AQUACULTURE AND FISHERIES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION
1. This document relates to the Aquaculture and Fisheries (Scotland) Bill introduced in the Scottish Parliament on 3 October 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 17–EN.

POLICY OBJECTIVES

OVERVIEW
2. The primary purpose of this 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. It also aims to amend the Fisheries Act 1981 and modernise existing enforcement provisions to ensure that sufficient powers are in place to enable British Sea Fishery Officers to enforce sea fisheries regulations; introduce legislative provisions to safeguard shellfish water protected areas; make provision for charges for a number of fishery functions; and to extend the scope of offences that could be subject to a fixed penalty notice.

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 salmon farming, and ensure that salmon and freshwater fisheries can be effectively managed in an open and transparent manner.

Background
4. Scotland is home to important and prosperous aquaculture and iconic freshwater fisheries, both of which have enviable international reputations. Those reputations have been built on Scotland’s unique natural environment and high standards of best practice and management.
5. Over the last decade, aquaculture (the breeding and harvesting of plants and animals in water) has gained significant momentum as a viable method to produce seafood. Over the period from 2005 to 2010 (latest published figures) the value of aquaculture almost doubled with an estimated farm gate value\(^1\) of £563 million in Scotland. Almost 87% of that figure is the value of salmon aquaculture with the rest comprising trout farmed for the table and restocking trades, brown trout, halibut, blue mussels and other shellfish. The combined value of aquaculture production, salmon and freshwater fisheries to the Scottish economy is estimated to be over £650 million (in 2010). This is based on industry price estimates and official production statistics.

6. Farmed salmon exports have grown as the demand for high quality Scottish farmed salmon has increased. Industry figures indicate that seven of the top ten markets have grown in volume in 2011 with farmed Scottish salmon reaching nearly 60 countries worldwide. The value of overseas exports increased by over 25% in real terms in 2011, with opportunities increasingly being identified in Asia, most particularly Japan, where salmon exports have more than doubled over the period 2009-2011. Based on HMRC trade data, there has also been a huge increase in exports to the United States – from £86 million in 2009 to c. £178 million in 2011 (2011 prices).

7. In Scotland there are currently around 254 active marine finfish sites producing Atlantic salmon and 228 freshwater sites producing salmon, brown trout and rainbow trout (2011 figures). Additionally there are around 325 active shellfish sites.

8. The Scottish Government is committed to the support and protection of the country’s famous and valuable salmon and freshwater fisheries. We promote modern evidence-based management of fisheries, enabling their economic and social potential to be realised for the benefit of local communities, particularly those in rural areas.

9. Provisional 2011 statistics\(^2\) reveal that rod catch levels for Scottish wild salmon were the sixth highest on record. 86,655 salmon were caught in 2011, 97% of the five year average. Catch and effort for both fixed engine and net and coble fisheries remain at historically low levels. Fishing effort in the net fisheries was the fourth lowest since records began in 1952. Catch in the fixed engine and net and coble fisheries were 5% and 2% of the maximum recorded in the respective time series. For sea trout, following a long period of decline, catch levels were 8% up on the five year average, to 24,049.

10. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003\(^3\) (“the 2003 Act”) provides the framework for management of salmon and freshwater fisheries in Scotland. It should be noted that, in law, the term ‘salmon’ means fish of the species Salmo salar (known as salmon) and migratory fish of the species Salmo trutta (known as sea trout). The 2003 Act does not apply to the River Tweed (provision for which is made in The Scotland Act 1998 (River

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\(^1\) The price of the product at which it is sold by the farm (the **farm gate price**).


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Tweed) Order 2006\(^4\) or to the Upper Border Esk (which is managed by the Environment Agency).

11. Uniquely, Scottish salmon netting and rod and line fishing rights are private, heritable titles registered separately from land. Management of salmon fisheries takes place at a local level through district salmon fishery boards (DSFBs) within a framework of national regulation via prescribed methods of fishing and weekly and annual close times. DSFBs are committees of proprietors of salmon fisheries, created voluntarily under statute for the purpose of the protection or improvement of fisheries within their district. Their functions and duties are set out in the 2003 Act.

12. The Scottish Government actively promotes local, consensual management of salmon fisheries by DSFBs through implementation of locally-agreed voluntary measures. Where voluntary measures fail, or DSFBs consider the scope of a problem requires national government’s intervention, boards can apply for statutory measures to be made. The Scottish Government considers all applications for statutory measures within the context of its broader strategic objectives and responsibilities. Under the 2003 Act, Scottish Ministers also have the power to make certain – but not all types – of management measures at their own hand; these back-stop powers provide a partial contingency plan to enable the Scottish Government to act in cases of local failure, or overriding national interest or challenges.

13. The Bill represents the first step in the Scottish Government’s commitment to modernising and improving arrangements for management of Scotland’s salmon and freshwater fisheries. Further work to consider the most appropriate governance structures and responsibilities will be undertaken during this Session of the Parliament. In the meantime, the Bill takes forward policy objectives to secure good governance by DSFBs and enhanced management of salmon and freshwater fisheries.

**Aspirations for the future – sustainable growth**

14. The Government Economic Strategy focuses actions on six strategic priorities which will drive sustainable economic growth\(^5\) and develop a more resilient and adaptable economy. Key actions include promoting Scottish exports to capitalise on the significant opportunities in growth markets – with an ambitious target to deliver a 50% increase in exports by 2017. In addition, the Scottish Government identified the food and drink sector as a key economic area for development – to increase the value of the food and drink sector from £11 billion (2010) to £12.5 billion by 2017.

15. The Strategy recognises that Scottish farmed salmon is now Scotland’s largest food export, making a significant contribution to the Scottish economy and providing vital employment for rural communities.

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16. There remain significant opportunities for further sustainable development of the Scottish aquaculture industry within an ever increasing and demanding consumer market, especially at a time when other industries have been more dramatically affected by poorly performing economic markets. Aquaculture is seen by many as having a significant role to play in feeding a growing world population, especially as the pressure for available land and resource to grow crops and animal protein intensifies, as the world’s population continues to grow and the implications of climate change become more evident.

17. The Scottish Government supports the aquaculture sector’s targets for sustainable growth by 2020 (based on the 2009 baseline of 145,000 tonnes per annum\(^6\)), as outlined in Scotland’s pre-consultation draft National Marine Plan. The Scottish Government is committed to working with the industry and other stakeholders to deliver these aspirations for growth. These targets include:

- Marine finfish at an average rate of 4% per annum to achieve 50% increase;
- Shellfish, especially mussels, by 100%.

18. The most recently available figures for farmed finfish (2010\(^7\)) show production growth of almost 7% whilst the shellfish sector (based on 2011 figures) reports steady production after a recent period of significant growth.

**Investment**

19. The Scottish Government has committed significant investment under the European Fisheries Fund to help develop Scotland’s aquaculture industry. In excess of £23 million grant assistance has been provided to date in direct and indirect support, including capital investment in aquaculture sites, funding to improve fisheries science and innovation (such as modelling of sea lice dispersal) and for the development of a natural control for sea lice on farmed salmon. Support has also been provided throughout the supply chain, including funding to processors to increase aquaculture processing capacity and towards the consolidation in existing, and the development of new, premium markets. Significant additional work is now being undertaken to ensure future programmes, such as the European Maritime and Fisheries Fund, prioritise a robust package of support measures for the Scottish aquaculture sector going forward.

20. The Scottish Government has promoted the development of local fishery management plans across Scotland, through investment over the last five years including £1.2 million over three years in partnership with the Rivers and Fisheries Trusts of Scotland (RAFTS). In conjunction with other public agencies, considerable support is also being provided to the National Fisheries Management Demonstration Project on the River South Esk (estimated at £0.2 million per annum for three years). The Scottish Environment Protection Agency (SEPA) has also made available over £1 million towards improved water quality, which also benefits fish habitat.

21. In addition, the Scottish Government is working on a number of projects to support the aquaculture industry to enable it to grow and achieve its potential in an environmentally

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\(^6\) [http://www.publications.parliament.uk/pa/cm201012/cmselect/cmscotaf/1117/1117we15.htm](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmscotaf/1117/1117we15.htm)

\(^7\) 2011 figures to be available later in the year
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sustainable manner. This includes support through the Contract Research Fund (CRF) to enhance the Autodepomod modelling tool. This tool, owned by SEPA, is used by fish farm site operators in support of their applications to SEPA for licences to discharge wastes to the inshore marine environment. The project will enhance the existing modelling tool, increase confidence in terms of managing and monitoring the discharge from existing sites and improve it further to enable the introduction of large scale fish farms, typically further offshore.\(^8\)

22. The Scottish Government recognises that providing policy certainty for the aquaculture industry will provide it with greater confidence to invest and plan for the longer term, and believes that this can be achieved by providing a clear regulatory framework which takes account of the wider marine environment. Recent and planned examples of significant investment by those in the Scottish aquaculture industry suggest they are confident that we are doing just that.

Employment

23. Employment in farmed salmon production in 2010 was 1,064 full and part time with a further 289 jobs in ova and smolt production. Some 3,099 full-time and part-time jobs were provided through shellfish cultivation and 172 full-time and part-time jobs in the cultivation of trout and other finfish species. Many communities now depend to a significant extent on the employment, investment and revenue that these areas provide. While it is difficult to provide a comparative figure, a report from 2004\(^9\) estimated that freshwater angling supported 2,786 full-time equivalent jobs in Scotland.

Consultation

24. In December 2011 the Scottish Government commenced a consultation\(^10\) on a number of proposals primarily, but not exclusively, aimed at supporting the sustainable development of the aquaculture industry and salmon and freshwater fisheries while also recognising the impacts to the wider marine environment.

25. The consultation made clear that the Scottish Government wanted to build on best practice and voluntary arrangements where appropriate, providing statutory underpinning and a legislative backstop, where necessary, to protect the environment and the interests of those who have invested in the highest standards of management and husbandry. The Government was clear that it wanted to promote openness and transparency, including in the collection and publication of information. At the same time, it recognised the need to strike the right balance, respecting and consulting on the interests and perspectives of the range of stakeholders, and avoiding unnecessary or disproportionate new regulatory burdens.

26. A number of the aquaculture proposals within the consultation paper were developed in partnership with a number of working groups, major stakeholders in the sectors and scientific research in relation to the aquaculture sector. These included the Ministerial Group on Aquaculture and its related working groups, which developed and implemented *A Fresh Start* –

\(^8\) The project is expected to start summer 2012 and complete in 2015.
\(^9\) http://www.scotland.gov.uk/Publications/2004/03/19079/34369
\(^10\) http://www.scotland.gov.uk/Publications/2011/12/06081229/0
the Renewed Strategic Framework for Aquaculture. The Code of Good Practice for Scottish Finfish Aquaculture originated from the previous version of the Strategic Framework.

27. In relation to the wild salmon and freshwater fisheries sector, there is the Strategic Framework for Freshwater Fisheries, fishery management plans (developed by fisheries trusts) covering most of Scotland, and recommendations for legislative change from the Mixed Stock Salmon Fisheries Working Group Report of March 2010.

28. A total of 1,342 responses were received to the consultation. Of these, some 1,193 were in the form of interest group responses received from individuals associated with the aquaculture industry and voluntary sector, consisting of letters providing general comments on the paper but not addressing the questions asked in the consultation, and questionnaire proformas endorsing the responses of the respective industry organisations that have provided comment on the ‘Bill’ (that is on the proposals, some of which have progressed to the Bill). A further 149 were detailed responses, in terms of the length and detail of comments on the consultation questions in many of these responses. Most of the detailed responses focused on the consultation questions, but many commented on the proposed Bill and the wider industry itself, either in addition or in preference to directly answering the consultation questions.

29. The consultation responses confirmed some fundamental differences in opinion between the aquaculture industry, freshwater fisheries and other environmental stakeholders. With a small number of exceptions, the aquaculture industry was largely unsupportive of many of the proposals in the consultation, with most industry respondents aligning themselves with the response provided by the Scottish Salmon Producers’ Organisation (SSPO). Their opposition focussed on concerns about over-regulation of the industry, and adding unnecessary red tape. There was also some misunderstanding about how the proposals aligned with the aspirations for growth and concerns about reputation and commercial damage. They considered that there was a fundamental contradiction in the consultation, with aspirations for industry growth being undermined by proposals for further legislation.

30. What was evident from many of the responses was a presumption that most of the proposals detailed in the consultation comprised the constituent parts of the Bill. In fact, many of the questions explored the effective use of existing enabling powers and the extent to which some of the aims could be achieved without further legislation or by consensus. The consultation was therefore around a package of proposals designed to complement aspirations for sustainable growth with due regard to any wider implications for the marine environment.

31. The non-confidential responses to the consultation were published on 5 April 2012\(^{11}\). The analysis of the consultation responses was published on 10 August 2012\(^{12}\). This report focused on the 149 detailed responses containing comments addressing at least some of the consultation questions. However, policy development was also informed by the significant number of letter and questionnaire proformas. All views, whether from individuals or organisations, were proportionately taken into account.

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\(^{11}\) [http://www.scotland.gov.uk/Publications/2012/04/5057](http://www.scotland.gov.uk/Publications/2012/04/5057)

\(^{12}\) [http://www.scotland.gov.uk/Publications/2012/08/4768](http://www.scotland.gov.uk/Publications/2012/08/4768)
32. The Scottish Government used the summer period to continue to discuss the proposals with stakeholders. The Ministerial Group on Aquaculture met twice during this period and the Bill is now a standing item on the agenda. A Stakeholder Reference Group was established on 23 July 2012 with a remit to inform the development of the Bill. Separate meetings took place with interested groups and a number of engagements within the Ministerial Summer tour programmes were used to discuss policy thinking and to discuss issues of concern.

33. While many of the consultation proposals have been taken forward as provisions within the Bill, it was always likely that some would be progressed through alternative means such as secondary legislation or voluntary schemes, while others would require further consideration. The Scottish Government’s response to the consultation sets out in more detail how it intends to deal with the individual proposals outlined in the consultation document.

Environment

34. Through A Fresh Start - the Strategic Framework for Scottish Aquaculture (published 2009\textsuperscript{13}) and in partnership with industry, the Scottish Government is ensuring that Scotland farms fish to the highest standards. Through Marine Scotland all fish farming businesses are authorised under the Aquatic Animal Health (Scotland) Regulations 2009 and subject to inspection for disease control, sea lice management and containment measures under the Aquaculture and Fisheries (Scotland) Act 2007.

35. Fish farms are also licensed, controlled and monitored by SEPA with the aim of ensuring that the environmental impacts from the industry are assessed and managed within acceptable bounds. In addition to these regulatory regimes, the accredited industry Code of Good Practice for Finfish Aquaculture aims to ensure adherence by industry to the standards set down within the code.

36. Key work has been taken forward under the auspices of the Ministerial Group on Aquaculture and related working groups, including development of a renewed Strategic Framework for Aquaculture and the Code of Good Practice.

37. Atlantic salmon (which in terms of the 2003 Act includes salmon and sea trout) are afforded special protection (in fresh water only) along with their habitats under the EU Habitats Directive (Directive 92/43/EEC\textsuperscript{14}). The Scottish Government has other conservation obligations also, for example to the international community as signatories to the Convention for the Conservation of Salmon in the North Atlantic. We pursue policies that conserve salmon stocks at a level that supports their continuing biological sustainability, basing our approach on the best available scientific advice at a scale which data can support. In pursuing this approach the Scottish Government seeks to give priority to the weakest stocks.

\textsuperscript{13} http://www.scotland.gov.uk/Publications/2009/05/14160104/0

\textsuperscript{14} http://www.central2013.eu/fileadmin/user_upload/Downloads/Document_Centre/OP_Resources/HABITAT_DIRE
CTIVE_92-43-EEC.pdf
BILL CONTENTS

38. The Bill is divided into 6 parts. **Part 1** has a number of aquaculture themes designed to strengthen the regulatory framework for the industry to continue delivering sustainable growth going forward - the creation of a legal requirement for marine finfish farm operators to operate under the terms of a farm management agreement (or statement), within an appropriate management area; an amendment to the Aquaculture and Fisheries (Scotland) Act 2007 to make provision for the taking of samples of, or from, fish on fish farms; powers to prescribe technical requirements for equipment used in fish farming; provision for regulations controlling and monitoring the operations of wellboats and related intervention and enforcement provisions; and provisions for orders to prevent the spread and ensure the effective control of commercially damaging native species.

39. **Part 2** has two themes. First, the introduction of ‘good governance’ obligations on DSFBs to improve openness, transparency and accountability to their constituency; a requirement for DSFBs to consult prior to submitting applications to Scottish Ministers for measures under the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”); and the power to end the operation of a DSFB committee which is persistently failing to meet its obligations. Second, a series of amendments to the 2003 Act on enhancing management of salmon fisheries. These amendments comprise: powers to create a statutory carcass tagging scheme, to take fish and fish samples and require information from fisheries; power to recall or restrict DSFB powers to consent to the introduction of salmon or salmon spawn; and powers for Ministers to make changes to the annual close time at their own hand, and require monitoring and evaluation of measures granted. These amendments acknowledge the current arrangements for local management of fisheries but highlight the need for effective contingency arrangements in the event of failure by boards or overriding national interests or challenges.

40. **Part 3** relates to enforcement of sea fisheries legislation, in particular the powers of British sea-fishery officers to enforce the legislation, powers to detain vessels in connection with court proceedings and inspection and associated powers not currently provided where there are no vessels, vehicles or relevant premises involved – for example on a beach. There are also provisions relating to the retention, disposal and forfeiture of objects and fish seized.

41. **Part 4** of the Bill amends the Water Environment and Water Services (Scotland) Act 2003 to provide for the protection of shellfish waters once the Shellfish Waters Directive is repealed in 2013. The Bill also amends the Sea Fisheries (Shellfish) Act 1967 to make clear that the Scottish Ministers’ order-making powers under section 1(1) of that Act can extend to all types of shellfish (molluscs and crustaceans) and are not restricted to specified shellfish; and makes clearer the extent of Ministers’ powers in relation to the appointment of an inspector to conduct an inquiry into the proposed making of several and regulating orders.

42. **Part 5** of the Bill gives Scottish Ministers powers to impose charges in connection with the carrying out of functions relating to fish, shellfish farming, salmon and freshwater fisheries, or sea fisheries. There are also provisions relating to the extension of the system of fixed penalty notices (“FPNs”) which was introduced for sea fisheries under Part 4 of the Aquaculture and Fisheries (Scotland) Act 2007. The Bill widens the scope of offences that could be subject to a
FPN which in practice provides a way for operators to deal with their regulatory non-compliance outwith the criminal court system.

43. **Part 6** of the Bill contains the usual general and commencement provisions and the short title.

**PART 1: AQUACULTURE**

**Chapter 1: Fish farm management**

**Fish farm management agreements and statements**

44. The marine finfish farming industry in Scotland currently operate 277 active sites, 261 of which farm Atlantic salmon, within 91 farm management areas as depicted by industry in The Code of Good Practice for Scottish Finfish Aquaculture (CoGP). The vast majority of operators are signed-up to either a farm management agreement (FMA), or statement (FMS), that require operators to conform to a certain standard that optimises fish health management, reduces impacts on the environment, and improves economic performance. The Scottish Government recognises the Atlantic salmon farming industry as an important sector of the Scottish economy with excellent prospects and ambitious plans for growth. Future sustainable growth can only be realised, however, if the industry adheres to the latest and highest environmental and husbandry standards. Recent experience, both domestically and overseas, has demonstrated how failures in the regulatory framework or the absence of adequate controls to prevent and anticipate environmental problems or the development of transmittable fish diseases, can have a huge impact.

45. At present, FMAs are in place on a voluntary basis between most operators. The policy aim is to require that agreements are developed according to the needs and circumstances of the particular farms, although there will be generic criteria which each management area must cover as a minimum. This should ensure that operators in each area work in unison with respect to treatments, fallowing and the harvesting of fish and stocking levels on the farm, building on the best practice already in place.

46. The Bill makes provision for all operators of authorised aquaculture production operations to be party to, and ensure that marine fish farms are managed and operated in accordance with, an FMA, or to maintain an FMS. The Bill also requires a description of the farm management area and the fish farms to which the agreement or statement applies.

47. The FMA or FMS is required to include arrangements for fish health management, management of parasites, the movement of live fish, the harvesting of fish and fallowing with these agreements or statements reflecting 'so far as possible' the CoGP. The Bill makes provision for FMAs and FMSs to be reviewed every 2 years, and for Scottish Ministers to be able to modify the definition of the CoGP by order.

48. The Bill, by virtue of amending the Aquaculture and Fisheries (Scotland) Act 2007, enables Scottish Ministers to authorise any person to act as an inspector to enforce the legislation
relating to FMAs and FMSs, and to issue an enforcement notice and/or take court proceedings where a particular farm is not adhering to the terms of the agreement.

Consultation

49. The Scottish Government consulted on a proposal to place a legal obligation to participate in an appropriate farm management agreement. Responses in the analysis report appeared to be in general support. The support focused around the need for good husbandry and management of fish farms to be practised consistently across the sector. The industry was generally supportive of the concept of agreements but was opposed to making it a legal requirement to participate in an agreement.

Alternative approaches

50. One alternative would be to leave things as they are, whereby industry works to the voluntary CoGP. This option has no direct additional cost to either the private or public sectors, but it would mean no improvements in management arrangements and practices and existing issues and risk from opting out would continue. A further option would be the statutory adoption of specific sections of the Code. However, this could have significant cost implications for government and industry for no additional benefit beyond what is proposed.

Escapes and obtaining samples from fish farms

51. Under the Aquatic Animal Health (Scotland) Regulations 2009, there is a statutory requirement for fish farmers to notify Ministers in writing of an escape of fish or a suspected escape. Under powers available in the Aquaculture and Fisheries (Scotland) Act 2007 (“the 2007 Act”), Marine Scotland’s fish health inspectors can inspect a fish farm site following a reported escape to assess measures in place to contain fish, prevent escapes and recover escaped fish. The 2007 Act provides a power for inspectors to take samples from a farm for the purposes of ascertaining whether fish have escaped from that farm.

52. Alongside reported escapes there are also concerns about ongoing ‘drip’ or ‘trickle’ escapes, which have been associated with inappropriate mesh sizes on nets or screens, undetected ‘below the waterline’ damage to nets or when fish simply jump over the level of the net. Drip escapes can remain undetected until ‘farmed fish’ are caught in neighbouring catchments or at harvest when a farmer counts stock and discovers a shortfall.

53. Most years, angling and wild fish interests contact DSFBs, fisheries trusts or Marine Scotland with reports of catching or sightings of suspected farmed fish escapes. Some will have originated from known reported escape events but others may be explained by drip escapes or due to farmers failing to report escape incidents. This is further complicated when there is a number of operators within a catchment. There have been occasions when farmers have disputed the origin of escaped fish. There are other potential introductions of fish not associated with aquaculture escapes, for example, put and take fisheries or restocking.

54. The provisions of the Bill amend the 2007 Act to enable inspectors to take or require samples of fish from any fish farm in Scotland for certain purposes, including developing and implementing methods for tracing the origin of any known or suspected escape of fish and
examine potential impacts associated with escapees or for any other purpose. The power will allow the taking of whole fish as well as samples.

55. Marine Scotland Science is developing a methodology on the use of forensic tracing of escaped farm salmon in Scotland. A scoping study considered the feasibility of adopting Norwegian fish farm escapee traceability methods and is based on the development of molecular genetic methods for the discrimination of farmed and wild salmon, and for the determination of whether wild caught salmon originate from local farms or have an alternative wild or non-wild origin. The methodology now requires robust field-testing.

56. If the method is proved in a Scottish context, in the absence of other evidence, Marine Scotland may use it to determine which farms are losing fish so that companies can be notified accordingly to mitigate against further losses. This is likely to result in an investigation at a site where escapes are suspected, but have not been reported. Existing provisions do not permit inspectors to take samples of fish from neighbouring farms upon which future investigations and tracing could be based. The powers proposed will allow for inspectors to take fish from:

- a farm suspected to be the origin of an escape, although that site has not reported an escape;
- a farm which either supplied the ‘escaped’ stock under investigation or a site to which the remainder of the stock was moved for growing-on; or
- a site operating in the vicinity of a suspected escape and which may be the origin of the escape.

57. It is not the intention to undertake universal sampling or to create a national database of genetic samples, as this would be impractical, unaffordable and unnecessary. Powers would be used on a targeted basis when other methods of tracing have proved unsuccessful. Methods employed will not be restricted to genetic testing but may also include taking samples for testing using chemical methods.

Consultation

58. The Scottish Government consulted on a proposal that there should be additional powers for Scottish Ministers to take or require samples of fish from fish farms, for tracing purposes. There was overall support amongst respondents for the proposal, though the aquaculture industry and other commercial industry respondents were strongly opposed. Several respondents also suggested that the ability to carry out genetic identification should be established before introducing these powers.

Alternative approaches

59. The alternative approach would be to leave the powers as they are with all the shortcomings detailed above. This would restrict the ability to collect samples necessary to develop and test robust detection methods or to take samples to determine the origin of escaped fish. There would be no increased understanding of the level of non-attributable escapees or of how such losses are occurring. There is evidence that escapes are generally declining through increased awareness, significant investment of new equipment by industry and the roll-out of
best practice training on containment. This, coupled with the development of a Scottish technical standard, should lead to continued decline in escapes.

Chapter 2: Fish farming: equipment and wellboats

Equipment

Technical requirements for fish farming equipment

60. A general trend of reducing fish farm escapes has been recorded since 2005 due to a combination of increased awareness and significant industry investment in new equipment, a programme of industry best practice workshops and work on accredited training for fish-farm workers in minimising escapes. A Memorandum of Understanding signed by Scottish and Norwegian aquaculture Ministers in 2009 included an agreement to develop best practice on engineering design standards and collaboration on research.

61. Whilst recent industry progress on reducing fish farm escapes has been steady and broadly welcomed, concerns remain. In particular this relates to risks associated with operators using older equipment or using equipment inappropriate for site conditions. There are also concerns about ongoing ‘drip escapes’ which are generally associated with use of inappropriate mesh sizes on nets or screens. A technical standard for finfish farm equipment and infrastructure means that all routine maintenance and equipment replacement programmes will be developed using the latest specifications.

62. All fin fish farms operating in Scotland should have equipment (nets, pens mooring etc) appropriate for the environmental conditions in which they operate and which effectively contain fish and prevent escapes. The current system relies on recommendations in the Code of Good Practice for Scottish Finfish Aquaculture (CoGP) that ‘Installations, facilities, moorings, pens and nets etc should be fit for purpose for the site conditions and installed by an appropriately qualified person’. All SSPO farms are independently audited for compliance with the CoGP. Trout farmers follow relevant sections of, and trout farms are audited for compliance with, relevant aspects of the CoGP.

63. Under existing powers in the 2007 Act, Marine Scotland inspects fish farm sites to ensure that measures are in place to contain fish and prevent escapes. Inspections are based on the recommendations set out in the CoGP. There is currently no statutory definition of “fit for purpose”. Inspectors check records for attestations from manufacturers that the equipment is fit for purpose, but cannot identify below-water-line failure or whether equipment is appropriately installed or set up. A technical standard would, in effect, define “fit for purpose”.

64. The Bill includes an enabling power for Scottish Ministers to make subordinate legislation which will provide technical specifications for fish farm equipment. The purposes of the technical standards regulations will be the containment of fish, prevention of escape of fish, and the prevention, control or reduction of parasites, pathogens or diseases. Escaped farmed fish can interact with wild stocks through interbreeding, competition for food and space and have potential to transmit disease and parasites. In addition, the loss of fish and equipment (for example through storm damage) can be a significant financial loss to fish farmers. The regulations will achieve this through setting standards for the design, construction, materials,
manufacture, installation, maintenance and size of equipment and be flexible to take into account environmental conditions of different site locations.

65. The standard will cover site surveys (measurements and monitoring of current, wave height and speed over time and pertinent geographical features). This will take account of historical weather and tidal conditions and allow for predictions of wind, wave and current conditions that might be expected at that site over the lifetime of the equipment. Consideration of current, particularly tidal and wind generated, is crucial given it usually generates the greatest forces on equipment. The standard also covers mooring systems in terms of holding the equipment together, maintaining the structure of the fish farm and fastening it to the seabed. This includes the type of seabed (rock, mud etc), type, size and weight of anchor and fitness to withstand the expected loads and forces to which the structure will be subjected. The standard also includes pen design and construction both in terms of connecting together but also material type and strength. It also covers net design and construction again in terms of material but also breaking strength and mesh size (to prevent fish escaping through the net).

66. For example, for any given site, the operator will have to be able to demonstrate that: the relevant site survey and calculations have been done and that the equipment is suitable for the expected tides, currents, wave height and speed every year but also include a safety factor to account for severe weather events (e.g. 1 in 50 year storms); the structure was installed correctly and by an approved body/person. After installation, the regulations may specify that the site must be inspected at a specified appropriate interval. The regulations will also impose requirements on fish farm operators, employees and agents to keep records, for example of net testing, equipment replacement and also report equipment failures, for example where a particular piece of mooring has failed or where nets have degraded or damaged easily. The standard will also take account of scenarios whereby operators move equipment to other sites. The operator will need to demonstrate that the nets are still of appropriate size to contain the new stock of fish and strong enough to withstand damage. If the site is more exposed, the farmer will need to demonstrate the equipment is still able to withstand the higher tidal, currents and wave induced forces it will endure. Likewise, if a site has a different sea bed substrate as anchoring requirements for a hard rock bottom are dramatically different than for a bed of deep silt.

Consultation

67. The Scottish Government consulted on a proposal that Scottish Ministers should have powers to require all finfish farms operating in Scotland to use equipment that confirms to a Scottish technical standard. Analysis of the consultation responses showed strong support for the introduction of a technical standard (across all stakeholder groups), including the finfish farming sector. Several respondents acknowledge the work of the Improved Containment Working Group in developing the standards, as well as suggesting transitional procedures are in place for its introduction.

68. In advance of publishing the consultation document, industry itself indicated “Introducing a Scottish technical standard is key in the reduction of escapes from salmon and trout farms. Staff training is also important but making sure the right equipment is installed on farms to the specification required to deal with the worst weather conditions is essential for secure containment of fish stocks. In doing this we will have fit for purpose equipment on fish
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farms capable of dealing with the worst conditions and being operated by a highly skilled work force.”

69. The Marine Alliance for Science & Technology Scotland observed “There is a sound and pressing practical and economic rationale for developing binding engineering and operational standards for marine cage fish farming in Scotland and beyond. Preventing the loss of valuable stock is important for the industry not only in terms of potential economic loss, but also in demonstrating that it is taking all reasonable steps to prevent escapes. Such standards will become increasingly important if the industry is to expand and is to do so in ever more challenging environments.”

70. There has been wide engagement, including with the salmon and trout finfish farming industry, net, pen and mooring suppliers/manufacturers, insurers, engineers and research institutes, through a Scottish Aquaculture Research Forum (SARF) project to develop a Scottish technical standard, likely timeframes for implementation and on subsequent inspection and audit regime. This included workshops in Inverness, Shetland and Oban in June 2011 to which all finfish production operators and trade associations operating in Scotland as well as fish farm equipment manufacturers and suppliers were invited. The detail of the proposed technical standard is being developed by an expert group including fish farmers and equipment providers. An initial draft Scottish technical standard including recommendations for further information required to develop the standard was published by SARF in February 2012.

Alternative approaches

71. The Scottish Government has previously considered four options for a technical standard through the Improved Containment Working Group of the Ministerial Group on Aquaculture. Other than no change, options considered were: a standard adopted by industry as part of a revised CoGP and subject to existing inspection/audit regimes; a standard adopted by industry as part of a revised CoGP and revised Marine Scotland role in ensuring compliance with containment aspects of the CoGP; and a Government standard to be adopted by industry with an inspectorate established to ensure compliance. We also considered an option to develop a technical standard with associated certification and inspection regimes similar to the NYTEK system in Norway but rejected this at an early stage due to cost both in terms of establishment and implementation of a new regime and duplication of existing industry audit and inspection regimes. The Group, after close dialogue with Atlantic salmon and rainbow trout farmers; trade associations; pen, net and mooring manufacturers; and engineers, recommended the approach outlined in the Bill. This will ensure that the standard developed is appropriate and will be fit for purpose in Scotland.

Steve Bracken, business support manager, Marine Harvest Scotland and chair of MGA Improved Containment Working Group – November 2011.

Dr Mark James, Operations Director, MASTS – November 2011.


www.akvaplan.niva.no/en/aquaculture/accredited_inspections/

Wellboats

72. A wellboat is defined within 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 or treatment.

73. Guidance within the industry CoGP advises how risks in wellboat operations, such as cross-infection and hazards to bio-security measures between farms, can be minimised. There is, however, no statutory requirement that wellboat operators or farmers record wellboat movements or what they are moving. This means that cross-contamination of pathogens and parasites continue to be a major concern. The introduction of additional control requirements on wellboats will enable standards of bio-security to be raised, and improve monitoring of fish movements by wellboat within and across national boundaries.

74. The provisions contained in the Bill will help to minimise the risks of sea lice and disease spread from wellboats, thereby improving fish health and protecting the interests of both the farmed and wild fish sectors. The Bill makes provision for Scottish Ministers to control and monitor the operations of any wellboats in Scotland. The provisions will also enable requirements to fit equipment such as filters, which would be of a sufficient mesh size to prevent the spread of sea lice through discharges, with powers for enforcement where compliance failure is determined.

75. For the purpose of enforcing regulations in the Bill, a marine enforcement officer will have a common enforcement powers conferred by part 7 of the Marine (Scotland) Act 2010. Scottish Ministers may recover any expense reasonably incurred by a marine enforcement officer taking such action from the person on whom an enforcement notice was served.

Consultation

76. The consultation document asked if consultees agreed that enabling legislation should be made to give Scottish Ministers power to place additional control requirement on wellboats. There was strong cross-sectoral support, with the exception of some parties within the aquaculture industry, for the introduction of enabling legislation giving Scottish Ministers powers to place additional control requirements on wellboats. The industry suggested an alternative Wellboat Working Group to consider the issues. Scottish Government will work with the industry to develop this appropriately. It is understood that Norway is moving towards technical standards for wellboats. As wellboats are a shared resource between the industry in Scotland and Norway, officials from Scottish Government will seek to work with counterparts in Norway to ensure standards are consistent.

Alternative approaches

77. The only viable alternative would be the status quo, which would in effect mean that there would be no improvements in fish health management and the issues surrounding cross-contamination of pathogens by wellboats would remain.
Chapter 3: Commercially damaging species

78. Currently there is no clear definition of a commercially damaging species and an absence of any ability to prevent and/or limit their movements. Commercially damaging species are defined within the Bill as those that, 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. There is existing legislation, contained primarily in the Wildlife and Countryside Act 1981 (as amended), which covers invasive alien species. While there may be some overlap with the 1981 Act in relation to species which are outwith their native range and may be both an invasive species and a commercially damaging species, it is anticipated that the provisions in this Bill will be used in respect of native species.

79. The provisions contained in the Bill are designed to assist in protecting the wider aquaculture industry from commercially damaging species. The provisions will provide the powers to limit the potential impacts of commercially damaging species on both a local and a national level. Such species may make a particular remote and rural area a no-go zone for commercial aquaculture, leading to the loss of jobs, decreased production and reduced economic performance. The provisions allow for action to be taken before there is any significant impact, maximising the potential for new developments and restarting existing operations.

80. The provisions have been informed by the experience of dealing with a commercially damaging species, *Mytilus trossulus*[^19], in Loch Etive. Loch Etive was one of the three highest mussel producing lochs in the country until *Mytilus trossulus* became dominant on mussel farms in the area. As a result of the low market value of this species (due to lower meat yields, thin shells and poor shelf life) mussel farming in the loch became unviable.

81. Control work that has been undertaken by voluntary agreement in Loch Etive has demonstrated how important it is to obtain agreement and cooperation between operators. Successful control work is important to reduce future impact on new areas. The new control provisions will enable control schemes to be implemented where a voluntary control agreement has been refused or has not been complied with. It will also enable emergency work to be undertaken where there is thought to be an immediate and significant adverse impact likely on aquaculture interests.

82. European Fisheries Fund grant aid provided for the shellfish farming facilities in Loch Etive to be synchronously cleared of stocks, which should allow for the commercially viable culture of blue mussels, *Mytilus edulis*, to restart.

83. The Bill provides powers for Scottish Ministers to control the movement of commercially damaging species by order. This provides powers to take samples from a site to determine whether a commercially damaging species is present, to carry out a programme of surveillance and to prohibit or otherwise control movement from the site. The purpose of these provisions is to prevent the further spread of a commercially damaging species to other areas where it could have adverse impacts on other aquaculture sites and operators.

84. The Bill provides for the notification of commercially damaging species. This will ensure that species that are listed as commercially damaging species, and are therefore considered a risk to the aquaculture industry, are reported to Scottish Ministers, can be investigated at an early stage, and control measures can be implemented as considered necessary.

Consultation

85. The consultation set out a proposal that additional powers should be provided for Scottish Ministers in relation to commercially damaging species. There was majority support for the proposal but further information and assurances were sought in relation to particular issues.

86. A Scottish Aquaculture Research Forum project sought to develop national and regional scale controls (using Loch Etive as a case study) to identify the appropriate management actions to prevent the species increasing in abundance where it is present and to avoid transfer of the species to areas where it is not already present. Following initial consultation with industry to identify their concerns, a draft code was prepared. This was informed by a literature review of existing legislation and existing codes of practice and guidance on invasive species. The provisions in the Bill will provide legislative backing to the measures outlined in the draft code of practice including vigilance in detection (including sampling measures), control actions and the avoidance of movement to help prevent spread.

87. The Scottish Government facilitated Shellfish Forum, which meets quarterly, has provided the opportunity for industry and government to discuss the issue of commercially damaging species and specifically the issue of *Mytilus trossulus*. Some responses to the Consultation noted support of the use of powers for identified problems such as *Mytilus trossulus*.

Alternative approaches

88. The alternative that was considered was providing powers to control movements, and notify and control *Mytilus trossulus* alone, not for other commercially damaging species. The potential impact of *Mytilus trossulus* was relatively unknown in Scotland until it caused the problems on Loch Etive; it is possible that, in time, there may be other commercially damaging species. It will be important to prevent adverse impacts on the fish and shellfish sectors to support these sectors and enable them to achieve challenging sustainable growth targets. Introducing powers that can be used for other commercially damaging species will also ensure there is more likelihood of successful control work to prevent spread and does not rely on voluntary cooperation to achieve success.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

89. None of the provisions in Part 1 will have a differential or discriminatory impact on equality groups.
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**Human rights**

90. The provisions in Part 1 are compatible with the European Convention on Human Rights.

**Island communities**

91. Aquaculture is a key food production sector for Scotland and operates in many remote rural and island communities, many of which depend on it to provide employment. The provisions in Part 1 will improve fish health and biosecurity bringing industry savings through reduced stock loss and improved productivity by increased operational efficiency and increased confidence for investors.

92. Where a commercially damaging species is identified and specified, provisions such as movement restrictions could be introduced that could impact on individual aquaculture operators. As these provisions aim to deliver protection to the wider aquaculture industry from commercially damaging species, they should safeguard jobs in those island communities more generally.

**Impact on local government**

93. The provisions have no impact on local authorities.

**Impact on sustainable development**

94. The provisions in Part 1 are expected to have a largely positive effect on sustainable development. Aquaculture is a key food production sector for Scotland and provides secure and high quality jobs in remote rural and coastal communities.

95. Wellboats are used extensively by the Atlantic salmon farming sector within and between management areas. Their activity increases the risk of pathogen and parasite spread between sites and areas that could lead to disease outbreaks. Through the provisions in the Bill, the potential impact can be reduced, for example, through filtration, parasites would be removed from the water and the opportunities for re-attachment eliminated. This has the added benefit of helping to reduce the emergence of parasite resistance to treatments and reduce reliance on medicine use. Such a measure will help to minimise environmental impacts.

96. As regards commercially damaging species, the provisions are expected to have a largely positive effect on sustainable development, as they deliver protection from commercially damaging species to the wider aquaculture industry, enabling it to grow.

**PART 2: SALMON AND FRESHWATER FISHERIES**

**Good governance**

97. The Strategic Framework for Scottish Freshwater Fisheries set out a shared vision of sustainably managed freshwater fish and fisheries resources that provide significant economic

20 [http://www.scotland.gov.uk/Publications/2008/06/26110733/0](http://www.scotland.gov.uk/Publications/2008/06/26110733/0)
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and social benefits for Scotland and its people. While the rights to fish for salmon and sea trout are private and heritable, the fish are a natural public resource.

98. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”) provides the framework for governance of salmon fisheries in Scotland by proprietor-led District Salmon Fishery Boards (DSFBs). The 2003 Act sets out the purpose of DSFBs and their statutory duties; however, it does not specifically provide for wider stakeholder and public involvement in their activities, the promotion of more open and consultative management, or a sanction to deal with non-compliance with the duties and obligations placed upon them.

99. The policy objective is to ensure that DSFBs, as bodies created under statute and having, in effect, public law functions, act in an open, fair and transparent way with greater accountability to their constituency. The Bill introduces a suite of good governance obligations on DSFBs, requiring them to act in a manner consistent with other public bodies. This includes the publication of the DSFB’s annual report, accounts and minutes of meetings; holding of an annual public meeting; the presumption of meetings open to the public; a register of members’ interests; and a requirement to have a complaints procedure in place. Many DSFBs are already operating in this way and the Bill seeks to underpin this good practice to drive improvement across the sector and encourage greater local participation and interest in DSFB activities. The Bill also includes the power for Ministers to modify, by order, the good governance requirements to ensure they remain up to date and in line with equivalents in the public sector. This power is narrow in scope and would not, for example, allow for change to DSFBs as local management structures.

100. The Scottish Government wishes to see DSFBs engage more with local interests, for example anglers, and also the general public, taking account of community and interest groups’ views. This is particularly relevant where DSFBs are considering an application to Ministers for statutory management measures. Public consultation on the general effect of proposals for orders or regulations made under the 2003 Act is provided for under paragraph 11 of schedule 1. This is undertaken at a stage where Scottish Ministers have considered detailed proposals from a DSFB and taken advice on them from appropriate persons, for example SNH, SEPA or Marine Scotland, and are minded to proceed with the statutory process provided for in schedule 1 to the 2003 Act. This consultation process is similar to that routinely undertaken prior to the introduction of any secondary legislation.

101. It is considered desirable that additional, earlier consultation with interested parties take place prior to proposals being submitted to the Scottish Ministers. This would promote local participation in, and a greater, local understanding of, the development of management measures which may impact on a number of interested parties. It would enable a wide range of opinion to contribute to the process and generate informed debate on river and fisheries management. It can be anticipated that proposals developed in co-operation and discussion with local communities will be evidenced more thoroughly and developed in a more holistic manner than can currently be the case, aiding their consideration by Ministers. The Bill responds to this policy objective by introducing a duty on DSFBs to advertise and consult on any applications they intend to make to Scottish Ministers for statutory measures under the 2003 Act. DSFBs will be required to consult with those with a direct interest in or who are likely to be affected by the proposals and the Bill prescribes a procedure that should be followed. This new pre-application consultation duty fits with the themes of openness, transparency, fairness and accountability.
102. Scottish Ministers do not intend to become more involved in administering or monitoring DSFBs. The clear preference is for accountable, effective management at a local level and for DSFBs to be held to account by their local constituency. However, the absence of a sanction against non-compliance with statutory obligations is a risk to effective management of fisheries and the Bill therefore provides a power for Scottish Ministers, exercisable in extremis, to dissolve by order the incumbent committee forming the DSFB. The effect of this will be to trigger the election of a new committee by proprietors.

103. The power to dissolve a committee will only be used in cases of persistent failure to comply with the good governance or other statutory obligations placed on DSFBs. It is intended to be used only in circumstances where all reasonable attempts to address persistent failure have been exhausted. The Scottish Government recognises the differing nature of DSFBs and that each is a product of local circumstances. Ministers intend to consider individually each case of non-compliance brought to their attention and do not intend to state a standard behaviour threshold. It is anticipated that non-statutory guidance on the good governance principles will be issued by the Scottish Government to aid compliance. It is also considered that DSFBs themselves, for example through the Association of Salmon Fishery Boards (ASFB), will work together to drive and enshrine good governance within the sector.

104. There is no policy intention within the Bill to change fundamentally the existing local, voluntary arrangements for management of wild salmon fisheries. However, the Bill represents the first step in taking forward the Scottish Government’s commitment to modernise management structures: delivering immediate improvements to the existing governance functions pending a more comprehensive consideration of management options.

Consultation

105. There is public expectation that managers of public resources should act in an open, transparent manner and be accountable for their decisions and actions. While the 2003 Act provides the statutory framework for management of salmon and freshwater fisheries it consolidates historic legislation and has not kept pace with modern expectations and practices. The existing good practice by DSFBs on good governance was recognised by the Scottish Mixed Stock Salmon Fisheries Working Group but the need to strengthen and support greater openness, transparency and information sharing was also noted.

106. There was overall support among consultees for measures to ensure DSFBs act openly and transparently and are more accountable. Consultees discussed the suitability of various mechanisms to deliver this policy objective, including how the requirement could best be enforced. Some commented on the diversity of Scotland’s DSFBs and the need for new statutory provisions to acknowledge local circumstances. While supportive of a Code of Practice for DSFBs there was overall opposition to making this a statutory requirement. Some consultees pointed to the existing Code of Good Practice prepared by the ASFB which offers guidance and support to DSFBs from their representative body. Some consultees argued for greater access to DSFB business and decision-making, stating that those with a direct interest and potentially affected by management proposals should be made aware of how the proposals were developed, their effect and the views of others.
Alternative approaches

107. The alternative approaches would be to pursue a statutory Code of Practice or to continue to rely on voluntary adoption of good governance principles across all DSFBs. It is accepted that many Boards have made improvements in this area and the Bill proposals are based on statutory underpinning of existing good practice. However, there is a recognised need for further improvement and a clear case for requiring DSFBs to act in a way which is consistent with bodies with public law functions. This supports the case for additional obligations to be placed on DSFBs.

108. There was little support for a statutory Code of Practice. The ASFB’s existing Code is sector led, developed and monitored and this provides an appropriate guidance and support tool for DSFBs in understanding and fulfilling their functions. It is therefore anticipated that the ASFB’s Code will continue to exist and be further developed and updated to reflect new statutory responsibilities and working practices.

109. The alternative to a power of dissolution for Ministers would be to continue with no sanction for non-compliance or to introduce specific criminal sanctions. The former is not compatible with policy objectives for effective management of salmon and freshwater fisheries and there is an obvious gap in accountability which needs to be addressed. The latter is considered undesirable as a matter of policy. The 2003 Act envisages local management of salmon and freshwater fisheries by a locally accountable, elected committee of proprietors comprising the DSFB for that district. The Scottish Government would seek to intervene or interfere with the functions of a DSFB in circumstances only where it persistently fails to achieve its statutory objectives or exercise its functions. In such a case, the Scottish Government’s primary objective is to ensure the DSFB gets back on track, dissolving the offending committee to assist the appointment of a new committee in order to achieve the DSFB’s statutory functions and to ensure the district’s fisheries management needs are adequately addressed and met. Criminalising proprietors will not assist to deliver this objective, whereas locally driven change in DSFB management will.

Enhancing management of salmon fisheries

110. The majority of the following proposals stem from the legislative recommendations of the Scottish Mixed Stock Salmon Fisheries Working Group (SMSSFWG), published in 2010. The SMSSFWG report recommended a Bill be brought to the Parliament to take these forward.

111. Salmon fisheries are managed on a voluntary, local basis by a committee of proprietors through DSFBs with a presumption in favour of locally-agreed voluntary management solutions. This structure sits within a national legislative framework which regulates effort and practice in pursuit of sustainable salmon and freshwater fisheries objectives. The Scottish Government has obligations to the EU and internationally on salmon conservation and hence responsibility for ensuring that domestic arrangements reflect these obligations and best practice.

112. Information on the status of salmon fisheries is acquired, compiled and disseminated through publication of annual catch statistics by Marine Scotland in reliance of powers in section

21 http://www.scotland.gov.uk/Publications/2010/03/31154416/0
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64 of the 2003 Act. Interpretation of such data within a wider framework of stock conservation, protection and enhancement is facilitated by a targeted research and monitoring programme. This work is conducted primarily by Marine Scotland and supplemented with specific time-limited projects commissioned by Marine Scotland through the university and private sector routes.

113. Scottish Government policy is to promote an evidence-based approach to fishery management, supporting entitlements to fish in accordance with the law where stocks can support the effort. The differing aims and interests of wild fisheries groups should be acknowledged. Angling proprietors seek to manage fisheries for abundance of angling while netsmen exercise their right to harvest fish for commercial purposes. The need for occasional management measures to reduce exploitation for conservation reasons is recognised by all stakeholders and there are many examples of these in place across the country. In cases where local agreement on voluntary measures cannot be reached or where they have not adequately addressed the issue DSFBs can apply to Scottish Ministers for statutory measures. In seeking action or resolution through national government, DSFBs as local managers should acknowledge that Scottish Ministers will have regard to the advice of statutory advisors, national strategic objectives and priorities when determining applications.

114. Scottish Ministers have powers to make some fisheries management measures at their own hand; however, certain options can only be pursued at the request of DSFBs. There is no intention in the Bill to introduce a parallel management system. However this piecemeal approach presents risks in terms of contingency planning and addressing national challenges such as development of a co-ordinated response to climate change.

Carcass tagging

115. The SMSSFWG recommended the introduction of a carcass tagging scheme for all wild, net-caught salmon offered for sale, whether privately or on the open market. The Group cited policy drivers of enhanced traceability, additional support for tackling the illegal sale of rod caught salmon, improved data gathering and marketing of a premium Scottish product. An application for protected food name for Scottish wild salmon is currently being considered by the European Commission.

116. A voluntary carcass tagging scheme for salmon (though not sea trout) is already in place in Scotland and applies to 90% of the net caught fish offered for sale. This pilot scheme was developed with financial support from the Scottish Government. It is operated through the Salmon Net Fishermens’ Association of Scotland and has been in place since 2010. The scheme involves attachment of a gill tag bearing the name, address and contact details of the fishery on one side and the ‘Scottish wild salmon’ brand logo on the other. The tags are not numbered and no logbook is kept. A statutory scheme of carcass tagging has been in place in England and Wales since 2009. It is administered by the Environment Agency (EA) and linked to the licensing arrangements for salmon fishing. Tags are numbered and logbooks kept and returned to the EA annually.

117. The Bill provides an enabling power for Scottish Ministers to make regulations requiring salmon caught and retained by any legal method to be tagged. The purpose, scope and requirements of the scheme are to be defined in the regulations. Once the regulations delivering
the scheme are in force, it will be a criminal offence to sell, offer for sale, or have possession of any salmon that has not been tagged in accordance with the regulations, or to remove a tag otherwise than in accordance with them. Contravention of the regulations or failure to take any action or to comply with a requirement of the regulations will also be a criminal offence.

118. There is a number of options for how the scheme could operate in practice and for its administration. Stakeholder views on these vary. Some favour placing the current voluntary scheme on a statutory footing, seeing considerable advantage in the continuation of proven, light-touch administrative arrangements and technology. Others wish to see a scheme administered by the Scottish Government or DSFBs with numbered tags and record-keeping requirements. Consultation with stakeholders is currently being undertaken with a view to introducing a scheme which delivers policy intention without imposing a disproportionate financial burden on small businesses.

Consultation

119. The proposal for a carcass tagging scheme came from the SMSSFWG with both the angling and netting sectors in support. There was strong support among consultees for powers to introduce a carcass tagging scheme in Scotland with respondents recognising numerous potential benefits from the proposal. Some felt a scheme would bring Scotland into line with England and Wales while others felt it was an extension of the existing voluntary scheme. Opposition to the proposal was based on the potential administrative and financial burdens for local fisheries and questioning of benefits in relation to costs. A number of respondents emphasised the importance of additional consultation with stakeholders on the design and the detail of the scheme.

Alternative approaches

120. The alternative approach is continued reliance on the voluntary scheme. While this covers around 90% of the net caught fish going to market it is not universal, potentially undermining the benefits that can be realised from a statutory scheme. It is notable that although opinion differs between angling and netting interests on the purpose and design of the scheme, the power to create a statutory scheme has support from both sectors.

121. The use of an enabling power to create a statutory scheme is in line with recognised practice in framing legislation. An alternative would be to outline the scheme in primary legislation. This is not considered an appropriate approach given the technical detail and operational nature of the scheme and the need for flexibility in the light of operational experience.

Sampling and information

122. The policy objective is for effective, science-based management, protection and conservation of salmon. For these purposes, the Scottish Government requires access to fish for investigation and sampling. This can include sampling for genetic material to aid understanding of stocks within rivers, and whole fish for acoustic tagging and tracking to identify spawning sites and identify the factors that suppress population size. This work, undertaken by Marine Scotland, informs development of national policy across a range of marine policy areas, notably regulation of exploitation and options for mitigating against potential impacts of renewable energy installations and other developments.
123. Access to information on activities undertaken by proprietors and others with respect to management of salmon fisheries is also required. For example, information on local management plans including how information is obtained on numbers of fish, structures of stocks and defining of stock levels (such as conservation levels) below which exploitation might be curtailed or suspended in order to conserve populations. Quantification of impacts of factors affecting fish stocks and fisheries, along with options for mitigating against these factors if appropriate and practicable, is also needed. It is considered that local managers and proprietors should work together with the Scottish Government to co-ordinate approaches, share expertise and develop best practice.

124. Scottish Ministers have powers under section 64 of the 2003 Act to conduct inquiries and investigations into questions of practical or scientific importance to salmon and freshwater fisheries. They also have powers to collect statistics on salmon caught in salmon fisheries. Non-compliance with a request under section 64 is a criminal offence. These powers are exercisable for the purpose of protecting and developing stocks.

125. The 2003 Act does not specifically provide powers for access to fish or fish samples. To date, fisheries have willingly given access to Scottish Government researchers and scientists. However, co-operation is voluntary and relies on goodwill. It is considered desirable to have a reserve power which can be relied upon in cases where there is public interest in investigating a fishery but the co-operation of the owner or occupier is not secured. The Bill provides the Scottish Ministers with powers to take fish and samples of fish for analysis and to undertake tracking and monitoring of fish. This work, undertaken in the national interest, will inform conservation and fisheries management decisions at national and local level. Failure or wilful refusal to permit the taking of fish, taking of samples or to provide fish or samples of fish from a fishery will be a criminal offence.

126. In recognition that Scottish Ministers undertake inquiries and investigations of fisheries in the national interest, the Bill removes the caveat in section 64 of the 2003 Act that the operation of Ministerial powers shall not cause damage or interference to the rights of the owner or occupier of the fishery. It is considered that, on balance, any interference in an individual fishery caused where officials undertake scientific investigations is necessary in the public interest and proportionate in the context of wider national objectives of protection of salmon stocks.

127. The Bill responds to the need for additional information on fish and fisheries by broadening the requirement on occupiers and proprietors to provide statistics to include provision of information. The purpose remains for the protection and development of stocks and the request for information must be reasonable. It is intended that this be a backstop power to be used only where the collection of information is in the national interest but an agreement to co-operate in the provision of information cannot be reached. This power complements the good governance themes of openness and transparency and responds to the SMSSFWG’s call for greater information sharing by all parties in the public and private sectors.

128. In partnership with stakeholders, the Scottish Government intends to consider the need for a national data collection workstream to consider the most effective collection and use of information and statistics on fish and fisheries. This might include exploration of the various
material collected and held by bodies with an interest in fisheries, including the Scottish Government, DSFBs, River and Fisheries Trusts, SEPA and SNH and how it can be shared and used.

Consultation

129. The proposal to create reserve powers to ensure fish and fish samples are provided from any salmon fishery originated from the SMSSFWG in support of evidence-based management of fisheries. There was strong support among freshwater fisheries consultees for Ministerial powers to take fish and fish samples. The aquaculture and other commercial sector respondents were opposed, however. Some consultees commented that the extent of existing Ministerial and DSFB powers in this area is not clear.

130. The majority of consultees supported the principle of providing information to the Scottish Government on fish and fisheries. A small number had reservations. Consultees mentioned the areas of fish introductions, stocking and hatchery operations as key areas where sharing of information was needed, based on perceptions of lack of transparency about activities and impacts. An integrated national data collection strategy was suggested by some, and it was felt that additional consultation with stakeholders was required with the goal of reaching agreement on collection of additional information with proprietors, Boards and regulatory authorities. Some consultees highlighted the cost implications for Boards and Fishery Trusts of providing information.

Alternative approaches

131. The alternative to introducing powers to require fish and fish samples, and information on fisheries, is to continue reliance on voluntary arrangements. While assistance from proprietors and others has been forthcoming in the past there is no guarantee that this will remain the case. It is considered that a backstop power is reasonable and justifiable to enable the pursuit of work undertaken in the national interest.

Annual close time and conservation measures

132. The annual close time is a cornerstone of salmon management and conservation. It provides a continuous period of time where fishing by all methods is prohibited except by rod and line and under express statutory provisions, offering a measure of protection for fish during the reproduction season. The annual close time for each salmon fishery district is prescribed in statute. Under the 2003 Act, DSFBs or - where there is no DSFB - proprietors, may apply to Scottish Ministers for variations to the dates of the annual close time and periods within it where fishing for salmon by rod and line may be permitted. Scottish Ministers currently have no powers to change either the close time dates or the permitted fishing periods at their own initiative, nor can they require DSFBs to monitor and evaluate the impact of variations on salmon stocks in cases where fishing by rod and line during the annual close time has been permitted.

133. The 2003 Act also provides for regulation of salmon fishing through prohibiting the use of specified baits and lures and by general conservation measures, for example catch and release. These options can be pursued by DSFBs at their initiative, or by Scottish Ministers. However,
Scottish Ministers cannot require monitoring and evaluation of the effect of measures on salmon stocks.

134. The policy objective is for a flexible, responsive suite of management options to be available to DSFBs and Scottish Ministers to ensure that salmon are adequately protected while the economic benefits of fisheries are realised. The primary role of DSFBs as local managers is acknowledged but there is a need for Ministers to be able to act to address issues in the national interest. Where locally-applied management measures are in place, these should be robustly monitored and evaluated to assess their impact.

135. The Bill contributes to the policy objectives by enabling Scottish Ministers to initiate a wide range of management and conservation measures by amending section 38 of the 2003 Act to include annual close time orders as a conservation measure available to Ministers. This fulfils recommendations 4 and 5 of the report of the SMSSFWG22. The Bill will enable Ministers to promote a wider, more flexible package of management measures where advice from statutory advisors suggests there is need, ensuring they have a full range of options to address problems which pose a significant risk to stocks. A Ministerial power to make annual close time orders will support risk management in terms of potential infraction proceedings or reputational damage from inability to fulfil obligations to the EU; in circumstances where there is no DSFB in place or where a DSFB does not intend to promote measures in their own behalf; or where there are cross-DSFB dimensions.

136. Further, it provides that Scottish Ministers can impose requirements on DSFBs and proprietors in relation to the monitoring and evaluation of the effect of annual close time orders and salmon conservation regulations; and on DSFBs for baits and lures regulations. This will ensure management measures are monitored robustly and consistently with a view to assessing their continued effectiveness. Contravention of monitoring and evaluation requirements will be a criminal offence.

137. The Bill introduces two further amendments to the 2003 Act in relation to statutory measures. These reflect Scottish Government policy to promote clarity on the legal exercise of fishing rights and ensure the framework for applications for statutory measures can be readily updated to reflect future changes in working practices.

138. The Bill provides Scottish Ministers with the power to amend, by order, the procedures by which applications for designation, estuary limits and close times orders, and conservation and baits and lures regulations are made and considered. This takes account of possible developments in information technology or accepted practices in carrying out consultations or placing adverts.

139. A technical, consequential amendment is also made to the 2003 Act regarding the offence of fishing during the annual close time. Its purpose is to provide clarity on the circumstances in which it is legal to fish by rod and line during the annual close time. The defence of fishing for salmon by rod and line during periods exempted by regulations, byelaws, designation orders,

22 http://www.scotland.gov.uk/Publications/2010/03/31154416/0
annual close time orders and conservation regulations is set out in the amended version of section 14(2) of the 2003 Act.

Consultation

140. There was strong support across all stakeholder groups for Ministerial powers to make annual close time orders at their own hand and to attach conditions. However, there were varied views on the circumstances in which it was appropriate for Ministers to exercise the power and to promote combined measures; DSFBs and Trusts largely felt that it was the responsibility of DSFBs to promote measures and the power should only be used where there was no DSFB. Others felt it should be a reserve power for when DSFBs were not fulfilling their obligations and some considered that it should be used only where Ministers had significant concern about stocks. Many recommended a partnership approach to developing conditions.

Alternative approaches

141. The two alternative approaches are for the power to initiate applications for all management measures to rest solely with Ministers, or to continue with the existing piecemeal approach. The former is not proportionate or desirable and does not align with broader policy on local management of salmon fisheries. The latter is discounted on the basis of the need for Scottish Ministers to ensure effective contingency and risk management systems are in place and overwhelming support among consultees for legislative change.

Introductions

142. Proposals to introduce fish or spawn of fish into inland waters or to possess live fish or spawn is subject to a consent process under section 33A of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. Marine Scotland Science is the consenting authority on behalf of Scottish Ministers for all species with the exception of salmon fishery districts with a DSFB, where the DSFB is the consenting authority for the proposed introduction or possession of salmon and salmon spawn. Introduction of live fish or spawn, or possession of live fish or spawn with an intention to introduce, without consent is a criminal offence.

143. Scottish Government policy is for rivers and fisheries to be sustainably managed based on the best available science. The practice and potential impacts of fish stocking are subject to considerable debate among stakeholders; the debate is characterised by concerns about lack of transparency on activities and impacts. Due to the division of responsibilities for consenting to introductions there is no national picture of stocking practices and no mechanism to ensure it is undertaken in line with good practice and monitored effectively. DSFBs may consent to their own introductions of salmon, a situation which presents potential risks in terms of impartiality and transparency. They may also licence introductions where the inland waters are, or may affect, a designated site for salmon or other protected species under the Habitats Directive. This presents risks in terms of the Scottish Government’s obligations under European law as DFSBs are not subject to any statutory obligation to consult on their introduction plans.

144. The policy objective is that, where stocking does take place, it is done in line with good practice guidelines and that appropriate record keeping and monitoring take place. There is a range of guidance material and literature on this issue produced by a variety of bodies. The Scottish Government intends to review this body of work in partnership with key stakeholders.
and develop a national policy position. This will include consideration of whether, in certain circumstances, it is it more appropriate for Scottish Ministers, in the national interest, to take responsibility for consenting to introductions of salmon and salmon spawn, even where a DSFB is otherwise the consenting body. It is anticipated that potential circumstances might include where the waters are situated within a Special Area of Conservation (SAC), where self-authorisation is proposed, or where there is evidence of poor restocking practice which has not been addressed through local management.

145. The Bill supports policy objectives by introducing an enabling power for Scottish Ministers, to modify, by regulation, DSFBs functions under the 2003 Act with respect to consenting to introductions. The regulations may specify circumstances or cases where the consenting function is to be exercised by Ministers or when applications for consent should be referred to them; and in cases of referral to determine the application or to issue direction to DSFBs on determination. This represents a proportionate approach to managing risk, providing the ability for Ministers to act in support of their national objectives and obligations whilst acknowledging the role of DSFBs as local managers.

146. The Bill also provides for a more robust and accountable consenting regime for introductions by giving the Scottish Ministers and DSFBs powers to attach conditions and requirements to consents for introductions of all freshwater species, including salmon and salmon spawn. Breach of the requirements or conditions will be a criminal offence. As a parallel and complementary measure, the Bill also introduces certain additional amendments to strengthen existing provisions in the 2003 Act which makes provision for consenting regimes for activities such as taking of broodstock; electrofishing; methods of fishing during the close time; and netting, trapping and disturbing redds - for all freshwater species – to enable the consenting authorities to attach conditions and requirements to statutory consents and permissions. Breach of these conditions will again be a criminal offence.

Consultation

147. The need to undertake further work on stocking and, more broadly, fish introductions, as a fisheries management tool was identified in the Strategic Framework for Scottish Freshwater Fisheries. There was strong support among consultees for Ministerial powers to restrict or exclude the jurisdiction of DSFBs with respect to consenting to introductions. A need for more information on fish introductions, stocking and hatchery operations was shared by respondents based on a view that there is a lack of transparency about stocking activities and their impacts. Others felt a reserve power would provide a helpful safety net where DSFBs were not fulfilling their duties. Many respondents highlighted the variety of good practice guides on introductions, including that of the DSFBs.

Alternative approaches

148. The alternative approach to delivery of the policy objective is to remove DSFB jurisdiction over introduction of salmon and salmon spawn and vest it exclusively with Scottish Ministers. This would bring together all freshwater fish introduction consents with one body: Scottish Ministers. In the absence of a full assessment of the operation of the current consent regime under the 2003 Act, this option is not considered to be justified and does not align with broader policy on local management of salmon fisheries.
EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

149. None of the provisions in Part 2 will have a differential or discriminatory impact on equality groups.

Human rights

150. The provisions in Part 2 are compatible with the European Convention on Human Rights.

Island communities

151. The provisions in Part 2 support the shared vision of sustainably managed freshwater fish and fisheries resources that provide significant economic and social benefits for Scotland’s people, including island communities.

Local government

152. The provisions in Part 2 have no impact on local authorities.

Sustainable development

153. The provisions in Part 2 support the shared vision of sustainably managed freshwater fish and fisheries resources that provide significant economic and social benefits for Scotland’s people.

PART 3: SEA FISHERIES

154. Experience has shown that some additional enforcement powers are required for sea fisheries enforcement officers in Scotland. These include the power to detain vessels in port to ensure the attendance of suspects at court proceedings, the power to dispose of property and forfeit illegal equipment, and the power to inspect objects associated with commercial fishing activity. Similar powers already exist in the rest of the UK.

Detention of vessels in connection with court proceedings

155. The Bill provides powers for enforcement officers to detain vessels in port for the purposes of ensuring that alleged offenders attend relevant court proceedings. Enforcement officers have powers to take vessels to port to facilitate investigations where offences are suspected. Where the procurator fiscal instigates criminal proceedings, the accused person is normally cited to appear in court on a given date. Where foreign vessels or individuals who live abroad are involved in the commission of offences, a different approach is required to ensure accused persons turn up in court. There is ambiguity regarding the scope of existing statutory provisions to detain vessels beyond the point where a report has been submitted to the procurator fiscal. The Bill seeks, therefore, to provide express powers to detain vessels in connection with court proceedings.
Inspection and seizure of objects used in commercial sea fishing

156. Enforcement powers currently available to sea fisheries enforcement officers are generally predicated around the inspection of a vessel, vehicle, or certain premises. There is a potential gap in enforcement powers when an inspection does not involve one of these situations. Officers may encounter objects in the sea, or in harbours, or on the foreshore which appear to relate to commercial sea fishing but they are not at that time immediately associated with a vessel, vehicle, or relevant premises. The Bill, therefore, seeks to provide inspection powers to inspect objects which are being used in connection with commercial sea fishing.

Forfeiture

157. Sea fisheries enforcement officers have powers to seize material as evidence. They do not, however, have any authority to interfere with the property rights of seized material and dispose of such items unless they are forfeited by the courts at proceedings for any relevant offences. If items are not forfeited by the courts, or if no proceedings are instigated, then any seized items fall to be returned to their owner. The return of property in certain circumstances, however, may run contrary to the public interest. This might include situations where enforcement officers find persons with live immature shellfish in their possession for the purposes of offering them for sale where the ‘common sense’ approach would be to take the live shellfish and return it to the sea where it can continue to grow. There may also be occasions where the use of seized items in connection with sea fisheries would be illegal. It would, therefore, seem counterintuitive that enforcement action would be taken by the authorities because they had detected illegal activity, only to facilitate the continuation of that same activity through the return of the means to carry out the relevant offence. The Bill, therefore, seeks to provide the Scottish Ministers with powers to dispose of property and the power to forfeit prohibited items which have been seized by enforcement officers.

Enforcement of EU rules

158. Section 30(1) of the Fisheries Act 1981 creates offences and confers inspection powers for effective enforcement of EU obligations relating to sea fishing where an order has not been made under section 30(2) of the 1981 Act. At present the scope of section 30(1) is limited to the sea area inside the 200 nm fishery limit around Scotland. The Bill seeks to amend section 30(1) to include the activity of Scottish vessels wherever they are.

Consultation

159. In general there was broad support among respondents for the additional sea fisheries enforcement powers contained within the Bill. Areas of concern were around the need for consistency and safeguards in the application of enforcement powers.

Alternative approaches

160. The alternative to the creation of the additional enforcement powers proposed in the Bill would be to rest on existing statutory provisions. This would, however, leave several potential gaps in the powers available to monitor compliance with regulatory obligations and take appropriate enforcement action where required.
EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

161. None of the provisions in Part 3 will have a differential or discriminatory impact on equality groups.

Human rights

162. The provisions in Part 3 are compatible with the European Convention on Human Rights.

Island communities

163. Sea fisheries are an important part of the economy of many remote rural and island communities. There is a risk that, where poorly maintained vessels are taken to port in respect of a fisheries infringement, they are deemed too unsafe to leave the port by the relevant competent authorities until repairs carried out or deficiencies in safety equipment addressed. In extreme cases these vessels can become a socio-economic burden to the ports where they are located especially where the crew of the vessel (who may be unable to go ashore for immigration related reasons) run out of provisions.

Impact on local government

164. For the reasons set out above, vessels can become a socio-economic burden to the ports (some of which are owned by local authorities) where they are located especially where the crew of the vessel (who may be unable to go ashore for immigration related reasons) run out of provisions.

Impact on sustainable development

165. On the whole, the provisions in Part 3 are expected to have a largely positive effect on sustainable development as they deliver added protection to the sustainable sea fisheries sector.

PART 4: SHELLFISH

Protection of shellfish waters

166. The policy objective is to ensure the continued sustainability of the Scottish shellfish industry following the repeal of the Shellfish Waters Directive (SWD) in 2013 by creating new legislative provisions to safeguard shellfish waters protected areas. The broad principles of the SWD will be incorporated into the river basin management planning process introduced by the Water Framework Directive (WFD).

167. Shellfish waters will continue to be designated as protected areas within the River Basin Management Plans (RBMPs). Ministers will develop a framework of environmental objectives for designated shellfish waters. An environmental objective will be assigned to each designated water and this objective will become the focus of any environmental improvement programmes.
This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 3 October 2012

Delivery of these objectives will be aligned with other RBMP processes. SEPA and the FSA will continue to monitor shellfish and their waters.

168. This policy objective will ensure continued support is provided to the shellfish industry, safeguarding jobs in local communities as well as protecting human health and the water environment from the effects of pollution. However, in providing this continued protection to the shellfish industry, consideration needs to be given to ensuring that any additional costs falling on other sectors and public bodies are not disproportionate.

Consultation

169. The Scottish Government carried out a consultation in October 2011 “Delivering Scotland’s River Basin Management Plans: An integrated approach to the protection of shellfish growing water,”23 which set out a range of proposals to address the need to continue to offer protection to shellfish growing waters. The Scottish Government received 21 responses from organisations and one individual response. Overall the respondents were supportive of the proposals.24 They welcomed the recognition of the shellfish industry for its economic importance and the continued support of Scottish Government to the protection of shellfish waters.

170. During the consultation and policy development process numerous discussions have taken place with stakeholders including:

- SEPA;
- FSA in Scotland;
- Association of Scottish Shellfish Growers.

Alternative approaches

171. The alternative approach would be to do nothing following the repeal of SWD. There would be no faecal indicator organisms standard (within the WFD) and no legal obligation for those discharging to the water environment to protect growing shellfish. This would result in deterioration to Scotland’s waters quality which would not support a sustainable future for the shellfish farming industry and could impact human health.

Orders as to fisheries for shellfish

172. The Bill also amends the Sea Fisheries (Shellfish) Act 1967 (“the 1967 Act”) to make the operation of section 1(1) of the 1967 Act more straightforward. Sections 1(1) of the 1967 Act enables the Scottish Ministers to make several orders and regulating orders for the establishment, improvement, maintenance and regulation of shellfish fisheries. (Several orders give the grantee of the order exclusive rights to manage a fishery for shellfish; regulating orders give the grantee a right to manage (regulate) activities within the area of the order, including the imposition of restrictions on where shellfish may be taken.) At present, Ministers’ powers are restricted to making such orders in respect of the types of shellfish specified in section 1(1). Ministers have a regulation-making power, however, to add to the list of shellfish, listed in section 1(1) and have

23 http://www.scotland.gov.uk/Publications/2011/10/03120828/0
24 http://www.scotland.gov.uk/Publications/2012/05/8479
done so under the Shellfish (Specification of Molluscs and Crustaceans) (Scotland) Regulations 1999 (SSI 1999/139).

173. The Bill amends section 1(1) of the 1967 Act to extend the Scottish Ministers’ order-making power under section 1(1) of the 2003 Act in order to remove the need for regulations to be made each time a non-specified type of shellfish is proposed to become the subject of a regulating or several order. This will simplify the process for making new regulating and several orders, and brings the law on the application for several and regulating orders in Scotland in line with the regime in England and Wales.

174. The Bill also contains provision to amend paragraph 4 of schedule 1 to the 1967 Act, which concerns the powers of Ministers to appoint an inspector to conduct an inquiry into an application for an order under section 1(1) of the 1967 Act. The policy intention is to make clearer Ministers’ discretionary power to appoint an inspector.

Consultation

175. There was limited response to the consultation on these provisions. Of those who did respond on them, most were in favour of the proposals. There were some concerns, however, amongst sea fisheries respondents and some individuals and political representatives.

Alternative approaches

176. Not applicable. The measures are technical amendments to existing statutory functions. There is no alternative other than to retain the current provisions which are over-complicated and lack clarity.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

177. None of the provisions in Part 4 will have a differential or discriminatory impact on equality groups.

Human rights

178. The provisions in Part 4 are compatible with the European Convention on Human Rights.

Island communities

179. The provisions in Part 4 support continued sustainability of the Scottish shellfish industry that provide significant economic and social benefits for its people, including island communities.

Local government

180. The provisions in Part 4 have no impact on local authorities.
Sustainable development

181. The provisions in Part 4 support continued sustainability of the Scottish shellfish industry that provides significant economic and social benefits for its people.

PART 5: MISCELLANEOUS

182. The measures contained within this part of the Bill make provision for charges in connection with a number of fishery functions (fin- and shellfish farming, salmon and freshwater fisheries and sea fishing) and for fixed monetary penalties for a wider range of marine related regulatory offences.

Charging

183. The principle of charging for goods and services where there are direct or indirect benefits is not new. There is a number of examples where charging regimes have been introduced, including the FSA, Quality Meat Scotland and SEPA. For many of these bodies charging has enabled them to progress projects and meet ongoing regulatory requirements through cost sharing and recovery.

184. Marine Scotland currently provides a number of services free of charges (for example aspects of the functions undertaken by Marine Scotland Fish Health Inspectorate) or at best at less than full resource cost. That is no longer a sustainable position as the pressures on public sector budgets increase at the same time as we seek to meet the demands of growing marine industry sectors.

185. To begin to address this position the Bill includes a provision for Scottish Ministers to enable them to make regulations for or about the imposition of charges in connection with the carrying out of certain fishery functions which will be specified in the regulations. It is recognised that the rationale and detailed arrangements for charges will need to be considered on a case by case basis and ensuring that they did not impact disproportionately on competitiveness.

186. There is a number of existing activities where the introduction of a charging regime could be appropriate but only if it is possible to demonstrate a clear link between the activity and the benefit to an individual stakeholder or group of stakeholders. For example, the Marine Scotland Fish Health Inspectorate helps to prevent the introduction and spread of serious fish and shellfish diseases in Scotland by providing advice and diagnostic service to fish and shellfish farmers, district salmon fishery boards, fishery trusts and other stakeholders.

187. Fish health inspectors also carry out inspection and testing of fish and shellfish farms to maintain the status of the United Kingdom as an approved zone for various diseases of fish and shellfish; fulfil the monitoring required in support of the additional guarantees afforded by the European Commission for the importation of live aquaculture animals or products to prevent the introduction of *Gyrodactylus salaris* and other parasites and diseases; and continue surveillance for infectious salmon anaemia.
188. It is proposed that a similar model to that currently used at section 24 of the Certification of Death (Scotland) Act 2011 (asp 11) be applied\textsuperscript{25} where it is explicit that, when determining the amount to be charged it must not be in excess of the reasonable costs of the exercise of the functions in respect of which the fee is to be charged and can only be imposed on persons with respect to whom the function is carried out. Any new scheme would need to balance a number of competing demands, and would need to be transparent, open to scrutiny and as simple as possible but with a range of factors that would help apportion costs fairly across a range of sectors. For example, that might include the premise that activities that pose the greatest risk attract the highest charge.

Consultation

189. While there was general support from consultees, there were some concerns about how this might be progressed, and the need for a proportionate approach. There was a general desire for further consultation, which would be undertaken as part of any order making process.

Alternative approaches

190. The alternative option to the non-introduction of a charging regime would be to retain the status quo. That approach would place considerable pressure on current funding arrangements designed to support sustainable growth with the wider marine environment.

Widening the scope of fixed penalties and increasing the maximum fine level

191. Section 25 of the 2007 Act makes provision for enforcement officers to issue fixed penalty notices (“FPNs”) in certain circumstances as an alternative to prosecution in the criminal courts. At present an FPN may only be offered as an alternative to prosecution for offences under sea fisheries legislation only. Measures in this section of the Bill will therefore widen the scope of offences for which FPNs can be used to include all marine and freshwater fisheries-related related offences which fall within the responsibility of Marine Scotland. This will mean that enforcement officers have access to a common set of options to deal with non-compliance on marine matters, including in relation to aquaculture and marine planning/licensing.

192. The current level of fixed penalty that can be offered is constrained by the definition given in section 27(1) of the Aquaculture and Fisheries (Scotland) Act 2007. Increasing the level of maximum penalty would allow a greater number of offences to be disposed of through the payment of a fixed penalty rather than prosecution through the criminal courts. In addition, the current maximum fixed penalty available may not be appropriate or provide a sufficient deterrent in the case, for example, of larger businesses where the benefits of non-compliance may significantly outweigh the potential penalty. The Bill will, therefore, increase the maximum level of penalty that can be offered to £10,000.

193. The expansion of the fixed penalty notice system to include other regulatory offences would not only be beneficial to the conservation of the marine environment but also to Marine Scotland, the Crown Office and Procurator Fiscal Service (COPFS), the fishing industry, other industries that work in the marine environment and recreational users of the sea. It would

\textsuperscript{25} http://www.legislation.gov.uk/asp/2011/11/section/24
provide certainty to operators about the consequences of regulatory non-compliance through a transparent and equitable process.

194. By widening the scope of the fixed penalty notice regime, many more offences could be, and would be, concluded outwith the criminal justice system with reductions in resource and opportunity costs for commercial operators, and the criminal courts. Commercial operators may be able to reduce or avoid expenditure on legal fees, and the time taken up with court appearances. They would also be able to avoid a criminal conviction which may have unexpected and un-helpful consequences for businesses in their wider commercial enterprises. This would also mean that only the most serious of regulatory non-compliance will be dealt with by the criminal courts.

195. The proposed increase in the maximum penalty that can be offered through a fixed penalty notice would mirror, in respect of sea fisheries offences, the maximum level of fixed penalty that can be offered in England under the Sea Fishing (Penalty Notices) (England) Order 2011.

Consultation

196. There were mixed views in the responses to this proposal, in particular strong opposition from the aquaculture industry. However, it was clear, from subsequent engagement with the industry, that they had conflated this issue with the separate issue of strict liability, and officials invested considerable time and effort in explaining the policy intentions to key stakeholders.

Alternative approaches

197. Alternative policy approaches were considered. One, take no legislative action and instead rely on existing mechanisms to achieve the same outcomes and two, enhance the compliance monitoring and regulatory regime by introducing strict liability for certain aquaculture related offences; extending the scope of the fixed penalty notice scheme, and enhancing the powers of enforcement officers where their existing powers are insufficient.

198. Experience has shown that, in relation to some aspects of regulatory non-compliance in the aquaculture sector, it is not always possible to determine who was directly responsible and ought to be held liable for apparent illegal activity. A potentially simpler and more effective model is one where strict liability for any non-compliance rests with persons in a particular position or capacity. Investigators would need only to pursue one avenue of enquiry to gather sufficient evidence to establish what happened, as there would be no requirement to demonstrate intent on the part of the accused. Where evidence proves that an offence has been committed, certain persons are guilty of that offence by virtue of the capacity/office they hold at the time of the offence.

199. An alternative to the use of strict liability would be the use of vicarious liability. Vicarious liability would mean that an employer could be held liable for the actions of an employee. However it would still be necessary for any investigation to establish the actions of the employee before vicarious liability could be successfully used to pursue his/her employer.
200. A number of reforms to the criminal justice process in Scotland in recent years have extended the range of alternatives to prosecution that can be offered. The general approach is that there should be less reliance on the criminal courts as the default means of punishing business non-compliance with regulatory obligations.

201. The alternative to widening the scope of the fixed penalty notice regime is to continue to rely on the criminal justice system, which runs contrary to justice reforms and the recommendations of a number of key reviews that, where possible, business regulatory non-compliance should be handled outwith the criminal justice system.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

202. None of the provisions in Part 5 will have a differential or discriminatory impact on equality groups.

Human rights

203. The provisions in Part 5 are compatible with the European Convention on Human Rights.

Island communities

204. The provisions in Part 5 will have no negative implications for island communities.

Impact on local government

205. The provisions in Part 5 have no impact on local authorities.

Impact on sustainable development

206. The provisions in Part 5 work in support of sustainable development.
AQUACULTURE AND FISHERIES (SCOTLAND) BILL

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