

## Public Audit and Post-Legislative Scrutiny Committee

### Post-legislative Scrutiny: Biodiversity and Biodiversity Reporting Duties

#### Written submission from Salmon and Trout Conservation Scotland

S&TCS welcomes the opportunity to submit written evidence to the PAPLSC concerning the biodiversity duties placed on public bodies by the Nature Conservation (Scotland) Act 2004. This submission will focus on the biodiversity duty (and not its reporting requirements) by reference to the duties of local authorities and SEPA when dealing with the various permitting and licensing processes associated with open cage marine salmon farming in Scotland and that industry's negative impacts on wild salmonids (Atlantic salmon and sea trout).

The Environment, Climate Change and Land Reform Committee has recently taken evidence on the environmental impacts of salmon farming, including wild fish impacts, and the Committee is referred to the SAMS Report commissioned by SPICE for the ECCLR Committee this year for details of that impact<sup>1</sup>.

By way of background, the multi-sea-winter component of the Atlantic salmon population is a UK Biodiversity Action Plan (BAP) priority fish species. Atlantic salmon in freshwater is listed on Schedule 3 of the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended), as it appears on both Annexes II and V of the Habitats Directive, as a species of European importance. Atlantic salmon is also recognised by OSPAR as a threatened and/or declining species, and is a mobile Priority Marine Feature in Scotland<sup>2</sup>. Both brown trout and sea trout are UK BAP priority fish species and sea trout is a mobile Priority Marine Feature in Scotland.

#### Local authorities

Currently, local councils in their role as planning authorities under the Town & Country Planning (Scotland) Act 1997 are the only Scottish public authorities that regularly consider the potential interactions between marine cage fish farming and wild salmonids which they do when planning applications are made for completely new farms, or when farms wish to expand by increasing the number of cages<sup>3</sup>.

This may seem odd, but there are no other bodies that recognise they have statutory functions that require them to consider the negative interactions between fish farms and wild salmonids. Marine Scotland's Fish Health Inspectorate deals only with the welfare of the *farmed* fish, pursuant to its duties under the Aquaculture and Fisheries (Scotland) Act 2007 and has no wild fish remit. SEPA states regularly that it has no responsibility for interactions with wild salmonids and does not consider these when licensing fish farms under the Controlled Activities Regulations (but see below). SNH has no relevant regulatory function and, in responses it makes to other Scottish public authorities as a statutory consultee, largely ignores wild salmonids other than those in European (Special Areas of Conservation) protected sites (of which there

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<sup>1</sup> [http://www.parliament.scot/S5\\_Environment/General%20Documents/20180125\\_SAMS\\_Review\\_of\\_Environmental\\_Impact\\_of\\_Salmon\\_Farming\\_-\\_Report.pdf](http://www.parliament.scot/S5_Environment/General%20Documents/20180125_SAMS_Review_of_Environmental_Impact_of_Salmon_Farming_-_Report.pdf)

<sup>2</sup> SNH(2016) SNH Commissioned Report 406: Descriptions of Scottish Priority Marine Features

<sup>3</sup> See, for example, Argyll & Bute Council letter of 9<sup>th</sup> January 2017 to SEPA concerning CAR/L/1152438 application for Marine Cage Fish Farm, Dounie, Sound Of Jura - "The Council is required to consider the interaction between farmed fish and wild migratory salmonids for any planning application for a new or expanded fish farm".

are only two designated for Atlantic salmon on the west coast and in the western isles of Scotland).

Although the duty to further biodiversity under the 2004 Act bites on Councils in relation to their duties under the 1997 Act - and they should be congratulated for attempting to meet this duty - S&TCS' experience of dealing with many fish farm applications is that the Councils are not adequately resourced nor have the in-house skills in relation to the interactions of fish farming with wild salmonid populations.

Further, and more importantly, once the grant of planning permission has been made, there is very little Councils can do to control on-farm operations in order to fulfil the duty to further nature conservation, should, for example, the permitted fish farm start to operate with high levels of sea lice or escapes, or be consented to increase biomass under licences granted by SEPA.

## **SEPA**

It might be expected that SEPA has a role here, as its functions encompass policing and enforcing the Controlled Activities Regulations, setting maximum permitted biomass of farmed fish on farms and controlling the quantity of sea lice treatment chemicals that can be released. However SEPA considers only organic and chemical residue pollution of the seabed and water column from salmon farms.

SEPA's own Fish Farm Manual<sup>4</sup>, published in 2005, stated variously that "*in order to better protect wild salmonid stocks however, SEPA has adopted a Limiting Factor approach to consenting marine caged fish farms. SEPA may, in determining biomass limits for sites where proximity to important wild stocks is considered as a significant issue, impose a biomass limit equivalent to that biomass which can be effectively treated for sea lice infestations using an authorised sea lice medicine*" and that, when setting consent limits, "*in certain instances to protect important wild salmonid stocks, SEPA will limit the biomass to that which can be treated at the site using an authorised sea lice medicine.*"

However, SEPA has altered its position and now states, for example, in relation to a recent CAR licence application for a new fish farm in the Sound of Jura, that "*regarding your comments on the potential interactions between farmed fish and wild stocks, 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 on SEPA under the Water Framework Directive, the specific issue of containment/security of farmed stock at fish farming installations does not fall within SEPA's regulatory remit. SEPA acknowledges that 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 principal bodies for regulating existing and new aquaculture developments. As you are aware, 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*"<sup>5</sup>.

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<sup>4</sup> <https://www.sepa.org.uk/regulations/water/aquaculture/fish-farm-manual/>

<sup>5</sup> Letter from Anne Anderson, Chief Officer, Compliance and Beyond, SEPA to Friends of the Sound of Jura 29<sup>th</sup> January 2018 CAR application 1152438 Dounie fish farm, Sound of Jura

Further, SEPA's Biodiversity Duty Report 2015/2017, published in February 2018, refers, on page 7, paragraph 3, to SEPA's Nature Conservation Procedure for environmental licensing, which SEPA says ensures that its regulatory decisions across the range of regulatory regimes help to implement statutory duties to protect designated features of conservation sites. However, this Procedure is silent on how SEPA protects mobile Priority Marine Features when exercising its functions, species that are not linked to particular sites, such as wild salmon and sea trout.

S&TCS believes SEPA is wrong at law to ignore its duty under the 2004 Act with respect to conservation of wild salmonids and the effect of its licensing of fish farms under CAR. As such, S&TCS believes that SEPA is failing to fulfil the duty under the 2004 Act to further the conservation of biodiversity.

Importantly, local authorities appear to share this view that SEPA does not meet their duties under the Nature Conservation (Scotland) Act 2004:

*"on the subject of sea lice control and wild salmonids, agencies such as Marine Scotland Science and SEPA appear to be sidestepping their biodiversity duty with regard to impacts on wild salmonids and this issue remains one of the key aspects to determining applications"*<sup>6</sup>.

Further, the qualification of SEPA's duty under section 51 of the Regulatory Reform (Scotland) Act 2010, which introduces a focus on sustainable economic growth, is taken too far by SEPA, to the neglect of its 2004 Act duty, particularly when it considers fish farm applications. SEPA needs to be reminded that, under Section 51(1) of the 2010 Act, SEPA is obliged to carry out the functions conferred on it by or under the 2010 Act or any other enactment for the purpose of protecting and improving the environment. The economic considerations introduced by section 51(2)(b) bite "except to the extent that it would be inconsistent with subsection (1)". In short, the duty on SEPA to protect the environment, and that under the 2004 Act to further nature conservation, trump any duty to promote sustainable economic growth, but SEPA consistently fails to recognise this.

### **General observations**

It is worth noting the Explanatory Notes to the 2004 Act state that under the Act, "*public bodies have a legal obligation to further the conservation of biodiversity in the course of carrying out their functions.....In exercising the duty, public bodies must have specific regard to the 1992 Rio Convention on Biological Diversity and to any Scottish Biodiversity Strategy designated by the Scottish Ministers under section 2 of the Act. Whilst compliance with the duty is obligatory, public bodies may have significant discretion in relation to the particular action which they consider to be necessary in any particular situation. The new duty is not intended to be narrow or prescriptive, but the purpose of it is to place the onus on public bodies to take direct responsibility for the impacts which their policies and operations may have on the natural environment*" (underline added).

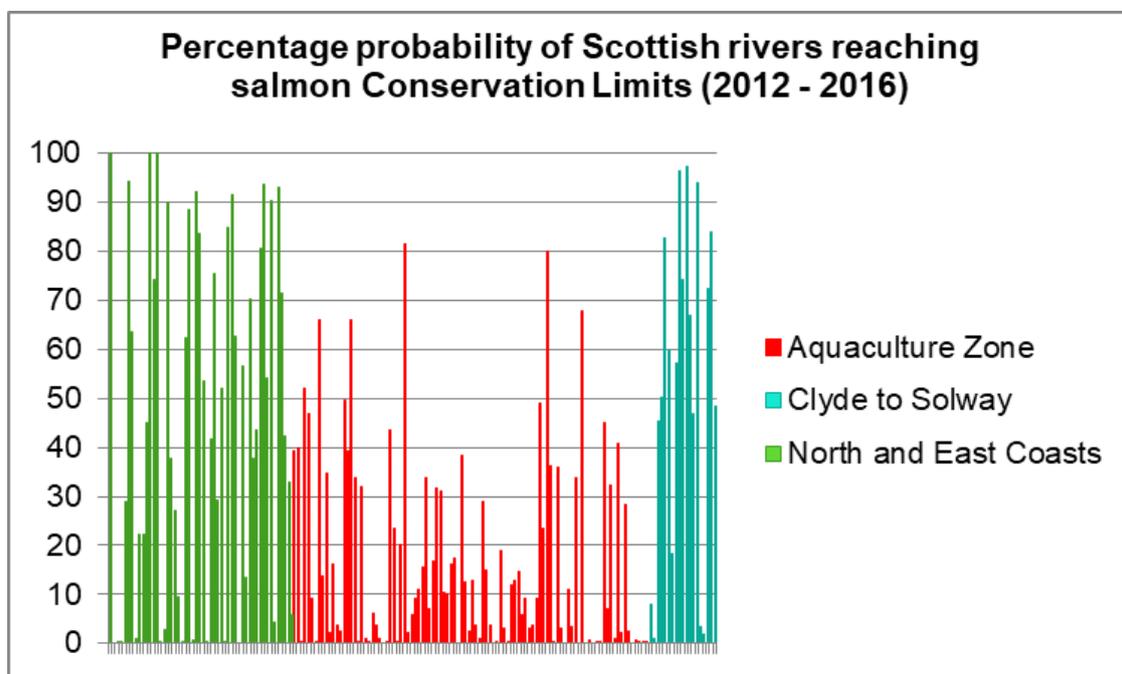
Indeed, a key action of the Scottish Diversity Strategy 2004 was to "*minimise the risk of farmed organisms adversely affecting wild organisms, directly or indirectly, through conditions and protocols, and through spatial zoning where appropriate*"<sup>7</sup>.

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<sup>6</sup> Email from Mark Harvey, Team Leader, Development and Infrastructure Services, Highland Council, re SARF Review of the Aquaculture Consenting Regime, 16<sup>th</sup> January 2018

<sup>7</sup> Scotland's Biodiversity: It's in Your Hands. A strategy for the conservation and enhancement of biodiversity in Scotland <http://www.gov.scot/Publications/2004/05/19366/37245>

However, the percentage probability of Scottish rivers reaching salmon Conservation Limits (five-year average 2012-2016), shown below using Marine Scotland Science data from the conservation assessments for 2018 by river and assessment group<sup>8</sup>, shows a clear impact on the conservation of wild Atlantic salmon in the ‘aquaculture zone’ of the west coast of Scotland, with Atlantic salmon populations in rivers in the aquaculture zone far less likely to be reaching Conservation Limits than populations in rivers elsewhere.



Given the above, it cannot be concluded that relevant Scottish public authorities have “*taken direct responsibility*”, in respect of marine cage fish farming impacts upon wild salmonids, in line with the duty in the 2004 Act or the 2004 Scottish Biodiversity Strategy, sufficiently to protect those species. The evidence is clearly to the contrary.

In respect of the duty in the 2004 Act, S&TCS can only conclude that the duty in the 2004 Act is insufficiently robust. S&TCS suggests that this is because the wording of the duty - “*to further the conservation of biodiversity*” - makes the duty at best aspirational, without clear sanction for failure to apply the duty.

Contrast this with the fisheries duty given to the Environment Agency in England under section 6(6) of the Environment Act 1995 - “*it shall be the duty of the Agency to maintain, improve and develop salmon fisheries, trout fisheries, freshwater fisheries and eel fisheries*”. S&TCS would suggest that the 2004 Act needs to be amended, dropping the requirement to ‘further’, such that it then reads “*It is the duty of every public body and office-holder, in exercising any functions, to conserve biodiversity, so far as is consistent with the proper exercise of those functions*”.

Such a revised duty would give nature conservation far more weight when public bodies are performing their statutory functions, in order to ensure that the policy aims of the Nature Conservation (Scotland) Act 2004 can be delivered across all Scottish public bodies and that priority species, including wild Atlantic salmon and sea trout, are conserved in practice.

<sup>8</sup> An explanation of Conservation Limits, and the probability of rivers meeting them, is available here: <http://www.gov.scot/Topics/marine/Salmon-Trout-Coarse/fishreform/licence/status>