

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

[18/04/2019]

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

To Whom It May Concern:

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

An Taisce has reviewed the applications T12/407, T12/409, T12/441, T12/455, T12/500, T12/502, T12/508, T12/509, T12/510, T12/514, T12/515, T12/516 and T12/517 in Ballyness Bay, County Donegal, and would like to make the following submission in relation to these applications.

1. Traffic disturbance

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

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

The recommendation outlined in the AA report is the following:

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

and the AA conclusion statement included this condition:

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

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

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

As such, An Taisce submit that this condition will be entirely ineffective and does not address the risk posed. The risk arises due to the level of traffic, and has nothing to do with adherence to the existing track. The licensing authority need to be able to conclude beyond reasonable doubt that the QI communities will not be disturbed. , as outlined in the ECJ ruling for C-404/09¹ [Commission v Spain] which held that "*[a]n assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions **capable of removing all reasonable scientific doubt** as to the effects of the works proposed on the SPA concerned.*" [An Taisce emphasis]

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

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

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

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

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

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

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

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

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

2. Grey Seals

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

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

and:

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

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

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

3. Mobile sand community

The AA report outlines the following:

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

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

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

and

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

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

In conclusion, An Taisce would strongly highlight that due to the risks posed to the Coastal Dune habitats by both vehicular traffic accessing the sites, and the risks posed by aquaculture activity in general to the Grey Seal, and in light of the binding mitigation measures provided, the risks posed cannot be discounted based on the data provided, and it is our considered opinion that the licensing authority cannot legally proceed with the licensing of these sites. Recent ECJ rulings on this clearly underpin the need for the removal of doubt. In addition, it would appear to An Taisce that many of the sites may fall foul of the mobile shifting sands, which are unsuitable for trestle placement. Based on this data, An Taisce submit that no licences should be granted in Ballyness Bay based on the data provided in the AA report. If licensing of these sites should proceed, further information should first be sought, and provided in an additional public consultation period.

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

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

Is mise le meas,

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

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