

## **RURAL ECONOMY AND CONNECTIVITY COMMITTEE**

### **SALMON FARMING IN SCOTLAND**

#### **SUBMISSION FROM EWAN G KENNEDY**

##### **INTRODUCTION**

I am the secretary to the saveiseilsound campaign group and in due course expect to be submitting a general response on their behalf dealing with the questions posed in the invitation to contribute. I offer this submission in a personal capacity as a resident of mid-Argyll for over thirty years. I have no business interests and no interest in wild fishing.

Over the last twenty years or so the waters near where I live, Seil Sound, Shuna Sound and lochs Shuna and Melfort, which truly together form one medium sized sealoch, have been increasingly subject to applications for fish farming installations. Local residents have become concerned not only about the environmental impacts but also the effects on local businesses in a micro-economy that is almost entirely dependent on tourism and recreation.

A major event mortality took place at Ardmaddy in October 2011, when over 83,000 mature fish died, which led to an interest in the disposal of fish waste. The complaint that saveiseilsound made to the European Commission led to the removal of the derogation that had previously permitted unregulated disposal to landfill.

##### **MULTIPLICITY OF REGULATORS**

It is clear that both the industry on one hand and the scientists and environmentalists on the other are equally unhappy with the present system of regulation. Members of the SPPO complain that it is complicated and bureaucratic and causes delays, while the latter also complain that it is these and add that in addition it is completely ineffective.

To summarise, to operate a fish farm in the sea one requires to register as an aquaculture business with Marine Scotland, to get a site lease from the Crown Estate, a CAR licence to pollute from SEPA and finally Planning Consent. Once operating one requires to comply with a mass of regulations from bodies dealing with fish health and veterinary matters. Other bodies such as SNH, the Coastguard and Scottish Archaeology become involved as consultees.

Despite, or maybe because of, this web of regulation there are *lacunae* such as the absence of a body with responsibility for wild salmonids and crustaceans, as the witnesses on 14 March pointed out in their oral evidence to you.

There are other gaps as well, for example Food Standards Scotland do not test farmed salmon for the presence of Emamectin Benzoate before it is sold to the public and Police Scotland do not have any protocols in place for dealing with the transport of fish mortalities.

As your witnesses pointed out on 14 March, when a local authority notes that SEPA has given approval it becomes more difficult to refuse the planning case, despite SEPA now having quite a narrow view of their remit. Here are extracts from a letter from SEPA in connection with their decision to grant a CAR licence at Pol na Gille, a very contentious site in our area.

1. Impact on wild salmonid fish species from sea lice

Whilst recognising the listing of Salmon under Annex II of the Habitats Directive which requires protection and promotion of salmon habitats and the wider ecological considerations imposed upon SEPA under the Water Framework Directive, the specific issue of containment / security of farmed stock at fish farming installations does not fall with SEPA's regulatory remit. SEPA acknowledges that the sea lice and escapes of farmed stocks are pressures in the water environment. For these pressures however, Marine Scotland and the Local Authorities are the principle bodies for regulating existing and new aquaculture developments. SEPA has a significant role in regulating fish farm developments under the provisions of the Water Environment (Controlled Activities) (Scotland) Regulations 2011, but these regulations are not appropriate to address the issue of containment and sea lice. These pressures are more appropriately addressed through the Aquaculture and Fisheries (Scotland) Act 2007 and the Town and Country Planning (Scotland) Act 1997, regulated by Marine Scotland and the local authorities respectively.

2. The absence of an Environmental Impact Assessment (EIA) in support of the application

There is no statutory requirement under CAR 2011 for an Environmental Impact Assessment to be carried out. This is a matter for the Local Authority to consider in line with the requirements of planning legislation.

The history shows that Argyll & Bute Council do not always require an environmental assessment and that those submitted have invariably related to the individual site and ignored the existence of others in the area, a fairly blatant breach of requirement in the EIA Directive that they should be comprehensive.

Local authorities must be finding themselves in difficulties dealing with fish farming applications, which as your witnesses mentioned on 14 March are very different from house extensions and garages. In essence they are being asked to approve a process rather than a structure, with quite inadequate resources and a lack of scientific expertise. Apart from this they derive no revenue, fish farms being exempt from rates, which places an unfair burden on the half dozen or so Councils with fish farms out of thirty two. As the ultimate decision makers they will be aware that they are in the firing line for appeals and judicial reviews if they get things wrong.

## **REGULATION INEFFECTIVE**

From reading through hundreds of emails disclosed in terms of environmental information requests I noted that, understandably, relations at local level between officers within SEPA and local fish farms were cordial and often on a first name basis. It seems that SEPA prefer a light touch approach, especially when many of the things that can and do go wrong are not currently offences. For example there is no penalty for fish escapes, whether due to negligence or natural events such as storms, only for failing to report, and the same applies to outbreaks of notifiable diseases.

From looking at the data disclosed it was clear that there were occasionally events that could not have an innocent explanation and might lead to a prosecution. I sent an inquiry to the Crown Office in respect of the period from the inception of their Wild Life and Environmental Crime Unit on 15 August 2011 to 31 October 2012. Here is an extract from their reply:

**Your ref:**  
**Our ref: R003993/CH**

**11 December 2012**

**Dear Mr Kennedy**

**Thank you for your e-mail of 31 October 2012 to the Crown Office and Procurator Fiscal Service (COPFS). I apologise for the delay in providing you with a response.**

**You have requested the following information in terms of both the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRs):**

**A note of the numbers of cases notified to the Crown Office Wildlife and Environmental Crime Unit (WECU) in the period from the inception of the Unit to date by the Scottish Environment Protection Agency (SEPA), broken down under the following headings.**

- (1) Operators of fin fish farms in respect of their water-based facilities**
- (2) Operators of fin fish farms and relative processing units in respect of their facilities on land**
- (3) Operators of all other water-based facilities**
- (4) Operators of all other land-based facilities.**

**I have understood point (3) to mean cases where the individual, company or organisation has been reported to COPFS regarding an activity on the sea, a loch or a river.**

**The first day of operation of WECU was 15 August 2011. I have therefore taken the timescale of your request to cover 15 August 2011 to 31 October 2012, both dates inclusive.**

**The number of cases reported to WECU by SEPA within this period was as follows:**

- (1) No cases**
- (2) No cases**
- (3) 2 cases**
- (4) 44 cases**

**In December 2015 I asked for an update and the reply included:**

Our ref: R011905

17 February 2016

Dear Mr Kennedy

Thank you for your request dated 4 December 2015 under the Freedom of Information (Scotland) Act 2002 (FOISA) for the undernoted information:

"1 A note of the numbers of cases notified to the Crown Office and Procurator Fiscal Service in the period from 1 November 2012 to date by the Scottish Environment Protection Agency relating to operators of fin fish farms in respect of (a) their water-based facilities and (b) in respect of their facilities on land. Please give sub-totals for each calendar year or part thereof in the said period.

2 In relation only to such facilities located in the area of Argyll & Bute Council a detailed breakdown giving (a) the names of the operators (b) the sites affected (c) the date(s) of the referral(s) (d) the charges, if any, which resulted and (e) the outcomes of proceedings following on such charges."

As the information you have requested is 'environmental information' for the purposes of the Environmental Information (Scotland) Regulations 2004 (EIRs), we are required to deal with your request under those Regulations.

Please accept my apologies for the delay in responding to you. This was due to the manual examination of case papers which required to be carried out in order to provide the information in the response. I can advise that two cases have been notified to COPFS in the period from 1 November 2012 to 4 December 2015, by the Scottish Environment Protection Agency in relation to operators of fin fish farms. Both these reports were received in 2014 and are located in the area of Argyll & Bute Council. No decision has yet been taken in respect of proceedings.

The Crown Office refused to disclose any details of the two cases and we suspected that one of them might relate to Pol na Gille, where we were aware there had been massive over-stocking. I requested a review, which included:

*"information published by SEPA on its website disclosed inter alia that in the period between October 2013 and March 2014, both inclusive, tonnages at Pol na Gille were always in excess of (the permitted biomass tonnage), sometimes by a factor of 50%. To put this into context, if we assume, being kind to the operators, that the salmon were reaching maturity at about 4kg per fish, the permitted stocking would allow 375,000 fish to be caged at Pol na Gille. Overstocking by 50% means that an additional population of at least 137,500 must have been in the cages.*

*It is impossible to overstock, especially over a period of several months, by accident."*

Subsequent exchanges failed to persuade the Crown Office to change its mind and the Committee will be aware that there is no appeal to the Information Commissioner in such cases.

I later learned that both cases had been dropped and nobody outside of SEPA and the Crown Office knows the identity of the sites involved.

As a former solicitor with some experience of criminal defence and regulatory matters I was curious to find out the reasoning behind the decisions.

One matter that was clarified was a concern I had that the normal that the usual time bar in summary prosecutions for statutory offences of six months might apply. In a letter to my MSP Mike Russell from the then Lord Advocate Frank Mulholland confirmed that this was not a problem, but without quoting a statutory reference for this.

Another issue was outlined in a letter I sent to the Crown Office, which included:

*“As a former defence solicitor it seems to me that there is one major problem with the current system, that it relies entirely on self-reporting of breaches, which means that any prosecution would have to rely entirely on evidence supplied by the accused. It's difficult to see how that sits with the general privilege against self incrimination.*

*There is also the problem that reports filed with SEPA by fish farm operatives are presumably not self proving and would have to be spoken to by the person who had prepared them, who might no longer be in the employment of the accused company.*

*It is interesting to see from the Lord Advocate's letter that these cases apparently don't get time-barred, but it would plainly be better if they could be processed rather faster than has been the case.*

*I hope that you find these comments of assistance. Our members will be happy to assist in any steps to bring what look like very obvious and serious breaches to court.”*

The reply confirmed that prosecutors only bring cases when there is sufficient evidence and it's in the public interest, which of course I knew anyway. The writer did not highlight my concern as a problem, but did not explain how the Crown Office would have handled the issue, had a case come to court.

For the sake of completeness I can confirm that outwith Argyll & Bute there have been two cases, neither concerning a farm at sea, as shown in this extract courtesy of Don Staniford:

We advise there have been two successful prosecutions involving fish farms since April 2006 resulting from SEPA reporting cases to the COPFS. Please refer to the summary below for details of each prosecution.

- Marine Harvest Scotland Ltd (following a plea of guilty were fined on 12 December 2007) – an unauthorised discharge of effluent to a river, depositing sludge on land and burning waste. All offences took place at the Amhuinnsuidhe Hatchery site on the Isle of Harris. Fined £23,500
- Lighthouse Caledonia Limited (pled guilty on 27 November 2008) - spilling diesel/fuel oil which leaked through a bund wall and then ultimately discharged to the Russel Burn. The Russel Burn flows into Loch Kishorn. Fined £12,000.

It is noteworthy that in both of these cases there was real, i.e. objective factual evidence, outwith any testimony from operatives of the companies involved.

### **CONCLUSIONS RE PROSECUTIONS**

While not intending any criticism of the writers of those letters, I respectfully suggest to the Committee that you obtain, for the sake of completeness, reassurance in the form of reference to statutory or judicial authority for the assurances I was given.

Whatever the reasoning for decisions not to prosecute, bringing criminal cases against fish farm operators is obviously difficult and could be counter-productive if it were to discourage operators from reporting data accurately.

At least it could poison what seem to be good relations at local level.

### **ALTERNATIVES TO PROSECUTION**

It is of course possible that in the two Argyll & Bute cases matters were dealt with by way of a private informal warning.

I asked Marine Scotland for a note of any “Fixed Penalty Notices” and “Fixed and Variable Monetary Penalties” under the Aquaculture and Fisheries Acts in the period from 16 September 2013 to date. The answer confirmed that while numerous FPNs had been issued none was in respect of fish farming. No VMPs had been issued at all. Here is a reply to Mike Russell’s letter sent on my behalf:



Cabinet Secretary for the Rural Economy and  
Connectivity  
Fergus Ewing MSP



Scottish Government  
Riaghaltas na h-Alba  
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F/T: 0300 244 4000  
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Mr Michael Russell MSP  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Our ref: 2018/0005513  
13 March 2018

Dear Michael,

### **Fixed Penalty Notices**

Thank you for your email of 12 February and enclosures regarding your constituent Mr Ewan Kennedy, voicing his concern at what he considers to be an absence of fixed penalty notices awarded to aquaculture.

Responsibility for regulating and maintaining the high health status of farmed and wild fish and shellfish stocks in Scotland rests with the Fish Health Inspectorate (FHI). The manner of enforcement activity available to FHI is detailed in section 4.12 of the Fish Health Inspectorate Service Charter, which can be found at the following web address:  
<http://www.gov.scot/Topics/marine/Fish-Shellfish/FHI/charter>

The Fish Health Inspectorate provide clear advice and assistance to the aquaculture sector to encourage regulatory compliance through a risk based surveillance program which has maintained accreditation by the United Kingdom Accreditation Service (UKAS) to ISO 17020 standard. Mr Kennedy my wish to know that this approach fosters cooperation and has been found to be beneficial, particularly when serious outbreaks of disease require swift and effective management and eradication. It also ensures the high health status afforded to Scotland is maintained.



In regards to enforcement action taken by FHI, this is done in a proportion to the risks posed by any issue and, in the vast majority of situations, advice and/or recommendations have been provided which have been acted upon to ensure the management of any risk. On the occasions where a more immediate response is required, warning letters and enforcement notices have been issued to the industry. Escalating enforcement action to the use of Fixed Penalty Notices or more formal criminal proceedings has not been necessary to date, although this would be undertaken should the seriousness of the offence require it.

I hope this is helpful.

Yours aye,

A handwritten signature in black ink that reads "Fergus Ewing". The signature is written in a cursive style with a large loop under the 'F' and 'E'.

**FERGUS EWING**

## **THE WAY FORWARD**

There is a strong case for reducing the number of bodies involved in regulating aquaculture.

As between local authorities and SEPA the former do not look suitable, for the reasons outlined above. It could be argued (and was argued by Guy Linley-Adams) that they can assess local needs, but I'm not convinced that they do this at all well. We have seen farms approved in the face of hundreds of objections (for example 840 at Ardmaddy, with about a half from local residents, LibDem Councillor Robin Currie from Islay, where fish farms are not allowed, voting in favour). The aquaculture councils cover vast areas and issues regarding fish farms are very local. There are conflicts of interest between areas with fish farms, which are usually in tourist areas of low population density with few elected councillors and industrial areas, where equipment manufacture, feed processing and transport and accordingly jobs are based.

For SEPA to take on the lead role they would require considerably more resources than they have at present, possibly including inspectors with navigational, scientific and diving abilities.

The range of remedies needs to be widened, on the basis of experience in other countries such as Norway and the Faroes. Enforced reduction of biomass, restrictions on licences and financial incentives other than fines would be helpful. Making these depend on civil rather than criminal standards of proof would help. Requiring the worst performing companies to pay more for polluting our waters seems only fair.

The lack of data is woeful. It was tragic that the industry got away with keeping sea lice data secret. A great deal of the science knowledge actually exists and just needs out be brought out.

Finally, the proposal to double production based on untested computer modelling in the face of appalling and rising mortalities, sea lice and biotoxin pollution must at least be put on hold and, unless supported by good science applied on the precautionary principle, abandoned.

Ewan G Kennedy  
March 2018