

AQUACULTURE LICENCES APPEALS BOARD



Submission
to
**Independent Aquaculture
Licensing Review Group**
in response to request
for a written submission

10 February 2017

AQUACULTURE LICENCES APPEALS BOARD

INTRODUCTION

The Aquaculture Licences Appeals Board (ALAB) welcomes this opportunity to make a submission to the Independent Review Group established by the Minister for Agriculture, Food and the Marine Michael Creed TD to review the process of licensing for aquaculture and its associated legal framework. ALAB notes that the objective of this review is to aim to identify changes required to the aquaculture licence process and its associated legal framework that will:

1. Deliver licence determinations in a timely manner, having regard to international best practice;
2. Support achievement of the actions and priorities of Food Wise 2025 and the National Strategic Plan for Sustainable Aquaculture Development;
3. Facilitate enhanced transparency in the licensing process for all stakeholders; and
4. Ensure legally robust licence determinations having regard to EU and national law.

As the independent body prescribed by statute to determine appeals against decisions of the Minister on aquaculture licence applications, ALAB is a key stakeholder in and constituent element of the process whereby aquaculture licences are granted. As such, ALAB believes it is important to engage fully with the Independent Review Group. ALAB's objective in making this submission is to deliver to the Independent Review Group the benefit of ALAB's experiences in terms of it delivering on its statutory obligations. In addition to this written submission, ALAB would welcome the opportunity to meet with the Independent Review Group members in person to elaborate on, or clarify if necessary, the points made in this Submission.

SUBMISSION

To assist the Independent Review Group, a summary of the role, function and composition of ALAB is included at **Appendix 1**.

ALAB Appeal Process

The Fisheries (Amendment) Act, 1997 (as amended) ("the 1997 Act") details the process to be followed by ALAB in considering and determining appeals made to it. This 1997 Act is quite prescriptive. For the assistance of the Independent Review Group, **Appendix 2** contains a flow chart which seeks to illustrate the process which must be followed by ALAB in considering appeals and reaching a determination, as mandated by the 1997 Act.

However the flow chart in **Appendix 2** belies the complexity of the appeals made to ALAB, and in particular the time involved in moving from stage to stage within the appeal process. Since the introduction of the 1997 Act, the extent of the matters which fall to be considered as part of a licence application have expanded and have become increasingly complex. In addition to the matters mandated to be taken into account by ALAB by section 61 of the 1997 Act¹, ALAB must also

¹ 61.—*The licensing authority, in considering an application for an aquaculture licence or an appeal against a decision on an application for a licence or a revocation or amendment of a licence, shall take account, as may be appropriate in the circumstances of the particular case, of—*

- (a) *the suitability of the place or waters at or in which the aquaculture is or is proposed to be carried on for the activity in question,*
- (b) *other beneficial uses, existing or potential, of the place or waters concerned,*

assess whether the aquaculture is likely to have significant effects on the environment by virtue of, *inter alia*, its nature size of location and if so, if it has been subject to an environmental impact assessment.² In determining whether aquaculture is likely to have significant effects on the environment ALAB must have regard to the criteria specified in Annex III to the EIA Directive which sets out various criteria including criteria relating to the characteristics of the project (including the cumulative effects with other projects), the location of the project and the potential impacts of the project.

In addition, ALAB must consider whether an Appropriate Assessment is required.³ This requires ALAB to carry out a screening for Appropriate Assessment to ascertain whether a "European Site" is affected by a proposed project, and if so, whether the project, individually or in combination with other plans or projects is likely to have a significant effect on the European Site.

Appeals are increasingly complicated reflecting the increasing sophistication of environmental NGOs and other appellants. In addition the increased burden represented by the AIE and FOI requirements places a significant burden on our administrative resources.

Time for Consideration of Appeals

Section 56 of the 1997 Act imposes duties on the Board⁴ in relation to the time limits within which appeals should be determined. Given the complexity of the Appeals which are appealed to ALAB,

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- (c) *the particular statutory status, if any, (including the provisions of any development plan, within the meaning of the Local Government (Planning and Development) Act, 1963 as amended) of the place or waters,*
 - (d) *the likely effects of the proposed aquaculture, revocation or amendment on the economy of the area in which the aquaculture is or is proposed to be carried on,*
 - (e) *the likely ecological effects of the aquaculture or proposed aquaculture on wild fisheries, natural habitats and flora and fauna, and*
 - (f) *the effect or likely effect on the environment generally in the vicinity of the place or water on or in which that aquaculture is or is proposed to be carried on—*
 - (i) *on the foreshore, or*
 - (ii) *at any other place, if there is or would be no discharge of trade or sewage effluent within the meaning of, and requiring a licence under section 4 of the Local Government (Water Pollution) Act, 1977, and*
 - (g) *the effect or likely effect on the man-made environment of heritage value in the vicinity of the place or waters*

² EIA Directive - Regulation 3(1) of SI 468 of 2012 – Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012

³ Regulation 42 of European Communities (Birds and Natural Habitats) Regulations 2011 - S.I. No. 477/2011
"A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site."

⁴ S. 56 of 1997 Act

(1) *The Board shall, as far as practicable, ensure that appeals are dealt with and determined expeditiously and that all steps are taken to avoid unnecessary delays.*

(2) *Without limiting the generality of subsection (1) but subject to subsections (3) and (4), the Board should endeavour to ensure that every appeal is determined within—*

(a) *a period of four months beginning on the date of the receipt by the Board of the notice of appeal, or Board shall endeavour to ensure that the appeal is determined before the date, or within the period, specified in the notice of appeal or*

(b) *such other period as the Minister may prescribe, either generally or in respect of a particular class or particular classes of appeals.*

allied to the resources available to ALAB (addressed later in this Submission), the statutory time limit of 4 months often proves unfeasible, particularly when with a complex appeal.

To give the Independent Review Group an indication of the length of time an appeal takes, on average, ALAB has compiled a summary of the length of time taken to consider all appeals made to ALAB in the period from 2013 to date in 2017, inclusive. The information is set out in **Appendix 3**.

Volume of Appeals

In addition, again for the benefit of the Independent Review Group, **Appendix 4** sets out the numbers of appeals received by ALAB in each year from 2003 to 2016 inclusive, together with the numbers of appeals with ALAB determined in each of those years. It is apparent from this that the number of appeals can fluctuate considerably, and managing this is a challenge for ALAB

Resources available to ALAB

Under *Section 32* of the Act, an officer of the Minister who is an established civil servant and who is seconded to ALAB for that purpose, either on a whole-time or part-time basis, shall act as Secretary to ALAB. At present, and since September 2014, the personnel resource available to ALAB is a part-time Secretary and a clerical officer. The ALAB Secretary is shared between ALAB and the Agriculture Appeals Office within the department of Agriculture, Food & the Marine (DAFM). This office is located in the same building as ALAB, in Portlaoise.

In earlier years, ALAB had available to it a larger secretariat as well as a full time allocated technical advisor. During the years in which few or no aquaculture licences were being issued by the Minister, the staff resource available to ALAB understandably diminished. However with the number of appeals now being made, combined with the complexity of the matters raised in those appeals, ALAB is of the view that the allocation of additional staff to it on a full-time basis is warranted, and will be pursuing this issue shortly with DAFM.

To put this in context, the ALAB Secretary must manage the ALAB office, manage all appeals including procuring Technical and other advisors, liaise with DAFM and all state agencies governance requirements, manage the financial affairs of ALAB, attend all board meetings, record and implement all decisions and actions, liaise with appellants and third parties, ensure the statutory requirements under the 1997 Act are complied with in relation to appeals, deal with AIE and FOI requests, maintain the website and generally support the Board in its activities.

An ongoing concern of the ALAB board is the vulnerability of ALAB to sudden changes in personnel and the associated loss of expertise and accumulated "corporate knowledge" in the secretariat available to ALAB. For example, the present ALAB Secretary was allocated to ALAB by DAFM in September 2014. For four months' before her appointment, that is between early May and September 2014, ALAB was in the unenviable position of not having any secretariat whatsoever. The practical effect of this was that there was no person allocated to even perform simple administrative duties such as open post or emails, or to answer the ALAB phone, and no person available to progress the appeals then in hand. Quite frankly this is and was not acceptable to the ALAB board.

As mentioned above, the present Secretary spends half her time with ALAB and the remainder with the Agriculture Appeals office in DAFM. The Board acknowledges the contribution and commitment

(3) Where it appears to the Board that it would not be possible or appropriate, because of the particular circumstances of an appeal, to determine an appeal within the period required by subsection (2), it shall, by notice in writing served on the parties to the appeal and all persons who made submissions or observations to the Board in accordance with section 45 before the expiration of that period, inform those parties and persons of the reasons why the appeal would not be determined within that period and shall specify the date before which, or the period within which, the Board intends that the appeal shall be determined.

of the Secretary to ALAB, but is concerned that as the appeal numbers increase the challenge of managing a split role between ALAB and Agriculture Appeals will not be sustainable.

ALAB recognises there is a challenge in managing the volume of work which it has on hand from time to time – the Independent Review Group will see from Appendix 4 that the number of appeals can fluctuate quite dramatically from year to year. However ALAB would also caution that there is a danger in simply looking at the numbers of appeals submitted – the issues raised in one single appeal can be very complex and time consuming whereas those raised in another appeal may be more straightforward and capable of earlier determination. However in the interests of more effective management of appeals, ALAB is of the view that more and permanent resources are required.

Corporate Knowledge and Expertise

When the present Secretary was appointed, she understandably had no previous experience of ALAB or its legislation, and had to undergo an enormous learning experience to be able to offer the required support to the ALAB board to enable it progress the determination of appeals. This took some time, and is one of the reasons (but, for the avoidance of doubt, not the only reason) why it took some considerable time to advance some of the appeals before ALAB.

Technical Advisor

As mentioned above, ALAB at present has no dedicated technical advisor. ALAB is in the process of seeking to retain a dedicated technical advisor on a contract basis for a specified number of days each year, with a view to managing costs and conflicts of interest. It is almost invariably the case that a Technical Advisor is required by ALAB to support it in its consideration of appeals. ALAB's preference would be to have a permanent technical advisor available to it on an exclusive basis. In order to properly manage conflicts of interest, or perceived conflicts of interest, ALAB believes it would not be possible to share a technical advisor with any entity which is consulted by the Minister in connection with his consideration of a licence application in the first instance. So for example, if it were proposed that ALAB could share a Technical Advisor with say, the Marine Institute (MI), this would in ALAB's view give rise to a conflict of interest for the Technical Advisor as the MI is a reference body for the Minister for initial aquaculture licence applications. ALAB believes this would be the case even if the advisor in question did not participate in the evaluation of the licence application for the Minister. The challenge facing ALAB in seeking to appoint a Technical Advisor on a contract basis is to source an advisor with the requisite qualifications who also has the required degree of independence.

The practical implication of ALAB not having a dedicated Technical Advisor is that an advisor must be procured on a case by case basis, leading to a delay in progressing and determining the appeal.

Independence of ALAB

As the Independent Review Group will be aware, ALAB shares an office with the Agriculture Appeals office in Kilminchy, Portlaoise. Co. Laois. The Secretary to the ALAB board also works part time with the Agriculture Appeals office. The ALAB board is absolutely satisfied that all necessary steps are taken to ensure the confidentiality of the files, papers and processes of ALAB from those of DAFM, and takes stringent measures to ensure the ALAB material is absolutely secure. Having said this, it may be considered legitimate to question whether the mere fact of sharing a building provides the appropriate perception of independence to appellants and applicants. The ALAB board is acutely conscious of this and is very careful to ensure that papers and systems are kept separate and are not accessible by any party other than ALAB staff.

Financial Resources

ALAB is allocated a budget on an annual basis by DAFM and is subject to oversight by DAFM. ALAB strives hard to maintain the appropriate balance at all times between the understandable requirements for oversight of budgetary expenditure and indeed allocation of budget and resources by DAFM on the one hand and the independence of ALAB on the other

Conflicts of Interest

This is an issue which regularly concerns the Board. The circumstances in which it arises vary from those where a member of the ALAB board may have to discharge him or herself from participating in the determination of an appeal, to difficulties in locating technical advisors who are not conflicted and unable to act as technical advisor to the ALAB board by reason of having acted for one or other party to an appeal. The fact is that there is a small pool of available people with the necessary expertise in the area of aquaculture. The fact the Board does not have a dedicated TA means that it must tender for this expertise on the occasion of each appeal, leading to time delays in considering the appeal and potentially further delays if conflicts of interest emerge.

A further concern is that if one or more of the Board members is conflicted for any reason, this reduces the pool of ALAB board members available to consider an appeal. In 2016, the Board also found itself, for a period of almost 3 months, without a quorum due to the a board resignation and the expiry of terms of office of a number of Board members, and so for that period was unable to progress or determine any appeals.

Material Received from DAFM

Section 43(2) of the 1997 Act requires the Minister to submit his file to ALAB.⁵ While the quality of the files received is quite in order, ALAB does note that the time between which the Licence application was initially made and the date of determination of the application involves a lapse of years, sometimes up to 5 years. The challenge then presented to the ALAB board in progressing and determining the appeal is whether the material included in the file, and in particular is the EIS /EIA or AA is up to date. This issue may resolve itself in time once if the period for consideration of licences is shortened, but meanwhile it puts additional obligations on ALAB to seek more up to date information from a variety of sources so that it can acquit its statutory responsibilities. The practical implication of this is to cause delays to the appeal process, and to put further pressure on ALAB's limited resources.

Oral Hearings

The 1997 Act prescribes that ALAB may conduct oral hearings. In recent years ALAB conducted one oral hearing and is about to hold another. ALAB has discretion as to whether or not to hold an oral hearing, and it is sometime necessary to hold an oral hearing to hear or tease out up to date evidence. Because of ALAB's limited resources it is quite a challenge for ALAB to conduct an oral hearing and it puts an enormous strain on the ALAB resources and personnel.

⁵ 43.(2) The Minister shall, within 14 days after receiving a copy of the notice of appeal sent to him or her in accordance with subsection (1), submit to the Board—

(a) a copy of the aquaculture licence application concerned and of any drawings, maps, particulars, evidence, environmental impact statement, other written study or further information received or obtained from the applicant for the licence in accordance with a requirement of or under regulations under this Act,

(b) a copy of any report prepared for the Minister in relation to the application, revocation or amendment, and

(c) a copy of any document recording the decision of the Minister in respect of the application, revocation or amendment and of the notification of the decision given to the applicant.

SUMMARY

The ALAB Board hopes this submission will give the Independent review Group an understanding of the challenges faced by ALAB in determining appeals and delivering on its statutory responsibilities. As mentioned above, ALAB would very much welcome the opportunity to meet with the Independent Review Group members in person to elaborate on, or clarify if necessary, this Submission.

APPENDIX 1

ROLE, FUNCTION AND COMPOSITION OF ALAB

ALAB was established on 17th June 1998 under *Section 22* of the Fisheries (Amendment) Act, 1997 (as amended) ("the 1997 Act") to provide an independent authority for the determination of appeals against decisions of the Minister on aquaculture licence applications. Under *Section 40(4)* of the 1997 Act, on receipt of an appeal by the Board and provided it is not withdrawn, the Board can determine the appeal by:

- (a) confirming the decision or action of the Minister ;
- (b) determining the application for the licence as if the application had been made to the Board in the first instance; or
- (c) in relation to the revocation or amendment of a licence, substituting its decision on the matter for that of the Minister.

ALAB is an independent body with its own funding provided for by the Oireachtas under *Section 36* of the 1997 Act and operates under the aegis of the Department of Agriculture, Food and the Marine.

Section 23 of the 1997 Act provides that the Board shall consist of a Chairman and six other members. At present the Board comprises a Chair and 5 other members. The Chair and all Board members are engaged on a part-time basis. The Act provides that the Minister for Agriculture, Food and the Marine may make regulations prescribing not less than two organisations to nominate members of the Board. Those organisations should be representative of the following groupings:

- (a) organisations concerned with the promotion of the development of aquaculture or representative of persons carrying on the business of developing aquaculture;
- (b) organisations concerned with the conservation, development and protection of wild fisheries;
- (c) organisations representative of persons whose professions or occupations relate to physical planning and development;
- (d) organisations representative of persons concerned with the protection and preservation of the environment and amenities;
- (e) organisations representative of persons concerned with the promotion of general economic development and
- (f) organisations representative of persons concerned with the promotion of community development.

The present membership of the Board is as follows:

The Chairman, Ms. Imelda Reynolds, was appointed by the Government in accordance with *section 23(2)* of the 1997 Act, for a term of 5 years from 1st April 2014 to 31st March 2019.

Mr. Sean Murphy was appointed on 8th January 2013 for a period of five years, up to 31st December 2017.

Mr. Michael Sweeney was appointed on 13th January 2013 for a period of five years up, to 31st December 2017.

Mr. Jim Power and Dr Owen McIntyre were appointed on 17 June 2016 for a period of 3 years, up to 16 June 2019.

Mr. Brendan Brice was appointed on 17 June 2016 for a period of 3 years up, to 16 June 2019.

As there is a Chair and 5 other members, a vacancy exists on the Board for one ordinary member.

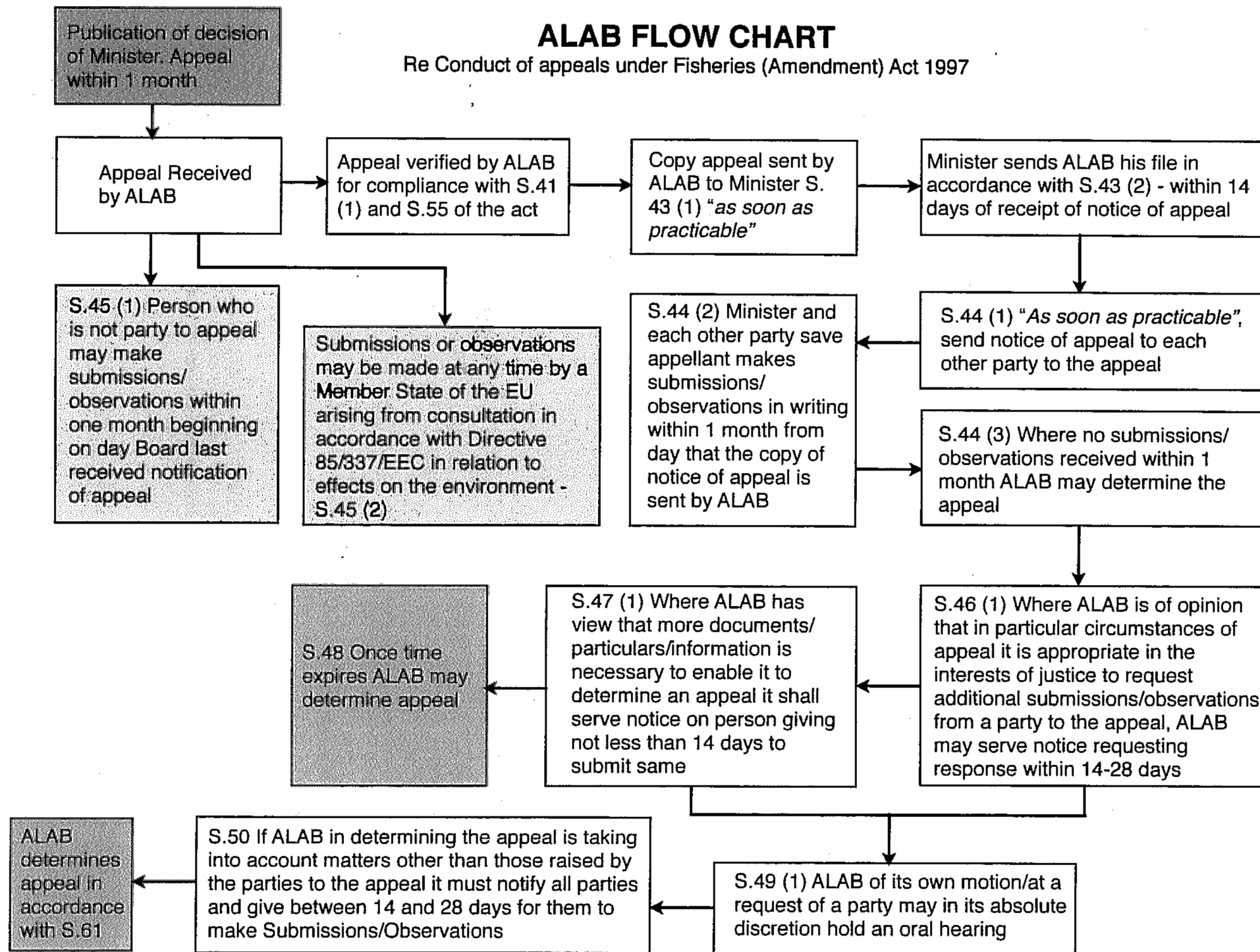
In addition, though the Act provides in section 27.1 that the Minister shall appoint from amongst the members of the Board a person to be the Deputy Chairperson of the Board, no such person has been appointed.

APPENDIX 2

APPEAL PROCESS – FLOWCHART

ALAB FLOW CHART

Re Conduct of appeals under Fisheries (Amendment) Act 1997



APPENDIX 3

AVERAGE DURATION OF APPEALS

2013

(1) AP1/1 – 3 /2013

- Received: 18/1/13
- Determined: 14th May, 2013
- Duration of Appeal – 116 days

(2) AP2/1 - 19/2013

- Received: 6/2/13
- Determined: 19th May, 2015
- Duration of Appeal – 832 days

(3) AP3/1 - 2/2013

- Received: 5/4/13
- Determined: 31st July, 2013
- Duration of Appeal – 119 days

(4) AP4/1 - 4/2013:

AP4/1/13:

- Received: 6/6/13
- Duration of Appeal – 111 days

AP4/2/13:

- Received: 7/6/13
- Duration of Appeal – 110 days

AP4/3/13:

- Received: 7/6/13
- Duration of Appeal – 110 days

AP4/4/13:

- Received: 6/6/13
- Duration of Appeal – 111 days

All Determined: 25th September, 2013

(5) AP5/1 + 2/2013

AP5/1/13

- Received: 28/6/13
- Duration of Appeal – 89 days

AP5/2/13

- Received: 1/7/13
- Duration of Appeal – 87 days

All Determined: 25th September, 2013

(6) AP6 / 2013

- Received: 4/11/13
- Determined: 11th March, 2014
- Duration of Appeal – 129 days

2013 AVERAGE for 31 Appeals was 553 days. AP2/2013 was a very complex appeal which included an oral hearing; leaving that appeal aside the average period for reaching a determination was 112 days). (Four months is approximately 122 days).

2014

(1) AP1 / 2014

- Received: 24/1/14
- Determined: 20th May, 2014
- Duration of Appeal – 116 days

(2) AP2/2014

- Received: 3/2/14
- Determined: 20th May, 2014
- Duration of Appeal – 106 days

(3) AP3 / 2014

- Received: 9/7/14
- Determined: 4th December, 2014
- Duration of Appeal – 148 days

(4) AP4 / 2014 (1 - 9)

- AP4/1/14
- Received: 15/8/14
- AP4/2/14
- Received: 15/8/14
- Duration of each Appeal – 193 days
- AP4/3/14
- Received: 18/8/14
- Duration of Appeal – 190 days
- AP4/4/14
- Received: 19/8/14
- AP4/5/14
- Received: 19/8/14
- Duration of each Appeal – 189 days
- AP4/6/14
- Received: 21/8/14
- Duration of Appeal – 187 days
- AP4/7/14
- Received: 25/8/14
- Duration of Appeal – 183 days
- AP4/8/14
- Received: 22/8/14
- Duration of Appeal – 188 days
- AP4/9/14
- Received: 20/8/14
- Duration of Appeal – 190 days
- All Appeals determined: 24th February, 2015

(5) AP5 / 2014

- Received: 30/10/14
- Determined: 16th January 2015
- Duration of Appeal – 78 days

(6) AP6 / 2014

- Received: 10/11/14
- Determined: 24th February, 2015
- Duration of Appeal – 106 days

2014 AVERAGE for 14 Appeals was 161 days. Again AP4/2014 was a complex appeal and leaving that appeal aside the average period for reaching a determination was 111 days. (Four months is approximately 122 days.)

2015

(1) AP1/ 2015

- Received: 26/11/15
- Determined: 19th January, 2016
- Duration of Appeal – 54 days
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(2) AP2/2015 (1 - 14)

- AP2/1/15
- Received: 10/11/15
- AP2/2/15
- Received: 8/10/15
- AP2/3/15
- Received: 7/10/15
- AP2/4/15
- Received: 7/11/15
- AP2/5/15
- Received: 12/10/15
- AP2/6/15
- Received: 13/10/15
- AP2/7/15
- Received: 13/10/15
- AP2/8/15
- Received: 13/10/15
- AP2/9/15
- Received: 14/10/15
- AP2/10/15
- Received: 16/10/15
- AP2/11/15
- Received: 16/10/15
- AP2/12/15
- Received: 16/10/15
- AP2/13/15
- Received: 16/10/15
- AP2/14/15
- Received: 16/10/15
- Determined: **NOT YET DETERMINED**

2015 – 1 determined Appeal only which took 54 days. AP2/2015, yet to be determined, is a complex appeal which to date has been with ALAB for 491 days . An Oral hearing of this Appeal will be held the week commencing 13 February 2017.
(Four months is approximately 122 days.)

2016

AP1/2016

- Received: 14/12/16
- Determined: **NOT YET DETERMINED**

2017

AP1/1/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP1/2/17

- Received: 13/1/17
- Determined: NOT YET DETERMINED

AP2/1/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP2/2/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP2/3/17

- Received: 13/1/17
- Determined: NOT YET DETERMINED

AP3/1/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP3/2/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP4/1/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

AP4/1/17

- Received: 16/1/17
- Determined: NOT YET DETERMINED

APPENDIX 4

NUMBER OF APPEALS 2003 TO 2016

2003

Appeals Received 7

Appeals Determined 16

2004

Appeals Received 21 (4 of which were declared invalid)

Appeals Determined 14

2005

Appeals Received 17

Appeals Determined 19

2006

Appeals Received 6 (1 of which was declared invalid)

Appeals Determined 1

2007

Appeals Received 0

Appeals Determined 4

2008

Appeals Received 1

Appeals Determined 1

2009

Appeals Received 0

Appeals Determined 0

2010

Appeals Received 0

Appeals Determined 0

2011

Appeals Received 3

Appeals Determined 0

2012

Appeals Received 5

Appeals Determined 2

2013

Appeals Received 31

Appeals Determined 11

2014

Appeals Received 11

Appeals Determined 15

2015

Appeals Received 15

Appeals Determined 29

2016

Appeals Received 1

Appeals Determined 1

2017

Appeals presently before ALAB and awaiting determination 24

