or not taking relevant factors into account.
100. The NPWS appears to interpret the EC Guidelines as recommending that, at most, 25% of an SAC should be allocated to activities which may be damaging to the relevant habitat. As stated above, this mis-interprets the EC Guidelines. All the EC Guidelines say is that if more than 25% of an SAC is considered unfavourable, then the entire area has an 'unfavourable' status (see above regarding Section 61(e) of the Act). However, even if the NPWS's interpretation was correct (which the Appellant strongly disputes), in order for the EC Guidelines to apply in the first place, it must be demonstrated that the activities are, in fact, damaging. As noted above, Lindahl and Kollberg, amongst others, have demonstrated that mussel farming activities are in fact beneficial to the marine environment. These benefits include the combatting of eutrophication. (See section 4 of the Aquafact Report.)
101. Going one step further, again assuming that the NPWS's interpretation of the EC Guidelines is correct, even if mussel farming could be said to be damaging to the local habitat/marine environment (which the Appellant strongly disputes), reducing the licensed area to 15% of the SAC is draconian and wholly disproportionate. It is not clear to the Appellant why such a large reduction is merited. Indeed, this 'cut' appears somewhat arbitrary. The Appellant acknowledges that the NPWS's view is not binding on the Minister. Nonetheless, the Minister should have given due consideration to the merits of (a) the NPWS's interpretation of the EC Guidelines and (b) the NPWS's view that it is appropriate to reduce the licensed area from 25% to 15%. This is particularly true in circumstances where the evidence for the purported net environmental damage (i.e., damage from the mussel farming to the local habitat) is, at best, suspect and where mussel farming has been conducted at Wexford Harbour for several generations while producing environmental and other benefits. Instead, the Minister appears to have (a) blindly accepted the NPWS's interpretation of the EC Guidelines and (b) given a disproportionate weight to the NPWS's view, taking an upper limit for aquaculture of 15% of an SAC 'as read', notwithstanding the substantial evidence that a figure of 25% should be more than acceptable (and that the activity is not environmentally damaging in the first place).

³¹ *Barry v Sentencing Review Group and the Minister for Justice, Equality and Law Reform*, [2001] 4 IR 67.

³² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

102. The NPWS has taken the view that the figure of 25% should be reduced to 15% without any scientific basis and despite the positive influence that the mussel cultivation has had in the wider Wexford Harbour over decades. This reduction will likely bring about a drastic change, the impacts of which are entirely unknown, and there is no suggestion that the reduction proposed could be said to avoid adverse significant impacts and in particular could be said not to adversely affect the integrity of the Natura 2000 site. The fact that the mussel cultivation is so long established and has been shown to have positive impacts in this regard should be stressed (as might not be the case in other aquaculture such as fish farming). The European Commission's comments in this regard apply to aquaculture in general and the positive impacts of mussel cultivation necessitate a far more positive appreciation of its role in the biological functioning and maintaining and enhancement of the conservation objectives and interests in an SAC.
103. The NPWS's view is not binding on the Minister and it is proposing a development being the removal of large areas of mussel cultivation, the impacts of which have not been scientifically assessed. In circumstances where the mussel cultivation has led to a state where the site merited designation as an SAC/Natura 2000 site and has continued to support this status since, the removal of mussel cultivation without scientific assessment should not be permitted.
104. An analogy here could be drawn with an SAC such as the Burren where an amount of grazing carried out by domestic animals has contributed to and continues to contribute to the conservation objectives by limiting the spread and cover of species that would otherwise be likely to deprive the listed habitats and species of light and space as well as nutrients. The drastic reduction of mussel cultivation, and the periodic removal of excess nitrogen from harvesting, should not be enforced or compelled as to do so would be to risk a fundamental alteration of the balance within the SAC.
105. The analysis enclosed carried out by Aquafact makes clear that the mussel cultivation is unlikely to have adverse impacts on the SAC and in fact has and will continue to have positive effects on preserving and maintaining the conservation objectives and interests at a favourable conservation status. Accordingly, ALAB has before it scientific analysis that has been carried out on the effects of the mussel cultivation, the impacts of which have been assessed and are not challenged as having no adverse impacts on the integrity of the SAC.

(iii) Breach of Appellant's legitimate expectations

106. The doctrine of legitimate expectations is a fundamental feature of Irish public/administrative law. In essence, the doctrine requires a public body such as the Minister honour a commitment as to the procedure(s) it will follow. The aim of the doctrine is partly to ensure legal certainty with regard to a public body's performance of its functions, and to ensure good administration.³³ In *Glencar Exploration plc v Mayo County Council*,³⁴ Fennelly J in the Supreme Court stated the three principles of legitimate expectation. Firstly, a public authority must have made a promise or representation, express or implied. Secondly, that representation must be addressed to identifiable group of persons, such that it forms part of the relationship between the authority and those persons. Thirdly, that representation must create a reasonable (or legitimate) expectation, to the extent that it would be unjust for the authority to renege from it.
107. The same approach was adopted by the High Court in *Lett & Co v Wexford Borough Council*, a case which, coincidentally, related to a compensation scheme for mussel fishermen in Wexford Harbour who suffered financial losses caused by the operation of a waste water facility. In that case, it was decided that the representation by the public body must relate to its exercise of a statutory power.³⁵
108. As documented above, the Appellant applied for its licence to be renewed in 2017 (replacing an application by Lett & Co). The Appellant had received no communication from the Minister or his officials regarding the licence application suggesting that any adverse finding was being considered. Relations with the Minister were, at all times, positive. There was thus an implied representation by the Minister that the Appellant would, at the very least, be consulted upon, and given the right to make submissions on, any proposed decision by the Minister. The Minister failed to process the Appellant's licence application expeditiously. The Appellant thus continued to farm the relevant sites, with no indication that an adverse decision was being contemplated.
109. The Appellant, together with some of its competitors who are also affected by similar decisions of the Minister (and have lodged separate appeals), comprise a clearly identifiable group of persons.
110. Finally, the Minister's implied representation gave no indication that there would be any reduction in the licensed area. At the very least, the Minister never gave any indication that a significant reduction,

³³ See, for example, *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 which endorsed by the Irish High Court in *Fakih v Minister for Justice* [1993] 2 IR 406.

³⁴ *Glencar Explorations plc v Mayo County Council*, [1992] 1 IR 84 at 162 – 163.

³⁵ In that case, the purported payment of compensation was not under a statutory power. Therefore, it was held that no legitimate expectation had been formed.

which poses a serious threat to the viability of the Appellant's business (and indeed of the other appellants) and their employees, was contemplated. Therefore, the Appellant (and the other appellants) had formed a legitimate expectation that their licences would be renewed in full.

111. It is also clear that the Minister's implied representation relates to a statutory function, namely the Minister's power to grant licences under Section 7 of the Act, in contrast with the facts of *Lett & Co* cited above.

Non-Exhaustive Nature of Claims

112. In addition to the factors outlined above regarding the Act and fundamental principles of public/administrative law, the Appellant reserves the right, as stated in paragraph 15, to make further submissions to ALAB at an oral hearing or otherwise, based on including under constitutional law, the EU Charter of Fundamental Rights and/or under the European Convention on Human Rights.

Conclusion

113. For the reasons set out above and, notwithstanding the severe difficulties that the Appellant has had to operate under as outlined above, it is contended that the overwhelming evidence and environmental considerations lead to only one reasonable outcome that the Total Area, which has an established and environmentally favourable use for mussel cultivation and has contributed to the designation of the River Slaney SAC and other adjoining Natura 2000 sites, should be continued. There is furthermore no possible justification for any arbitrary reduction whether by 20 hectares or otherwise of the licensed area for a possible development (of a marina and associated significant shore line development) that would have an admitted and permanent negative impact on the SAC. Such a proposed development has not been approved and is almost certain to be rejected or to require referral to the European Commission as having an adverse impact on the integrity of the SAC, which hosts a priority habitat albeit not one in any way connected with mussel cultivation or which would in any way be capable of being affected thereby.³⁶ It would be entirely wrong, contrary to Section 61(b) of the Act and improper given that the development of a marina would not be beneficial (involving, as it would, negative impacts on the SAC) and given the requirement on ALAB as an emanation of the State to take a purposive interpretation of legislation aimed at protecting and preserving the environment to remove areas from this licence to facilitate (and indeed possibly to go far beyond if the 20 hectares was deducted for this purpose) such

³⁶ Being Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (Alno-Padion, *Alnion incanae*, *Salicion albae*) (Priority Habitat 91E0).

a development which has not been approved, has negative impacts and any reduction would furthermore be entirely premature at this stage.

114. Several detailed scientific assessments have been carried out of the cultivation of mussels have been carried out. The clear conclusions of those assessments has ruled out any adverse impact on the integrity of the SAC arising from the activity. In addition, those assessments have demonstrated the positive environmental effects on the maintaining and enhancing the habitats and Species within the Natura 2000 sites of mussel cultivation. These studies have shown a favourable conservation condition as accords with the conservation objectives for the SAC. In light of this, the appeal should be allowed, and the licence should be issued for the Total Area, to facilitate the continued operation of mussel cultivation with all its attendant environmental and economic benefits.
115. In conclusion, the Decision is vitiated by errors of law both in the interpretation of the various criteria established by Section 61 of the Act and in failure to follow key principles of administrative law. It is also simply wrong on the substance. Therefore, the Appellant requests ALAB to set aside the Decision and grant it the right to continue cultivating mussels on the Total Area of the Site.