

Response to the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament on behalf of the UK Environmental Law Association (UKELA)

Stage 1 Inquiry, Aquaculture and Fisheries Bill SP Bill No.17, session 4, 2012.

The UK Environmental Law Association (UKELA) is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of the legal framework for the regulation of aquaculture and fisheries management in Scotland.

UKELA has recently published a report called "The State of UK Environmental Law in 2011-2012", the culmination of a two-year research programme. It finds that there is a lack of coherence, integration and transparency in UK environmental law today. This response, prepared by the Scottish Law working party of UKELA, in consultation with its water law sub-group, comments specifically, but not exclusively, on the issues of legislative coherence (i.e. clarity and comprehensibility), integration (i.e. overlapping and interaction of different regimes) and transparency (i.e. accessibility).

This response considers only Part 1 and clause 51 of the Bill. Where the Bill includes provisions and we consider these can be improved, we have included drafting suggestions in an appendix. Where the Bill does not include provisions, we would be happy to offer drafting suggestions if requested.

Part 1 chapter 1 – fish farm management agreements and statements

1. The availability of farm management statements (FMSs) on an equal footing to farm management agreements (FMAs) undermines the policy intent of creating a statutory requirement to participate in a FMA. The effectiveness of a FMA could easily be undermined by the exclusion of just one operator in a farm management area. It is certainly desirable that, if any fish farm operator is unable to sign up to an agreement with other operators in the area, a FMS be produced as a fall-back position. But improved control of sea-lice etc. will best be achieved by the cooperation of all the operators in a farm management area, so the Bill should establish a **hierarchy**, making FMAs the default, and permit a FMS only where every reasonable effort is shown to have been made to enter agreement with other operators, without success. Drafting suggestions can be offered if required.
2. In the interests of transparency and the promotion of good practice in farm management areas across Scotland, FMAs and FMSs should be made available on a **public register**. It is likely that they would have to be disclosed in any case (at least in part) on request under the Environmental Information (Scotland) Regulations 2004. Please see wider comment under *Public register* below.
3. The new section 4A needs to state the **purpose and scope** of FMAs and FMSs. The placement of this new provision immediately after sections 3 and 4 of the 2007 Act suggests that the purpose is the "improved prevention, control and reduction of parasites", reflecting the wording used in sections 3(2)(a) and 6(2)(a) of the 2007 Act. But the intended purpose might be wider and cover the "improved prevention, control and reduction of parasites, *pathogens and diseases*", reflecting the purpose set out in clause 3(2)(c) of the Bill in relation to technical standards. It needs to be clear which of these is the intended purpose, so that operators are aware of the scope of this obligation.

Also, it would be possible for a FMA to set out arrangements for sea-lice management that did not satisfy either of these possible overall purposes, yet comply with the provision as drafted. Clearly such a FMA would not achieve the policy intent, so the purpose must be stated, whichever it is. A suggested amendment to section 4A(1) is included in the appendix to this response.

4. It needs to be clear that, in relation to farms that are party to a FMA (as opposed to farms that are not and have a FMS) the arrangements listed in new section 4A(4)(b) have to be **integrated** and/or common as between the farms. A FMA setting out separate and unconnected arrangements for each farm in the FMA might satisfy the provision as drafted, but there would be no point in such a FMA. A suggested amendment to section 4A(4)(b) is included in the appendix.

5. It is suggested that users of this legislation will naturally abbreviate the term 'farm management area' to FMA, leading to confusion with the term 'farm management agreement' (also FMA). The term '**farm management zone**' (FMZ) should perhaps be used instead, throughout new section 4A.

6. A suggested amendment to new section 6(1), to improve clarity, is included in the appendix.

Public register and publication of data on sea-lice

It is extremely surprising that the 2007 Act does not contain provision for a public register. Openness and transparency are amongst the most important of public law principles, and it is standard practice for regulators acting in the public interest to be required to maintain a public register of licensing and enforcement activity. Marine Scotland already has such a duty under section 54 of the Marine (Scotland) Act 2010. The 2007 Act is the only example UKELA is aware of where this is not the case, meaning that the public has no means of knowing when, for example, an enforcement notice under section 6 of the Act has been served, and it is highly regrettable that an exception appears to have been made for aquaculture. For reasons of transparency and accountability, this regulatory anomaly needs to be corrected at this opportunity, and a provision included in the Bill requiring Marine Scotland to maintain a public register of enforcement activity under the 2007 Act and under this Bill, fish farm management agreements and statements, and any other information obtained using statutory powers under the 2007 Act or this Bill.

It is equally regrettable that sea-lice emissions data are not routinely collected, made available to a regulatory body and published. Site-specific emissions data have to be made available by every other industry that collects them, and again it appears that an exception is made for aquaculture. Fish farm operators' concerns about commercial sensitivity and misuse of information are no different to those expressed by other industrial sectors, so in addition to the principles of openness and transparency, the principle of fairness is at stake. The public interest in the sharing and scrutiny of environmental information should outweigh operator concerns in this context, as they do in others. UKELA strongly urges the Committee to consider introducing amendments to this effect.

Part 1 chapter 2 – wellboats

The Bill presents an opportunity for the resolution of a long-standing anomaly in the regulation of certain discharges to the marine environment from fish farming operations. This anomaly creates an inherent conflict for Marine Scotland, and it has caused enforcement problems in the past, so the opportunity to simplify the regulatory landscape and improve both the governance and enforcement of pollution control legislation should be taken now.

Farmed fish can be treated for sea-lice infestations in two broad ways, depending on the type of chemical used: either using 'in-feed' treatments, where the active chemical is mixed with feed during the feed production process, eaten by the fish and absorbed through its gut; or using 'bath' treatments, where the chemical is dissolved in sea-water and absorbed through the fish's skin. Bath

treatments can be administered either by surrounding the cage containing the fish with a tarpaulin and dissolving the chemical in the enclosed 'bath' of sea-water, or by dissolving the chemical in sea-water held in a wellboat and pumping the fish into the wellboat for treatment. In all cases, a residue of toxic chemical remains, which is subsequently discharged to the marine environment without further treatment. In the absence of treatment, such toxic discharges need to be tightly controlled.

Discharges of unabsorbed chemical residues from fish cages to the water environment are regulated by SEPA under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (the 'Controlled Activities Regulations' or 'CAR'). However, when a bath treatment takes place within a wellboat, the subsequent discharge, although made to the water environment and apparently covered by CAR just like discharges from cages, is regulated by Marine Scotland under the marine licensing provisions in Part 4 of the Marine (Scotland) Act 2010. The reason for this anomaly is that the discharge is made from a vessel as opposed to a cage.

One reason why regulatory control over sea-lice management was given to Marine Scotland in the 2007 Act, not SEPA, is because there is an inherent conflict between the function of controlling discharges of sea-lice treatment chemicals (which have to be kept within tight limits for the reasons given above) and the function of controlling the spread of sea-lice themselves (which for fish health reasons might require use of chemicals beyond the carrying capacity of the local marine environment). But when it comes to wellboat treatments, Marine Scotland has to operate with that conflict between these roles. For reasons of good governance, such conflicts should be avoided.

At the time of making CAR in 2005, discharges from vessels were covered by Part II of the Food and Environment Protection Act 1985 (FEPA). It is understood that the anomaly was not resolved at that stage because it would have required an amendment to Westminster legislation. This led to the provision in CAR (as originally made in 2005) that "these Regulations do not apply to any activity for which a licence is needed under Part II of the Food and Environment Protection Act 1985".

In an incident in 2009, hundreds of farmed fish were killed at a fish farm in Shetland following the alleged use of illegal chemicals to treat a sea-lice infestation. The chemicals used were in some cases authorised by the Veterinary Medicines Directorate for use on pigs or horses, but not on fish. Reputable fish farm operators were reportedly as eager as local people and animal welfare charities to see action taken, considering this the behaviour of a rogue operator that gave the whole industry a bad name and needed to be rooted out and punished. SEPA conducted an investigation and gathered evidence that it considered sufficient to secure a conviction for an offence under CAR, had the treatment taken place in cages. But it had taken place in a wellboat, meaning no such offence had been committed. Marine Scotland considered that SEPA's evidence was insufficient to secure a conviction for an offence under FEPA, so no report was made to the Procurator Fiscal, and no further action was taken. There was much frustration that a legislative quirk had prevented action by SEPA.

Now that discharges from vessels in the Scottish marine area are regulated by Scottish Ministers under Scottish legislation, there is no longer any good reason not to resolve this regulatory anomaly, fully separate the conflicting functions of sea-lice and pollution control by giving SEPA control over discharges from wellboats (in the vicinity of fish cages), and bring consistency to enforcement in this area. This would require a short extra provision in the Bill amending Part 4 of the Marine (Scotland) Act to exclude such discharges from the list of licensable marine activities. It would not affect any of the currently proposed provisions in relation to wellboats.

Controls on biomass and processing plants

In its October response to consultation responses to a proposal in its last consultation to give Ministers powers requiring SEPA to reduce biomass to address concerns about fish welfare, the Scottish Government stated that SEPA can already reduce biomass in certain circumstances, and appeared to rule out the need for legislation.

SEPA can reduce biomass using its powers under CAR in response to benthic pollution, but it has no statutory remit in relation to fish health, so any attempt by SEPA to use those powers to reduce biomass in response to a sea-lice problem would be *ultra vires*.

In relation to another proposal for Ministerial powers to place additional controls on processing plants, the Scottish Government appeared again to suggest that SEPA has existing powers – possibly a reference to its powers under the Pollution Prevention and Control (Scotland) Regulations 2000 (the PPC Regulations). Again, SEPA's lack of a statutory remit regarding fish health would undermine any attempt to apply its powers under the PPC Regulations in relation to a sea-lice problem.

It is submitted that legislation therefore would be needed for both these purposes.

Part 1 chapter 3 – commercially damaging species

UKELA is concerned that the Bill's proposals in this regard are so wide-ranging, and that no reference is made, either in the Bill or the accompanying Policy Memorandum, to biodiversity or the Scottish Ministers' duty under the Nature Conservation (Scotland) Act 2004 to further its conservation.

The aquaculture industry has reported problems in the past with native species such as seals, otters and cormorants, and as currently drafted, Ministers would be able, if convinced that they are having significant impact on fish farms and that they themselves have little commercial value, to designate such species as commercially damaging, with all that entails in relation to subsequent control.

The step of designating a native species as commercially damaging under clause 8 of the Bill appears to be the critical step in the process, so it is submitted that wide public consultation should be undertaken in relation to any designation proposal. This will give Ministers' nature conservation advisor Scottish Natural Heritage (SNH), other public bodies and the general public the opportunity to comment on the proposal. As currently drafted, no consultation of any sort is required.

At the very least, a species's value beyond the mere commercial needs to be considered: ecological and cultural value should be taken into account, and if wide public consultation is deemed excessive, or emergency designation becomes necessary, Ministers should be obliged to consult and have regard to the advice of SNH before designating any native species as commercially damaging.

Clause 51 – fixed penalty notices

UKELA regrets the casual introduction of a range of different sanctions in various regulatory regimes, in many cases imposed directly by the regulator without reference to the courts, whether fixed penalties as in the 2007 Act and the Bill, or "civil sanctions" e.g. under the Wildlife and Natural Environment (Scotland) Act 2011. There should be a proper public debate not only about the desirability and appropriateness of this approach to enforcement, taking account of outcomes in other parts of the UK where different enforcement approaches have been debated and introduced,

but also about the powers and safeguards required, so that a consistent and principled enforcement 'toolbox' can be introduced across a number of regimes, rather than a series of fragmented and incomplete set of powers.

The opportunity for such a debate exists following the joint Scottish Government/SEPA consultation on proposals for an Integrated Framework for Environmental Regulation, which discussed a wide range of non-criminal regulatory sanctions for use by SEPA. The legislation that emerges from such a debate could provide the sanctions blueprint for all regulatory regimes in Scotland.

Appendix - drafting suggestions

Clause 1(2) - new section 4A(1):

‘A person who carries on a business of fish farming at a fish farm located within a farm management ~~area~~*zone* must, *for the purpose of improved prevention, control and reduction of parasites[, pathogens and diseases]* —

(a) be party to a farm management agreement, or prepare and maintain a farm management statement, in relation to the fish farm...’ etc.

Clause 1(2) - new section 4A(4)(b):

‘(b) arrangements, *which in the case of farm management agreements must be integrated as between the fish farms involved*, for—

(i) fish health management...’ etc.

Clause 1(3) - new section 6(1):

‘Where the Scottish Ministers are satisfied that a person who carries on a business of fish farming—

(a) *in relation to a fish farm*, does not have satisfactory measures in place for any of the purposes mentioned in subsection (2), or

(b) in relation to a fish farm to which section 4A(1) applies, has failed or is failing to comply with that section,

the Scottish Ministers may serve a notice (“an enforcement notice”) on the person *in relation to that fish farm*.’