

Mary O'Hara,
Aquaculture Licences Appeals Board
Kilminchy Court
Dublin Road
Portlaoise
Co. Laois.

Sent by email to: info@alab.ie

12/03/2020

Appeal observation pursuant to the provisions of S45 of the 1997 Fisheries Amendment Act

To Whom It May Concern:

Please find attached An Taisce's submission in support of multiple appeals to ALAB by the Save Ballyness community group. The appeal reference numbers are AP3-20, AP4-1-20, AP4-2-20, AP5-20, AP6-20, AP7-20, AP8-20, AP9-20, AP10-20, AP11-20, AP12-20, AP12-20, AP13-3-20, AP14-20, AP15-20, AP16-2-20 in relation to aquaculture in Ballyness Bay, County Donegal. An Taisce notes that there is no provision in S45 of the 1997 Act setting out how a submission is to be made, and as such this submission is being made by email.

Our original submission outlines many of An Taisce's points in regard to oyster cultivation in Ballyness Bay, as applicable to these granted licences, and as such our earlier documentation is attached to this document as Appendix I.

1. Grey Seals

Our original submission outlined our concerns in regard to the potential impact of aquaculture operations on Grey Seal in Ballyness Bay (see original submission- Appendix I). The conclusion statement by the DAFM rebutted our concerns thus:

*'While it is noted that the species observed at the haul-out location in Ballyness Bay was not defined and **could have been the Common Seal or the Grey Seal** the conclusions of the report are based upon experience at other seal locations. Where seals do not have to share space (i.e., sandbank) with other activities, there tends to be acclimation and less likelihood of disturbance. It is considered the greatest risk*

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will originate from activities at the proposed aquaculture site identified. The management measures proposed are appropriate.'

An Taisce would highlight, that there is clearly lacunae in the data if the Department cannot even say for definite what type of seal was seen. As outlined in our initial submission, legally the licensing authority need to be able to conclude beyond reasonable doubt that the QI communities will not be disturbed. , as outlined in the ECJ ruling for C-404/09¹ [Commission v Spain] which held that "[a]n assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions **capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned.**" [An Taisce emphasis]

Similarly, the court held in the case of the Commission v Italy that "assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, **where doubt remains as to the absence of such effects, the competent authority will have to refuse permission.**" (C304/05². Para 58) [An Taisce emphasis]

To argue that there may not be an impact owing to a lack of information on the type of seal species is not equivalent to removing all reasonable scientific doubt. We submit that what is clearly evident from this statement is that before licensing can proceed a targeted seal survey must be carried out.

Further to that, An Taisce would question how the Department can conclude that the management measures proposed are appropriate given the below copied statements from the AA report. There is no indication in the conclusion statement that these have been sufficiently addressed.

*'In relation to interactions between aquaculture operations and seal use of the site, the risk of disturbance **cannot be discounted.** It is important to note that the site, to date, has had very little aquaculture operations and therefore, the seals will have little opportunity to habituate to the activities.'*

and:

*Given that there are currently no aquaculture operations in Ballyness Bay, **it is not certain** that the introduction of significant levels of aquaculture operations will not impact on the site use by these Annex II species, in particular at those locations proximate to the this haul-out location. Therefore, the risk posed by the proposed*

¹ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/09>

² <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-304/05&td=ALL>

*aquaculture activities in Ballyness Bay to seal conservation features **cannot be discounted**.* [An Taisce emphasis].

An Taisce would direct the licensing authority to the paragraphs above which outline the requirement for certainty under the Habitats Directive, and the removal of doubt before licensing can continue. As outlined in our original submission, while An Taisce acknowledge that site T12-508A posed the greatest risk, the conclusions reached in the AA document indicate that it is the aquaculture activity in general which poses a risk, and this cannot be discounted.

As such, An Taisce would advise ALAB and the Department that in our opinion to proceed with licensing while significant levels of uncertainty remain will place the licensing authority in contravention of Article 6(3) of the Habitats Directive. We would also highlight the increasing body of Irish and European case law in regard to insufficient appropriate assessments, and subsequent rulings to quash licensing decisions and planning permission on those grounds.

2. SPAs

An Taisce note the submission by the DCHG, which outlined the following concern:

"The Appropriate Assessment screens out a number of SPAs on the basis of no spatial overlap. However, the following SPAs - Falcarragh to Meenlaragh SPA (site code 004149), Inishbofin, Inishdooley and Inishbeg SPA (site code 004083) and Horn Head to Fanad Head SPA (site code 004194) lie within the 15km zone of impact (DEHLG, 2010) of Ballyness Bay. No rationale is given as to how or why potential detrimental interactions between the conservation features of these SPAs and aquaculture activities within Ballyness Bay were ruled out. It is therefore recommended that a more thorough and complete consideration of these SPAs and their conservation features be documented in order to complete this appropriate assessment process."

Despite this concern from the NPWS, the national Government body charged with the implementation of the Birds Directive in Ireland, the conclusion statement outlines the following:

'It is noted that to date, 30+ Natura reports have been produced and the comment from DCHG in relation to SPA screening is the first time, to our knowledge, this Department have requested additional detail in relation to a screening exercise of proximate Natura sites. The Department scientific advisors concur that connectivity with regard to Natura sites is an important issue and this was considered when examining conservation objectives set for all proximate Natura sites. It should be noted that particular focus on the SPA sites considered in Natura assessment reports are Species of Conservation Interest (SCI) that would exclusively use intertidal sand-flat/mud-flat habitats. Mud-flat and sand-flats are not typical feeding areas for

many of the SCIs identified in the SPAs in question. These species as they are likely to feed in a diverse range of offshore or terrestrial (in the case of corncrake) habitats (Gittings and O'Donoghue 2012). As such, many SCIs were considered unlikely to interact with the proposed activities. For those species that may utilise intertidal sedimentary habitats (i.e., gull species), **it is the view of the MI** that gull species will not rely to any great extent on the intertidal sandflats found in Ballyness Bay given alternative feeding habitat is available, e.g., terrestrial or open water—as is the case in this instance. Furthermore, it should be noted, that the interaction with trestles by gull species was considered variable in the Gittings and O'Donoghue (2012) study, and at low abundance levels (up to 10) the predicted levels closely matched the observed levels (Gittings and O'Donoghue 2012), indicating little or no negative interaction. Given the low numbers of breeding pairs (i.e. 20) of Common Gulls found on Inishbofin, Inishdoeey and Inishbeg SPA and that alternative habitat between these areas and the proposed culture sites can be found, we **consider it unlikely that gulls that might attend the aquaculture areas in numbers** that would result in adverse impact. The Department based on all the above considerations does not see any need to revise the outputs or conclusions in the AA report underpinning the assessment process.' [An Taisce emphasis]

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Firstly, An Taisce would observe that given the lack of previous comment by the DCHG on the 30+ Natura Impact Statements, their decision to comment on this one would mark it out as potentially being of greater concern. Given the proximity to 7 SPAs, and the concerns raised by the DCHG, An Taisce submit that it is not sufficient to screen out all impacts on SPAs, with no bird surveys in the Bay itself, with the conclusions based purely on data gathered for other SPAs. Furthermore, it was outlined in the AA report that:

'there are 7 SPA sites in the vicinity of Ballyness Bay SAC. The characteristic features of these sites were identified and a preliminary screening was carried out on the likely interaction with aquaculture activities based primarily upon the likelihood of spatial overlap.

Table 4.3 in the AA report then went on to outline for each SPA: *'No spatial overlap or likely detrimental interactions of conservation features with aquaculture activities in Ballyness Bay SAC – excluded from further analysis'*. This was the full extent of the information provided in the screening document for screening these sites out.

An Taisce would highlight that lack of spatial overlap with SPA sites is not a robust reason for screening an activity out, given the mobile nature of the birds and likely ex-situ impacts. The emboldened wording above in the text from the Conclusion Statement indicates that it cannot be concluded beyond reasonable doubt, given that the screening decision would appear to be based on conjecture, with no on site bird surveys, or strong scientific rationale.

In the ruling of *Kelly v An Bord Pleanála & Ors.*, [2013 No 802 J.R.] with reference to *Commission v Spain* C-404/09 the High Court held in para 36 that that the competent authority must carry out an AA for a plan or project in light of the best scientific knowledge in the field and that the final determination of the competent authority must include complete, precise and definitive findings. It was also held that the competent authority must also lay out the rational and reasoning which was used to arrive at the determination. An Taisce do not believe these criteria have been met in this instance given the paucity of the data provided in the screening section.

In summary, given the concerns expressed by the DCHG and the proximity to 7 SPAs, the screening out of these sites with no robust scientific rationale or bird surveys is very concerning in light of the Government's legal requirements under the Birds Directive. We submit that a full stage 2 Appropriate Assessment is required to meet the requirements of the Birds Directive prior to making any licencing decision.

3. 15% Rule

The 15% rule upon which the Appropriate Assessment report and the AA Conclusion Statement references guidance from the NPWS:

'Taking account of these revised values and habitat utilisation by the aquaculture sites themselves, the total spatial overlap will be below the threshold for disturbance of 15%.'

. The NPWS's Conservation Objectives supporting document outlines that:

'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%³.'

The source of this 15% threshold is unknown. The Commission framework on which it is allegedly based has not been included in the application documents, and it has not been possible to examine it. More fundamentally, it is not referred to in Article 17 of the Habitats Directive. It is also not referred to in Article 6(3) of the Habitats Directive which sets out the obligation for Appropriate Assessment. And it is not anywhere referred to in the case law of the EU Court of Justice. On the contrary, several judgements of the Court of Justice set out very clearly very specific requirements in relation to site specific considerations and the thresholds of scientific certainty required for each of the different tests required to be addressed under Article 6(3) as clarified by the CJEU.

³ NPWS. 2014b. Ballyness Bay SAC (Site code: 001090) Conservation Objectives supporting document – Marine habitats. Department Arts, Heritage and the Gaeltacht. Version 1 (April 2014); 12pp.

The court's consideration of the case specific context for how effects need to be considered relies in large part on the specific ecological considerations at issue for the habitat or species at issue, and the nature of impacts. In assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project as clarified by the CJEU in case c-127/02 Waddenzee. So both the project and site characteristics are required to be considered which is quite opposite to the very generic approach proposed with this 15% rule by the NPWS. As such, the guidance provided by the NPWS would appear to undermine the legal requirements of the Habitats Directive if applied across the board.

In conclusion, An Taisce would highlight that due to the risks posed by aquaculture activity in general to the Grey Seal, and in light of the screening out of all SPAs without robust scientific rationale or studies, it is our considered opinion that the licensing authority should not legally proceed with the licensing of these sites. Recent ECJ rulings on this clearly underpin the need for the removal of doubt. In addition, we would question the legality of the 15% threshold frequently being relied upon for aquaculture appropriate assessments. For the reasons set out above, An Taisce submits that there is inadequate information to establish beyond reasonable scientific doubt that the appealed licences will not adversely affect the conservation interests of the qualifying interests of the proximate SACs and SPAs, and accordingly ALAB should refuse the licences sought.

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A handwritten signature in black ink, appearing to read 'E. McGoff', written in a cursive style.

Elaine McGoff,
Natural Environment Office, An Taisce – The National Trust for Ireland.

Appendix I- Original An Taisce submission on Ballyness Licence Applications

Department of Agriculture, Food & the Marine,
Aquaculture and Foreshore Management Division,
National Seafood Centre,
Clonakilty,
Co. Cork.

[18/04/2019]

Submission pursuant to the provisions of Article 5 (2) of Directive 2011/92/EU

To Whom It May Concern:

Thank you for referring this notification to An Taisce in accordance with Section 10 of the Aquaculture (Licence Application) Regulations, 1998 (SI No 236 of 1998).

An Taisce has reviewed the applications T12/407, T12/409, T12/441, T12/455, T12/500, T12/502, T12/508, T12/509, T12/510, T12/514, T12/515, T12/516 and T12/519 in Ballyness Bay, County Donegal, and would like to make the following submission in relation to these applications.

1. Traffic disturbance

The increased traffic which would result from licensing of all the aquaculture applications poses a serious risk to fixed coastal dune habitats [2130]:

'the licencing of aquaculture activity at this site could lead to additional risk of erosion and degradation of this dune habitat [2130]. The risk of damage from vehicular traffic to dune habitat (2130) in Ballyness Bay therefore, cannot be discounted.'

The recommendation outlined in the AA report is the following:

'It is recommended that the views those with specific engineering expertise be sought in order to identify erosion prevention measures that might be put in place to mitigate the risks identified. Alternatively, the re-routing of access routes to avoid overlap with habitat feature 2130 might be considered?'

and the AA conclusion statement included this condition:

'A licence condition requiring strict adherence to the identified access routes over intertidal and nearshore habitat in order to minimise species/habitat disturbance will be included.'

but An Taisce would draw the Licensing Authorities attention to this line within the AA report:

*'the risk arises from the additional traffic likely to occur **on existing tracks** as a result of the need to access the sites'* [An Taisce emphasis]

As such, An Taisce submit that this condition will be entirely ineffective and does not address the risk posed. The risk arises due to the level of traffic, and has nothing to do with adherence to the existing track. The licensing authority need to be able to conclude beyond reasonable doubt that the QI communities will not be disturbed. , as outlined in the ECJ ruling for C-404/09⁴ [Commission v Spain] which held that "[a]n assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions **capable of removing all reasonable scientific doubt** as to the effects of the works proposed on the SPA concerned." [An Taisce emphasis]

Similarly, the court held in the case of the Commission v Italy that "assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, **where doubt remains as to the absence of such effects, the competent authority will have to refuse permission.**" (C304/05⁵. Para 58) [An Taisce emphasis]

Before these sites can be licenced the relevant authority must be certain that there will be no significant impact on the qualifying habitat, and it is obvious from the AA report that the licensing authority do not currently possess the necessary information to reach this conclusion. As such we submit that licencing cannot proceed without contravening Article 6(3) of the Habitats Directive.

The suggestion in the AA report that the opinion of an engineer be sought, or that the traffic be re-routed, while valid, would lead to additional information which would need to then be made available for public scrutiny, by means of an additional public consultation period, prior to proceeding with licensing. To fail to do this would be in contravention of the Aarhus convention by failing to provide for adequate public participation, as required by the Aarhus Convention, which provides for access to information, and public participation in decision-making.

Further, the AA conclusion statement provides this line in the mitigation measures section:

⁴ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/09>

⁵ <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-304/05&td=ALL>

'Alternative access routing will also be considered as a mitigation measure.'

yet despite the clear risk posed by the main proposed access route, the necessity for the alternative route is not actually provided as a binding mitigation measure.

As such, given that the specifics of the alternative route were not provided as a part of this public consultation, the 'erosion prevention measures' are not detailed, and the necessity of an alternative route is not provided as a binding mitigation measure, it is our considered opinion that the licensing authority cannot proceed with licensing any of the proposed aquaculture applications without contravening both the Habitats Directive and the Aarhus convention.

2. Grey Seals

The introduction of aquaculture into Ballyness Bay poses a serious risk to Grey Seals, as outlined in the AA report:

*'In relation to interactions between aquaculture operations and seal use of the site, the risk of disturbance **cannot be discounted**. It is important to note that the site, to date, has had very little aquaculture operations and therefore, the seals will have little opportunity to habituate to the activities.'*

and:

*Given that there are currently no aquaculture operations in Ballyness Bay, **it is not certain** that the introduction of significant levels of aquaculture operations will not impact on the site use by these Annex II species, in particular at those locations proximate to the this haul-out location. Therefore, the risk posed by the proposed aquaculture activities in Ballyness Bay to seal conservation features **cannot be discounted**. [An Taisce emphasis].*

An Taisce would direct the licensing authority to the paragraphs above which outline the requirement for certainty under the Habitats Directive, and the removal of doubt before licensing can continue. While we welcome the decision to refuse licensing of site T12-508A, which is closest to the seal haul out area, the risk to the Grey Seals applies to the licensing of all of the aquaculture applications, as outlined above *'it is not certain that...significant levels of aquaculture operations will not impact on the site use by these Annex II species'*.

An Taisce would highlight that while site T12-508A posed the greatest risk, the conclusions reached in the AA document indicate that it is the aquaculture activity in general which poses a risk, and this cannot be discounted. As such, similar to the traffic disturbance, to proceed with licensing while significant levels of uncertainty remain will place the licensing authority in contravention of Article 6(3) of the Habitats Directive.

3. Mobile sand community

The AA report outlines the following:

'The sensitivity of the community type Mobile sand community complex is unknown given the wide variation in species composition and sedimentary characteristics that comprise this community type. In particular, areas where there are very 'soft' mobile sands with impoverished communities would appear to be sensitive to the placement of trestles and even foot traffic among the trestle rows. On this basis, it is assumed that intertidal shellfish culture has the potential to disturb this community type.'

In order to mitigate for this, it is proposed that:

*'Mobile sand community complex is such that there are likely to be locations where the **sediments are extremely mobile** (and soft) thus making them unsuitable for aquaculture operations. It is recommended, prior to making a decision to licence, that these areas be clearly identified with the Bay'* [An Taisce emphasis]

and

'Locations where the sediments are extremely mobile (and soft) thus making them unsuitable for aquaculture operations will be excluded from licensing'

However, An Taisce would highlight that these habitats are by definition mobile, and mapping of these will be subjective and unreliable considering the habitats are in constant flux. As such, a large degree of uncertainty remains, and licencing of oyster trestles within a habitat which is constantly in flux puts this community type at risk of disturbance. As such, An Taisce submit that without the necessary degree of certainty of suitability of these sites for supporting oyster trestles, the licencing authority should not proceed with licencing in this Bay.

In conclusion, An Taisce would strongly highlight that due to the risks posed to the Coastal Dune habitats by both vehicular traffic accessing the sites, and the risks posed by aquaculture activity in general to the Grey Seal, and in light of the binding mitigation measures provided, the risks posed cannot be discounted based on the data provided, and it is our considered opinion that the licensing authority cannot legally proceed with the licensing of these sites. Recent ECJ rulings on this clearly underpin the need for the removal of doubt. In addition, it would appear to An Taisce that many of the sites may fall foul of the

mobile shifting sands, which are unsuitable for trestle placement. Based on this data, An Taisce submit that no licences should be granted in Ballyness Bay based on the data provided in the AA report. If licensing of these sites should proceed, further information should first be sought, and provided in an additional public consultation period.

We should be grateful if you would take account of these concerns in considering this application. If approved, An Taisce maintains the right to appeal this application should we be dissatisfied with the approval and/or any conditions attached.

We should be grateful if you would provide to us in due course: an acknowledgement of this submission; the nature of the decision; the date of the decision; in the case of a decision to grant an approval, any conditions attached thereto, and the main reasons and considerations on which the decision is based; and, where conditions are imposed in relation to any grant of approval, the main reasons for the imposition of any such conditions.

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A handwritten signature in black ink, appearing to read 'Elaine McGoff', written in a cursive style.

Elaine McGoff,
Natural Environment Office, An Taisce – The National Trust for Ireland.