

## The Scottish Government: Marine Scotland

### Aquaculture and Fisheries Bill Consultation

#### Submission from The Crown Estate

March 2012

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#### **Introduction**

The Crown Estate welcomes the opportunity to contribute to the Scottish Government's consultation on the Aquaculture and Fisheries Bill.

The Crown Estate is a public body and in Scotland owns and manages approximately 50% of the foreshore and beds of tidal rivers together with virtually the entire territorial seabed out to 12 nautical miles, with renewable energy and (non-hydrocarbon) mineral rights out to 200 nautical miles. In addition we own and administer the fishing rights on a number of salmon rivers in Scotland and as such have a significant interest in the continued health and well-being of these fisheries.

The Crown Estate has played a central role in the development of Scottish aquaculture over the past 30 years, and is proud of this long association with an industry of national economic and socio-economic importance, and we administer leases for over 800 aquaculture sites. The continued prosperity, sustainability and value of the industry to the communities in Scotland in which and with which it operates is of prime importance to The Crown Estate. We will continue to invest effort and money in seeking to assist industry achieve this alongside and in co-operation with its significant stakeholders and neighbours in Scotland's marine environment

Similarly The Crown Estate manages salmon fishing rights across Scotland which remain with the Crown as part of the hereditary possessions of the sovereign. There are 140 tenancies for rod and line fishing granted by the Crown Estate, a third of which are let to local angling associations providing public access to salmon fishing at reasonable cost for local anglers. The Crown Estate's rural estates also include salmon and freshwater fishing rights on rivers such as the Spey and the Annan and these are let to a combination of local angling associations and managed syndicates. We have a relationship with the Fishery Board in each district where we have salmon fishing rights either being directly represented or through our tenants as our local mandates. The Crown Estate supports the work of the Boards and Trusts to create the environment in which sustainable fisheries for salmon and sea trout can be enjoyed. Conservation of fish stocks, and the habitats on which they depend, is essential and many DSFB's operate riparian habitat enhancement schemes and have voluntarily adopted 'catch and release' practices, which in some cases are made mandatory by the introduction of Salmon Conservation Regulations. The leases granted by The Crown Estate stipulate that tenants must comply with statutory regulations as well as voluntary conservation

policies adopted by the relevant Board in addition there is a limit placed on the number of anglers who are permitted to fish the beat at any one time with each lease area assessed on its merits for this purpose.

## **Responses**

Our responses to those questions raised in the consultation on which we have an interest and/or view follow below:

### **Section 1: Sustainable Development of Aquaculture**

Farm Management Agreements (FMAs) – Our experience has been that, on the whole, strategic control of sea-lice and other bio-security matters has been more fruitfully managed for the farmed salmon sector in circumstances where sites and operators are co-ordinating their activities along the lines of Farm and/or TWG Area Management Agreement aims. Such benefits have accrued largely as a result of the familiarity and relationships that have manifested themselves and the consequent communication and co-operation in pursuit of mutual objectives. There are also sufficient examples in our view of poor pest and bio-security management where such co-operation and particularly communication has been lacking, so The Crown Estate is a keen proponent of such FMA measures.

**Q1.** In light of the above, we would encourage the participation of operators in FMAs, and while we'd prefer to see such participation voluntarily entered into, where reluctance to do so on the part of any operator would jeopardize the farm management proposals and ambitions of other operators in the area, we would support legal means to enforce participation and adherence. Similarly where a number of operators within a recognizable management area did not attempt to enter into agreed measures that were commonly accepted to improve and enhance pest management and bio-security measures, again some legally based means to enforce such co-operation would be justified in our view. It is our opinion that the majority of finfish farm operators acknowledge the benefits of and would be willing to enter into such agreements, and therefore enforceable means to ensure the engagement of a recalcitrant few would serve a useful purpose. However any enforceable requirement will have to include clear communication of the sanction to be exercised for non-compliance, and the means by which such non-compliance will be identified/confirmed (as addressed in subsequent questions here). We would recommend that to assist operators in managing this process and engagement themselves (and recognizing benefits where unsure), that a standard or 'pro-forma' set of FMA objective headings and minimal acceptable baseline for associated measures be drawn up in consultation with industry, with appropriate guidance. We also consider it very important that any enforceable FMA requirement needs to be recognized in the development planning and consenting structures and processes of the Local Authorities, such that an operator's ability to comply with/enter into FMA measures can be considered material to development proposals, so that these

FMA ambitions for the industry can be realized without undue risk to producers' commercial viability. This will be particularly important where production regimes for existing site locations do not easily lend themselves to FMA measures without some modification or alternative location options being available. In this regard a wider engagement in and recognition of FMA type arrangements with additional stakeholders should be encouraged – further zoning options for example. It is important to recognize that realizing FMA ambitions for the industry will not lie solely at industry's door. There is one last reason that we think relevant to this topic and that is the wider perception amongst some communities and interests in the Highlands & Islands, as well as elsewhere, that aquaculture regulation is still not particularly rigorous with regard to appropriate locations and/or practices, given support in some instances by the fact that initiatives past and present to implement such (which have been pointed to as acknowledgement of their requirement) have been on a voluntary basis only and so have not necessarily exercised any control over less responsible practitioners. Enforceable FMA's as a manifestation of 'enforceable best practice' should assist in the confidence ascribed to regulation of the industry by stakeholder and wider community interests alike, and so potentially lessen the 'activist' attitude and approach that has characterized reaction to (and detrimentally influenced?) many recent development proposals.

Appropriate Scale Management Areas – the appropriate scale of management areas or more importantly, the real connectivity of farms within areas and discreteness between farms in different areas is the key foundation to the success of a FMA concept. It is our view that ideally farm management areas should be underpinned by verifiable hydrographic/biological (sea-louse infectivity) data, based around the current location areas/clusters of finfish farms such that the identification of such areas will then remain valid over a period to allow industry development that fits with and accommodates FMA ambitions. The Crown Estate is currently engaged in exploring means of carrying out such identification and would be happy to collaborate on such work with others.

**Q.2** With regard to the determination of Management Area boundaries, we do not have strong views necessarily on who should have primary responsibility but rather upon the process whereby such area boundaries are arrived at. Therefore subject to verifiable evidence for and (preferably, expert) agreement on the basis of biological/hydrographic connectivity of farms within a proposed area and a similar discreteness from any excluded from the area, it would be entirely appropriate, even desirable, for operators to determine the boundaries of a management area. We would suggest that some sort of guidance on what should constitute such evidence is made available, and incorporated into the FMA pro-forma measures guidance referred to in Q1 above. In the event of dispute or poor validation for proposed boundaries, we consider it would be appropriate for Scottish ministers, through suitably qualified and independent scrutiny, to specify alternative areas.

Management Measures and Dispute Resolution – it is likely that with implementation of enforceable participation in FMAs, a provision for dispute resolution and arbitration will be an essential part of achieving full industry participation.

**Q.3 & Q.4** In our view an arbitration process is likely to be required if enforceable FMA ambitions for industry are to be implemented.

The key, we feel, to any such process is likely to lie in the development of the standard or 'pro-forma' set of FMA objective headings and agreed minimum actions against each; referred to above (it could in addition to agreed minima, include also the aspired-to level of engagement too?). To prevent or attempt to avoid non-compliance liability issues where two or more parties are involved in any FMA dispute, the FMA standard/pro-forma heading and associated minima, etc should be drawn up so that the required actions/measures were applicable to and demonstrable by each and every party to any potential FMA. In this way each party could be assessed for compliance against proposed minimum requirements at least, for which they were individually responsible.

These standard requirements could be taken from current standards such as the CoGP, ISA Well-boat CoP, etc, and be drawn up and overseen by the CoGP Working Group for example in discussion with industry and regulatory authorities.

With regard to arbitration of any disputes arising, the SSPO would appear to be a suitable first point of communication for arranging arbitration facilities where necessary. On the other hand, it may be for the monitoring and enforcement agency responsible for identifying non-compliance issues to 'follow through' with referral to arbitration where no resolution has been possible with the parties concerned.

Unused Consents – we are familiar with the complexity of the issues surrounding the retention of unused sites and consents by industry. For this reason The Crown Estate has rarely exercised the 'use it or lose it' clause in the leases for such sites unless the unutilized retention was blocking development ambitions by another party, in which case we would request a development plan and timetable from the incumbent or relinquishment/assignment to the other interested party. Prior to the transfer of planning controls in 2007, relinquishing a lease also meant relinquishing the development consent which in the event of any subsequent aquaculture development interest at the location would mean a new application, the success of which was by no means assured. Therefore assignment rather than relinquishment was often the more secure means of ensuring some continuity of development opportunity, and this combined with real or perceived asset value favoured what might be termed a precautionary approach to lease relinquishment by industry, in our opinion. Latterly, consolidation/rationalization opportunity also came into play, and one or two instances of such have been undertaken although not lately to our knowledge.

In the vast majority of cases we consider that unused consents are highly unlikely to be used again for the purpose originally consented, even in the case of shellfish, for purely economic reasons. There may be scope for change of species from finfish to shellfish or seaweed, but even here the sites may not necessarily be optimal in respect of size,

location, etc. Nevertheless it is an option we have encouraged holders of unused finfish sites to consider. The justification in terms of area management bio-security/firebreak preservation, formal or informal, in some cases valid, others not, really reflects a gap and/or lack of confidence in the planning processes and controls exercised for aquaculture that can or should at least be able to take such matters into account.

**Q.5 & Q.6** We do agree that the question of unused consents should be reviewed, simply because while possibly less so in the case of the lease or development consent, the retention of unused CAR consent capacity can be restricting on further development with respect to the criteria for determining Locational Guidelines categorizations. In seeking options for resolving the unused consent issue, the most obvious means of addressing it would be through the consenting process for new sites and expansion and modification of existing sites, but here the question is whether doing so is possible under the Town & Country Planning (Scotland) legislation that applies. If not we feel that statutory consultees such as SEPA and Marine Scotland Science could possibly take account of unused site relinquishment/rationalization in their submissions to Local Authorities on aquaculture development proposals in which any such initiative may feature.

In looking to address the non-use of existing site capacity through the consenting process, we favour the 'carrot' approach rather than 'stick'. This could manifest itself as the ability for developers to offer up ('trade in' essentially) unused site consent in supporting proposals for new sites and expansion of existing sites. It may be that current planning considerations for particular development proposals at particular locations may not be able to regard such measures as material, and that each development stands or falls on its location specific merits. However if Farm Management Agreements acknowledge the wider biological influences of salmon production site locations and seek to address their effects, then capacity rationalization to improve and optimize business and environmental efficiencies within such 'areas of effect', even when outside the immediate environs of a development proposal, we suggest, should still be considered material. We would also suggest that current aquaculture planning controls fail to properly recognize the strategic element of the salmon farming industry's activities at least, and the balance and consistency in production over often a wide geographical area of operation that successful businesses in this sector require. It might therefore also be worth looking at the ability for developers to offer up unused capacity in support of further development, from other 'biologically unconnected' areas. If a developer is able to demonstrate a strategic net benefit in doing so, though increased operational efficiency and control, particularly with regard to investment that would serve to further mitigate environmental impacts, then these relinquishments too may possibly be seen as material to developments. The limits of local authority jurisdictional boundaries should not preclude wider environmental optimisation opportunities for the activities of businesses that span several such boundaries. In this regard measures such as the relinquishment of capacity that could be used in support of additional development that adds to the overall wider environmental sustainability of a developer's activities should be able to be recognized in planning processes. The final

extrapolation of such measures would be that companies might be able to purchase the unused capacity of other producers for such purposes, thus allowing some asset value to be realised for those who are retaining sites for that reason.

The advent of planning consents that are separate from The Crown Estate lease allows for revocation of the lease for say, non-utilisation, without the loss of production capacity sanctioned by that consent. However we feel that the vast majority of sites that are not viable production facilities for the existing tenants are unlikely to be any different in that respect for others. Therefore revocation of the lease with a view to re-letting may not be an option in other than very few cases, and so for most, the other consents - CAR in particular - remain unused.

In summary then, while simply removing unused capacity is possible with existing tools, as well as any arising out of this Bill, we are of the opinion that resolving this issue by means of measures that might eventually provide some 'added value' is worth serious consideration.

**Q.7 & Q.8** The marine aquaculture industry's relative youth and associated changes in knowledge, technology and market developments have meant that production site requirements have changed similarly, which has meant a relatively short economically viable shelf-life for some, and consequent stock-pile of unused consents. However as the above changes have taken effect, so the rate of non-utilisation in our view has slowed, and we think that this should largely be a historical feature to be addressed rather than something that will occur at anything like the volume presently encountered, in the future. As such we would suggest that the Government's current Fish Farm Review programme should sort out quite a number where the costs of applying for and obtaining planning permission to make them even remotely viable, particularly for unused finfish sites where EIA will be a factor, will be seen as a step too far for most consent holders. If planning consent, of whatever form, is absent from any lease once the transitional arrangements come to an end in 2013, The Crown Estate will have to exercise the 'use it or lose it' clause, as tenants will not be able to fulfill the terms of the lease without obtaining planning permission, and any reluctance to do so will mean termination of the lease. We would expect voluntary relinquishment following a reminder in most such scenarios. While this will not address CAR consents for example, we feel that the means should be afforded the WEWS legislation to rescind consents in the event of continued non-use, rather than confer such powers on Scottish ministers who are one-step removed if you like from the actual legislation in question. Where powers granted to Scottish ministers in this regard may serve a useful purpose, would be where they could summon a co-ordinated scrutiny of unused consents by all those agencies granting them, such that the overall continued presence or otherwise of the production site with regard to all its consents could be considered at the same time. This lack of awareness on the part of authorities as to what consents were actually authorized with regard to an ability to produce or not is probably one reason many unused consents slip beneath the radar. This might mean that ministers had the option if they so chose, or at the request of a consenting authority, to require a developer with an unused site to submit proposals for utilizing the site, or retaining it albeit unused, to

all the relevant consenting agencies and require also for the agencies concerned to return a view on continuation of these consents in light of the developer's proposals, including conditions for any continuation. Revocation or conditional continuation of any of the consents required would then require action of both developer and/or agencies for a particular site. This would allow consenting authorities to manage the consents for which they have legislative responsibility, but allow any of them to call upon Scottish ministers to request a developer to submit proposals for re-use for an inactive production site to all relevant agencies within a specified period and a response from those agencies in turn – the reverse of a development consultation in effect – in instances where non-utilisation was apparent. It would also allow some scope for a developer to put a case for continued retention of the consents, or transfer through sale of business asset, to the relevant agencies and for all involved to see the representations made to all of the others and their responses – the full picture in other words, necessary for the actual practical use or not of a particular production site concerned. Revocation of any one consent would require consequent revocation of all, on the basis of lack of justification for the continued consenting of or granting of rights for an activity that was, following the suggested scrutiny, not able to proceed?

Collection and Publication of Sea-Lice Data – our view is that this should serve to inform a genuine material interest and/or requirement, and not simply scrutiny where such interest and/or requirement is not clearly evident.

**Q.9** Clear identification and acknowledgement of the requirement for data should inform its provision, at whatever infrastructural or administrative level in question. At a national, or regulatory, level the recommendations of the Healthier Fish Working Group on failed treatment notification to Marine Scotland Science are valid in our opinion insofar as they inform therapeutic efficacy matters that are of importance industry wide. As far as serving a regulatory or other compliance requirement, we feel that a standard, industry wide system for monitoring, recording and records management and maintenance should be the requirement (if not already in place), such that considered interrogation of the data could be made for compliance purposes, as well as others, by those parties who had either a statutory or other reason to do so, the latter with the agreement of the producer in question. In this way the relevance and value of raw data records would remain available if required, and would remain within the control and confidentiality of the producer. This would be in line with similar systems for other commercial health and hygiene regimes subject to regulatory scrutiny. Therefore various interests could be assured that the data was maintained and available to those authorized to access it should they consider it necessary, either as part of a regulatory protocol or other representation for which they were the competent authority. In such instances it is compliance or associated conclusions' emerging from interrogation of the data rather than the data itself that is in the wider interest, in our opinion. Actual submissions to a national or regional database could be made in agreed formats as currently undertaken by the SSPO's system, or other producer countries

examples, with the appropriate context, but here again the format and timing should serve a clear need.

The real requirement for and value of sea-lice data we would argue lies with those to whom it reflects or forewarns of actual effects in regard to their specific interests. So apart from the producer of the stock from which data in question emanates, fellow members of the relevant Farm and/or Area Management Group of which the producer may be a member. In a situation where sea-lice management for a group of interests that are collectively managing incidence and effects and subject to the success or otherwise of doing so, we see no reason why it shouldn't be the raw data that is provided, and if necessary made available in real time, particularly when such data is made available under confidentiality or similar arrangements. Here we think the need is for real time management and monitoring, so it is more the appropriately circulated availability of the data than any submission as such that is important. Access to such data would be dependent on membership of and participation in the relevant Management Group and its agreed processes.

Outside serving a regulatory function for a national sea-louse infectivity threshold control, in our view of somewhat dubious value anyway, we would query the need for further dissemination of such data simply because the context that could inform its real value in regard to reflecting the actual effects arising from the situation that it describes would very likely be absent. Without knowing what the data means in terms of the effects arising from it at its sampling location and immediate biological environs make the value of the data, and arguably the requirement, questionable.

If sea-lice and other biological effects are to be primarily managed and control effected at a localized level through FMA arrangements, accurate and timeous data provision will be a key feature for the successful operation of, and co-operation within, such a group. Therefore data availability to those best placed to utilize and take benefit from it should be part of mandatory FMA requirement minima (referred to earlier), and the successful demonstration of these FMA processes be the focus of scrutiny. This is one reason for our support for enforceable FMAs – the 'devolving' out of monitoring and recording of biological processes and effects to a level best placed to address the specific circumstances, interests and associated data requirements involved. We still consider that wild fish interest inclusion in biological area management is desirable, the AMA rather than FMA approach, to both improve 'cross-party' dialogue, relationships, knowledge and data provision. Participation in an area management process provides participants with the relevant interest that justifies their access to data relevant to that interest. Doors should always be open to such participation.

Surveillance, Biosecurity, Mortality and Disease Data – as with sea-lice data above, we consider that data collection should serve to inform a genuine material interest and/or requirement.

**Q.10 & Q.11** In this instance if the declared value that can be gleaned from such data collection can be put to a use that will return benefit to the industry through improved



regulatory proficiency, awareness, knowledge and expertise, then there is a theoretical case for its provision. We feel however that it is really for the industry to make that judgment and offer comment in respect of actions, and any associated timing and frequencies. The only comment we would make is for adequate confidentiality to be maintained in respect of such data being submitted, where appropriate, such that businesses are not unnecessarily compromised or unfairly portrayed through details being made public through FOI requests and any subsequent misinterpretation of information obtained.

Biomass Control - The Crown Estate has been involved in initiatives such as the Tripartite Working Group and its AMA process, and various fora that have addressed planning and bio-security matters for salmon aquaculture, not to mention the contact we have with salmon farm leaseholders. Our experience leads us to the view that sea-lice control is underpinned by management measures and is an integral element of a production strategy, where therapeutant use forms part of this strategy. There have been and there remain very good examples of this being achieved. Regulators and planners have a role to play here too in providing policies and practices that lend themselves to such management measures and their optimization. It should be the aim of both industry and very importantly those that regulate it to put in place regimes for development that seek to lessen reliance upon therapeutant control. It is this view that informs our response to enforceable FMA proposals. We therefore see a proposal for biomass reduction as proposed here as possibly somewhat short-sighted?

**Q.12** While we understand the reasons and reasoning behind this proposal, and recognize the likely additional desire to have some sanction against producers who persistently put their and others' interests at greater risk through poor sea-louse management, as currently set out we do not feel we can agree with it in the absence of a great deal more detail on just how and in what circumstances these powers would actually manifest themselves.

In terms of the welfare of the stock for which therapeutant consents are granted, there is already legislation that can be brought to bear where welfare standards are considered to be compromised. Our view here is that there are in addition to these, and quite justifiably, wider health and welfare issues at hand in respect of neighbouring farmed and wild stocks, in light of stated 'management' issues. In this regard we are not sure whether the intention of this proposal is remedy or sanction or an attempt at both. There is also the matter of just what the defining criteria will be for such a policy, when a consented limit is punitively reduced where no actual breach of that consent has occurred.

We would prefer to see proposals for ultimately addressing sea-lice management and control issues resolved rather more holistically through options that also provided planning and other regulatory means such that the 'unmanageable' biomass limits were redistributed/re-positioned/re-consented so as to more equitably address a problem that may not always be (wholly or in part) the producers fault, but for which they would undoubtedly pay a penalty through the above proposals. Admittedly this brings other

planning issues back to the fore but in the interests of maintaining economic viability with improved sustainability, should be considered an option on the basis that if the original consents did not address this satisfactorily, albeit with hindsight, then the producer ought to be allowed to make a sympathetically heard case for a second option on the basis of investment, etc undertaken in good faith. If the regulators got it wrong basically, they ought to allow a remedial version to apply, if possible? If FMA proposals manifest themselves and all farms will ultimately be members of such a group, problems of this nature can be addressed such that remedies are best suited to all affected parties.

Ultimately if persistent sea-lice problems are down to poor management and poor or even negligent practices, it is not simply the consented limits that are at issue but the practices of the producer, and measures to address this should be considered rather than removal of capacity that may well be sustainable in another more responsible, better resourced or enlightened producer's control.

#### Well-boats

**Q.13** Given the evidence to date of the potential for poor practice associated with well-boat operations and activities to cause and/or contribute to fish health problems, we would support the provision of enabling legislation for additional control measures. In all such instances, it goes without saying that it is surely the desire of all concerned that any legislation and measures arising address the problematic aspect and do not unduly interfere with or burden responsible practice.

#### Processing Facilities

**Q.14** Legislative controls that apply to premises and activities that could potentially present a 'disease risk' should be able to satisfactorily address that risk, ideally with measures that are appropriate to the level of risk presented. There is already a lot of legislation that applies to the operation of such plants, much of it based around the implementation of required checks and controls arising from (competent) risk assessment. We consider that avoidance and mitigation of the disease risks at issue here is added to the risk assessment protocols for fish processing plants (if not already in place), either as part of legislation currently applying as indicated or as additional powers.

Seaweed Cultivation – The Crown Estate has an active interest in furthering knowledge on and providing enabling actions for the commercial cultivation potential of seaweed. Our primary interest is in the larger scale offshore/exposed location development of this sector, although we foresee the wider manifestation of a seaweed cultivation industry in a range of forms from smaller inshore developments to, we anticipate, very large offshore installations and quite possibly points in-between.

Unlike current the current aquaculture sector in Scotland, we are sure that for fairly obvious reasons cultivation of seaweeds will not be based around food production, but a combination of energy, chemicals (including animal feedstocks) and possibly nutra/pharmaceuticals in combination with food interest. There is also the potential to

have such cultivation exercise combined functions of utilizable production and environmental impact mitigation, as in polyculture or IMTA practices for example.

**Q.15, Q.16 & Q.17** we do agree that the regulatory framework should be the same for all seaweed farms, but because of the nature and range of possible manifestations and scales of development, we do not feel that the present Town & Country Planning (Scotland) legislation governing fin and shell fish farms is the most appropriate regulatory vehicle for a seaweed cultivation sector.

We are likely to see different cultivation methods arise, some based upon current shellfish cultivation practice, others not. What is in little doubt is that as technology develops, knowledge accumulates and experience grows, cultivation systems and practices will change, and will require a regulatory system that accommodates the developments such changes will bring about, their locations in and offshore and their associated effects on the environment and other marine users. It's our opinion that seaweed cultivation will be largely a 'marine issue' in all of these respects, in much the same way as marine renewable energy developments, of which seaweed cultivation may well constitute one materialization. For example, there are cultivation systems under current consideration that are entirely subsurface, where operation and maintenance is not a daily requirement, and where locations may either rotate or 'flex' with regard to actual boundaries in use at any time for crop rotation purposes. In other words we consider that while coastal Local Authorities will naturally be interested parties to developments off their coastlines, and consultees to regulatory processes for development proposals, Town & Country Planning (Scotland) legislation does not provide the range or flexibility that we foresee this sector requiring of such processes, particularly when national and regional marine planning proposals are to be implemented to provide the necessary frameworks for such developments.

In this regard then, our view is that the arrangements for Marine Licencing would seem most appropriate.

The only exception likely to arise is where seaweed cultivation forms part of a single development proposal for an area of seabed on or over which fin and/or shellfish cultivation are to be practiced immediately alongside each other and seaweed cultivation, as a polyculture exercise. In such cases, the fact that the presence of equipment for the fin and/or shellfish farming would be governed by Town & Country Planning (Scotland) legislation and secondly that the seaweed cultivation would be the 'secondary' activity, especially where finfish farming was concerned, then where an area of seabed will be subject to all two/three species developments and activities (and potentially two regulatory control processes) simultaneously, the development should 'default' to T&CP regulation. However where a seaweed farm is proposed as part of a wider polyculture/IMTA project but is to be developed over an area of seabed adjacent to but separate from a neighbouring fin/shellfish farm, then it should be regulated by Marine Licencing, as indicated above.

Commercially Damaging Species – The Crown Estate has been involved in the initial stages of the project to address the *Mytilus trossolus* issue in Loch Etive, and so we are

aware to some degree of the problems associated with the presence of such commercially damaging species and of resolving them.

**Q.18** We broadly agree that providing additional powers for Scottish Ministers to deal with such issues so that the aquaculture industry and wider stewardship obligations for the marine environment both benefit would be a positive move. However we would urge circumspection and attention to detail in the drafting and implementing of such powers so that, in practice, the aim of assisting the aquaculture industry was realized and care was taken that curing the infection does not kill the patient, so to speak. Many, if not all, such species are likely to native (INNS would be subject to different controls we assume?), and taking into account that certain elements of the aquaculture industry, shellfish in particular, have minimal resource available over and above that required for the business of cultivation, we recommend that any such powers account for this and other fragilities of certain parts of industry and are implemented accordingly. For example it may be that timetables and any movement or other controls for addressing occurrences of damaging species could be tied into and be exercised through production and business requirements. In this regard, we consider it will always be more productive for such powers to identify and confirm the need for remedial action, but to allow industry concerned scope to put forward proposals for doing so. This will hopefully result in necessary 'buy-in' to the requirement by industry if they can manage, albeit with appropriate accountability, the process. The Loch Etive experience referred to above, whilst still on-going, seems to have been a reasonable example of such an approach.

## **Section 2: Protection of Shellfish Growing Waters**

**Q.19** The Crown Estate agrees with the introduction of provisions to protect shellfish growing waters, and support the sustainable growth of the shellfish industry, as proposed. More detail on our views here are available in our response to the Government's separate consultation on 'An Integrated Approach to Protection of Shellfish Waters'.

## **Section 3: Fish Farming and Wild Salmonid Interactions**

Sea-Lice – In a slightly wider context than that of the immediate question on treatment thresholds, The Crown Estate is firmly of the view that the interaction here between farmed and wild salmonids is firstly dynamic and secondly particular in many if not most respects to the location and circumstances that prevail, at a loch system or even river system level. We feel therefore that the measures to mitigate and if possible avoid deleterious interactions between these stocks and their respective interests should reflect and work with these features. Our opinion is that this will be best achieved by 'devolving out' much of the responsibility implementing such measures to a level that

reflects the biological connectivity and interest, as well as indicating those relevant local parties who should be tasked with establishing the relationships to identify the particular characteristics of the interactions specific to their localized circumstances and agreeing measures to tackle issues. This will be recognized as the premise of the TWGs Area Management Agreements and worth the repetition in our view given its on-going validity for the matter in hand. A note has been submitted to Marine Scotland contacts on a zoning concept which mirrors in large part the AMA ambition, as well as aims proposed in this consultation, which provides further detail on our thoughts on this wider interaction management topic.

**Q.20** The idea of ‘more appropriate’ treatment thresholds at particular times and more importantly particular locations is one with which we agree wholeheartedly. We also consider that treatment thresholds should be particular to and an integral feature of FMAs. In our response to Question 1 we advocated the provision of some standard pro-forma FMA objectives document to assist FMA establishment and against which enforcement criteria could be assessed, and consider that such a vehicle be used to set out aims for treatment threshold management in FMA groups. These should be reviewed annually or at least every production cycle to reflect sites in use, life cycle stages of farmed stocks and overall numbers of farmed fish within the management area to properly manage the interactions and their fluctuating nature, in our view. The aim of any such measures in a FMA should be the avoidance of farm to farm infection (including self or re-infection of individual sites), such that the only infestations producers should have to deal with are those emanating from wild fish vectors. Suitable knowledge of local management area hydrodynamics and effective communication between partners should enable reasonable assessment of effectiveness in pursuit of such an aim. The reliable and hopefully demonstrable ability to prevent inter-farm infections will stand as a very useful step toward mitigating farmed to wild infectivity risks.

So we would wish to see the power to determine a ‘lower threshold in appropriate circumstances’ proposal amended to a power to require the setting of an appropriate treatment threshold as part of the measures integral to the proposed FMAs, on a reviewable basis referred to above, to better reflect the dynamic nature and associated monitoring of both the inter-farm and farmed-wild stock interactions. We do not see how else such a power could manifest itself anyway, and familiarity with local circumstances will be key to getting such measures right. We emphasise that as with therapeutic use, stocking regimes, etc, locally determined treatment thresholds will be most effective (and cost-effective) when part of an overarching strategic sea-lice control programme for a discreet management area.

We would support this by pointing out some of the excellent existing practices in this regard exercised by producers in existing Farm Management Agreements, in addition to the experiences elsewhere referred to in the consultation document.

## Containment and Escapes

### A Scottish Technical Standard for Fish farm Equipment

**Q.21** In light of experience in Norway, the work and recommendations of the Improved Containment Working Group and Thistle Environmental, and the audit purpose indicated, we would agree with powers that required all Scottish finfish farms to conform to a Scottish Technical Standard.

As with other such measures of good practice, and falling escape incidents, we anticipate that the bulk of the industry will already be compliant with the terms of such a Standard, and that regulatory powers will serve to bring any 'lagging tail' up to similar levels.

It is to be hoped that implementation and general compliance audit can be achieved insofar as possible through attestation means such that required standards of equipment can be certificated at purchase/deployment by suppliers, for particular developments, to ease administration and avoid costly regulatory processes.. Identification technology and systems, such as those used with nets at present by many salmon producers, would serve as a useful template.

### Tracing Escapes

**Q.22** We can understand the ambition in this proposal, but as seems alluded to in the consultation document, it may be that the sensitivity required for site specific genetic identity is yet to be confirmed. The relative homogeneity of farmed stock origins for many different companies and their sites will also make such accuracy important. We suggest that the ability to carry out such genetic identification is established first prior to sampling measures for such processes are considered, particularly in light of the stated purpose of sample acquisition upon which 'future investigations and tracing could be based'. Given the production cycle of farmed salmonids, some clarification of this proposal would be helpful, and why retained samples from procedures already in place would not suffice in this regard.

## **Section 4: Salmon and Freshwater Fisheries Management**

General Comments: We share the view that the current DSFB organisational structure provides highly effective management of our Atlantic salmon and sea trout fisheries. Its strengths lie in its local self-financing structure, and it is a structure which is highly respected and envied. It is capable of reacting swiftly to changing circumstances, and yet no changes to individual's rights can be made without the sanction of the Minister. Scotland benefits hugely from the management of fisheries by DSFBs. DSFBs are funded by fishery proprietors in the district, in the interests of the overall management of the fishery. In addition, Board Members give their time on an entirely voluntary basis. To

replicate this management model in the public sector would be massively expensive to the public purse.

The optimistic view painted in paragraph 74 demonstrates that the present management structure is effective. However, it would be wrong to assume that all runs of salmon in all rivers are at their optimum level. Whilst 2010 did indeed see the highest total rod and line catch on record (since 1952) it is important, when drawing comparisons with the past, that we compare like with like. In the 1960s, half a million fish or more were caught annually in Scottish coastal and estuary nets, before salmon were able to access their natal rivers. There was also a catch of over 3000 tonnes at Greenland and the Faroes. The number of salmon returning to Scottish waters is clearly hugely reduced from sixty years ago. Despite strong grilse and summer salmon runs in many parts of Scotland in 2010, it was another poor year for spring salmon. Conversely, in 2011, whilst the spring runs recovered to a degree, the grilse runs were late and weak. Fishery managers manage the resource based on individual stock components (such as spring salmon) rather than on total numbers of fish returning to the river. A healthy run of fish, returning throughout the entire season, contributes to a long angling season which secures employment and is important to the local angling-related economy. Protection of such stocks may, on occasion, require the intervention of Scottish Ministers, via statutory conservation measures.

Paragraph 75, sets out the retention of fish in the fixed engine (15,577), net and coble (11,738), and rod (32,712) fisheries in 2010, but does not comment on the sustainability of these catches, or indeed the contribution to fisheries management arising from these catches. The Crown Estate has not let salmon netting rights for operational purposes since the late 1980's in line with a policy in support of conservation. 48 stations are retained in hand on which The Crown Estate continues to pay annual Fishery Board assessments in support of Board operations.

We welcome many of the proposals laid out in this section as we are confident that DSFBs can demonstrate accountability and transparency via an agreed Code of Good Practice. We are comfortable with the availability of additional powers to Scottish Ministers, but we believe that these should provide a safety net, not a parallel management framework. We would note that should Scottish Ministers elect to take such powers, there are associated financial implications, a point which is particularly relevant given the reduction in public sector budgets highlighted in section 6. We would also note that the consultation document does not clarify what alternative arrangements would be put in place should Scottish Ministers take these powers. One of the great advantages of the current structure of fisheries management in Scotland is that the resource is managed at a local catchment scale rather than centrally, and funding raised locally is spent locally. We believe that this principle of local management remains the foundation of effective fisheries management in Scotland, and accords with our views on the management of the relationships between salmon fisheries and the farmed salmon industry.

### Modernising the Operation of District Salmon Fishery Boards

**Q23.** We agree that all DSFBs, as with all bodies, should act fairly and transparently. Whilst we would not be uncomfortable with the obligation to act fairly and transparently, we are not convinced that a specific duty is the best way to achieve this aim. Indeed, it is unclear how such a duty would work in practice or how DSFBs would demonstrate that they were discharging such a duty. In addition, it is not clear from the consultation document who would judge whether a Board has acted fairly and transparently, or what criteria would be used to determine this? DSFBs have no legal powers to make statutory regulations without application to Scottish Ministers (e.g. conservation measures, reduction of exploitation (rod and/or net fisheries), methods of fishing etc.). Therefore any such regulations are already subject to due process, consultation and Ministerial approval. It is worth noting, that it is almost inevitable that any such decisions will be perceived as unfair by some stakeholders. Indeed, this difficulty is highlighted by the fact that the consultation includes a section entitled 'dispute resolution'. Despite the requirement for Ministerial Approval, if a stakeholder does not believe that DSFB has acted fairly, then any decision is already subject to judicial review.

We believe the best means of achieving fairness and transparency is adherence to an agreed Code of Good Practice (see below).

**Q24.** We are aware that ASFB finalised an updated version of the Code of Good Practice for Boards in November 2011 and therefore we strongly agree that there should be such a code. The code is designed to ensure a rigorous and consistent approach, but one which allows solutions to be tailored to local conditions and catchment management. We note that it is not clear which code is being referred to in the consultation as we are also aware that the production of a Code of Best Practice for Fisheries Management is also under development. The consultation document also goes further and suggests what the code could include. We address these issues point by point below, but we would make the general point that DSFBs across Scotland vary greatly in terms of size and resources. With that in mind, a 'one size fits all' approach is unlikely to be appropriate across the network.

*Hold annual open meetings i.e. in addition to the statutory requirement on Boards to call an annual meeting of proprietors.*

We understand that very many boards hold open meetings. We are not aware of any boards resisting demands for open meetings.

*Hold Board meetings in public, unless there is a good reason not to*

The 2003 Act requires DSFBs to call an annual meeting, but does not require DSFBs to hold any further meetings. However, most DSFBs hold a number of Board meetings per year. The cost of moving these meetings to a venue with sufficient capacity for members of the public, would involve a significant expense, which may prove disproportionate for many of the smaller DSFBs.



*Publish summary reports and/or minutes of meetings*

We support the view that significant transparency in Board decision making could be achieved by publishing summary reports and/or minutes of meetings and where issues arise from those reports, by inviting evidence/submissions from members of the public, should the latter prove necessary.

This is included as a recommendation in the latest version of the Code of Good Practice (November 2011).

*Invite evidence from members of the public on matters of public concern*

The Crown Estate would support this in principle. However, it is not clear from the consultation what aspects DSFBs are being asked to take evidence on. The 2003 Act already ensures that salmon anglers and netting interests are represented on DSFBs, in addition to proprietors. A number of DSFBs also invite other bodies to Board meetings, such as SEPA, SNH and local authorities, although we would note it is not always possible for such bodies to make staff available. The present system therefore allows DSFBs to consider a wide range of views in discharging their functions.

*Consult stakeholders on a wide range of issues*

Already largely addressed in the responses provided above.

**Q25.** We think that a Code of Good Practice is by definition non-statutory anyway. We feel that the updated Code should be given time to bed in, be fine-tuned if and where considered necessary and as such therefore tested in terms of its effectiveness in delivering its ambitions. Non-delivery we would suggest may well be symptomatic of something deeper than simply whether the Code's requirements were statutory or not and so any such event should be the subject of a more considered review.

Statutory Carcass Tagging

**Q26.** Yes, such powers should be taken and implemented as soon as possible. A carcass tagging scheme has been in operation in England and Wales since January 2009. The scheme is reported as having been a success. Similar schemes have been in operation in the Republic of Ireland since 2001 and Northern Ireland since 2002. Carcass tagging has been considered both as a quality control measure and as a means to minimise the possibility of illegally caught fish reaching markets or dealers. In combination with the ban on sale of rod caught fish across the UK, any untagged fish would be made unmarketable and clearly identifiable as illegally taken. It is of note that the EA has identified a loophole in their system that, in the absence of a mandatory carcass tagging system in Scotland and in the Tweed District, illegally caught English fish are reaching the market masquerading as Scottish produce. There are also a number of potential routes for illegally caught Scottish fish to reach the market. There is a continuing, significant problem of wildlife crime in Scotland - the illegal taking of salmon within rivers and estuaries is still a significant problem. The reduction of such illegal activity, by significantly reducing the potential market for illegally caught fish, would have a significant conservation benefit for wild salmonids.

It is not clear whether the consultation question refers to net caught fish, rod caught fish, or all fish caught in Scotland. However, carcass tagging of rod caught fish may be a useful tool to aid DSFBs in ensuring compliance with their conservation policies. We would therefore suggest that DSFBs should be given a power to introduce a carcass tagging system within their own districts. However, we would note that the existing ban on the sale of rod caught fish across the UK, means that, even without carcass tagging of rod-caught fish, any untagged fish would be unmarketable.

Finally, as mentioned above it is currently illegal to sell rod caught fish. However, it is not illegal to purchase rod caught fish. Once we have a statutory system of carcass tagging in place, we believe that it should be illegal to both sell and purchase an untagged fish.

### Fish Sampling

**Q27.** This was a recommendation of the mixed stock fisheries working group and we agree that the Scottish Government should have the power to ensure that fish genetic samples can be produced where necessary from any salmon fishery. Genetic analysis is a key tool in modern fisheries management, and without such information it is not possible for DSFBs to know the impact of the catch on individual catchments or to apply targeted conservation measures. Access to this information will enable rational management decisions on net fisheries to be made. DSFBs would hope to be able to take such samples with the agreement of proprietors, but agreement from all fisheries within a district is not always possible. It is suggested therefore that such a power should also be available to DSFB. We believe that genetic samples can be taken without killing the fish in question. However, if such sampling, undertaken on behalf of Scottish Ministers, would be likely to involve killing fish we consider that the DSFB should be fully consulted prior to sampling taking place.

### Management and Salmon Conservation Measures

**Q28.** We believe that such powers should only be used where there is no DSFB in place. Where a DSFB is in place, and is complying with good practice as set out in the Code of Good Practice, then changes to Salmon District Annual Close Time Orders should be initiated only on the application of the DSFB.

**Q29.** The consultation document does not set out the basis or need for combined salmon conservation powers and therefore we are unclear as to what advantage there is in combining these powers. DSFBs across Scotland have applied for both close time orders and conservation measures, sometimes in combination, and we are not aware of a particular problem with this arrangement.

**Q30.** This is consistent with evidence based management and on that basis we are supportive of this in principle. However, there would need to be a degree of proportionality in placing monitoring requirements on a DSFB, due to the potential expense and/or expertise required to carry out such monitoring. A partnership approach, between DSFBs, Fishery Trusts and Marine Scotland Science would appear to

be a sensible approach here (please see our comments on the National Strategy for Data Collection below).

### Dispute Resolution

**Q31.** Again, we are unclear on the need for a statutory mediation/dispute resolution process. Fisheries management in Scotland largely progresses on a consensual basis. Where it is not possible to reach agreement on a voluntary solution, the legislation allows for DSFBs to apply to Scottish Ministers for e.g. conservation measures, reduction of exploitation (rod and/or net fisheries), methods of fishing etc. The ultimate decision rests with the minister, who will only act after consultation. Assuming that DSFBs are acting in accordance with a agreed Code of Good Practice, and that decisions are therefore justifiable, we believe that it is entirely appropriate for Scottish Ministers ultimately to make such decisions. With regard specifically to compensation arrangements, mediation may prove useful in some instances, but we are not convinced for the need for statutory provisions in this regard.

### Improved Information on Fish and Fisheries

**General Comments:** The Crown Estate agree that there is a need for improved information on fish and fisheries. Between the DSFBs, Fisheries Trusts and MSS there is a significant resource which we feel could be deployed in a more integrated and efficient manner to ensure data collection (whether from catch returns, electrofishing or counters) is consistent and useable. For instance, catch statistics are currently collected by MSS, by DSFBs and by the District Assessor. We would support any proposal for a national strategy for the collection of fish data to provide the evidence required for appropriate fisheries management. Such a strategy could be drawn together using the existing structures of the Strategic Framework for Scottish Freshwater Fisheries. For a DSFB to operate effectively, using an evidence-based system of management, it must have access to robust information (e.g. adult returns, juvenile numbers & factors affecting them). A national strategy for the collection of data would identify the roles of Marine Scotland Science, DSFBs, Trusts and individual proprietors in providing this information, and this could be defined through the relevant code of practice or statute. It is also important that this information is used to inform stakeholders and members of the public. Such a strategy would need to be sensitive to the variable resources available to DSFBs/Fishery Trusts across Scotland.

**Q32.** We believe that there would be value in collecting effort data, if it could be clearly demonstrated that such data will significantly add to the understanding of fish stocks. We recognise that stock assessment from catch statistics alone is a blunt tool, and any refinement is welcomed. We believe that refinement can be done on specific test sites, and thus avoid the significant extra effort and cost involved in collecting this data nationally. There are a number of potential variables in collecting effort data: the experience of the angler; the familiarity of the angler with the river; whether fishing effort has occurred during optimal or sub-optimal fishing conditions; if the fishing effort occurred in the presence or absence of an experienced ghillie. In looking at historic

records, it should also be noted that changes in technology now mean that an angler using new equipment can cover a greater area of river than before – essentially there can now be greater effort per angler. We are not clear how these factors could be accounted for in what is likely to be a relatively basic measure of effort.

We believe it would also be useful for more information and data to be collected from net fisheries. We believe that netting effort should be more clearly defined (not simply the monthly mean), all instances when leaders are not removed during weekly close times should be reported, and number of fish taken from specific nets should be reported (net locations often range from close to river mouths, to several km from river mouths - such a reporting requirement would give an indication of the relative impact of a fishery on specific rivers).

We would support this issue being examined in detail in drawing up a national strategy for the collection of fish data as proposed above. We are aware that MSS are currently undertaking a pilot study on specific indexed rivers to assess the potential value of such data. On that basis, it would seem appropriate for Scottish Ministers to take a power to collect effort data, to be utilised on the successful conclusion of the MSS pilot study. We would also highlight that the existing catch statistics database contains a great deal of valuable information and the national strategy could also examine the most effective means of utilising such information.

**Q33.** Please see our comments above on a national strategy for the collection of fish data.

**Q34.** Paragraph 104 of the consultation document appears to suggest that this question might be limited to licensing functions on the introductions of salmonids to freshwater. However, we are working under the assumption that this question involves all aspects of the salmon and sea trout fisheries in a district. A number of DSFBs already collect and publish information on catches, conservation policies, monitoring, introductions and enforcement within their districts. We believe that the Code of Good Practice is the best way to ensure that this information is provided, in a consistent manner for all DSFBs. The operation of the Code in this matter could be linked to the proposed national strategy for the collection of fish data.

It is not clear from the consultation document, should such a power be invoked to require a DSFB to undertake additional functions above and beyond their core work, who would be expected to pay for such additional functions. It is important that any such power must be used in a proportionate way, which reflects the resources of the DSFB in question.

#### Licensing of Fish Introductions to Freshwater

**Q35.** As highlighted in the consultation document ASFB and RAFTS have developed guidance on stocking<sup>5</sup>. ASFB have also developed specific guidance on stocking programmes in Special Areas of Conservation which is currently with SNH for comment. Adherence to this policy is a requirement of the Code of Good Practice and therefore we

believe that issues relating to stocking practice should be dealt with through the Code. Where DSFBs are not fulfilling their duties such a power may be useful as a safety net.

**Q36.** It is appropriate that Scottish Ministers might use such powers where DSFBs can be demonstrated as not fulfilling their duties. We note that Scottish Ministers already have jurisdiction over fish introductions in those parts of Scotland which are not covered by DSFBs. In addition, Scottish Ministers have jurisdiction over introductions of other freshwater species throughout Scotland. In the specific example of introductions of freshwater fish (other than salmon and sea trout) we believe that DSFBs should be consulted prior to any introductions of fish within that district.

### **Section 5: Modernising Enforcement Provisions**

**Q37.** The scope of this question appears to be limited to breaches of the requirements for, or conditions of, Marine Licensing requirements (under the Marine (Scotland) Act 2010), insofar as they apply to aquaculture operations. However, there is no explanation in the consultation document as to the scope of such requirements or conditions. We are in favour of strict liability in principle, particularly where the safety and/or integrity of other marine user interests are put at risk of compromise.

#### Widening the Scope of Fixed Penalty Notices

**Q38.** We are content to leave for industry to comment

**Q 39-44** – No comment

#### Sea Fisheries (Shellfish) Act 1967

**Q45.** The Crown Estate welcomes proposals to add clarity to the 1967 Act as well as consistency with wider UK implementation.

### **Section 6: Paying for Progress**

**Q46.** With regard to aquaculture, The Crown Estate does not levy any fees for applications for lease and associated processing, but charges rents for leases of seabed once granted. Details of these rents are available on our website if required. We would not wish to comment on any further charging that may be levied on the aquaculture industry, and so restrict our views here

to the salmon and sea trout fisheries sector: It would have been useful if the consultation document had highlighted exactly which services/benefits are being referred to in relation to salmon and sea trout fishery management.

It would seem reasonable for charges for services/benefits and we believe that SEPA provide a good model here. For generic services such as setting up the framework of Controlled Activities Regulations, data collections standards etc. there is no charge. However, where a specific application is made, SEPA then levy a charge. In operation

this appears equitable and proportionate. We would be concerned however, if any such charges were set at a level that put these services out of the reach of the smaller DSFBs. It is also worth noting that the current CAR regime provides for the waiving of the application fee for an activity which delivers an environmental benefit. It would therefore seem logical that, where there is an application for e.g. conservation measures (where there is likely to be an environmental benefit) there should be no charge. In line with the SEPA model we would also expect Scottish Government to meet certain performance requirements. Specifically, applications to Scottish Ministers should be dealt with, within a statutory timeframe and we would expect the Act to reflect this.

**Q47.** Again, we limit our comments to the salmon and sea trout fisheries sector. It is worth noting that Scotland gets a huge benefit from the management of fisheries by DSFBs. DSFBs are funded by fishery proprietors in the district, to a value exceeding £3.5m in 2010. Board Members give their time on an entirely voluntary basis. To replicate this management model in the public sector would be massively expensive to the public purse. In addition, DSFBs are consulted on, and expend significant time and effort in responding to, planning applications for wind farms, run of river hydro developments, marine renewable developments, fish farm developments and other commercial developments with the potential to impact on the freshwater or marine environment. Any decisions on the level of charges, or indeed the need for charges, should be taken in the light of the considerable value already provided by DSFBs.

**Q48.** There are a number of ways in which funds could be freed up. A national strategy for the collection of fish data could potentially help to refine the operations of MSS, thereby freeing up staff time. We also believe that a closer working relationship between DSFBs and MSS, SEPA and SNH would be valuable in this regard. We also suggest below that the period in which DSFBs can authorise certain activities without applying to Scottish Ministers should be extended. This again would free up scarce Government resources.