

FISHERIES (AMENDMENT) ACT 1997 (AS AMENDED AND SUBSTITUTED)

Appeal Reference Number: **AP5/2020**

## **DETERMINATION**

**WHEREAS** an appeal having been made to the Aquaculture Licences Appeals Board (“**the Board**”) pursuant to Section 40 of the Fisheries (Amendment) Act, 1997 (as amended) (“**the Act**”) by Save Ballyness Bay S.A.C. Action Group (“**the Appellant**”) against the decision of the Minister for Agriculture, Food and the Marine (“**the Minister**”) to **GRANT with Variation** a Licence to Edward & Paul O’Brien for the cultivation of Pacific Oysters using bags and trestles & Clams on wooden trays under mesh on Site T12/409B (“**the Site**”) on the inter-tidal foreshore in Ballyness Bay, Co. Donegal.

**AND WHEREAS** the Board in considering the appeal took account of the appeal, the file provided to it by the Minister, the “Report supporting Appropriate Assessment of Aquaculture in Ballyness Bay SAC” of the Marine Institute dated February 2019, the “Final Appropriate Assessment Conclusion Statement by Licencing Authority in support of the Appropriate Assessment of Aquaculture in Ballyness Bay SAC” dated November 2019, the “Screening for Appropriate Assessment & Natura Impact Assessment” produced by Aquafact dated September 2023, the “Appropriate Assessment Supplementary Report” of the Board’s Technical Advisor dated 22 March 2024, the “Appropriate Assessment Conclusion Statement” of the Board dated 05 April 2024, the “Technical Advisor’s Report – Shellfish Appeals” of the Board’s Technical Advisor dated 10 April 2024 and the matters set out at Section 61 of the Act (as amended and substituted), including the following:-

- (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 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.

The Board considered the appeal at its meetings on the **31 January 2020, 26 February 2020, 19 March 2020, 22 April 2020, 15 May 2020, 28 May 2021, 21 September 2021, 21 October 2021, 25 November 2021, 13 January 2022, 10 February 2022, 14 April 2022, 16 March 2022, 12 May 2022, 14 July 2022, 25 August 2022, 6 October 2022, 23 November 2022, 15 December 2022, 26 January 2023, 2 March 2023, 6 April 2023, 25 May 2023, 23 June 2023, 28 July 2023, 31 August 2023, 28 September 2023, 23 November 2023, 14 December 2023, 26 January 2024, 1 March 2024, 28 March 2024 and 11 April 2024.**

## **GROUND OF APPEAL**

The grounds of the appeal are summarised as follows:

1. Ineffective Public Consultation: the appellant claims the Minister was in breach of the Aarhus Convention regarding proper public consultation and that they have made a submission to the Aarhus Convention Compliance Committee regarding this issue. They claim the Minister did not advertise the proposed development in an appropriate, effective manner and did not take the appellant's views into consideration once they became aware of the proposed development. They also claim that the notices were only published in English and not Irish.
2. Inadequate Appropriate Assessment (AA) and AA Conclusion Statement: the appellant claims the Minister made unsubstantiated assumptions in determining that the proposed development would have no significant impact on Natura 2000 sites. The appellant then goes on to detail a number of issues they feel were not dealt with sufficiently in the AA Report or the AA Conclusion Statement and do not fulfil the requirements for an AA. These include:
  - a. Screening out habitats without sufficient explanation.
  - b. Unresolved issues, that is, highlighted issues within the AA report were not resolved in the AA Conclusion Statement.
  - c. Inadequate consideration of ex-situ effects.

- d. Inadequate consideration of increased traffic and access to the site and uncertainty over access to some sites.
  - e. Lack of assessment for alternative proposed access route.
  - f. Potential impacts on local otter population.
  - g. Potential impacts on local seal populations (species not specified),
  - h. Not fully considering physical and biological impacts including biological effects, seston filtration, shading, fouling, introduction of non-native species, nutrient exchange and surface disturbance.
  - i. The potential for triploid Pacific oysters to reproduce.
  - j. The risk posed by introducing Manila clam to the bay.
  - k. Incorrect information regarding a lack of fishing activity in the bay.
  - l. Inadequate consideration on in-combination effects.
  - m. Inadequate consideration of the physical impacts of aquaculture.
  - n. The assessment of all 18 applications in one AA report rather than individually
  - o. Lack of a bathymetric survey.
  - p. Inadequate consideration of identified residual impacts.
  - q. Inaccurate conclusions regarding the impacts on recreational users and tourists
  - r. Relying on conclusions from data assigned a "low confidence."
  - s. Lack of consideration of facilities for packing and storage of harvested shellfish
  - t. Lack of inclusion of conditions under Section 7 (3) of the Fisheries Act (1997)
  - u. Inadequate consideration of the effect the proposed development will have on public access to the area.
3. Lack of an EIA: The appellant claims an EIA should have been carried out by the Minister for this development and that it contravenes the requirements under the Habitats Directive (rather than the EIA Directive).
  4. Incorrect conclusion of the Minister regarding potential impacts on the local economy
  5. Not a designated shellfish area: the appellant claim this indicates the area should not be licenced for shellfish aquaculture.

## **ENVIRONMENTAL IMPACT ASSESSMENT**

The Board considered the project proposed in the Application for an Aquaculture Licence under the requirements of the Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012 and the EIA Directive (2011/92/EU) and concluded that, under the requirements of the legislation as they are extensive aquaculture, they are exempt developments. Therefore, they were not likely to have significant effects on the environment by virtue of their size, nature or

location and so do not require a screening report or an environmental impact assessment report.

Therefore, the Board is satisfied that the project was not likely to have significant direct or indirect effects at the Site on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under the Habitats and Birds Directives;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape; and
- (e) the interaction between the factors referred to in points (a) to (d)

will not have significant effects on the environment, including the factors listed in (a) to (d) by virtue of, inter alia, its nature, size or location.

The Board has concluded that the proposed project falls outside the requirements for conducting an environmental impact assessment as this type of aquaculture is not deemed “intensive” so does not require an environmental impact assessment report under the Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012.

## **APPROPRIATE ASSESSMENT**

The Board considered the project proposed in the Application for an Aquaculture Licence under the requirements of the European Communities (Birds and Natural Habitats) Regulations 2011 and the Habitats and Birds Directives (2009/147/EC and 92/43/EEC) (“the Birds and Habitats Directives”), “Report supporting Appropriate Assessment of Aquaculture in Ballyness Bay SAC” of the Marine Institute dated February 2019, the “Final Appropriate Assessment Conclusion Statement by Licencing Authority in support of the Appropriate Assessment of Aquaculture in Ballyness Bay SAC” dated November 2019, the “Screening for Appropriate Assessment & Natura Impact Assessment” produced by Aquafact dated September 2023, the “Appropriate Assessment Supplementary Report” of the Board’s Technical Advisor dated 22 March 2024, the “Appropriate Assessment Conclusion Statement” of the Board dated 05 April 2024.

Following an assessment of the available reports and the additional information assessed in their own technical advisor’s supplemental Appropriate Assessment Report, the Appropriate Assessment Conclusion Statement of 5 April 2024 the Board found that once the recommendations and mitigations listed in the Technical Advisors AA Conclusion Statement of

the 5 April 2024 are implemented, that the proposed developments would not have a significant negative impact on any of the conservation objectives or qualifying interest species of any of the SACs or SPAs assessed.

## **DETERMINATION**

The Board has determined the appeal on the grounds that:

- There are no objections from a technical perspective as the sites are suitable for clam culture and trestle culture, being in an area with a firm substrate of sand and a good tidal range for the intertidal culture of oysters.
- An alternative access route has been identified which does not pose a risk to the Annex 1 habitat (2130); Fixed coastal dunes with herbaceous vegetation (grey dunes) which forms part of the Ballyness Bay SAC.
- Although the sites are not in a Designated Shellfish Area or a Classified Bivalve Mollusc Production Area, this does not preclude the site from being licenced.
- This sites, partially due to the reduced site size licenced by the Minister (resulting of the splitting of the original site into two smaller sites), will not have a visual impact or pose a risk to recreational users when the tide covers the site.
- The area used by the sites, when combined with all other proposed aquaculture sites, do not utilise more than the 15% habitat use threshold identified for disturbance of a conservation interest within a SAC.
- The Site T12/409B1 is a suitable distance from the known seal haul-out site identified in the bay.
- The sites will have a positive impact on the local economy.
- The sites will not have a significant negative impact on the statutory status, ecology or environment of the bay.
- The sites will not have a negative impact on the man-made heritage of the area.
- Visual impact of the Site from nearby roads will be minimal due to distance although there will be some visual impact for recreational users at low tide due to the flat, open nature of the bay, but this is not considered significant.
- Potential risk to recreational users e.g. kayakers, windsurfers if the locations of the trestles are not marked at high tide, but the technical advisor recommends that suitable marking be made a condition of any licence granted(which is outlined in section 4.3 of the Aquaculture Licence from the Minister for Agriculture, Food and the Marine).


With regard to site T12/409B2 a portion of this Site is not a suitable distance from the known seal haul-out site identified in the bay. A variation licence granting a smaller site size is being granted here.

It is the technical advisor's recommendation to **grant a licence for part of the site for appeal site AP5/2020**. This site was granted with variation by the Minister, effectively splitting it into two sites. The technical advisor advises granting T12/409B1 for the reasons outlined above and granting with variation T12/409B2, by removing the portion that overlaps with the 200m limit from seal haul out sites as shown in the accompanying reports.

Having considered all the foregoing and the information contained in the technical advisor's report of the 10 April 2024, the Board determined at its meeting on 11 April 2024 pursuant to Section 40 (4) (c) of the Act, to **AMEND** the decision of the Minister and **GRANTING with Variation** an Aquaculture Licence to the Applicant at Site T12/409B1 & T12/409B2.

Dated this 22<sup>ND</sup> day of MAY, 2024

The affixing of the Seal of the  
**AQUACULTURE LICENCES APPEALS BOARD**  
was authenticated by: -



Deputy Chairperson



Authorised Signatory