AQUACULTURE AND FISHERIES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Aquaculture and Fisheries (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The primary purpose of the Bill is to ensure that farmed and wild fisheries – and their interactions with each other – continue to be managed effectively, maximising their combined contribution to supporting sustainable economic growth with due regard to the wider marine environment.

3. The Scottish Government is committed to ensuring that there are modern and effective management structures in place, supported by an effective and proportionate regulatory framework. It is persuaded that appropriate regulation and management will help to ensure that aquaculture products remain of the highest quality and are produced within environmental limits. The provisions in the Bill will work to secure the sustainability of aquaculture growth, principally as regards the farming of Atlantic salmon, and that salmon and freshwater fisheries can be effectively managed, in an open and transparent manner.

Rationale for subordinate legislation

4. In deciding whether provisions should be specified on the face of the Bill or alternatively left to subordinate legislation, the Scottish Government has carefully considered the substance of each issue and the need to provide flexibility to respond to changing circumstances, without the need for primary legislation.

Delegated powers

5. The delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.
Section 1 - power to modify the definition of the Code of Practice.

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

6. Section 1(2) of the Bill inserts a new section 4A into the Aquaculture and Fisheries (Scotland) Act 2007 (“the 2007 Act”). Subsection (4) of the new section 4A creates a power for the Scottish Ministers to modify, by order, the definition of the “Code of Practice” in subsection (5) of the new section, to substitute a reference to another document and / or body for the current one.

Reason for taking power

7. The new section 4A inserted into the 2007 Act by section 1 of the Bill makes provision about fish farm management agreements and statements. It refers to the existing voluntary Code of Good Practice for Scottish Finfish Aquaculture as issued and revised from time to time by the Scottish Salmon Producers’ Organisation, which is the industry producer organisation for Scottish salmon farming. As both organisations and documents can change over time, this provision enables Ministers to amend the definition of “Code of Practice” to reflect such changes as and when they occur.

8. It is appropriate that provision be made by subordinate legislation as the power enables Ministers to respond to such changes more readily and flexibly than if the changes were required to be made in primary legislation.

Choice of procedure

9. Orders under inserted section 4A(6) will be subject to affirmative procedure by virtue of section 43(3) of the 2007 Act, as amended by section 1(4) of the Bill. This procedure is considered appropriate as any order will textually amend provisions in new section 4A of the 2007 Act and has the potential to result in the recommendations of a body on best practice, other than an industry producer organisation, being adopted.

Section 3 - power to prescribe technical requirements for equipment used in fish farming.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

10. Section 3(1) of the Bill creates a power for the Scottish Ministers to make regulations prescribing technical requirements for equipment used for and in connection with fish farming; and which make provision to ensure such requirements are complied with.
Reason for taking power

11. Section 3 of the Bill makes provision about the matters which may be provided for in regulations which will require the fish farming industry in Scotland to adopt specified standards and types of equipment in its operations in relation to the containment of fish. The aim of the regulations is to ensure the installation and deployment of condition and site appropriate fish farming equipment so as to better contain fish, prevent escapes of fish, improve productivity, increase sustainability and minimise the potential for any significant adverse impact on wild salmonids, including as a result of parasites and diseases.

12. Whilst the fish farming industry has made improvements in containment practices and in reducing fish farm escapes, there remain concerns associated with fish farming businesses which use equipment unsuitable for the authorised farming activity or location, or which fail to replace equipment as it degrades over time. The power in section 3(1) of the Bill will enable Ministers to make regulations specifying minimum standards of acceptable infrastructure with regard to farming activities and their location, and will allow Ministers to respond to technological developments in equipment, novel farming approaches or climatic changes which impact upon the prescribed standards. In order to ensure the efficacy of the regulations, section 3(3) enables Ministers to make provision regarding enforcement of the regulations.

13. It is appropriate that provision be made by subordinate legislation as the requirements to be prescribed under the regulations as regards equipment are likely to change as a result of technological advances and the evolution of best practice within the industry. A regulation-making power enables Ministers to respond to these issues more readily and flexibly than if the relevant standards were to be prescribed in primary legislation. In addition, it is considered that in prescribing certain pieces of equipment, the provisions of Directive 98/34/EC of the European Commission and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services will be engaged (the “Technical Standards Directive”, OJ l 204, 21.7.1998, p37). The Technical Standards Directive requires any measures containing technical standards to be notified to the European Commission in draft, and the unpredictable impact of delay associated with this process in relation to the progress of primary legislation through the Scottish Parliament makes it undesirable for the equipment specifications to be prescribed in primary legislation.

Choice of procedure

14. Regulations under section 3(1) will be subject to negative procedure. This procedure is considered appropriate as the regulations will in the main prescribe technical specifications which have been agreed in discussion with industry and technical experts and which, in the case of notifiable provisions, will have been considered in draft by Member States and the European Commission under the Technical Standards Directive. Negative procedure therefore provides for the appropriate degree of scrutiny. Further, where the regulations make provision in relation to the keeping of information and records, it is considered that provisions of this kind are administrative in nature and negative procedure is therefore appropriate.
Section 5 – Power to make regulations to control and monitor the operation of wellboats

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** Regulations made by Scottish statutory instrument

**Parliamentary procedure:** Negative procedure

**Provision**

15. Section 5(1) of the Bill provides a power for the Scottish Ministers to make provision, in regulations, for or about controlling and monitoring the operations of wellboats in Scotland. Section 5(2) specifies the matters which the regulations may, in particular, make provision for or about, and section 5(3) describes the persons upon whom requirements under the regulations may be imposed. It is an offence to contravene the regulations or to fail to take action required under or to comply with the requirements of the regulations (section 5(5)).

**Reason for taking power**

16. “Wellboat” is defined in section 4(1) of the Bill as a vessel that contains a tank or well for holding water (including sea water) into which live farmed fish are taken and subsequently kept for transportation, storage and treatment. The spread of the serious notifiable disease infectious salmon anaemia (ISA) in 1998 and 1999 was linked to movements of wellboats. The 1998/99 ISA outbreak is estimated to have cost the industry between £25 and £30m in direct costs at the time. It has also been reported that wellboats may act as a vector for the spread of pancreas disease (non-notifiable disease that is known to affect Atlantic salmon) and the spread of sea lice following treatments in wellboats. It is considered that the power to control and monitor wellboat operations will contribute significantly to the control of disease spread.

17. The power in section 5(1) of the Bill will enable Ministers to make regulations specifying minimum, acceptable standards of wellboat operation and control, including specification of the equipment to be deployed, with a view to minimising the impact of such operations as regards the potential for the spread of parasites, pathogens or diseases. The regulation-making power will allow Ministers to respond to technological developments in equipment available to be deployed on board such vessels, and section 5(2)(b)(ii) will enable Ministers to monitor the efficacy of the regulations.

18. It is appropriate that provision be made by subordinate legislation as the requirements to be prescribed under the regulations as regards equipment are likely to change as a result of technological advances and the evolution of best practice within the industry. A regulation-making power enables Ministers to respond to these issues more readily and flexibly than if the relevant standards were to be prescribed in primary legislation.

**Choice of procedure**

19. Regulations under section 5(1) of the Bill will be subject to negative procedure. This procedure is considered appropriate as the regulations will in the main prescribe technical, operational specifications and requirements agreed in discussion with industry and technical experts. One way of doing this would be through a working group on the same lines as the

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1 Movement restrictions were placed on 329 sites between May 1998 and January 2001 as a result of the ISA outbreak (Note – not all of these sites would have been producing).
existing Improved Containment Working Group. Negative procedure therefore provides for the appropriate degree of scrutiny. In addition, it is considered that where the regulations prescribe the use of certain pieces of equipment, the provisions of Directive 98/34/EC of the European Commission and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services will be engaged (“the Technical Standards Directive”, OJ L 204, 21.7.1998, p37). The Technical Standards Directive requires any measures to be notified in draft and the unpredictable impact of delay associated with this process in relation to the progress of primary legislation through the Scottish Parliament, makes it undesirable for the equipment specifications to be prescribed in primary legislation.

Section 8- power to specify a commercially damaging species

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Negative procedure

**Provision**

20. Section 8(1) makes provision for the Scottish Ministers to specify, by order, fish, shellfish, animals, or plants as commercially damaging species.

21. Section 8(2) qualifies the making of an order such that an order may only be made in relation to species which, if not controlled, would be likely to have a significant adverse impact on the economic or commercial interests of a fish or shellfish farmer and which is itself of little or no commercial value.

**Reason for taking power**

22. Chapter 3 of the Bill establishes a new regulatory regime for the management, control and removal of commercially damaging species. Currently there is no statutory definition of what constitutes a commercially damaging species. Section 8(1), as read with subsection (2), of the Bill enables Ministers to specify what comprises a commercially damaging species. Other provisions in the Chapter go on to enable the Scottish Ministers to take measures in relation to the wider aquaculture industry in relation to these species. It is necessary to take a power to enable the Scottish Ministers to specify what comprises a commercially damaging species, rather than to specify such species in the face of the Bill, as this will allow Ministers to respond flexibly to the emergence of new or unknown species or threats.

**Choice of procedure**

23. An order under section 8(1) of the Bill is subject to negative procedure. Negative procedure is considered appropriate as if the Parliament agrees to give Ministers the powers, the specification of a commercially damaging species is viewed largely as a technical matter and negative procedure thus provides for the appropriate degree of scrutiny.
Section 9 - movement of species, etc

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

24. Section 9(1) of the Bill enables the Scottish Ministers, by order, to make provision to prohibit or control the movement of any commercially damaging species present or suspected of being present in any body of water. The power also enables Ministers to prohibit or control the movement of any other species of animal or plant and any equipment or other material used in fish or shellfish farming which may be associated with moving commercially damaging species, and water in which a commercially damaging or other species may be present.

25. Section 9(2) of the Bill provides for the matters that may be contained or provided for in an order under section 9, and section 10 of the Bill further explains the provisions in relation to sampling and surveillance programmes that may be provided for in such an order.

Reason for taking power

26. If commercially damaging species or fish farming equipment are moved to other areas, the movement could have adverse impacts on other aquaculture sites and businesses and on the wider aquatic environment. Regulating movements where commercially damaging species are known to be present is considered likely to help to prevent further spread. Powers to take samples will enable a determination to be made about whether a commercially damaging species is present and so inform decisions as to required movement restrictions and surveillance. An order-making power is considered desirable as it will enable Ministers to respond flexibly to the individual circumstances of an occurrence of a specific commercially damaging species, enabling tailored solutions to particular circumstances to be available in a way that provisions on the face of the Bill are believed could not so easily provide for.

Choice of procedure

27. An order under section 9(1) of the Bill is subject to negative procedure. Negative procedure is considered appropriate as if the Parliament agrees to give Ministers the powers, the specification of what is required as regards movement controls is viewed largely as a technical matter and negative procedure thus provides for the appropriate degree of scrutiny.

Section 20 – Ministerial power to modify the good governance requirements

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure
Provision

28. Section 20(3) of the Bill inserts new sections 46A to 46G into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”). Inserted section 46F confers a power enabling the Scottish Ministers to modify, by order, the good governance requirements placed on District Salmon Fishery Boards (DSFBs) and to impose additional requirements for specified purposes (section 46F(1)). “Good governance requirements” is defined in section 46F(4) of the 2003 Act, with reference to the meaning in new section 46A(3) of the 2003 Act, which is introduced by section 20(3) of the Bill.

Reason for taking power

29. The power in new section 46F(1) of the 2003 Act enables the Scottish Ministers to modify the good governance requirements as they consider necessary to achieve policy objectives on openness, transparency and accountability. This includes the option of placing obligations or functions on DSFBs in addition to those specified in sections 44 and 46A to 46E of the 2003 Act, to secure or underpin principles of good governance in light of operational experience of the enhanced governance functions. The power is not exercisable such as would allow Ministers to, for example, alter the structure of the DSFB administrative and management regime under Part 3 of the 2003 Act, but rather can be exercised only for the purposes specified in section 46F(2) of the 2003 Act. The order making power will give Ministers the ability to respond to current thinking as regards good governance requirements for DSFBs, ensuring that governance principles are up to date and in line with those in the public sector, and reflect the needs of the public.

Choice of procedure

30. Affirmative procedure is considered the appropriate level of parliamentary scrutiny as an order under section 46F(1) will textually amend the 2003 Act and may, potentially, affect the way in which DSFBs are managed and the nature of their relationship with their members or the general public.

Section 20 - Ministerial power to dissolve the committee constituting a board

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

31. Section 20(3) of the Bill inserts new sections 46A to 46G into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”). New section 46G confers a power to enable the Scottish Ministers, in the circumstances specified in section 46G(1) of the 2003 Act, to dissolve the incumbent committee of proprietors constituting the District Salmon Fishery Board (DSFB).
Reason for taking power

32. The Scottish Government considers section 46G(1) of the 2003 Act to comprise a reserve power. DSFBs are bodies created under statute but they are not accountable to the Scottish Government nor to the Scottish Parliament. There is no current sanction which can be applied by Ministers in cases of persistent DSFB non-compliance with their obligations under the 2003 Act. This oversight requires addressing to ensure DSFBs comply with their existing and new obligations, achieving the policy aim of more open, transparent and accountable management of salmon fisheries.

33. A reserve power for Scottish Ministers to dissolve the committee constituting the DSFB is considered a desirable and appropriate sanction. The power is only exercisable where Ministers consider that failure to comply with good governance requirements is persistent, or in circumstances where a DSFB has otherwise and persistently contravened the requirements of the 2003 Act. The circumstances of each case will be considered on an individual basis, with emphasis on working with DSFBs in the first instance to understand the circumstances leading to non-compliance and where possible to address that with the DSFB without resorting to the power in section 46G(1) of the 2003 Act.

Choice of procedure

34. The making of an order under section 46G(1) of the 2003 Act is a power intended to be exercised in extremis, after having worked with the DSFB in question and in circumstances where all reasonable attempts to address a DSFB’s persistent failures cannot be remedied. Exercise of the power does not annul the status of a DSFB, but rather will remove the incumbent committee of proprietors, and allow for the appointment, if appropriate, of a fresh committee, which it is hoped will be prepared to embrace its functions under statute. Negative resolution is considered the appropriate procedure as it provides a proportionate and appropriate level of parliamentary scrutiny for the administrative action required to dissolve the committee, at a stage when it is considered that no further action can reasonably be taken in cooperation with the DSFB in question.

Section 22 – salmon carcass tagging

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

35. Section 22 of the Bill inserts a new section 21A into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”). Section 21A(1) enables the Scottish Ministers to make provision, by regulations, for or in connection with tagging the carcasses of wild salmon, and new section 21A(2) provides examples of the matters that may be provided for under such regulations.
Reason for taking power

36. The regulation-making power in section 21A(1) of the 2003 Act will enable the Scottish Ministers to put in place a statutory scheme for carcass tagging of wild salmon. A carcass tagging scheme is considered to be a helpful vehicle to implement policy on, for example, enhanced traceability of wild salmon, promotion and identification of a Scottish quality brand and reinforcement of existing statutory measures banning the sale of rod caught salmon (the Conservation of Salmon (Prohibition of Sale) (Scotland) Regulations 2002 (SSI 2002/418)).

37. A regulation-making power is believed to comprise a more flexible delivery mechanism to provide for the technical aspects of the proposed tagging scheme, which is being developed in consultation with relevant stakeholders, and will facilitate any necessary amendments to the scheme in light of operational experience. In addition, it is likely that the specification of requirements as to the tags that have to be affixed to carcasses will engage the provisions of Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services (“the Technical Standards Directive”, OJ L 204, 21.7.1998, p37). The Technical Standards Directive requires any measures containing technical standards to be notified to the European Commission in draft and the unpredictable impact of delay associated with this process in relation to the progress of primary legislation through the Scottish Parliament makes it undesirable for certain specifications as regards the carcass tagging scheme to be prescribed in primary legislation.

Choice of procedure

38. Regulations under section 21A(1) of the 2003 Act will be subject to negative procedure by virtue of section 68(2) of the 2003 Act (as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). Negative procedure is considered appropriate as it provides a proportionate and appropriate level of parliamentary scrutiny of the technical detail of the scheme. In addition, certain provisions of the regulations will have been considered by the European Commission and Member States. Should the regulations make provision in relation to record keeping, etc. (section 21A(2)(b)), such provision is considered to comprise administrative matters and therefore negative procedure provides the appropriate degree of scrutiny.

Section 25 – Amendment of certain powers in the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003

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Provision

39. Section 25 of the Bill contains provision to amend sections 33, 37 and 38 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”).
This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 3 October 2012

40. Section 25(2) of the Bill amends section 33 of the 2003 Act (salmon fishing, regulations as to baits and lures) to insert a new subsection (6A). Section 33(6A) expands the Scottish Ministers’ current regulation-making power in section 33(1) of the 2003 Act to enable Ministers to impose, in such regulations, monitoring and evaluation requirements on district salmon fishery boards (DSFBs).

41. Section 25(3)(c) of the Bill amends section 37 of the 2003 Act (annual close times for salmon) to insert a new subsection (3A). Section 37(3A) expands the Scottish Ministers’ current order-making power in section 37(3) of the 2003 Act to enable Ministers to impose, in such an order, monitoring and evaluation requirements on DSFBs and proprietors of salmon fisheries.

42. Section 25(4)(c) of the Bill amends section 38 of the 2003 Act (salmon conservation regulations) to insert a new subsection (6)(ba). Section 36(6)(ba) expands the Scottish Ministers’ current regulation-making power in section 38(1) of the 2003 Act to enable Ministers to impose, in such regulations, monitoring and evaluation requirements on DSFBs and proprietors of salmon fisheries.

Reason for taking power

43. The expansion of Ministers’ legislation-making powers under sections 33(1), 37(3) and 38(1) of the 2003 Act will enable Ministers to require monitoring of the efficacy of salmon conservation, etc. measures made in reliance of those provisions. Currently, there is no power for Ministers to require DSFBs or proprietors to undertake investigations into or monitoring of the success or otherwise, of the objectives of measures granted under the said provisions. The ability to impose requirements on DSFBs and proprietors to evaluate the effect of the making of the measures in question will promote evidence-based management of fisheries, allow Ministers to form a view on the continuance of the measures in question, or to consider whether it may be desirable to introduce similar measures in other DSFB areas. It will also promote sharing of information and development of a knowledge base.

Choice of procedure

44. Regulations under section 33(1) of the 2003 Act are not currently subject to any formal parliamentary scrutiny (section 68(3) of the 2003 Act, as read with section 30(3) and (4) of the Interpretation and Legislative Reform (Scotland) Act 2010). Whilst the provisions of section 25(2) of the Bill expand the scope of the current regulation-making power, that expansion is considered to be in line with the current power, and will provide for more effective monitoring of the outcomes of any regulations made. On this basis, we do not consider there to be a need to review the processes by which the regulations are made, and intend to continue the practice of laying before the Scottish Parliament, on an informal basis, any regulations made in reliance of section 33(1) of the 2003 Act.

45. Orders under section 37(3) of the 2003 Act are currently subject to a formal laying requirement (section 68(3)(f) of the 2003 Act, as read with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010). Whilst the provisions of section 25(3)(c) of the Bill expand the scope of the current order-making power, that expansion is considered generally in line with the current power, and will provide for more effective monitoring of the outcomes of any orders made. On this basis, we do not consider there to be a need to review the parliamentary
procedures to which such orders are subject, and believe the formal laying requirement for such orders to afford a suitable degree of parliamentary scrutiny for orders made in reliance of section 37 of the 2003 Act.

46. Regulations under section 38(1) of the 2003 Act are currently subject to negative parliamentary procedure by virtue of section 68(2) of the 2003 Act, as read with section 28 of and paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010. Whilst the provisions of section 25(4)(c) of the Bill expand the scope of the current regulation-making power, that expansion is considered generally in line with the current regulation-making power, and will provide for more effective monitoring of the outcomes of any regulations made. On this basis, we consider that regulations under section 38(1) of the 2003 Act should appropriately continue to be subject to negative procedure.

Section 26 – Power to vary procedures for orders etc. relating to certain fisheries

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

47. Section 26 of the Bill enables the Scottish Ministers to amend, by order, the procedures by which applications for certain statutory salmon fishery management measures are made. Procedures for these applications are set out in schedule 1 to the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”) and in section 33(2) to (5) of that Act.

Reason for taking power

48. Section 35(4) of the 2003 Act (designation orders) currently provides the Scottish Ministers with a power to vary the provisions of paragraphs 1, 2 and 10 to 15 of schedule 1 to the 2003 Act. The Scottish Government considers that the effect of this provision could be clearer. Section 26 of the Bill seeks to clarify the effect and scope of that provision such that it is clear that the power to vary, by order, the provisions of paragraphs 1, 2 and 9B to 15 of schedule 1 to the 2003 Act is exercisable as regards the procedural requirements for baits and lures regulations under section 33, designation orders under section 35, estuary limits orders under section 36, annual close time orders under section 37 and salmon conservation regulations under section 38 of the 2003 Act. (Paragraph 9B of schedule 1 to the 2003 Act is introduced by section 21 of the Bill).

49. Section 26(2) of the Bill amends section 33 of the 2003 Act to enable Ministers, by order, to vary the procedural requirements for baits and lures regulations which have been specified in section 33(2) to (5) and paragraphs 9B to 15 of schedule 1 to the 2003 Act. Section 26(4) of the Bill amends section 39 of the 2003 Act (procedures for making orders and regulations under section 33 and Part 2) to enable the Scottish Ministers, by order, to vary the provisions of schedule 1 to the 2003 Act. The new variation power in section 39(2) is without prejudice to the power in section 33(8)(b) of the 2003 Act.
50. The powers in section 26, which are considered to comprise reserve powers only, will enable the Scottish Ministers to improve, enhance or update the processes by which applications for such statutory management measures are made, as considered necessary. For example, the prescribed methods of public advertising or consultation could be amended to reflect developments in information technology or expectations for more effective community engagement and participation. For example, it may in future be considered desirable to amend schedule 1 to allow for applications to be submitted electronically (paragraph 8 of schedule 1) or to require publication of application proposals on a named website as opposed to a newspaper (paragraph 11(2) of schedule 1).

Choice of procedure

51. An order under section 33(8) or 39(2) of the 2003 Act is subject to negative procedure by virtue of section 68(2) of the 2003 Act (as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)). An order under the current variation power in section 35(4) of the 2003 Act is similarly subject to negative procedure. Given that section 26 of the Bill restates what was the intended effect of section 35(4) of the 2003 Act without innovation, and comprises a clarification of the scope of the existing law, it is considered appropriate to continue the level of scrutiny offered by negative procedure, which is appropriate given the administrative nature of such an order.

Section 28 – Consents for introduction of fish into inland waters

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

52. Section 28(3) of the Bill inserts a new section 33B into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”). This provision enables the Scottish Ministers to make provision by regulations to recall or restrict District Salmon Fishery Boards’ (DSFB) functions when consenting to the introduction of salmon or salmon spawn into inland waters under section 33A of the 2003 Act.

Reason for taking power

53. Whilst many DSFBs discharge their introductions functions under section 33A(4) of the 2003 Act competently, there may be situations where the exercise of a DSFBs power to consent under section 33A of the 2003 Act may lead to a conflict of interest, for example where the inland water in which a proposed introduction is to take place comprises a Special Area of Conservation (SAC), where introduction of other freshwater species is proposed or where a DSFB proposes itself to introduce salmon into waters in its district. Regulations under section 33B(2) of the 2003 Act will enable the Scottish Ministers to take a national policy approach to introductions to ensure wider objectives are considered, where necessary. The regulation-making power also offers flexibility to provide for district-specific requirements reflecting particular sensitivities in any DSFB area (section 33B(3)), for example, where a DSFB has a SAC in its area, and also to ensure appropriate record keeping and monitoring is undertaken.
Choice of procedure

54. Regulations under section 33B(2) of the 2003 Act will be subject to negative procedure by virtue of section 68(2) of the 2003 Act (as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)). Negative resolution is considered the appropriate procedure as it provides a proportionate level of parliamentary scrutiny of the technical, administrative requirements of the consenting regime for applications to DSFBs under section 33A of the 2003 Act for the introduction of salmon and salmon spawn.

Section 34 (11) - power to allow amendment of the definition of commercial sea fishing

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

55. Section 34(11) of the Bill creates a power for the Scottish Ministers to modify by order the definition of “commercial sea fishing” contained in section 34(10).

Reason for taking power

56. Section 34 of the Bill makes provision for fisheries enforcement officers to inspect and seize objects which an officer reasonably believes have been or are being used for or in connection with commercial sea fishing. Section 34(10) of the Bill defines commercial sea fishing by reference to a number of enactments which deal with the regulation of sea fisheries and enforcement of sea fisheries rules. The section gives fisheries enforcement officers new enforcement powers with respect to objects used in connection with (sea fishing) activities regulated under a number of existing statutory provisions. These activities are defined as commercial sea fishing. To ensure effective enforcement, it is necessary to ensure that the definition of commercial sea fishing is up to date.

57. Section 34(11) of the Bill creates a power for the Scottish Ministers to modify, by order, the definition of commercial sea fishing. This will ensure that the enforcement powers conferred by this section will be available with respect to objects used in connection with activities regulated by any new legislation which may be introduced in the future. This will ensure that there are no enforcement power gaps when new statutory provisions are introduced.

Choice of procedure

58. An order under section 34(11) will be subject to negative procedure. This procedure is considered appropriate as it provides a proportionate and appropriate level of parliamentary scrutiny of proper powers to be granted on fisheries enforcement officers when new statutory provisions in relation to sea fisheries are introduced in the future.

Section 47– Protection and improvement of shellfish waters

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 3 October 2012

Provision

59. Section 47 inserts a new section 5A into the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”).

60. New section 5A of the 2003 Act enables the Scottish Ministers, by order, to designate an area of coastal or transitional water as a shellfish water protected area. They may do so if they consider it necessary or desirable for the protection or development of economic significant shellfish production. The effect of designation is that the Scottish Environment Protection Agency (SEPA) is obliged, under section 9 of the 2003 Act (as amended by the Bill), to set environmental objectives for that area and prepare a programme of measures to achieve those objectives.

Reason for taking power

61. Shellfish waters are currently protected under the Shellfish Waters Directive (Directive 2006/113/EC). However, that Directive will be repealed in December 2013 and has no directly equivalent replacement. The Scottish Ministers wish to ensure a continued high level of protection for shellfish waters in Scotland. It is accordingly necessary to make provision for a new regime for the protection of shellfish waters. Existing provision in the 2003 Act for the monitoring of, and setting environmental objectives for, water bodies will be adapted for this purpose, but it is necessary to give Ministers the power to designate the areas of water to which the provisions are to apply.

62. The areas of water that Ministers consider it necessary or desirable to designate for the protection or development of economically significant shellfish production are liable to change over time, so it is appropriate for Ministers to have the power to designate such areas by order.

Choice of procedure

63. The order designating shellfish water protected areas will be subject to negative procedure by virtue of existing section 36(4) of the 2003 Act. The Bill does not alter that position. The list of protected areas may need to increase from time to time if the sector is to expand sustainably. If the Scottish Parliament approves the principle of designating areas of water as shellfish water protected areas, negative procedure is thought to offer an appropriate level of parliamentary scrutiny of the designation of individual areas of water.

Section 48 – power to make orders under section 1 of the Sea Fisheries (Shellfish) Act 1967

<table>
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<td>Power exercisable by:</td>
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Provision

64. Section 48(1) of the Bill contains provision to amend section 1 of the Sea Fisheries (Shellfish) Act 1967 to enable the Scottish Ministers to make orders relating to shellfish under that section for the establishment or improvement, and for the maintenance and regulation, of a fishery for shellfish of any kind specified in the Order. Section 48(1) therefore amends an existing power rather than creates a new one.
Reason for taking power

65. At present, Ministers may make orders under section 1 of the 1967 Act in relation to the species of shellfish mentioned therein (oysters, mussels, cockles, clams and lobsters) and any other molluscs or crustaceans that have been specified in regulations. In this regard, the Shellfish (Specification of Molluscs and Crustaceans) (Scotland) Regulations 1999 (SSI 1991/139) specifies crabs, whelks and razor shells as species in respect of which orders under section 1 of the 1967 Act may be made.

66. The amendments in section 48(1) of the Bill would enable Ministers to make orders in relation to any species of shellfish, without the need to make regulations under section 1 of the 1967 Act where a species not mentioned in or specified for the purposes of section 1 is involved. It will allow Ministers to legislate more flexibly, and to react more quickly where orders relating to shellfish under section 1 of the 1967 Act are sought. The amendment brings section 1 of the 1967 Act in line with the position in England and Wales, where similar amending provision was made under the Marine and Coastal Access Act 2009.

Choice of procedure

67. Orders under section 1 of the 1967 Act are currently subject to negative procedure by virtue of section 20(2) of the 1967 Act, as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010. Whilst the provisions of section 48(1) of the Bill expand the scope of the current order-making power, that expansion is considered to be in line with the current power, and will provide for more effective and flexible response to applications for several and regulating orders in Scottish inshore waters. On this basis, we do not consider there to be a need to review the process by which orders are made.

Section 50 – power to make regulations to impose charges for the carrying out of certain fishery functions.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

68. Section 50(1) of the Bill confers a power on the Scottish Ministers which will enable them to make regulations for or about the imposition of charges in connection with the carrying out of certain fishery functions; which will also be specified in the regulations.

69. Section 50(2) of the Bill, as read with subsection (1), defines the functions in relation to which the Scottish Ministers may impose a charge. These are functions under certain legislation relating to fish and shellfish farming, salmon and freshwater fisheries and sea fishing.

70. The regulations will set out the details of the provision made for the amount of charge to be payable, by whom it is payable and when, including setting down the circumstances in which charges may be reduced or waived and exemptions provided for.
Subsection (4) provides that the charges payable under regulations made using this power may only require a person to pay a charge if and so far as the person is someone in relation to whom a fisheries function has been carried out. In addition the charge may not exceed the reasonable cost incurred in the carrying out of the function. The charge therefore must relate to the function in respect of which it is charged, and may not generate a surplus.

Reason for taking power

72. The Scottish Ministers are seeking to progress one of the key principles of the Scottish Government’s accounting procedure and practice which requires that charges should be set for all statutory and commercial services. This new power would enable the Scottish Ministers to impose charges in connection with certain specific fishery functions. The power would also acknowledge how these functions contribute to the Scottish Government purpose of sustainable economic growth by ensuring that SG resources are used effectively, with appropriate costs being recovered wherever possible.

Choice of procedure

73. Section 50(5) of the Bill requires the Scottish Ministers to consult before making regulations under 50(1). It is therefore considered that negative procedure is appropriate as it provides a proportionate level of parliamentary scrutiny of the application of a power.

74. It is anticipated that a wide ranging consultation would be undertaken on those areas where charging would be considered appropriate and reflective of the parameters detailed within the Bill.

Section 51(2) – power to modify definition of “relevant offence” and descriptions of persons.

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

75. Section 51 of the Bill contains provision which amends section 25 of the Aquaculture and Fisheries (Scotland) Act 2007 on fixed penalty notices. In particular, section 51(2) inserts new subsections (2A) to (2D) into section 25 of the 2007 Act. New section 25(2B) of the 2007 Act contains an order-making power that enables the Scottish Ministers to make an order to modify section 25 such that the definition of “relevant offence” in section 25(2) may be amended and to modify section 25(2A) as regards the descriptions of persons listed in that provision or to add to such list.

Reason for taking power

76. Fixed penalty notices are a form of sanction that may be offered in certain circumstances as an alternative to seeking a criminal conviction in court. The Bill extends the scope of regulatory non-compliance that can be dealt with through the offer of a fixed penalty notice and in doing so seeks to reflect current compliance monitoring and enforcement functions that fall to Marine Scotland to deliver. It may be that future changes to either the remit of Marine Scotland
(for example, when Marine Scotland inherited additional compliance functions in the Scottish offshore zone following implementation of the European Habitats and Wild Birds Directives) or the designation of relevant enforcement officers will need to be taken account of readily and flexibly and it is therefore appropriate for Ministers to make any necessary modifications by subordinate legislation rather than primary legislation.

Choice of procedure

77. The Scottish Ministers currently have an order-making power in section 25(2) of the 2007 Act, which is subject to negative procedure by virtue of section 43(2) of that Act, as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010. The power in section 25(2B) of the 2007 Act, as introduced by section 51(2) of the Bill, is required in light of the amendments to section 25 introduced by section 51 and is in line with that currently in place in section 25(2) of the 2007 Act. For that reason, we see no reason to review the process by which an order under section 25(2B) of the 2007 Act may be made.

Section 54 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative procedure (if it textually amends legislation): otherwise negative procedure

Provision

78. Section 54 of the Bill provides for an order-making power for the Scottish Ministers to make such incidental, supplemental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to the provisions of the Bill.

Reason for taking this power

79. Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst we have included a number of substantive and consequential modifications within the Bill, it may be that the need arises post-commencement for further changes in order to fully and properly implement the Bill’s provisions. We consider the order-making power to be necessary to allow for this flexibility, especially in light of operational experience.

80. We consider the power to make such provision should properly extend to the Bill in its entirety, and such other enactments, instruments or documents Ministers consider necessary or expedient. Without this power, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the Bill. We believe that this would not be an effective use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide on the face of it, is limited to the extent that it can be used only if the Scottish Ministers consider it necessary or expedient for the purposes of, in consequence of, or for giving full effect to, the Bill.
This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 3 October 2012

Choice of procedure

81. Any order made under section 54 which textually amends an enactment will be subject to affirmative procedure by virtue of section 52(2) of the Bill. We consider this provides the appropriate level of parliamentary scrutiny for the power, particularly given the ability to amend primary legislation. Where an order under section 54 does not seek to textually amend an enactment, it is considered that negative procedure provides for the appropriate degree of scrutiny.

Section 56(2) – Power to commence provisions of the Bill

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument

Provision

82. Section 56(2) of the Bill provides that the Scottish Ministers may, by order, bring the provisions of the Bill into force on a day or days appointed by the order. Section 56(3) provides that the commencement order may make transitional, transitory or saving provision. It is not unusual to allow for such provision in conjunction with a power to make a commencement order.

Reason for taking this power

83. It is appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

84. As is now usual for commencement orders, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies, and we see no reason to depart from this position in relation to the order-making power in this case.

Other-

Section 14 – Power to make control schemes

Power conferred on: the Scottish Ministers
Parliamentary procedure: None

Provision

85. Section 14 provides a power for Scottish Ministers to make control schemes for the control of commercially damaging species on fish and shellfish farms. The orders are not statutory instruments and are not subject to parliamentary controls. They are instead subject to procedures set out in sections 14 and schedule 1.

86. These can be made in various situations, broadly where a voluntary control agreement is refused (and 6 weeks have elapsed since the date of the offer), or has failed. They set out the
measures that must or must not be carried out in order to remove the species from, reduce the incidence of the species on, prevent the spread of the species beyond, or otherwise control the commercially damaging species on the fish farm or shellfish farm.

Reason for taking power

87. The new power will provide a legal mechanism to ensure work can be progressed if a voluntary control agreement cannot be reached; this will reduce the threat to the wider aquaculture industry from commercially damaging species.

Choice of procedure

88. This regime will be used to progress problems where voluntary agreement has failed. This process will therefore be directed to specific farm sites where a commercially damaging species is present. As such it is not considered necessary for this order to take the form of an SSI, and instead that it is suitable for it to be delegated and administered on a local basis.
AQUACULTURE AND FISHERIES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM