

CONSULTATION QUESTIONS

SECTION 1 - THE SUSTAINABLE DEVELOPMENT OF AQUACULTURE

Farm Management Agreements (FMAs)

1. Do you agree that we should, subject to appropriate safeguards, make it a legal requirement for marine finfish operators to participate in an appropriate Farm Management Agreement (FMA), with sanctions for failure to do so, or to adhere to the terms of the agreement? (Page 9)

YES, but the proposal is too vague. There needs to be provision for oversight and enforcement of FMAs, probably by SEPA as arms-length independent regulator. It could be an implied condition of a fish farm's discharge licence under the Controlled Activities Regulations (CAR) that the farm be signed up to the FMA for the area in question within a specified time limit.

FMAs should be available to the public. They could be kept on the public register maintained by SEPA under CAR.

Appropriate Scale Management Areas (MAs)

2. Do you agree that operators should have primary responsibility for determining the boundaries (and other management arrangements) for Management Areas, but with Scottish Ministers having a fallback power to specify alternative areas? (Page 9)

NO. This would require agreement amongst all the operators in a particular area, and they could use their failure to agree boundaries as a means of delaying implementation of a FMA. The effectiveness of a FMA could easily be undermined by the exclusion of one operator by the other operators in an area. SEPA or Scottish Ministers should determine and regularly review boundaries based on current states of knowledge.

The fact that information and understanding about connectivity between farms are incomplete is not a reason for leaving the setting of boundaries to industry, as opposed to government or regulator: they will be hampered just as much as anyone else.

Management Measures and Dispute Resolution

3. Do you agree that an independent arbitration process should be put in place (with statutory underpinning) to resolve disputes related to Farm Management Agreements? (Page 10)

YES

4. How do you think such a system might best be developed? (Page 10)

No comment

Unused Consents

5. Do you agree we ought to review the question of unused consents? (Page 11)

NO. The reasons given by operators for holding unused consents all seem perfectly reasonable, and some of them are highly commendable. If all consented sites were in production, the cumulative environmental impact from the industry would increase, making it less sustainable.

If the Locational Guidelines are causing a problem because they are based on consented biomass data, then the answer to that is to base them on better, available information about which sites are in production and which are not.

6. What do you consider are suitable options to promote use or relinquishment of unused consents? (Page 11)

No comment

7. Do you agree that Scottish Ministers should be given powers, ultimately, to revoke, or to require or request others to revoke, consents? (Page 12)

NO. There has to be proper justification in the public interest for depriving a person of their property, and the stated problem with the Locational Guidelines does not satisfy that test.

8. Should any such power relate to all or to particular consents (and if the latter, which)? (Page 12)

No comment

Collection and Publication of Sea-lice Data

9. What in your view is the most appropriate approach to be taken to the collection and publication of sea-lice data? (Page 13)

As much information on sea-lice as possible should be collected and published. Farmers' fears about misinterpretation of the data can best be allayed by open scientific debate. Such fears are no reason for secrecy. The Norwegian model is one which the bigger operators in Scotland should all be familiar with.

Surveillance, Biosecurity, Mortality and Disease Data

10. Do you agree that aquaculture businesses ought to be required to provide additional information on fish mortality, movements, disease, treatment and production as set out above? (Page 16)

Operators should certainly be required to collect such information, but not necessarily to actively provide it. Regulators should have powers to require the provision of such information when they need it.

11. What are your views on the timing and frequency of submission of such data? (Page 16)

No comment

Biomass Control

12. Do you agree that Scottish Ministers should have powers to require SEPA to reduce a biomass consent where it appears to them necessary and appropriate – for example to address concerns about fish health and welfare? (Page 16)

YES

Wellboats

13. Do you agree we should make enabling legislation giving Scottish Ministers powers to place additional control requirements on wellboats? (Page 17)

YES

Processing Facilities

14. Do you think Scottish Ministers should be given additional powers to place controls on processing plants? (Page 17)

YES

Seaweed Cultivation

15. Do you agree that the regulatory framework should be the same for all seaweed farms? (Page 18)

YES

16. Do you agree that the most appropriate approach to regulation of this sector would be through marine licensing? (Page 17)

NO

17. If not, what alternative arrangements would you suggest? (Page 18)

The control of activities in the water environment is best achieved by SEPA under the Controlled Activities Regulations (CAR), not by marine licensing. CAR allows for three levels of control: by site-specific licence for activities that pose most risk to the water environment; by registration subject to standard conditions for activities that on their own pose a small risk but cumulatively may cause problems; and, for the lowest-risk activities, by general binding rules (GBRs) set out in the legislation.

Unless seaweed cultivation requires chemical inputs, or the Strategic Environmental Assessment demonstrates that it will have other environmental impacts, licensing of individual seaweed farms would appear to impose a disproportionate regulatory burden. It would be more appropriate either to require registration of individual farms, if a potential cumulative impact is anticipated, or to classify seaweed cultivation as a new activity in Schedule 3 of CAR and develop appropriate general binding rules to control it.

Commercially Damaging Species

18. Do you agree that we should provide for additional powers for Scottish Ministers in relation to commercially damaging native species? (Page 19)

*NO. It would appear that the emergence of *Mytilus trossulus* as a threat to commercial production of *Mytilus edulis* in Scottish waters is a unique event, and as such does not justify the creation of a new category of 'commercially damaging native species' or powers to control such species, especially if such a classification could then be used as a means to control other native species such as seals or cormorants. If particular measures are required to control *Mytilus trossulus*, then specific legislation should be passed. However, Scottish Ministers should bear in mind their statutory duty under section 1 of the Nature Conservation (Scotland) Act 2004 to further the conservation of biodiversity. Far from being regarded as a nuisance, the discovery of a native relict population of a species otherwise found only in North America and the Baltic Sea should perhaps be a cause for celebration, and consideration given to designating this part of Loch Etive as a Site of Special Scientific Interest.*

SECTION 2 - PROTECTION OF SHELLFISH GROWING WATERS

19. Do you agree with the introduction of provisions to protect shellfish growing waters and support the sustainable growth of the shellfish industry? (Page 21)

YES

SECTION 3 - FISH FARMING AND WILD SALMONID INTERACTIONS

Sea-lice

20. Do you agree that there is a case for giving Scottish Ministers powers to determine a lower threshold above which remedial action needs to be taken, in appropriate circumstances and potentially as part of a wider suite of protection measures? (Page 23)

YES, but SEPA needs to be closely involved so that limits on discharges of chemical residues are not exceeded.

Containment and Escapes

21. Do you agree we should provide powers for Scottish Ministers to require all finfish farms operating in Scotland to use equipment that conforms to a Scottish Technical Standard? (The technical content of the standard would be defined separately.) (Page 25)

YES, but this and many other problems associated with fish farming, namely sea-lice infestations and benthic impacts from untreated waste products, would be completely and finally solved by the use of closed containment, whether floating in the sea or land-based.

Tracing Escapes

22. Do you agree that there should be additional powers for Scottish Ministers to take or require samples of fish from fish farms, for tracing purposes? (Page 26)

YES, but escapes could be totally eradicated by the use of closed containment.

SECTION 4 - SALMON AND FRESHWATER FISHERIES MANAGEMENT

Modernising the Operation of District Salmon Fishery Boards

23. Do you agree that we should introduce a specific duty on Boards to act fairly and transparently? (Page 29)

YES

24. Do you agree that there should be a Code of Good Practice for wild salmon and freshwater fisheries? (Page 29)

YES

25. If yes, should such Code of Good Practice be statutory or non-statutory? (Page 29)

Statutory

Statutory Carcass Tagging

26. Do you agree that Scottish Ministers should have powers to introduce a statutory system of carcass tagging for wild Atlantic salmon and sea trout? (Page 31)

YES

Fish Sampling

27. Do you agree that Scottish Ministers should have powers to take or require fish and/or samples for genetic or other analysis? (Page 32)

YES

Management and Salmon Conservation Measures

28. Do you agree that Scottish Ministers should have powers to initiate changes to Salmon District Annual Close Time Orders? (Page 32)

YES

29. Do you agree that Scottish Ministers should be able to promote combined salmon conservation measures at their own hand? (Page 32)

YES

30. Do you agree that Scottish Ministers should be able to attach conditions, such as monitoring and reporting requirements, to statutory conservation measures? (Page 32)

YES

Dispute Resolution

31. Do you agree that we should introduce statutory provisions related to mediation and dispute resolution, to help resolve disputes around salmon conservation, management and any related compensation measures? (Page 33)

YES

Improved Information on Fish and Fisheries

32. Do you agree that there should be a legal requirement to provide comprehensive effort data for rod fisheries? (Page 34)

YES

33. What additional information on the fish or fisheries should proprietors and/or Boards be required to collect and provide; and should this be provided routinely and/or in specific circumstances? (Page 34)

No comment

34. Should Scottish Ministers have powers to require Boards and/or proprietors or their tenants to investigate and report on salmon and sea trout and the fisheries in their district? (Page 34)

YES

Licensing of Fish Introductions to Freshwater

35. Do you agree that Scottish Ministers should have powers to recall, restrict or exclude the jurisdiction of Boards in relation to fish introductions, in certain circumstances? (Page 35)

YES

36. If so, why and in what circumstances? (Page 35)

No comment

SECTION 5 - MODERNISING ENFORCEMENT PROVISIONS

Strict Liability for Certain Aquaculture Offences

37. Do you agree that strict liability criteria should apply – where they capable of being applied – for offences related to Marine Licensing requirements insofar as the apply to aquaculture operations and, potentially, in other situations? (Page 37)

YES

Widening the Scope of Fixed Penalty Notices

38. Do you agree that we should extend the use of fixed financial penalties as alternatives to prosecution in relation to marine, aquaculture and other regulatory issues for which Marine Scotland has responsibility? (Page 38)

NO. This is yet another example of the piecemeal introduction of a range of different sanctions in various regulatory regimes, in many cases imposed directly by the regulator rather than necessarily involving the courts, whether fixed penalties or the “civil sanctions” under the Reservoirs (Scotland) Act

2011 or the Wildlife and Natural Environment (Scotland) Act 2011. There should be a proper debate about the desirability and appropriateness of this approach to enforcement and about the powers and safeguards to be provided so that there can be a consistent and principled enforcement mechanism across a number of regimes, rather than a series of fragmented and incomplete set of powers.

39. Do you agree that we should increase the maximum sum that can be levied through a fixed penalty notice to £10,000? (Page 39)

YES, subject to the comment above about the overall use of fixed penalties

40. Are there particular regulatory areas that merit a higher or lower maximum sum? (Page 39)

NO

Enforcement of EU Obligations Beyond British Fisheries Limits

41. Do you agree that we should amend section 30(1) of the Fisheries Act 1981 as proposed? (Page 40)

YES

Powers to Detain Vessels in Port

42. Do you agree that sea fisheries enforcement officers should be given specific power to allow vessels to be detained in port for the purposes of court proceedings? (Page 41)

YES

Disposal of Property/Forfeiture of Prohibited Items

43. Do you agree that sea fisheries enforcement officers should be able to dispose of property seized as evidence when it is no longer required, or forfeit items which would be illegal to use? (Page 41)

YES

Power to Inspect Objects

44. Do you agree that sea fisheries enforcement officers should have the power to inspect objects in the sea and elsewhere that are not obviously associated with a vessel, vehicle or relevant premises? (Page 42)

YES

Sea Fisheries (Shellfish) Act 1967

45. Do you have any views on the proposals to amend the Sea Fisheries (Shellfish) Act 1967 to help make its application clearer? (Page 42)

Seems sensible

SECTION 6 - PAYING FOR PROGRESS

46. Do you agree that there should be enabling provisions for Scottish Ministers to provide, through secondary legislation, for both direct and more generic charges for services/benefits arising from public sector services and activities? (Page 43)

YES, but this proposal should be subject to wider consultation.

47. If you do not agree that there should be charging provisions, how do you envisage ongoing and new work to assist in management and development of the aquaculture and fisheries sectors should be resourced? (Page 43)

No comment

48. If no new way of resourcing such activity can be found, what activities do you suggest might be stopped to free up necessary funds? (Page 43)

No comment

SECTION 7 – ANY OTHER ISSUES

UKELA is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. This response has been prepared by the Scottish Law working party of UKELA, in consultation with its water law sub-group.

We wish to make one fundamental point about the regulation of fish farming in Scotland, and another about District Salmon Fisheries Boards.

There is a perception that Scottish Ministers have a conflict of interest in relation to fish farming. On the one hand, they openly support the industry, citing its considerable economic benefits to Scotland and the UK. On the other, as Marine Scotland, they are expected to regulate it and take enforcement action when necessary. This perception is potentially damaging, and could be removed by delegating many of Marine Scotland's regulatory functions to non-departmental public bodies such as SEPA.

We recognise that SEPA's statutory remit limits its ability to control sea-lice and escapes of live fish, and in these cases it is appropriate for Scottish Ministers to be the regulator, but there are other functions such as control of polluting discharges from wellboats and seaweed cultivation that fit more comfortably within SEPA's responsibility for protecting and improving the water environment.

UKELA therefore urges Scottish Ministers to consider whether any additional powers that they propose for regulating fish farming should be conferred on SEPA rather than themselves.

In relation to District Salmon Fisheries Boards, UKELA considers that the focus on salmon as a single species is potentially detrimental to good management of the freshwater environment overall.

We acknowledge the special status of salmon fisheries in Scots law, as well as the ecological and cultural significance of the species, but consider that undue emphasis on a single species can in certain circumstances undermine the wider interests of other users of the water environment, be they human (tourists, recreational users, local communities, wildlife enthusiasts, etc.) or our other native fauna and flora. We would like to see the Boards take an 'ecosystems approach' to fisheries management, as is being promoted by SEPA and Scottish Ministers in other contexts.

UKELA therefore urges Scottish Ministers to consider giving District Salmon Fisheries Boards specific duties, in carrying out their statutory functions, to have regard both to the interests of other users of the water environment (human and non-human) and to the principle of sustainable development. Ministers may also wish to consider giving statutory guidance to the Boards for these purposes.