

AQUACULTURE AND FISHERIES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Aquaculture and Fisheries (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 1 - power to modify the definition of the Code of Practice.

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

Provision

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

Reason for taking power

4. The new section 4A inserted into the 2007 Act by section 1 of the Bill makes provision about fish farm management agreements and statements. It refers to the existing voluntary Code of Good Practice for Scottish Finfish Aquaculture as issued and revised from time to time by the body known as the Code of Good Practice Management Group. As both organisations and documents can change over time, this provision enables Ministers to amend the definition of "Code of Practice" to reflect such changes as and when they occur.

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

Choice of procedure

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

Section 19A(2)

Power conferred on: the Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: no procedure

Provision

7. Section 19A(2) of the Bill inserts new subsection (2A)(a) into section 31A of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”). This creates a power for the Scottish Ministers to grant planning permission for the operation of an individual marine fish farm by order.

Reason for taking power

8. Section 31A currently enables the Scottish Ministers to grant planning permission by order in respect of a class of development. The new section 31A(2A)(a) will enable such planning permission to be granted by order in respect of an individual marine fish farm and will enable a more focused and site specific exercise of the power to grant planning permission by order.

Choice of procedure

9. The choice of procedure for the new order making power follows the provisions which apply to the current powers under section 31A for the grant of planning permission by order. Orders under section 31A are not subject to the negative or affirmative procedure but are required to be laid before Parliament in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. It is appropriate that the procedures for the new order making powers are consistent with the existing provisions.

Section 19A(4)

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

10. Section 19A(4) amends section 31A(8) of the 1997 Act. Section 31A(8) enables the Scottish Ministers to make regulations in relation to the form of application or planning permission under section 31A and procedures to be followed in connection with the consideration of an application. This amendment removes the provision enabling regulations to specify in which cases applications must, rather than may, be made.

Reason for taking power

11. Subsection 31A(8)(a) is revoked in consequence of the new power to grant planning permission by order for individual marine fish farms. Given that new power, it would not be appropriate for regulations to specify cases where an application must be made. That would give rise to the implication that the power to grant planning permission by order is not available for those cases.

Choice of procedure

12. Regulations under section 31A(8) are already subject to the negative procedure and there is nothing in the amendment of section 31A(8) that affects that.

Section 22 – salmon carcass tagging

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure; affirmative procedure where power used to modify Part 5 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003

Provision

13. Section 22 of the Bill inserts a new section 21A into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”). Section 21A(1) enables the Scottish Ministers to make provision, by regulations, for or in connection with tagging the carcasses of wild salmon, and new section 21A(2) provides examples of the matters that may be provided for under such regulations. Subsection (4) of section 21A was amended at Stage 2 to provide that the regulations will be subject to affirmative procedure where the power at subsection (3)(c) is used (modification of Part 5 of the Salmon and Freshwater Fisheries Consolidation (Scotland) Act 2003).

Reason for taking power

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

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

Choice of procedure

16. Regulations under section 21A(1) of the 2003 Act will be subject to negative procedure by dint of section 68(2) of the 2003 Act (as read with paragraph 2 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp10). But affirmative procedure will apply where the power at new section 21A(3)(c) is exercised to modify Part 5 of the 2003 Act (section 68(4) is amended by section 22(4)). Negative procedure is considered appropriate as it provides a proportionate and appropriate level of Parliamentary scrutiny of the technical detail of the scheme. In addition, certain provisions of the regulations will have been considered by the European Commission and Member States. Should the regulations make provision in relation to record keeping, etc (section 21A(2)(b)), such provision is considered to comprise administrative matters and therefore negative procedure provides the appropriate degree of scrutiny. Affirmative procedure is considered appropriate where modifications are made to primary legislation.

17. Section 21A(3) provides that regulations made under section 21A(1) may make different provision for different purposes and different areas, and may modify Part 5 of the 2003 Act which deals with enforcement. If the regulations seek to modify Part 5 of the 2003 Act then they will be subject to Affirmative procedure. This is considered to be the appropriate level of Parliamentary scrutiny.

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

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

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

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

20. The regulations will set out the details of the provision made for the amount of charge to be payable, by whom it is payable and when, including setting down the circumstances in which charges may be reduced or waived and exemptions provided for.

21. Subsection (4) provides that the charges payable under regulations made using this power may only require a person to pay a charge if and so far as the person is someone in relation to whom a fisheries function has been carried out. In addition the charge may not exceed the reasonable cost incurred in the carrying out of the function. The charge therefore must relate to the function in respect of which it is charged, and may not generate a surplus.

Reason for taking power

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

Choice of procedure

23. No changes were made to the substance of the power in section 50 at Stage 2. However, an amendment was made to section 52(2) that has the effect of providing that regulations under section 50 will be subject to the affirmative procedure rather than the negative procedure (as was provided by the Bill on introduction).

24. While Section 50(5) of the Bill requires the Scottish Ministers to consult before making regulations under 50(1), it is considered that the affirmative procedure is appropriate as it provides a proportionate level of Parliamentary scrutiny of the application of these powers.

This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 17) as amended at stage 2

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

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