

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



**Appeal Form**

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Name of Appellant (block letters)	SAVE BALLYNESS BAY S.A.C. ACTION GROUP		
Address of Appellant	Killult, Falcarragh, Co. Donegal F92 N6X6		
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**Fees**

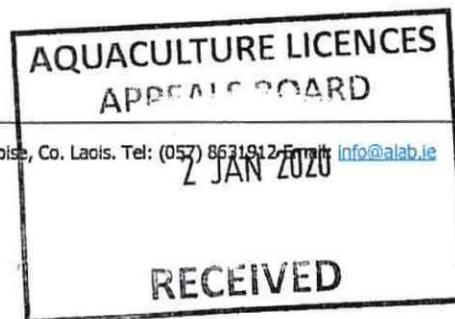
Fees must be received by the closing date for receipt of appeals		
	Amount	Tick
Appeal by licence applicant	€380.92	
Appeal by any other individual or organisation	€152.37	
Request for an Oral Hearing * (fee payable in addition to appeal fee)	€76.18	
* In the event that the Board decides not to hold 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**

The determination of the Minister for Agriculture , Food and the Marine to grant Aquaculture and Foreshore licences in Nov.2019, for the cultivation of Pacific Oysters using bags and trestles and for the cultivation of Clams at fourteen sites in Ballyness Bay, County Donegal.

T12/407B,

Please forward completed form to: Aquaculture Licences Appeals Board, Kilminchy Court, Dublin Road, Portlaoise, Co. Laois. Tel: (057) 8631912 Email: [info@alab.ie](mailto:info@alab.ie)



T12/409 A & B,  
T12 /441 A, B, C.  
T12/455 A, B.  
T12/500A  
T12/502A  
T12/510A  
T12/514A  
T12/515A      T12/516A

Site Reference Number:-

See above

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

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

The Save Ballyness Bay Action Group was formed in response to proposals to use Ballyness Bay SAC and SPA for aquaculture purposes. The Action Group represents a wide range of local citizens and organisations, including, Falcarragh Tourist and Traders, Tidy Towns Committee, C  iste Glan & Glas, Local schools, Solas group, Cloughaneely Angling Association, Nerosa Surfing Group, Peter Hart Windsurfing, Cloughaneely Golf Club etc. A petition circulated locally supporting the Action Group and opposing the proposals was signed by 5,100. Our Facebook page has 1,981 people supporting our efforts and our website: [www.SaveBallynessBay.com](http://www.SaveBallynessBay.com) has had 2,400 sign in support of our group. Two full-to-capacity Public Meetings gave unanimous support to the Action group's campaign to protect their environmental heritage.

Ballyness Bay is a local beauty spot along the Wild Atlantic Way. It is also a safe haven for native and migratory wildlife. Locals and an increasing number of visitors each year benefit from walking, swimming, kayaking, windsurfing, birdwatching, angling etc, in the surroundings of the bay.

Increasing numbers of tourists bring economic and employment benefits to the area. These health-giving and economic benefits are sustainable long-term by protecting the bay's present environmental status.

The local community, through the Action Group, see protecting the bay in its natural state as a guarantee of a sustainable and eco-responsible way into the future.

The introduction of industrial shellfish production into Ballyness Bay, on any level, for private commercial gain, would jeopardise the aims and efforts of this whole community.

The introduction of commercial aquaculture into Ballyness Bay would, undoubtably, undermine the huge State investment presently being put into the development of sustainable tourism in coastal areas through the Wild Atlantic Way project.

It is our view that the introduction of commercial aquaculture into Ballyness Bay, on any level, would undermine the aspirations of the whole Ballyness Bay community and in their chosen desire to protect the bay SAC and SPA environment into the future, in line with EU Directives.

The economic spin-off of eco-tourism to the area, all based on the natural scenic beauty and environmental preservation of the bay, is an asset that is sustainable.

In the community's view, that is how we want our area to develop.

The licensing of aquaculture in Ballyness Bay will only degrade the scenic value of the area and damage the high quality environmental status of the SAC. It will be a serious obstacle to efforts to co-ordinate local environmental protection and sustainable local employment for many into the future.

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):

See accompanying documentation.

Signed by appellant: John Connaughtan Date: 30/12/2019

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**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

**Extracts from Act**

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**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.

**SAVE BALLYNESS BAY S.A.C. ACTION GROUP**

**SUBMISSIONS ON APPEAL**

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**INTRODUCTION**

1. We invite the Board to uphold this appeal against the Minister’s decision to grant aquaculture licenses in Ballyness bay pursuant to section 40 of the 1997 Act for the reasons detailed below. We defer to the Board’s vast experience of these matters but we have been unable to find any comparable mobilisation of the community than that

of the people in the wider locality around Ballyness bay in response to the proposed licenses. The reaction of the entire community is one of shock and dismay.

2. The Board's consideration of this appeal will effectively be the first time that any objections to these licenses will be considered by any decision-maker. The Minister was unable to consider the Appellant's objections as the community were unaware of existence of these applications until after the consultation period had closed.
3. The procedure for putting the community 'on notice' of such applications was not 'effective' and is therefore not compliant with the State's legal obligations as set out below and in the attached documentation (particularly at Appendix 12).
4. Primarily, we ask the Board, for the substantive reasons set out below, to allow this appeal, the Minister plainly having fallen into error. Alternatively, we suggest that the Board 'recommend' that the Minister, having wrongly determined that there had been an 'effective' consultation, reconsider these applications with the benefit of detailed representations on the well-substantiated objections to such development in Ballyness bay.
5. It is accepted on behalf of the Appellant that concerns about the destruction of habitats and the disruption of areas of natural beauty are common themes in the objections filed to such licenses; however, in the present case the Minister has plainly misdirected himself on law and fact in several key respects, as well as failed to adhere to the relevant statutory provisions.

## **1 INEFFECTIVE PUBLIC CONSULTATION**

6. Domestic and international legal provisions ensure that in most matters of public importance there should be proper consultation with the public, particularly with those most effected. This is especially so and most keenly felt in the context of planning. In the international context, The Aarhus Convention requires statutory authorities to ensure that:

"The public concerned shall be informed either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and **effective manner.**" **(Ref. Aarhus Convention: Article 6).**

7. The Minister conspicuously failed to comply with this obligation as evidenced by the response of the local community when they eventually became aware of the proposals in respect of Ballyness Bay SAC/SPAs.
8. The Minister then adopted an inflexible approach to the issue of 'consultation' when those affected attempted to make representations. It is a fundamental principle of public and administrative law that proposed significant alterations to public or protected areas benefit from a consultation process which ensures that decision makers acting in good faith have access to the best possible information upon which to found their decision. The sensitivities and views of the local population who

- habitually use such amenities as Ballyness bay should of course carry significant weight when set against the private, commercial interests of a small group of people.
9. The public consultation in the present case was simply and very plainly not effective. This is very clear from the vociferous reaction of the community once they were made aware of the existences of the applications in question.
  10. A submission has been made to the Aarhus Compliance Committee in relation to the ineffective public consultation. That submission is attached hereto, rather than simply repeating the contents of same: Appendix 12.

## **2 FLAWS / MISDIRECTIONS CONCERNING:**

**(i) “Report supporting Appropriate Assessment of Aquaculture in Ballyness Bay SAC” ( “the Report”), and;**

**(ii) “Final Conclusion Statement by the Licencing Authority” ( “FCS”).**

11. The Minister’s reasons and considerations for granting the licences disclose that assumptions have been made by the Minister that there would be no effects or no significant effects on the local environments, in particular on the Natura 2000 network of ‘Sites of Community Importance’. These assumptions are far reaching but they are not substantiated in any way.
  12. This is supplemented and reinforced by the fact that Ballyness Bay is not listed as a Designated Shellfish Area.
  13. Neither the Report nor the FCS are supported by adequate, sufficiently detailed scientific evidence, and they are replete with errors. These Reports are wholly inadequate, in terms of detail and quality, to ground important decisions concerning permissions for such extensive commercial activity which require multiple aquaculture licences, over such a large area. This is especially so given the potential for significant impact on the Natura 2000 network.
- 14. The Appellant invites attention to the following areas where the Reports conflict with the requirements relating to Natura 2000:**

(i) **Exclusion of Habitats.** The Report provides, in relation to the Ballyness Bay SAC, at Section 2.5, “An initial screening exercise resulted in a number of habitat features being excluded from further consideration.” This bald statement is not elaborated upon in any or any sufficient detail given the importance of the subject matter. This is a significant error given that reliable scientific evidence exists to suggest that these habitat features should not have been excluded. Five neighbouring SPA/SACs were also excluded without sufficient regard to ex situ and cumulative effects. For example: to loss of feeding and roosting habitat; to cumulative eutrophication impacts; and, to site disturbance in adjacent SPAs.

The National Parks and Wildlife Guidance Notes require that there must be an examination of what Natura 2000 sites might be affected. (Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities, Environment, Heritage and Local Government 2010 ). These sites should be identified and listed, bearing in mind the potential for a plan or project, whether it is within or outside a Natura 2000 site, to have **direct, indirect or cumulative effects**, and taking a **precautionary approach** so that a site is included **if doubt exists**. Plans or projects that are outside the boundaries of a site may still have effects on that site.” There should be **no reasonable scientific doubt as to the absence of effects**. (Ref. Index 13). In the present case licenses have been granted despite, at best, the existence of scientific doubt in relation to such effects.

(ii) **Unresolved Issues.** Specific potential impacts on the Natura network have been identified in the Report but have not been resolved nor has detailed mitigation been proposed and/or assessed. The report by its own findings does not exclude the risk of damage to the Natura network beyond reasonable scientific doubt. (Ref. Index 9, 13)

(iii) **Spatial Overlap.** There has been inadequate consideration of ex-situ effects (cf. repeated reliance on lack of spatial overlap as evidence of no impact ). (Ref. Index 13). No consideration is given to disturbance due to noise, human activity, machinery operation. The over-reliance upon an absence of spatial overlap is wrong. This approach is not consistent with the Guidance Notes’ directions on Assessment of Likely Significant Effects. The Board will be acutely aware that the ‘precautionary approach’ is fundamental. Furthermore, in cases of uncertainty, it should be assumed that the effects could be significant.

(iv) **Access.** The Report minimises the impact of industrial traffic by confining consideration to the limited physical spatial overlap of the route. Noise, disturbance, compaction, lighting and erosion due to traffic and vehicle parking, and the potential for hydrocarbon/chemical spills are not addressed especially in relation to the Corncrake SPA. (Ref. Index 5,6 ,10 and Appendix 2). It should be noted that all the routes (i.e. rural roads which often would not allow two cars to pass without pulling over) to the proposed aquaculture locations traverse corncrake nesting sites in the SPA. (Appendix 11)

(v) **Access – new route.** Due to the likelihood of habitat loss within the priority habitat Grey Dunes ( 2130 ) a new access route has now been proposed. This new route has not been subject to the further rigorous appropriate assessment required. The route runs directly through an SPA site designated for the globally endangered and red listed corncrake, Site Code 004149 (Ref. Index 4, 5, 6, 8, 10,14 and Appendix 2) and no assessment on the potential impact on the breeding corncrake population has been made. No reference is made to Curlew breeding

sites within the Corncrake SPA nor to the Chough nesting site at Ballyness Pier. The impact on eelgrass beds, which are close to the proposed sites, is mentioned in passing but not addressed.

(vi) **Disruption of Otter Population.** The report discounts any impact on the otter population on the grounds that their activity is typically crepuscular. This is not supported by the evidence.

The following criticisms are made in respect of the assessment of the impact upon the otter population:

(a) Otters are frequently observed actively foraging and moving in Ballyness Bay in daylight hours. (Ref. Index 28, Appendix 7).

(b) Furthermore, evidence from other currently operational aquaculture sites shows a significant level of work being carried out during night hours, since this work is dictated by tidal conditions.

(c) Assertions are made at paragraph 8.4 regarding habitat extent, “net input” of fish biomass, couching sites and holts, disturbance and encounter rates. However these assertions are not supported by evidence or verifiable materials.

(d) The report bases its statements regarding “no disturbance” of the otter population on the observation of otters in Gweedore bay and the islands. There is no explanation as to how this can be a reliable indicator on the population at Ballyness bay. No data are offered for Ballyness bay. The Report’s assertion that interaction with the otter population is likely to be minimal is unsupported by any evidence.

(e) The otters’s foraging areas stretch along the channel and the foreshore from the Black Rock area below Ballyness Pier to Killult pier. They are also frequently observed crossing the bay from Killult to the Dooey peninsula. The potential impact on the species from aquaculture sites 510A, 455A, 455B, 441B, 441C, 516A has not been addressed.

(f) The FCS map fails to display the access routes to sites 441C, 441B and 516A. Based on the licence application documents, access to 516A is via the foreshore between sites 441C and 455B and then continues on the foreshore in excess of 800 metres to site 516A.

(vii) **Seals.** The Report states [para. 8.5] “Risk posed by the proposed aquaculture activities in Ballyness bay to Seal conservation features cannot be discounted.”

Proceeding on this basis is a breach of the precautionary principle (Ref. Index 13). Furthermore, the report states there is only one haul out location. This conflicts with the evidence. There are at least eight such sites commonly observed. (Ref. Index 29, Appendix 8).

Licence site 508A has been refused a licence because of proximity to an accepted seal haul out location. (Appendix 8, Map 1). Sites 455A, 455B and 409B are within the same radius distance of that haul out location and by the same logic should therefore also have been refused a licence. (Appendix 8, Map 2).

Furthermore, the main channel used by seals for passage through the area, and an important feeding area and avenue of travel for them at lower tide levels, runs directly beside sites 510A, 455A, 455B, 441B and 441C and 409B ( Appendix 8, Map 3 ). The impact of shellfish farming on this activity has not been recognised or addressed. The FCS summary of mitigation measures and management actions relies on treating the channel as a protective barrier between seals and aquaculture activity. There is no basis for this assumption. The channel is constantly used by seals at lower tide levels for passage and foraging.

**(viii) Physical and biological effects which impact specifically upon Ballyness.** Many physical and biological effects of aquaculture have been cited in the Natura Impact Report (NIR), principally in Chapter 6. However, these are not addressed at all, or are not addressed in any meaningful way. They include (the following list is not exhaustive):-

#### NIR 6:1. Biological Effects

- "deposition can accumulate on the seafloor beneath aquaculture installations (suspended and intertidal culture) and can alter the local sedimentary habitat type" (Ref Index 18). Low tidal flow rates in many of the sites will exacerbate this problem. ( Ref. Index 12 ).
- "enrichment can lead to a change in sediment biogeochemistry (e.g. oxygen levels decrease and sulphide levels increase) which can result in a reduction in species richness and abundance"
- "anoxic conditions may occur where no fauna survives and the sediment may become blanketed by a bacterial mat"
- Baffling effects of structures can increase or decrease water flow resulting in scouring of the seafloor or causing local deposition of material that "can lead to change in the composition of the benthic infaunal community".

#### NIR 6:1. Seston Filtration

- "Suspension feeding bivalves such as oysters have a large filtration capacity and in confined areas, have been shown to alter the phytoplankton and zooplankton community abundance and structure and therefore potentially impact on the production of an area".

#### NIR 6:1. Shading Suspended Culture

□□ "The structures associated with suspended culture (e.g. trestles & bags etc.) can prevent light penetration to the seabed and therefore potentially impact on light sensitive species such as maerl, seagrass and macroalgae".

#### NIR 6:1. Fouling/Habitat Creation

The structures associated with aquaculture , and the culture organisms themselves, provide increased habitat for fouling species to colonise" (Index 18, 19, 20 ).

#### NIR 6:1 Introduction of Non-native Species

□ "The introduction and establishment of non-native species can result in loss of native biodiversity due to increased competition for food and habitat and also predation and/or disease". (Ref Index 15, 18, 23, 24, 25).

#### NIR. 6:1 Nutrient Exchange

□□ "Intensive bivalve culture can cause changes in ammonium and dissolved inorganic nitrogen resulting in increased primary production". (Ref Index 18).

#### NIR 6:2 Surface Disturbance

□□ Dredging activity (associated with clam production) "physically disturbs the seafloor and the organisms therein, and has been demonstrated to cause habitat and community changes".(Ref. Index 15).

□ "The intertidal (and coastal) habitat can be affected by ancillary activities on-site i.e. servicing, vehicles on shore; human traffic and boat access lanes, causing an increased risk of sediment compaction resulting in sediment changes and associated community (infaunal and epifaunal) changes".

No hydraulic data is presented to assess the limited scouring effect of waste materials in the bay due to its narrow exit or to deposition of waste products on the substrate in the area of oyster trestles.

(ix) **Reproduction of Non-Native Triploid Oysters.** The assertion that non-native triploid oysters will not reproduce and impact local native fauna and habitats is in conflict with evidence from multiple other sites ( Ref. Lough Swilly Wild Oyster Society Ltd. Appeal. (Index 22, Appendix4). The potential impact of this on native communities and on the integrity of the SAC has not been addressed. The FCS states that the risk of Pacific oysters naturalising in Ballyness bay cannot be discounted , and then proceeds to discount it. This is a breach of the precautionary principle which should apply (Ref. Index 13. Appendix 10). The FCS also acknowledges a "minimal risk" of introduction of hitchhiker species from use of hatchery seed (page 4, par. 3. (Ref. Index 21,22,23,24,25 and Appendix 4) but gives no evidence of risk assessment nor proposes any Mitigation measures. This is a breach of the precautionary principle, especially in view of the fact that wild populations have already developed in Lough Swilly.

(x) **Manila clam.** The report says that the risk of naturalisation of this species is considered low but should be kept under surveillance. This is not in compliance with the precautionary principle espoused by appropriate assessment. ( Ref. Index 13,15)

The FCS (pages 3 & 4) acknowledges high disturbance from clam production but makes no proposals for mitigation. Clam production will occupy nine hectares of the SAC area. The AA admits that the associated dredging activity has been demonstrated to cause habitat and community changes but then ignores it. (Ref Index 15, pps 93-107).

(xi) **Fishing Activity.** The Report provides that there is no fishing activity in Ballyness bay (para. 9.1). This is rebutted in a letter (see Appendix 13) from Inland Fisheries Ireland to Minister Creed:

“Page 5 of the report (Assessment of in-combination effects of aquaculture, fisheries and other activities) states that “There are no fishing activities within Ballyness bay SAC and are therefore no likely combination effects.” This statement is in fact inaccurate. Ballyness bay contains a valuable and highly scenic wild sea trout fishery which forms an integral part of Ireland’s recreational and tourism sea trout angling resource. Documentary evidence of this is provided (as enclosed) by the enclosed angling guide produced by Inland Fisheries Ireland – *Sea Trout Angling on Ireland’s North West Coast*. It should also be noted that a commercial salmon draft net fishery still remains in existence at the base of the Tullaghobegley river, which drains to Ballyness bay. The draft net fishery hasn’t operated in recent years due to conservation reasons, but may open again in the future depending on the annual available harvestable surplus. (The Tullaghobegley river had a modest salmon surplus in 2019 and was listed as open for angling).”

Members of the Ballyness Bay Action Group include 5 individual proprietors of lands adjoining the estuary comprised in Land Registry Folio DL18638 and Folio 10903. The said proprietors and their predecessors in title have been paying rates to Inland Fisheries Ireland and their statutory predecessors for upwards of forty years in respect of Several Fishery rights. The proposed licensed aquaculture sites would prevent these proprietors from exercising their fishing rights throughout Ballyness Bay. (Index 30, Appendix 9).

Again, as a result of the deficiencies in the consultation process, no account whatsoever was taken of this. Indeed, it is clear that the Minister proceeded on an erroneous basis. This issue highlights the difficulties presented by a consultation process which, whilst adhering in **some** respects to technical requirements, failed in fact, to provide an **effective** consultation. The Board is respectfully invited to pause and consider whether it is remotely conceivable that the proprietors of these fishing sites would not have registered their objections, if these license applications had been properly/effectively publicised.

The said proprietors object to any trespass on their lands by persons engaged in aquaculture. Adjoining members and owners of land at both Ballyness Pier and Killult Pier similarly object to trespass over their lands by persons engaged in aquaculture. There is real scope for community tension arising out of the licenses being granted and a disruption in harmonious relations.

(xii) **Cumulative Effect.** As touched upon above at (i) (under the heading of ‘**Exclusion of Habitats**’) there has been inadequate consideration of in-combination effects of the grant of these licenses. Contrary to National Parks and Wildlife Service guidelines, the Report does not clearly indicate what plans/projects have been taken into consideration. Other proposed and current projects in the area that have not been assessed include Irish Water waste water treatment plans, MOVI salmon hatchery, Donegal County Council coastal erosion and flood defence plans.

The ‘**Appropriate Assessment of Plans and Projects in Ireland - Guidance for Planning Authorities**’ offers helpful guidance on this. We invite particular attention to the following passages:

#### **Section 3.2.3 Natura 2000 Sites [p31]**

The second element is an examination of what Natura 2000 sites might be affected. These sites should be identified and listed, bearing in mind the potential for a plan or project, whether it is within or outside a Natura 2000 site, to have direct, indirect or cumulative effects, and taking a precautionary approach so that a site is included if doubt exists. Plans or projects that are outside the boundaries of a site may still have effects on that site.

#### **[p33 & 34]:**

As the underlying intention of the in-combination provision is to take account of cumulative effects, and as these effects often only occur over time, plans or projects that are completed, approved but uncompleted, or proposed (but not yet approved) should be considered in this context (EC, 2002). All likely sources of effects arising from the plan or project under consideration should be considered together with other sources of effects in the existing environment and any other effects likely to arise from proposed or permitted plans or projects. These include ex situ as well as in situ plans or projects. The screening report should clearly state what in combination plans and projects have been considered in making the determination in relation to in combination effects. Simply stating that “there are no cumulative impacts” is insufficient.

#### **Section 3.3.3 Impact Prediction [p37]**

Prediction of impacts should be addressed in the NIS, but the competent authority, in considering the information submitted needs to carry out the AA within a structured and systematic framework that is evidence-based. Conclusions should be objective and scientifically grounded. This requires that the types of impact be identified, e.g. direct and indirect effects; short- and long-term effects; construction, operational and decommissioning effects; noise, light pollution and disturbance; hydrological effects; pollution, including diffuse pollution; habitat degradation and loss; and isolated, seasonal interactive and cumulative effects.

We respectfully ask the Board to consider that, in light of the above guidance:

- (a) **The examination of ‘what Natura 2000 sites might be affected’** was, at best, cursory.
- (b) **The Report and the FCS recurring theme of absolving any impact upon wildlife and sensitive sites by referring to the lack of ‘overlap’ is firstly wrong intuitively and as a matter of common sense. Secondly, it is incompatible with the Guidance which provides that** “These sites should be identified and listed, bearing in mind the potential for a plan or project, whether it is within or outside a Natura 2000 site, to have direct, indirect or cumulative effects, and taking a precautionary approach so that a site is included if doubt exists. Plans or projects that are outside the boundaries of a site may still have effects on that site.” [emphasis added]
- (c) Furthermore, the Guidance makes clear that “... the underlying intention of the in-combination provision is to take account of cumulative effects” and that “...All likely sources of effects arising from the plan or project under consideration should be considered together with other sources of effects in the existing environment and any other effects likely to arise from proposed or permitted plans or projects. These include ex situ as well as in situ plans or projects.”
- (d) The Report and the FCS abjectly fails to “... state what in combination plans and projects have been considered in making the determination in relation to in combination effects. Simply stating that “there are no cumulative impacts” is insufficient.”
- (e) Section 3.3.3 requires that “... the AA [needs to be carried out] within a structured and systematic framework that is evidence-based. Conclusions should be objective and scientifically grounded. This requires that the types of impact be identified , e.g. direct and indirect effects; short- and long-term effects; construction, operational and decommissioning effects; noise, light pollution and disturbance; hydrological effects; pollution, including diffuse pollution; habitat degradation and loss; and isolated, seasonal interactive and cumulative effects.” The Board is asked to determine that the Report and the FCS, when judged against these criteria, falls very far short of what it should contain. It is of course accepted that the scope and intensity of review required in the Reports will, to some extent, be fact specific by reference to the particular developments in question. In this instance the Board is asked to consider that the Report and FCS in the present case should have been much more far-reaching and should have adhered more faithfully to the Guidance provided.

(xiii) **Inadequate Consideration of Physical Effects of Aquaculture.** The assertion (at Report para 6.2) that pressures resulting from aquaculture activities relate primarily to sediments disturbance has no scientific basis. The assessment must consider many other factors including issues such as: (i) biomass produced, (ii) nutrient levels released (especially sources of Nitrogen, organic loads and BOD impacts). The conclusion that in-combination effects with aquaculture activities are considered to be minimal is, firstly, not supported by the evidence (Ref Index 15, 18, 19, 20); and, (ii) does not harmonise with common sense given the sheer extent of the area that these licenses cover.

(xiv) '**Lumping**'. The Report supporting Appropriate Assessment of Aquaculture in Ballyness Bay SAC considers eighteen individual proposed aquaculture projects in a single overarching appropriate assessment. As such the description of individual projects is wholly inadequate to allow for a meaningful assessment of potential impact.

Lumping of multiple individual proposed aquaculture projects ignores the potential for their in-combination effects and prevents adequate consideration and assessment of the potential cumulative impacts of such extensive multiple aquaculture developments within Ballyness Bay.

In particular, no assessment is made of:

- (a) in-combination hydrological impacts of the multiple individual aquaculture developments;
- (b) the total cumulative nutrient load arising from multiple individual aquaculture developments;
- (c) the total siltation load arising from multiple individual aquaculture developments;
- (d) duration of disturbance due to the multiple, independent individual aquaculture venture operations that will require repeated trafficking of vehicles and personnel across features of Community conservation interest and through the adjacent corncrake SPA.
- (e) fragmentation of habitats within Ballyness Bay due to multiple individual aquaculture developments.

Page 19 of the Guidance states

'In addition, where projects require more than one authorisation (e.g. planning permission, waste permit and foreshore lease/licence), each consent authority must treat the separate applications as projects.'

This also brings in to sharp focus the issue of Foreshore Consents and where the consented projects are in relation to this process. This was not addressed in the material before the Minister and again this absence both calls into question the quality of the material before the Minister and the level of scrutiny that these applications have received.

(xv) **Bathymetric Survey**. There is no evidence that any bathymetric survey was undertaken despite the increased shallowness of the Bay in recent years, due to the erosion of the "largest unvegetated dune in the country" (NPWS Ballyness Bay Site Synopsis 2013) (see Appendix 14) on Dooney – much of that sand is now within the Bay. Observation of the tides within the Bay suggests that oysters on raised trestles would be exposed to the air for more than 4 hours per tidal cycle. (Ref Index 12). Examination of the various maps and photographs applying to these licences will show constantly shifting channel patterns over time. Such shifting substrate in itself signifies that Ballyness Bay is unsuitable for oyster trestle farming.

(xvi) **Residual Impacts.** The Report concludes that there are some residual impacts remaining and suggests that these be addressed at some later stage. Deferral of the collection of information required for a screening or for an appropriate assessment, or the completion of a screening or an appropriate assessment until after the consent has been given is not permissible. Until any potential mitigation is proposed and rigorously assessed the statutory authority may not allow the proposed development to proceed. “It is entirely unacceptable for a planning authority to approve a plan or project conditional on the undertaking or completion of surveys, research or data-gathering of relevance in assessing the likely effects.” (Guidance Notes: Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities, Dept of Environment, Heritage and Local Govt). (Ref Index 13).

(xvii) **Accommodation for Access and Recreation.** The Minister’s reasons for granting licences include – “Public access to recreational and other activities can be accommodated by this project.” The Minister provides no indication as to how this will be achieved. Nor is any indication given as to what planning, steps or guidance will be (or even **could** be) given to all of those who regularly or occasionally use the bay for boating, paddling, swimming and fishing purposes. The Health and Safety of those who will be engaged in normal recreational activities in the areas where steel trestles are situated will be greatly compromised.

(xviii) **Environmental Impact Assessment.** The Minister erred in granting these licenses in the absence of an EIS. Accordingly an appropriate assessment was not carried out with the necessary factual and scientific information in relation to the developments. No reasons were given by the Minister for dispensing with the need for an EIS despite the fact that such a significant aquaculture development in such a sensitive area of outstanding natural beauty with such rich bio-diversity plainly met the threshold for same. The assessment presented cannot be taken as appropriate for the projects proposed at Ballyness bay SAC since it is overly constrained in its scope, lacks sufficient detail, contains inaccuracies and has lacunae. It is incomplete in its analysis and inaccurate in its facts. Firstly, the scientific data it contains is extremely limited – this data is presented in Tables 8.2 and 8.3. Secondly, of the 50 categories addressed 43 of those are labelled: **“Low Confidence”** [see Table 8.2]. Table 8.3 lists 7 species and 25 pressures and of these 175 categories, 110 are **“Low Confidence.”**

‘Low Confidence’ data cannot be cited as proof of beyond reasonable scientific doubt. (Ref. Index 13).

The Board is respectfully invited to consider that the Minister has erred and misdirected himself by relying upon such a large volume of of ‘low confidence’ material to satisfy himself to the requisite standard i.e. beyond reasonable scientific doubt.

(xix) **Dispensing With Need For EIS.** As touched upon above, the Minister erred in dispensing with the need for an Environmental Impact Statement (EIS) in relation to the applications. In this regard the Minister acted unreasonably (or ‘irrationally’ in the public law sense) and failed to comply with the requirements

of the Habitats Directive and the State's EU law obligations in relation to the conservation and improvement of European sites such as Ballyness Bay SAC and SPAs.

Even from the available materials the Minister ought to have determined that the grant of the impugned licenses would have a serious negative impact on the conservation value of the SAC and SPAs. This failure is exacerbated (and in some ways explained) by the absence of any voice or input on behalf of the local community and those with a concern about the impact of such relatively large commercial/industrial activity in Ballyness bay.

Such input is a crucial check and balance in this important process.

**(xx) Facilities for packing, storing and transportation.** No account has been taken nor measures specified for the control or provision of facilities for packing, storing and the transportation of shellfish on the type of scale that these licenses will entail.

This is especially so since so many licenses have been granted which will therefore mean separate, independent facilities required for each manufacturer.

Shockingly, no conditions as provided for at section 7(3) Fisheries (Amendment) Act, 1997, have been imposed. Such conditions should have been imposed to regulate *inter alia* the following issues,:

- (i) Annual or season limits on stock inputs, outputs and standing stock on site.
- (ii) Operational practices, including the fallowing of sites.
- (iii) The reporting of incidences of disease and the presence of parasites.
- (iv) The disposal of dead fish, empty shells and farm produced debris.
- (v) Measures for preventing naturalisation of imported species.
- (vi) Monitoring and inspection of aquacultural activities.
- (vii) Maintenance of records by the licensees.
- (viii) The protection of the environment and the control of associated waste product.
- (ix) Appropriate environmental, water quality and biological monitoring.
- (x) Control of the provisions for the hardening off of oysters.

**(xxi) Public Access.** In the stated reasons for granting licences, the Minister asserts that public access to recreational and other activities can be accommodated by these developments. No indication is provided as to how this can be accomplished. Indeed, our understanding of the terrain and topology of the area is such is that it is very difficult to envisage how this can in fact be accomplished without **serious** inconvenience being caused to those in the community and indeed the many thousands of tourists who visit the area. Ballyness Bay is extensively used for a wide variety of watersport activities, including a long established annual international school of windsurfing which

attracts participants from all over the world. No consideration has been given to the danger of the physical impediment and threat of thousands of oyster trestles, hidden under water at certain states of tide, to those participating in these activities.

The bay is very popular with locals and tourists for walking, bird watching, seal and otter spotting, angling and family recreation. It is used by the Donegal SOLAS group as a key element of their mental health promotion programmes.

(xxii) **Negative Effect on the Economy.** The Minister's assertion that the proposed aquaculture developments will have a positive effect on the economy of the local area is a prime example of the assistance that decision makers lose when the consultation process is so ineffective as to be non-existent. Firstly, there is no evidence provided of any cost/benefit analysis carried out to assess the alleged benefits of aquacultural development versus the certain damage to local tourism related income. Secondly, and contrary to the unsubstantiated assertions set out above, a far-reaching survey carried out of local businesses in Cloughaneely demonstrates that, of a total of 378 jobs in the local economy, 214 were directly dependent on tourism related income, in which the unspoiled natural environment was the dominant factor. Indeed, after many years of well-publicised government neglect and lack of investment in the Donegal region (especially the Gaeltacht area) the only 'asset' that the local economy has is the stunning, unspoilt landscape.

## CONCLUSION

15. The Local community has had no meaningful, effective opportunity to have any say in the process that led to the granting of these licenses.
16. One of the ways in which community acceptance of such invasive work over such a large, protected area of unspoilt natural beauty is by allowing them to participate democratically in the process that leads to it. That has not occurred and the community are aggrieved and finding it very difficult to come to terms with the decision that has been made.
17. Furthermore, even on the material available to the Minister and for the reasons set out above, the licenses were wrongly issued and Minister acted unlawfully in so doing.
18. We respectfully contend that the Board would benefit from an oral hearing of this matter. There are relatively high levels of public interest in these particular licenses. We respectfully defer to the Board's experience of these matters, but our own researches have not found any other developments where the reaction of all facets of the local community has been so widespread, vociferous and sustained. It is not an overstatement to refer to the fact the Ballyness / Magheroarty bay areas are areas of

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stunning natural beauty which have inspired artists and writers for generations. Any interference with this hitherto unspoilt landscape should benefit from the highest possible public scrutiny. We welcome any opportunity to clarify any matters set out above, should be Board deem that appropriate.

## **Index to Sources and Appendices Referenced in the Appeal Document.**

1. Aquaculture Licences site:  
<https://www.agriculture.gov.ie/seafood/aquacultureforeshoremanagement/aquaculturelicensing/aquacultureforeshorelicenceapplications/donegal/>
2. Aquaculture Licences decisions for Ballyness Bay:  
<https://www.agriculture.gov.ie/seafood/aquacultureforeshoremanagement/aquaculturelicensing/aquaculturelicencedecisions/donegal/>
3. Designated Shellfish Area  
<https://www.housing.gov.ie/water/water-quality/shellfish-waters/Donegal>
4. Conservation objectives for Falcarragh to Meenlaragh SPA [004149]
5. NPWS Corncrake project. Ballyness Bay SPA:  
<https://www.npws.ie/protected-sites/spa/004149>  
<https://www.npws.ie/sites/default/files/protected-sites/conservation-objectives/CO004149.pdf>
6. SITE SYNOPSIS SITE NAME: FALCARRAGH TO MEENLARAGH SPA  
SITE CODE: 004149
7. Ballyness Bay SAC 001090 Regs 2018
8. EUROPEAN COMMUNITIES (BIRDS AND NATURAL HABITATS)  
REGULATIONS 2011 S.I.477 of 2011
9. Guidance -Aquaculture – Natura 2000
10. Map showing proposed access routes as presented in Final Conclusion Statement. Appendices 1 & 11.
11. Combined map showing proposed aquaculture locations as shown on DAFM website map, proposed revised access routes as shown in Final Conclusion Statement, and seal haul out locations numbered. Appendix 2
12. Hydrographic Survey Falcarragh Sewerage scheme. SMG Doyle King 2004
13. Notes on the Precautionary Principle and Mitigation requirements as outlined in EU Habitats law. Appendix 10
14. ALAB Briefing Note: Bird impact assessment. Dr Tom Gittings. Report 13 Feb. 2018
15. A Review Of The Ecological Implications Of Mariculture and Intertidal Harvesting in Ireland, ML Heffernan, Irish Wildlife Manuals No.7, ISSN1393 – 6670. Duchas, Dept. Arts Heritage, Gaeltacht. Pps. 77 – 92, Pacific Oysters Summary p.89

- Intertidal Harvesting in Ireland, ML Heffernan, Irish Wildlife Manuals No.7, ISSN1393 – 6670. Duchas, Dept. Arts Heritage, Gaeltacht. Pps. 77 – 92, Pacific Oysters, Summary p.89. Also pps. 93 – 107, Clams, summary p. 106. PPs 69-70 and 72, P.75 (Summary) Effects of Dredging (Clams)
16. Historical Environmental and Cultural Atlas, Donegal, Edit. McLaughlin and Beattie. “ ....Ballyness Bay.... sand constantly changing under the influence of tides waves and sea currents...”.pps. 53, 88, 90.
  17. DEVELOPMENTS IN RELATION TO PROTECTED AREAS. *Conor Linehan, Environmental Law Unit, William Fry, Solicitors, Dublin.*
  18. *Ecological Consequences of Oysters Culture.* Ahmed and Solomon, Aquaculture and Fisheries Management, University of Ibadan, Nigeria International Studies in Aquatic Tropical Ecology, University of Bremen, Germany.
  19. The Dynamics of Environmental Sustainability and Local Development: Aquaculture A study for NESC by Dr Patrick Bresnihan Assistant Professor of Environmental Geography No. 143 April 2016
  20. Biodeposition from oysters Sustainable Aquaculture in New Zealand. Review of Ecological impacts of Farming Shellfish...Keeley and others.
  21. Triploidy and Reversion Chap. 7 Oyster Aquaculture (2004) [www.nap.edu/read/10796/chapter/8](http://www.nap.edu/read/10796/chapter/8).
  22. Lough Swilly Wild Oyster Society Ltd Appeal. AP2/2018.  
also  
“Into the Wild: Documenting and Predicting the Spread of Pacific Oysters in Ireland”, Kochmann 2012. Appendix 4.
  23. An investigation into the detection and identification of OsHV-1  $\mu$ var virus and associated risk factors causing mortalities in *Crassostrea gigas* in Ireland. Teresa Morrissey, BSc. Submission for Master of Science by Research Galway-Mayo Institute of Technology (GMIT)
  24. Oyster mortality in France. Fabrice Richez.
  25. Infestation due to Gigas in Ireland  
TWO EXOTIC COPEPODS IMPORTED INTO IRELAND WITH THE PACIFIC OYSTER
  26. Views, Ballyness Bay. Appendix 5.
  27. Examples of wildlife found in Ballyness Bay. Appendix 6.

- 31 Document submitted to the Aarhus Compliance Convention Office.  
Appendix 12.
- 32 Letter from Inland Fisheries Ireland to Minister Creed regarding fishing  
activities in Ballyness Bay.
- 33 NPWS Ballyness Bay SAC Site Synopsis 2013

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- 1 Map showing proposed access routes as presented in Final Conclusion Document.
  
- 2 Combined map showing proposed aquaculture locations as shown on DAFM website map, proposed revised access routes as shown in Final Conclusion Statement, and seal haul out locations numbered.
  
- 3 Extract from “Historical Environmental and Cultural Atlas, Donegal.”
  
- 4 Lough Swilly Wild Oyster Society Ltd. Appeal.  
and  
“Into the Wild”: Kochmann 2012.
  
- 5 Views of Ballyness Bay S.A.C.
  
- 6 Examples of wildlife found in Ballyness Bay S.A.C.
  
- 7 Daylight observations of otter activity in Ballyness Bay S.A.C.
  
- 8 Maps and photographic evidence of seal haul out locations in Ballyness Bay S.A.C.
  
- 9 Charges payable in respect of Ballyness Bay S.A.C. Several Fishery.
  
- 10 Notes on the Precautionary Principle.
  
- 11 Map showing proposed access roads to aquaculture sites through key corncrake nesting sites in SPA.

- 12 Document submitted to the Aarhus Convention Compliance Office.
- 13 Letter from Inland Fisheries Ireland to Minister Creed regarding fishing activities in Ballyness Bay.
- 14 NPWS Ballyness Bay Site Synopsis 2013