

✓ PSM



The attached case file refers to what appears to be a significant breach of the stocking limit for smolts by Marine Harvest at a site in Beara Co Cork. You will recall that we recently had another similar case with the same company at another location.

The notes from Cecil Beamish and John Quinlan on the attached file set out the evidence in this case in relation to overstocking, which seems clearcut. However it is also apparent that we have a difficulty in that the license specifies that the stocking limits relates to "smolts" and it is not straightforward to prove that the overstocked fish were technically smolts. Our licensing system also seems to lack any scalable penalties, making it difficult to determine a proportionate penalty to the offence.

In the light of the above, the attached notes set out two possible courses of action – discontinue the license or amend the license, if possible. I agree with ~~the latter approach~~ but think we should also seek a meeting with the company at the most senior level to set out very clearly how seriously we view these issues.

For approval by / discussion with Minister


Aidan O'Driscoll

30/1/17

x Agreed 

Secretary General;

Re: Marine Harvest (Silver King Seafood Ltd) – Salmon Farm – Inishfarnard, Coulagh Bay, Beara, Co. Cork.

Introduction

This matter relates to an apparent breach of an important licensing condition at a salmon farm in Beara, Co. Cork, operated by Silver King Seafood Ltd, a subsidiary of Marine Harvest. The key issue relates to what can be done about it in the context of the facts of the matter, the issues related to these facts and the legal position.

The detailed submission attached from Mr. Quinlan examines the issues, the options available, the legal position and makes a clear recommendation. That Submission deserves to be read in full. That submission recommends that the Minister determine that the relevant licence condition has been breached and that the Minister treat as discontinued the entitlement of Silver King Seafood's Ltd to continue aquaculture operations at the site. This submission also addresses the issues.

The matter which has arisen relates to an apparent breach of a maximum stocking level condition of the aquaculture licence under which the company is operating. That licence condition stipulates that "*the number of smolts to be stocked at the site should not in any event exceed 400,000*". The licence itself has passed its end date and the company has applied for renewal. The Fisheries Amendment (Act) of 1997 provides that in these circumstances the applicant is entitled to continue the aquaculture authorised by the licence, subject to the terms and conditions of the licence, until the renewal application is decided upon.

Consideration of the issue

In considering the issue there are two separate aspects that should be considered:

(A). Can the apparent breach be proven and could the State in a legal challenge/appeal satisfy a legal burden of proof that more than 400,000 "smolts" as against 400,000 "fish" were inputted to this farm in March 2014 and/or that there were more than 400,000 "smolts" on this farm at some point.

(B) If the Minister is satisfied that the apparent breach actually occurred, what is the appropriate action to take in the context of the legislative framework and the legal "entitlement" the farm is currently operating under.

The apparent breach of the licence condition

The specific condition of the licence on which the apparent breach occurred stipulates inter alia, that *"the number of smolts to be stocked at the site should not in any event exceed 400,000."* A Departmental inspection report on 8th June 2015 an actual standing stock on the farm at that time indicated a standing of 503,344 fish, weighing 2,114 tonnes (average weight 4.2kg). The fish at this point were not smolts hence this is not central to the specific breach that is at issue. However, the inspection also reported that company stocking records received on the day of inspection showed that *"in March 2014, 820,614 smolts with an average weight of 0.09kg was inputted onto the site"* the report also stated that *"no smolts were added to the site since March 2014"*. The question of whether or not a breach of the relevant licensing condition in relation to the maximum number of smolts on the site occurred hinges on the Engineering Division report.

The company position

The main elements of the company's initial response on 29/11/16 (Tab 4) said:

"The licence refers to smolt stocking events not exceeding 400,000. The licence does not contain any condition concerning how many salmon, that are not smolts, may be kept on the site at any point in time. I would suggest that the Marine Institute, who are the Ministers advisors on scientific and background matters be consulted in terms of explaining the different stages of a salmon's lifecycle and in particular the very short-lived and distinct "smolts" phase.

Marine Harvest had two separate silver salmon stocking inputs into this site during the period of interest, neither of which concerned fish at the "smolt" stage in their life cycle. Further neither of the stocking events involved fish transfers exceeding 400,000 fish. On this basis we strongly contend that we have not breached the licence terms concerning smolt stocking and therefore no remedial action is required.

2 |*The confusing and biologically incorrect phraseology employed in this licence highlights the recurring drafting problem we have all encountered, whereby inconsistent, contradictory and technically meaningless terms and conditions have found their way into many of the salmon farming licences issued over the years.*

.....*In this particular instance we do not believe that we breached any of the licensed terms as they are written and thus we are of the view that no remedial actions are called for at this point in time."*

Departmental Inspection Report Review

Following the company letter the Marine Engineering Division reviewed their earlier inspection report and stated:

"Based on the above MED confirm that they are satisfied that the number of stock input to the site in March 2014 (820,604 smolts) exceeded the permitted number (400,000); and that this clearly represents a breach of condition 2 (d) of the licence."

The Marine Engineering Division Review (MED) Report went on to say:

"Marine Harvest Ireland argue in their letter dated 29th January 2016 that the fish were not in fact smolts (as referred to in the licence) and that therefore they are not in breach of condition 2 (d). They suggest that advice be sought from the Marine Institute in regard to the difference between smolt and post smolt/salmon stage. MED comment that this advice should be sought as a technical/legal interpretation may be needed should any legal case be pursued in relation to the matter. MED have taken the view that all fish referred to can reasonably be regarded as smolts in the context of the licence in this instance."

Further Company response

In a further letter of 15th June 2016 the company recall *"a series of explanations demonstrating that Marine Harvest Ireland was not actually acting in breach of the licence terms and conditions...."* Other correspondence in a range of letters from the company argue that the licences are outdated etc and comment on the need for review etc. However, as Mr Quinlan points out the issue falls to be determined under the legal provisions in place.

Assessment of the issues in relation to the apparent breach

The issues around whether or not there was a breach of the maximum "smolt" numbers condition can be assessed in the following way. The fish moved to the Inishfarnard site, from the hatcheries in Lough Altan & Pettigo which are only licensed to produce smolts. However the exact definition of a "smolt" is hard to come by and the boundaries of the smolt stage seem to be hard to be precise about. For the purposes of this case there is no legal definition of a smolt. One description on the Marine Harvest website describes smolts as less than 100 grammes. The first 400,000 fish moved out of the hatchery were described in the movement order as having an average weight of 95g and therefore some of the fish would have been on the boundary or over the MHI boundary description of a smolt. The next tranche of 280,000 fish were average weight of 85 g.

The company records on file, for inputs to the farm, recorded the number of fish inputted and the weight of those fish. The records do not describe the fish as smolts or otherwise.

The company records describe the average weight of fish on the site in March as 90g and in April at 147g. What is clear is the fish grow rapidly to post smolt stage once on the farm, the issue is how many were smolt or post smolt before April and can that be determined in the absence of a legal definition of a smolt.

The Engineering Report takes the numbers and weights of inputted fish from the company records and then describes them as smolts. The Engineering Division review of their earlier report reaffirms their view that these were smolts but says that advice should be sought on the question of whether or not they were or were not all smolts *“as a technical/legal interpretation may be needed should any legal case be pursued in relation to the matter. MED have taken the view that all fish referred to can reasonably be regarded as smolts in the context of the licence in this instance”*. In short, The Engineering Division (MED) have simply taken a “reasonable” view that the fish were smolts, from the historic company records. The Engineering Inspection was some 15 months after the date of inputting the fish. There was not or cannot now be any physical inspection/verification to confirm exactly what life stage some or all of the fish inputted were at, at the date of input to the farm. For the breach to have occurred more than 400,000 of the fish inputted would have to be “smolts” at some point on or after March 2014. Much hinges on these points.

What is probable is that if a punitive decision is taken against the company on the basis that the 400,000 “smolt” limit was exceeded, the company will, most likely, contest this legally and the outcome of that case will centre on whether or not the State can prove that the fish inputted were “smolts” and only “smolts”. The burden of proof will fall on the State to prove that more than 400,000 of the fish on the farm were “smolts” at some point in March 2014 or thereafter. Whilst there are on the face of it good reasons to suspect that more than 400,000 smolts were on the farm at some point, it might be a different thing to prove it, particularly without a legal definition of a smolt. Accordingly, it is arguable that it might be very hard to prove that case to the satisfaction of the Court.

Consideration of the appropriate action to take

If the Minister is satisfied that a breach occurred then the issue of the appropriate action to take arises. In considering this the situation it is complicated by the fact that the date for expiry of the licence was in 2007, the company has applied for renewal of the licence but this has not yet been determined. The company is therefore operating the farm under the 1997 Act which allows it to continue to operate on the same terms and conditions as set out in the licence, pending determination on the renewal application. The issues arising from the legal position are set out in the legal advices at Tab 11 and in Mr. Quinlan’s submission.

Mr Quinlan’s submission beneath considers the options and recommends discontinuing the entitlement to continue salmon farming on the site. It is undoubtedly an issue that the

governing legislation does not provide for graduated sanctions. Given that there is at a minimum an element of uncertainty about the apparent breach, and that there is no other recorded breach of this licence, it seems to me that there is a significant issue of proportionality about an action to close the farm in all the circumstances. Any such action could undoubtedly be challenged on the State's ability to approve the "apparent" but denied breach and would also most likely be challenged on proportionality grounds. It could not be discounted that the State would be taking on a significant element of exposure in taking such an action in all the circumstances.

What seems clear from this case is that there is a problem in that the drafting of the licence condition is not as clear as it could be in that the maximum young fish stocking limit in this licence is not well drafted in specifying "smolts". If the provision were drafted on the basis of the maximum number of fish that could be inputted of not more than a certain weight, this would be more easily and objectively monitored and enforced. A redrafted condition in those terms coupled with a requirement for the pre notification of the Marine Engineering Division on each input event would allow for clear, real time, enforcement of the licence objective. Such an amendment would be in the public interest. The legal advices attached set out a complicated situation in relation to amending the "expired" licence. What is clear is that no such amendment can be done as a "punitive" measure. However, there does seem to be scope for amendment in the public interest where due process is followed and the company are in agreement. Any such course of action would need to be developed with Legal Services Division to ensure the state is not exposed.

Clearly in any event the form of the licence can be amended if a decision is made at a future date to renew the licence.

Summary

There is an apparent significant breach of the "smolt" stocking limit on this licence. That is an important Licence condition. There is no dispute about the number of "fish" inputted and that number exceeded the "smolt" limit number. There is a dispute over whether the fish inputted in March 2014 were "smolts" or not. It is even possible that some were and some were not. The net issue is were there more than 400,000 smolts on this farm at some point in March 2014 or thereafter. The fact that there were more than 400,000 fish on the farm on or after March 2014 does not determine the issue. The company argues that they did not breach the condition. The company argues that the fish inputted were not at "the *smolt* stage in their life cycle". The State records (Marine Institute Fish Movement Approval Notices) and the company records simply record the number of fish and their average weight. The Department inspection, some fifteen months after the event, simply transcribed the number of fish inputted from the company records and takes the view that they were all smolts. There was no physical inspection or verification at the time the fish were inputted to the farm or in the subsequent year. It is on that basis that the question of the "apparent" breach arises and that the judgement must be made on the matter.

For the State to take action on the apparent breach and overcome the burden of proof that it would be required to meet to prove its case when challenged, a decision is required that the State can prove the breach. This seems challenging to me especially as the Engineering Division agree with the company that further separate scientific inputs would be required on the difference between smolt and post smolt salmon stage in order to prove in any legal case that more than the fish inputted in March 2014 were "smolts" at that point or thereafter. It is hard to see how scientific advice could be given by an external party at this stage which would have adequate precision to stand up to legal challenge. It is inevitable that counter scientific advice would be given by some other expert witness on behalf of the company.

If the Ministers judgement were that the apparent breach could not be legally sustained, the issue of punitive action would not arise. If the Minister is unsure about the issue and felt further outside scientific input would help that could be sought. However, such outside scientific input could only be theoretical/hypothetical and could not provide definite verification of what exactly was inputted in March 2014.

If the Ministers view is that a breach occurred then the question is what action to take. The options under the legislation are limited and punitive action effectively comes down to removing the farms entitlement to operate, in the absence of graduated sanctions under the legislation. Mr. Quinlans submission sets out a reasoned case as to why that action should be pursued to discontinue the company's right to continue aquaculture operations on the site.

Taking all the aspects of the case, I differ on the recommended approach given all the circumstances. Firstly, there is the disputed facts about whether or not a breach occurred and the difficulty as I see it that the State would have in a legal challenge/appeal in meeting the necessary burden of proof on the matter. Secondly, it is reasonable to expect a strong challenge that the action to close the farm is disproportionate, given that even if the breach were proven/accepted this would be a first breach of a licence condition relating to this farm. It is, in my view, questionable whether or not removing the entitlement to operate in all the circumstances could be successfully defended in a challenge. At an absolute minimum there is a possibility that the challenge would succeed and the State would potentially be exposed.

In any event, the situation is not satisfactory and the case highlights the problem with the way in which the licence condition is drafted. It would be in the public interest to endeavour to amend this condition, either in this licence, or in any renewal licences or in both, to simply set a limit on the number of "fish" below a certain weight that could be inputted so that in this way or some similar formulation it would be possible to achieve the essence of the intention in the original licence. It would seem desirable to also consider further requiring the company to pre-notify the State where young fish are being inputted to enable clear real time verification that fish input limits are being reflected. Any action along

these lines would need to be developed in close co-ordination with Legal Services Division given the complex legal situation in this case.

Decision Sought

Submitted for consideration, discussion if sought, and Ministerial decision on

- A. Whether or not he is satisfied that the breach occurred .
- B. Which course of action to take, in the event that he is satisfied that a breach occurred.



C Beamish

6/01/2017