An Taisce
The National Trust for Ireland
5 Foster Place
Dublin 2, Ireland
D02 V0P9

Marine Finfish Unit Aquaculture and Foreshore Management Division

Department of Agriculture, Food and Marine

National Seafood Centre

Clonakilty

Co. Cork

P85 TX47

**sent by email to:** FinfishSC@agriculture.gov.ie

12th February 2024

**Submission pursuant to Section 11 of the Aquaculture (Licence Application) Regulations, 1998 (SI No 236 of 1998).**

**Reference T06/202**

A Chara,

Thank you for referring this notification to An Taisce in accordance with Section 11 of the Aquaculture (Licence Application) Regulations, 1998 (SI No 236 of 1998). An Taisce has reviewed the application for a renewal of a Salmon Farm Aquaculture Licence at Deenish Island, Co. Kerry. Reference: T06/202. We would like to raise the following issues.

## 1. Preliminary issues - renewal application

At the outset, we would highlight that it is our understanding that this licence is not a renewal, it should rather be classified as a new licence. We understand that in 2019 the Minister of Agriculture at that time revoked the licence which was provided to Silver King Seafoods Limited, trading as Mowi Ireland, as a result of an alleged gross overstocking of the salmon farm. The Minister wrote[1] to Mowi Ireland on the 12th April 2019 to inform them of the revocation, and to specifically highlight that Section 19(A)(4) of the regulations did not apply. It is our understanding that Mowi has continued to operate the salmon farm since, and has

[1] AP1-2019 - DAFM File Combined.pdf (alab.ie)

appealed the decision of the Minister to ALAB, as they are entitled to under section 40 of the Fisheries Amendment Act (1997) (as amended).

We note, under Section 40(4)(C) of the Fisheries Act, in relation to a revocation of a licence, ALAB has the power to substitute its decision for that of the Minister's:

*"(4) Where an appeal is brought under this section and is not withdrawn, the Board shall, subject to subsection (5), determine the appeal by—*

*(C) in relation to the revocation or amendment of a licence, substituting its decision on the matter for that of the Minister."*

It appears to us that Section 19(A)(4), whereby an applicant with an expired licence can continue to operate pending the renewal of their licence application, only applies in the instance that a licence has lapsed. There is no mention of this provision applying in the current case, whereby a licence has been revoked and an appeal taken. Section 19A copied in full below:

> *"19A.— (1) The power of the licensing authority to renew or to further renew an aquaculture licence under section 19 is exercisable notwithstanding the expiration of the period for which the licence was granted or renewed.*
>
> *(2) Where, prior to the passing of the Sea-Fisheries and Maritime Jurisdiction Act 2006, an aquaculture licence has been renewed or further renewed after the expiration of the period for which the licence was granted or renewed, such renewal shall be and be deemed always to have been as valid and effectual as if the licence had been renewed or further renewed on the expiration of the period in question*
>
> *(3) If, because of the validation expressed to be effected by subsection (2), that subsection would, but for this subsection, conflict with a constitutional right of any person, the validation shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect.*
>
> *(4)* ***A licensee who has applied for the renewal or further renewal of an aquaculture licence shall, notwithstanding the expiration of the period for which the licence was granted or renewed but subject otherwise to the terms and conditions of the licence, be entitled to continue the aquaculture or operations in relation to aquaculture authorised by the licence pending the decision on the said application."*** **[our emphasis]**

As such, it is our view that this licence has been incorrectly classified as a renewal application, instead of a new licence application. Pending the outcome of ALAB, the Minister's decision stands, and it appears to us that that means there is no extant licence for this farm, and no existing lawful right to continue operating under Section 19(A)(4) of the Fisheries Act. Any operations on this farm from 2019 onwards would appear to be unlicenced in the eyes of the law. As such, we submit that this renewal licence application is invalid.

## 2. Obligation to Remedy

Notwithstanding our comments on the validity of the application being a renewal, it is An Taisce's position that any grant of Licence for this site would be contrary to EU law. This is arising from the remedial obligation placed on State authorities to undo the unlawful consequences of a breach of EU law, in this case the EIA and Habitats Directives.

The Fisheries (Amendment) Act 1997 (as amended) under which this Licence application is to be determined, does not give effect to the decision of the Court of Justice in Case C-215/06 *Commission v Ireland*, which concerned the then provisions of the Planning and Development Act 2000 (as amended) and how under said provisions it was possible to grant retention planning permission for development which had been carried out in breach of EU law. Following the decision of the Court of Justice in that case, Part XA of the 2000 Act was introduced to provide for the system of what is known as 'Substitute Consent', whereby development regulated under the 2000 Act, but which has been carried out in breach of the EIA and Habitats Directives, can apply for a form of planning permission which includes remedial environmental assessments.

An Taisce notes that the 1997 Act was not amended to give effect to the decision of the Court of Justice in Case C-215/06 to provide for an equivalent system for the regularisation of aquaculture operations.

It is An Taisce's position that a decision to grant a Licence in this case would be unlawful, having regard to the material which is before the Minister concerning the failure of Silver King Seafoods, trading as Mowi Ireland, to comply with the terms of their existing Licence, as well as a failure to carry out the relevant assessments of environmental impact of the fish farming already carried out in contravention of EU law. Furthermore, the failure of the State to give proper effect to EU law in the field of aquaculture licencing does not absolve the State from its duty to comply with EU law in relation to a new application before the Minister, where the original Licence and the activity which it purported to regulate has been carried out to date in breach of EU law.

In that regard, and notwithstanding that the 1997 Act has not been amended to give effect to the decision in Case C-215/06, there is an autonomous obligation on the Minister to give effect to EU law in determining this licence application.

We refer the Minister to the decision of the Court of Justice in Case -378/17 *The Minister for Justice and Equality and The Commissioner of An Garda Síochána and the Workplace Relations Commission,* where the Court ruled that the duty to apply EU law extends not only to national courts but to all other organs of the State called upon in carrying out their functions to apply EU law. This includes the Minister in his role in relation to assessing this licence application before it. The Court held at para:

> *"As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law (see, to that effect, judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraph 31; of 9 September 2003, CIF, C-198/01, EU:C:2003:430, paragraph 49; of 12 January 2010, Petersen, C-341/08,*

*EU:C:2010:4, paragraph 80; and of 14 September 2017, The Trustees of the BT Pension Scheme, C-628/15, EU:C:2017:687, paragraph 54).*

*It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rule"*

The Court found that the effectiveness of EU law, in that case employment law, would be undermined if authorities called upon to comply with EU law could not of their own motion disapply conflicting provisions of national law. The fact that in Ireland someone may have recourse to Judicial Review to challenge the legality of a decision taken contrary to EU law does not absolve the primary decision maker from their obligation to comply with EU law. The Court held at para 50:

*"It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.*

*Consequently, the fact, highlighted by the referring court, that in the present instance national law permits individuals to bring an action before the High Court founded on the alleged incompatibility of a national provision with Directive 2000/78 and allows the High Court, if it upholds the action, to disapply the national provision at issue is not capable of calling the above conclusion into question.*

*In the light of the foregoing considerations, the answer to the question referred is that EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."*

Accordingly, An Taisce submits that there is an obligation on the Minister to comply with the EU jurisprudence in Case C-215/06 and the other caselaw which will be referred to below. The Minister must read into the 1997 Act the requirement to give effect to that caselaw, and if necessary disapply any conflicting provisions of the 1997 Act.

We will set out below in more detail, An Taisce's position as to how the grant of a Licence in this case would be contrary to EU law. In that regard, first of all it is clear that the failure of Silver King Seafoods to comply with their licence was 'significant'. At section 18 of the internal Departmental submission to the Minister prior to withdrawing the Licence in 2019, the breach of the licence identified was described as 'a very significant breach'.

Furthermore, the submission from Inland Fisheries Ireland of 7 June 2019 stated that the Deenish Island fish farm during the period in which it was in breach of its Licence there had been a significant decline in sea trout numbers on the Curran fishery. Concerns were

expressed as to the impact that the fish farm was having on the SAC designed for Atlantic salmon.

Silver King Seafoods were granted the previous Licence on the basis of environmental assessments. However, it is clear that those assessments were not in compliance with EU law, and that consequently the subsequent fish farming was carried out in breach of EU law.

Furthermore, the Licence limited the production of salmon to 500 tonnes per annum, based on the (presumed) absorption capacity of the marine environment for the waste produced by the salmon farm. However, Silverking Seafoods were found to be producing more than 120% of their allowable production of salmon, and therefore presumably the equivalent in terms of emissions of waste to the marine environment.

The Licence application is expressed to be a renewal to the existing licence. It is clear therefore that this is an application for a renewal of a licence, in circumstances where the original licence has been carried out in breach of the EIA and Habitats Directives, in that the effects on the environment arising from the production of significantly more waste than was permitted have not been assessed in accordance with those Directives as required.

There is no material supplied by the proposed Licensee in the EIAR and the Natura Impact Statement which provides the necessary information on the environmental effects of the fish farm when it was being carried out in contravention of EU law.

Neither the EIA Directive nor the Habitats Directive specify what action should be taken in the event of infringement of the obligations laid down by those directives. However, in Case C-201/02 *Wells*, the Court of Justice found that where there was a failure to conduct an EIA there was an obligation on the State authorities to revoke or suspend a consent. This obligation falls upon all organs of the Member State. The Court held:

> *"It is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 Humblet [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 Germany v Commission [1990] ECR I-2321, paragraph 13).*

*Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."*

In C-196/16*, Comune di Corridonia and Others,* the Court of Justice held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or

measures which are unlawful in the light of EU law. However, such a possible regularisation would have to be subject to the condition that it does not offer the parties concerned the opportunity to circumvent the rules of EU law or to refrain from applying them, and should remain the exception. The Court held:

> *"In the event of failure to carry out an environmental impact assessment required under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:*
>
> - *national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and*
> - *an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but must also take into account its environmental impact from the time of its completion."*

In C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* the Court of Justice held that such regularisation permitted under the EIA Directive also applies in relation to the Habitats Directive:

> *"By analogy, it must be held that EU law does not preclude such regularisation, subject to the same conditions, in the event of failure to conduct a prior impact assessment of the effects of the project concerned on a protected site, as required by Article 6(3) of the Habitats Directive."*

It is clear that legal consequences flow from the decision of the Minister to discontinue the statutory entitlement of Silver King Seafoods to carry out aquaculture operations in 2019. As the Court of Justice found in Case C-278/21 *AquaPri,* which was a Danish case involving a fish farm which had been authorised on foot of an Appropriate Assessment which was not in compliance with the Habitats Directive:

> *"In the second place, it must nevertheless be observed that, since the Member States are required to comply with Article 6(3) of Directive 92/43 and, more specifically, the assessment obligation laid down in the first sentence of that provision, it cannot be accepted that a legal consequence may not be drawn from the infringement of that obligation in the event that such an infringement is found, in a final decision, by the competent national authority or court.*
>
> *On the contrary, as the Court has stated with regard to the similar assessment obligation established by Directive 85/337, even where the authorisation of a project which has been adopted in breach of that obligation is definitive, that project cannot, however, be regarded as having been lawfully authorised with regard to that obligation, such that the Member State concerned is required, under the principle of*

*sincere cooperation provided for in Article 4(3) TEU, to eliminate the unlawful consequences of the breach which it has committed by taking all measures necessary within the sphere of its competence to remedy it (see, to that effect, judgment of 12 November 2019, Commission v Ireland (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraphs 71, 75, 80 and 90 and the case-law cited).*

*In particular, as the Advocate General noted, in essence, in points 29 and 30 of her Opinion, where a project has been authorised following an assessment which does not comply with the requirements of the first sentence of Article 6(3) of Directive 92/43, the competent national authority must carry out a subsequent review of the effects of the implementation of that project on the site concerned, on the basis of Article 6(2) of that directive, if that review constitutes the only appropriate measure for avoiding that implementation from leading to deterioration or disturbance that could have had a significant effect on the site concerned. (see, to this effect, judgment of 14 January 2016, Grüne Liga Sachsenand Others, C-399/14 EU:C:2016:10, paragraph 46).*

*However, such a subsequent review, based on Article 6(2) of Directive 92/43, is not the only appropriate measure that the competent national authority may, in a situation such as that at issue in the main proceedings, be called upon to adopt.*

*In fact, as is apparent from the case-law of the Court, EU law does not preclude that authority from revoking or suspending the authorisation already granted in order to carry out a new assessment in accordance with the applicable requirements, provided that those measures take place within a reasonable period of time and that account is taken of the extent to which the person concerned may have been able to rely on the lawfulness of that authorisation, or even, in certain exceptional cases provided for by the applicable rules of national law, for the authority to regularise the situation, which must then not only comply with those requirements, but also take place under conditions which exclude any risk of circumvention or non-application of the rules of EU law (see, to that effect, judgment of 12 November 2019, Commission v Ireland (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraphs 75 to 77 and 92 and the case-law cited).″*

It is noted that the Licence applied for by Silver King Seafoods is not a mere continuation of the Licence which it currently holds. The proposed Licence provides for increased production at the site, and therefore the operation conditions are changed. However, the fact that the Licence application has been made, now poses according to the decision of the Court of Justice in *AquaPri,* concurrent obligations on the Minister under both Article 6(2) and 6(3) of the Habitats Directive. Commenting on the decision in *AquaPri,* Braaksma and Haugsted stated in *Unlawfully Authorised Projects under the Habitats Directive: Remediation at All Costs?, Comment on the CJEU Judgment of 10 November 2022 in Case C-278/21 AquaPri*", Journal for European Environmental & Planning Law 20(1), 95-113:

*"That an unlawful authorisation has become final does not mean, however, that the project concerned can be regarded as having been lawfully authorised under Article 6(3). The obligation on the national authorities to remedy the failure to carry out an assessment does not go away as a result of the finality of the permit. Instead, it remains a contingent liability for the national authorities. As the Court pointed out in*

*AquaPri, this means that if a national authority gets the opportunity to rectify the failure to carry out an appropriate assessment in the context of a later consent procedure, the authority is obliged to do so. Or as the Court put it: 'where a Member State has provided, either in a measure of general scope, or in a measure of individual scope, that the continuation of an activity already authorised must be the subject of a new authorisation, the competent national authority is required to make that authorisation subject to a new assessment in accordance with the requirements of the first sentence of Article 6(3), where it appears that that activity has not yet been the subject of such a compliant assessment.*

*This was the case in the main proceedings in AquaPri. As required by Danish legislation as well as the 2006 permit, the fish farm concerned was required to apply for a new authorisation, by the latest in 2014. Before granting this new authorisation, the Danish authorities were therefore obliged to carry out an appropriate assessment even though the mere continuation of the activity under unchanged conditions did not constitute a 'project' within the meaning of Article 6(3). As is apparent, this remediation measure is also dependent on national law which has to provide for the renewal or reconsideration of existing permits. However, it is not unthinkable that the duty to rectify a failure to carry out an assessment at a later stage might also 'awake' under other circumstances than in AquaPri. This could, for example, be the case if the operator wishes to make amendments to the existing project requiring approval."*

The High Court recently per Mr Justice Humphreys found in *Carrownagowan Concern Group and Ors v An Bord Pleanála [2023] IEHC 579,* summarised *AquaPri* at para 92:

*"Thus, if EU law assessments were not carried out properly in relation to an original permission, and the developer (or someone benefitting from a previous consent) seeks an extension of the consent, or an amendment of it, the remedial obligation may have the consequence that the body giving consent to such subsequent application is obliged to rectify the failure to conduct a correct assessment originally. If such rectification is not put in place, then a given applicant can challenge the subsequent consent on that basis. This does not extend to a retrospective challenge to the original consent."*

The Court found that it was necessary at least in respect of judicial review proceedings taken under the Planning and Development Act 2000 alleging a failure of a competent authority to comply with the remedial obligation under EU law, for the applicant to have raised the issue of the requirement to carry out a remedial environmental assessment with the relevant competent authority prior to raising that point in subsequent judicial review proceedings.

For the avoidance of doubt, An Taisce is hereby raising with the Minister the obligation to carry out a remedial environmental assessment of the Silver King operations at Deenish Island, prior to the granting of any Licence to continue aquaculture operations.

It is however, An Taisce's position that the Licence must in fact be refused, as Silver King Seafoods have not submitted the relevant information to address the impacts of their aquaculture operations at Deenish Island which have been carried out in breach of the EIA

and Habitats Directives. The only course of action, An Taisce submits, which is lawfully open to the Minister in this case, is to reject the application for the Licence.

## 3. Sea Lice Impacts

The potential impact of sea lice infestation for wild salmonids is discounted thus in the NIS:

> *"The continuous weekly monitoring as well as coordinated treatment of all licenced sites within the bay through the Single Bay Management (see Section 2.1.16 for further details) plan once trigger levels have been breached is imperative to minimise any potential risk on wild salmonids. Consequently, it can be concluded that the proposed operations at the site are unlikely to result in significant impact in sea lice infestations in wild salmon populations; consequently there will be no likely significant direct effects to the Qualifying Feature salmon and no likely significant indirect effects to the Qualifying Feature freshwater pearl mussel"*

While the NIS provides a modelling exercise for lice, we would note that the operators of this plant are alleged to have previously stocked the farm at 122% of what they were licenced for, and, short of a change in approach in terms of monitoring and enforcement of the stocking density for this operator, then the licencing authority cannot be confident that the limit will be respected. That, in turn, raises reasonable scientific doubt as to the infection potential of the farm. We submit that this is a significant uncertainty, and given the alleged track record of the applicant, unless far stricter inspection and enforcement is guaranteed then the scientific doubt remains, in conflict with Article 6(3) of the Habitats Directive.

Additionally, anecdotal evidence from the very reputable Inland Fisheries Ireland indicates that there are serious concerns in regard to the impact of the salmon farm on wild trout and salmon. Inland Fisheries Ireland clearly outlined in their 2019 submission to ALAB[2], in regard to the revocation of the Mowi licence, how with an increase in the number of salmon being reared at the Deenish salmon farm there was a corresponding dramatic decline in Sea Trout numbers, as a result of sea lice infestation from the Deenish Salmon Farm. They made their concerns regarding the salmon farm very clear, and clearly welcomed the revocation of the licence.

Furthermore, we note that Mowi seeks to rely on a study from 2013 (Jackson et al., 2013), which downplays the overall impact of lice on wild salmon. However, there have been clear examples of lice infestation of wild salmonids as a result of farmed salmon, and the international literature is testament to that. Specifically, in the Irish context, a study by Shephard and Gargan (2020)[3] shows that salmon returns on five rivers on the West coast between 1990 and 2019 dropped by between 19% and 46% in the years following high lice

[2] Submission from Inland Fisheries Ireland 7-6-19_Redacted.pdf (alab.ie)

[3] Shephard and Gargan (2020). Wild Atlantic salmon exposed to sea lice from aquaculture show reduced marine survival and modified response to ocean climate. ICES Journal of Marine Science, Volume 78, Issue 1, January-February 2021, Pages 368–376, https://doi.org/10.1093/icesjms/fsaa079

levels on nearby salmon farms. Similarly, a previous study by Shephard and Gargan (2017)[4] demonstrated a 50% decrease in the salmon run largely attributable to lice infestation on farmed salmon. In a similar piece of work, highlighted by IFI, an extensive review by Thorstad et al (2015) assessed the impacts of the salmon louse on sea trout. They concluded that intensively farmed areas have negatively impacted wild sea trout populations by increasing marine mortality, changes in migratory behaviour, reduction of marine growth and reduced population sizes.

Given the anecdotal evidence of a collapse in the local salmonid population, which coincides with an increase in stocking density on the Deenish Island farm, combined with Irish studies demonstrating measurable impact as a result of salmon farms, and the large scale review of salmon farm impacts on sea trout, it becomes increasingly difficult to believe the conclusion in the NIS that there will be no likely significant direct effects as a result of sea lice emanating from the salmon farm.

The requirement for certainty when carrying out an Appropriate Assessment has been clearly fleshed out in case law. It is now very well established in law that approval can only be granted for plans and projects when it has been established beyond all reasonable scientific doubt that the subject proposal will not adversely impact any Natura 2000 sites. In Case C-258/11, Sweetman & Others v An Bord Pleanála & Others, the CJEU held that:

> *"authorisation for a plan or project ....may therefore be given only on condition that the competent authorities ....are certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where* ***no reasonable scientific doubt remains*** *as to the absence of such effects"* [emphasis added].

In 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 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. The case repeated the conclusion of the CJEU at para. 44 in Case C-258/11, namely that an AA:

> "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt*."

This test has not only been established in Irish law but further developed in recent case law, with reference to the Kelly judgement, in Connelly v ABP [2018] IESC 31 (paras. 8.15 & 8.16) and Foley v EPA & Ors and Hayes v EPA & Ors [2022] IEHC 470 (para. 118).

We would observe in this case that the only evidence upholding the conclusion that there will be no significant impact on the QI of the nearby SACs as a result of sea lice relies entirely

[4] Shephard and Gargan (2017).Quantifying the contribution of sea lice from aquaculture to declining annual returns in a wild Atlantic salmon population. AQUACULTURE ENVIRONMENT INTERACTIONS. Vol. 9: 181–192, 2017 https://doi.org/10.3354/aei00223

on modelling carried out by Mowi. There is extensive evidence highlighting that this is likely a flawed conclusion, and we submit that it is incumbent upon the licencing authority to seek external independent validation of any modelling work before relying on it. This is particularly pertinent given it appears to conflict with a large body of published literature on the impacts, and with very plausible anecdotal evidence provided by the IFI on this issue.

## 4. Water Framework Directive

In Case C- 461/13 Weser the CJEU held:

> "Article 4(1)(a)(i) to (iii) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be interpreted as meaning that the Member States are required

- — unless a derogation is granted
- — to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive."

However, we would argue that although the EIAR does address elements of water quality, it does not actually carry out a WFD assessment, as required by law. Water chemistry is just one of a number of quality elements which must be assessed under the Water Framework Directive. The assessment in the EIAR does not consider the WFD requirements holistically, rather it looks at specific things like nitrate pollution and Biological Oxygen Demand. According to the judgment in the Weser case, where any single quality element is reduced in class, even if it doesn't amount to an overall decline in the status of a WFD waterbody, that must be still considered a deterioration. We submit that no such assessment has been provided by the application. The decision maker must ensure that the point source responsible for discharges of nutrients and therapeutants does not lead to a deterioration in any of the quality elements in the surrounding waterbodies.

## 5. Bird Impacts

The location of this salmon farm is within the Deenish Island and Scariff Island SPA (Code 004175). Deenish Island and Scariff Island SPA is a site of high ornithological importance on account of the internationally important population of Storm Petrel and nationally important populations of Manx Shearwater, Fulmar, Lesser Black-backed Gull and Arctic Tern. It is also worth highlighting that the aforementioned Storm Petrel and Arctic Tern species, as well as Chough, are listed on Annex I of the E.U. Birds Directive

According to the NPWS, these islands support important populations of breeding seabirds. The Seabird 2000 survey recorded 1,960 pairs of Manx Shearwater on Scariff Island and 351 pairs on Deenish Island in 2000, giving a total of 2,311 pairs which is equivalent to c. 5% of

the national total[5]. On Deenish Island, birds breed in burrows on steep grassy slopes with rock outcrops in a limited area on the south-east side of the island. Deenish Island is also a traditional site for nesting terns, with 54 pairs of Arctic Tern present in 1995 - a population of national importance. Other seabirds which were recorded breeding in 2000 include Shag (5 pairs), Herring Gull (28+ pairs), Great Black-backed Gull (7 pairs) and Black Guillemot (several pairs).

Potential impacts on birds are outlined in the NIS:

> *"The greatest potential impact from human activity will be associated with boat movements around the site. The sensitivity of various high conservation value species to such impacts will vary"*

The NIS then proceeds to enumerate the risk to birds using a metric based on various aspects of the bird's sensitivity to disturbance, endangered status and habitat flexibility, and concludes that:

> *"The likelihood of impacts occurring is remote; it is concluded that there will be no likely significant effects."*

We are of the view that the chosen metric is unfit for purpose, and results in an overly positive assessment of the potential impacts on the protected species of this SPA. The NIS seeks to rely on a composite metric, which includes measures of species habitat suitability and species habitat flexibility. We would highlight that this is irrelevant in this context. Habitat flexibility estimates if a species is very flexible in habitat use, or if it is reliant on one particular habitat type; and habitat suitability assesses how likely a species is to use a particular habitat.

The Deenish Island and Scariff Island SPA's high ornithological importance is demonstrated by its support of important populations of breeding seabirds. The Seabird 2000 survey recorded 1,960 pairs of Manx Shearwater on Scariff Island and 351 pairs on Deenish Island in 2000, giving a total of 2,311 pairs which is equivalent to c. 5% of the national total.[6] As such, the impact on nesting species is the issue here, not their ability to nest or forage elsewhere. The SPA was designated because it is suitable for the species, and they naturally occur there. As such, assessing if they could utilise other habitats, or whether the existing habitat is suitable for them is moot. This is an area protected for the sole reason that it provides them with the habitat which they favour.

The impact of boat disturbances to these nesting bird species is entirely absent from the NIS, despite this being clearly identified in the NIS as having the greatest potential to impact on bird species. The energetic cost to the birds, and potential risks to their breeding success as a result of the flushing of birds due to boat traffic has not been assessed at all within the NIS. As such, the information which is necessary for the decision maker to reach a conclusion beyond all reasonable scientific doubt is absent. Habitat flexibility is irrelevant given that

[5] Deenish Island and Scariff Island SPA | National Parks & Wildlife Service (npws.ie)
[6] SITE SYNOPSIS (npws.ie)

Deenish Island is designated for the protection of breeding birds, no activity which requires the species to be flexible in their nesting choice should be licenced within the SPA. Likewise, the habitat suitability exercise is irrelevant as these species occur naturally on Deenish Island and are protected in that location. It is not up for debate whether the habitat is suitable for them or not.

As such, the assessment of impact significance is not fit for purpose in this case, and we submit that it cannot be relied upon by the decision maker. Until such a time as the impact of daily boat disturbances can be enumerated and discounted for each of the SCI species within the Deenish Island and Scariff Island SPA, any decision made cannot be considered to have reached the acceptable threshold for the decision maker to be able to conclude beyond reasonable scientific doubt, and as such will be non-compliant with Article 6(3) of the Habitats Directive.

## 6. 15% Threshold and Benthic Communities

The NIS outlined risks to QI sedimentary habitats in the Kenmare River SAC as a result of benthic enrichment beneath the salmon farm:

> *"The potential source of impact to benthic habitats from operations at the Deenish site is predominately organic enrichment due to settleable solids discharged from the fish sites which comprised fish faeces and feed waste. Solid wastes arising from the culture of fish can impact the seabed and associated benthic communities.*
>
> *Potential likely significant effects of the proposed project to the following marine Annex I benthic habitats of Kenmare River SAC could not be excluded at the Screening for AA stage (see Section 2.4 for summary):*
>
> *• Large shallow inlets and bays [1160]*
>
> *• Reef [1170]"*

However, any impacts were discounted with a reliance on a 15% disturbance threshold:

> *"For the practical purpose of management of habitats, a 15% threshold of overlap between a disturbing activity and a habitat is given in the NPWS guidance. Below this threshold, which was used by Marine Institute in the AA of aquaculture activity in Kenmare River SAC (Marine Institute, 2017, 2019) (see Appendix 1), disturbance is deemed to be non-significant.*
>
> *In all cases the percentage of the community overlapped by the proposed licenced area and/ or the sedimentation footprint was below the 15% threshold for a disturbing activity identified in NPWS guidance (NPWS 2013)."*

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 clearly set out 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. The court's interpretation of the case specific context for how effects need to be assessed relies largely on specific ecological considerations at issue for the habitat or species, and the nature of impacts.

For example, in Case C258/11 Sweetman, the loss of approximately 1% of the protected habitat was considered to be an adverse effect on the integrity of the site. Furthermore, in assessing the potential effects of a plan or project, their significance must be established in 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. Consequently, 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 we submit that this is an unlawful approach to risk assessment under the Habitats Directive, and percentage overlap should not be relied upon when drawing conclusions for Appropriate Assessment.

Additionally, the applicant proposes mitigation measures to protect the Annex I benthic habitats for which the SAC is designated. The NIS then concludes:

> *"It can be concluded that the operations at the proposed site, together with the mitigation measures proposed (i.e. implementation of a fallow period), will not significantly affect benthic ecology. Any disturbance experienced will be temporary with the species characterising the community types recovering to pre-disturbed state following cessation of activity."*

However, the fallow period is either for one month, or three, both are proposed at different points in the NIS, with no clarity provided for which is accurate.

Section 3.3.4 outlines that:

> *"Organic enrichment due to settleable solids discharged from the fish site is the main source of potential impact to marine benthic habitats. Potential effects of settleable solids will be mitigated through the implementation of fallow periods between production cycles at the site. Following each production cycle, the proposed Deenish site* ***will lie fallow for 3 months****."* [our emphasis]

But section 3.8 outlines that:

> *"Organic enrichment due to settleable solids discharged from the fish site is the main source of potential impact to Habitats Directive Annex I Habitats. Potential effects of settleable solids on Habitats Directive Annex I Habitats will be mitigated through the implementation of fallow periods between production cycles at the site. Following*

*each production cycle, the proposed Deenish site will lie fallow for a **minimum of one month**."* [our emphasis]

The applicant then asserts that the disturbance will be temporary:

*"Any disturbance experienced will be temporary with the species characterising the community types recovering to pre-disturbed state following cessation of activity."*

However, our information shows that this site was first licenced in 1995, and has been in operation ever since. It is difficult to conclude that this is a temporary disturbance given that it's now almost 30 years later Furthermore, having one/three month fallow periods does not provide optimum conditions for these sedimentary habitats for the other nine/eleven months of the year during which the farm is active.

Again, we submit that the potential pressure on sedimentary habitats has not been adequately identified in the NIS, the reliance on a 15% threshold is not lawful, and the proposed mitigation measures conflict with each other in terms of time limits. At best they allow an opportunity for sedimentary habitats to begin recovering for a quarter of the year, before being damaged again for the remainder of the year This harmful annual pattern is destined to continue indefinitely.

We submit that the efficacy of this proposed mitigation measure is insufficiently evidenced in the NIS, and as such is non-compliant with Article 6(3) of the Habitats Directive

## 7. Otters

Otters are known to occur in the Kenmare River SAC, in which the salmon farm site falls. The AA screening outlines that:

*"While otter is more an aquatic rather than a truly marine mammal, they are widely distributed in the SAC (Saunders, 2017) and so may occur within the proposed project area; consequently, potential effects to the otter cannot be excluded at the screening stage. Otter is brought forward to the Stage II AA NIS"*

The NIS outlines that Otters forage and feed within 80m to 100m of the coastline and can travel distances up to 500m across estuaries or between islands, but discounts them interacting with the farm site thus:

*"Although the proposed aquaculture renewal site is located within the Kenmare River SAC, the distance from the coastline of Deenish Island where otters can forage, is too significant for them to be found at the site.*

*The likelihood of an impact occurring on otters is remote, the consequence of an impact if realised is negligible; it is concluded that there will be no likely significant effects to otter."*

However, from the documentation on the NPWS site for the SAC, this does not seem to be entirely accurate. The following is a map of an Otter commuting buffer zone in the area, and clearly incorporates the entire boundary of Deenish Island, including the location of the fish farm.

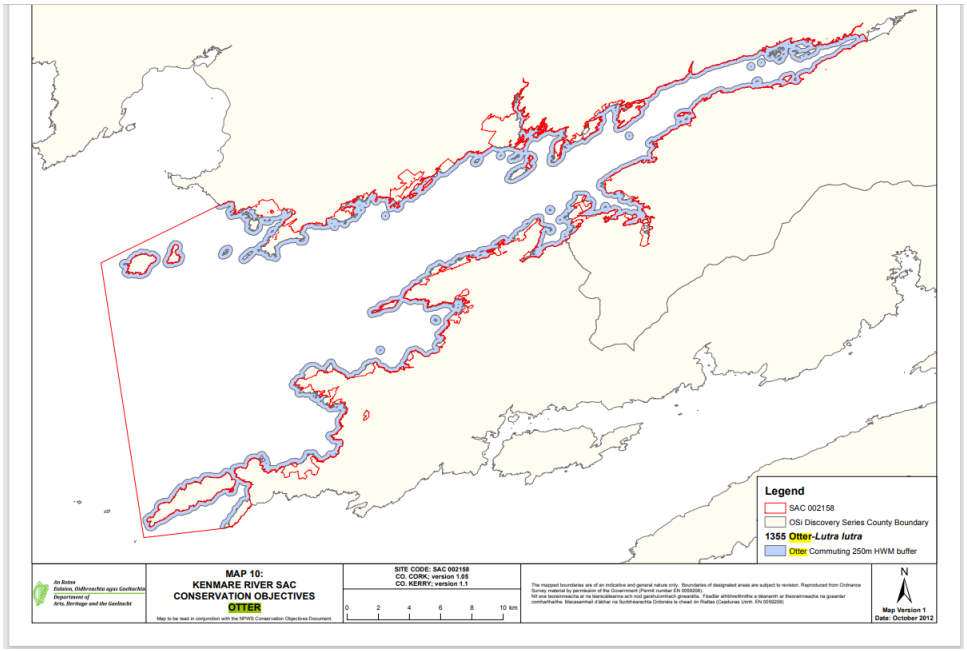



**Figure 1**: Map from NPWS Conservation Objectives for Kenmare River SAC[7]

As such, we would argue that the conclusion that there will be no impact is not scientifically robust. The CJEU at para. 44 in Case C-258/11 clearly states that an AA:

> "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt.*"

We would highlight that we do not believe the information provided in the NIS in regard to otters is accurate, given it appears to conflict with the information provided by the NPWS on the SAC. Further information should be sought from the licencing authority on otter movements in the vicinity of the salmon farm.

## 8. Escapees

The risk of farmed salmon escaping from their pens to interbreed with wild salmon is a significant ecological concern. However, the NIS discounts the risk thus:

[7] npws.ie/sites/default/files/protected-sites/conservation_objectives/CO002158.pdf

*"By and large, escapees are more likely to die or be preyed upon at sea than to enter a river system, in particular if they are immature, which is the most likely prospect"*

But instances of farmed salmon being caught in inland rivers would cast doubt on this assertion. Indeed, IFI were quoted in this[8] article saying:

*"This large number of escaped farmed salmon, with a high proportion of males likely to be sexually mature, presents a potential threat to local wild salmon populations,"*

The NIS relies on standard Mowi operating procedures to minimise the risk:

*"Preventing the escape of fish is a priority for MOWI Ireland. MOWI has an improved standardised pen, net and mooring design adopted on all farms. They have classified their sites in Kenmare Bay as having a High Risk for susceptibility to storm damage based on the wave climate and hydrographic regime in the locality. Pen, mooring and anchor design within Kenmare Bay reflects this and strongly mitigates against storm damage thus reducing the risk of an escape event"*

It should be noted that MOWI Ireland are responsible for circa 80% of farmed salmon production in Ireland, and in its report to NASCO in 2019[9] Ireland reported that 800,000 farmed salmon had escaped from marine sites between 1996 and 2017. Elsewhere in Europe, MOWI protocols do not appear to be enough to withstand increasing storm events, with an incident at a Scottish MOWI salmon farm in 2020 seeing the escape of almost 50,000 farmed salmon in one instance[10]. Despite this, the risk of future climate disruption in the guise of increased storm strength does not appear to have been factored into their risk analysis for this farm.

Furthermore, the applicant seeks to minimise the seriousness of escapees, highlighting that large escapes have greater potential for impact:

*"Large escapes (tens of thousands of individuals) of mature fish in the spawning season have a greater potential for impact significance than small escapes of smolts. Large escape events have the potential to have a significant effect on wild salmon populations in the area especially considering the low returns within many salmon rivers. However, the likelihood of an escape event occurring is remote and MOWI have adopted a range of measures to prevent such an occurrence; consequently, significant direct effects to the Qualifying Feature salmon and indirect effect to the Qualifying Feature freshwater pearl mussel can be excluded"*

While accurate, that does not diminish the risk from a smaller escape event. The risk is based not just on the number of escapees, but also on their level of maturity and the time of year of the escape event. The obligation on the decision maker in this instance is to determine if there is any risk to the integrity of the SAC, not to consider the acceptability of the quantum of risk posed. If there is any risk that the integrity of the SAC will be undermined, then the licencing body is obliged to not licence the activity. In Case C-258/11, Sweetman & Others v An Bord Pleanála & Others, it was held that:

[8] Lice, infectious disease and taking reef fish: The impact of salmon farms on marine biodiversity (noteworthy.ie)
[9] NASCO "Implementation Plan" for 2013-18
[10] Nearly 50,000 salmon escape from Scottish fish farm after storm damage | The Fish Site

*"authorisation for a plan or project ....may therefore be given only on condition that the competent authorities ....are certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where* ***no reasonable scientific doubt remains*** *as to the absence of such effects"* [emphasis added].

## 9. Conclusion

Based on the above, we submit that the analysis presented is not sufficient for meeting the needs of an Article 6(3) Appropriate Assessment, or an Article 4 WFD assessment. Furthermore, it is our considered opinion that the licencing authority should be seeking external reviewers for the modelling data to ensure its scientific robustness.

We are of the view that the relevant authority does not have the data and analysis available to them to be able to conclude beyond reasonable doubt that there will be no impact on the SCIs and QIs of the various Natura 2000 sites under the ambit of Article 6(3) of the Habitats Directive.

Ultimately, it is An Taisce's position that the Licence must in fact be refused, as Mowi Ireland have not submitted the relevant information to address the impacts of their aquaculture operations at Deenish Island which have been carried out in breach of the EIA and Habitats Directives. The only course of action, An Taisce submits, which is lawfully open to the Minister in this case, is to reject the application for the Licence.

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.

Le meas,



Dr. Elaine McGoff,

Head of Advocacy,

An Taisce – The National Trust for Ireland