

EXECUTIVE NOTE

THE AQUACULTURE AND FISHERIES (SCOTLAND) ACT 2007 (FIXED PENALTY NOTICES) ORDER 2008 - SSI 2008/101

The above instrument was made in exercise of the powers conferred by sections 25(2)(b), 26(5), 27(1) and (3), 29(2)(b) and 43(1)(b) of the Aquaculture and Fisheries (Scotland) Act 2007. The instrument is subject to negative resolution procedure.

Policy Objectives

The main objectives for introducing a system of administrative sanctions are:

- to improve the effectiveness of sanctions and to provide greater deterrence;
- conserve vulnerable fish stocks and promote compliance;
- to divert fisheries offences from the court system where appropriate and so reduce uncertainty for fishermen and perhaps industry (legal) costs (by simplifying and reducing the timescales involved);
- to increase consistency and transparency; and
- to protect those who observe the rules and hence protect the communities for whom fishing is an important part of the economic fabric.

Taking all these factors into account we concluded that a scheme where financial administrative penalties (FAPS) are offered in appropriate cases as an alternative to criminal prosecution, would be the most suitable form of administrative sanction

Consultation

A public consultation was held between 8 November and 1 February 2008. The consultation was sent to over 500 addresses and a total of 8 responses were received. The consultation was sent to representatives from the fish catching sector in Scotland, Fishermen's Associations and Organisations, registered buyers and sellers of first sale fish, under and over 10 meters license vessel holders, Local Authorities, MEPs, The Scottish Parliament, CoSLA NDPBs and other groups. In general the responses were in favour of the proposal.

Financial Effects

There will be no additional costs to compliant fishermen.

The Scottish Fisheries Protection Agency will continue to operate in the usual way, detecting offences. There is unlikely to be any significant additional costs compared with the existing system. However, there may be additional resources required to administer the collection and payment of fines. It is hoped that the level of fines have been fixed at such a level that they will serve as a deterrent for committing fishing offences. Industry costs may be reduced if there were fewer court hearings as they would not need to pay for legal representation.

Further information is set out in the attached Regulatory Impact Assessment.

Scottish Government Marine Directorate
05 March 2008

Final Regulatory Impact Assessment (ref no. 2007/35)

1. Title of proposal

1.1 The Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2008.

2. Purpose and intended effect of the proposal

Objectives

2.1 The main objective for introducing an administrative penalties system are:

- To improve the effectiveness of sanctions;
- Conserve vulnerable fish stocks and promote compliance;
- To decriminalise fisheries offences and so reduce uncertainty for fishermen and perhaps (legal) costs (by simplifying and reducing the timescales involved);
- To increase consistency and transparency and; and
- Protection of those who observe the rules and hence protect the communities for whom fishing is an important part of the economic fabric.

Background

2.2. Enforcement of fisheries regulations in Scotland lies with the Scottish Fisheries Protection Agency (SFPA). British Sea Fishery Officers (BSFO) at sea and ashore will continue to carry out their enforcement tasks as they currently do. If a breach is detected they will retain the discretion to determine at a local level whether advice, either verbal or in the form of a advisory letter, or a warning letter is appropriate.

2.3 Currently any alleged fisheries offences are prosecuted through the court system via the Crown Office and Procurator Fiscal Service (COPFS). The proposal is for an administrative penalties system to run in tandem with the existing system, releasing court resources for serious offences or for those who decline an administrative penalty. The more serious offences can attract a fine of up to £50,000 on summary conviction and may include additional penalties covering the value of the illegal catch, or on indictment an unlimited fine. However, the courts rarely impose penalties anywhere near the maximum.

2.4 The issue of administrative penalties has been reflected in various policy documents in recent years such as “A Sustainable Framework for Scottish Sea Fisheries” published by the then SEERAD in July 2005. The Scottish Government also contributed to the “Securing the Benefits” document (June 2005) which was a UK paper committing fisheries administrations to the development of proposals for greater use of penalties that do not involve automatic recourse to the courts.

2.5 Furthermore, in February 2004, in responding to the European Commission for alleged failures in enforcement, the UK informed the Commission that we were aware that administrative penalties systems were successfully operated in other member states and would look at whether such systems may be appropriate in the UK.

Rationale for government intervention

2.6 Over the last 12 years there have been considerable doubts about the deterrent effect of existing criminal sanctions. The degree to which our arrangements can be shown to be robust and effective in practice as well as in theory is particularly important given the fragile state of the fish stocks.

2.7 Under the Common Fisheries Policy, there is a requirement for Member States to have an effective system of sanctions in place for dealing with breaches of Community law, including administrative and criminal sanctions. In addition, various reports from government committees have recommended that Fisheries Administrations should introduce a simple administrative penalty system which is transparent and predictable to industry.

2.8 Following these recommendations, the Scottish Government has endeavoured to find a method of combining and accommodating the needs of all interested parties. The intention is to find a balance between the aspirations of the reporting Committees and the interests of the fishing community, whilst working within the constraints and balances inherent in our criminal justice systems.

2.9 Scientific evidence also shows that many of the main fish stocks found in the waters of the European Community are near or at historically low levels caused mainly by over-fishing. Over exploitation of fish stocks results in detrimental impacts on marine ecology. In addition, in some fishing activities, controls may be required to limit the environmental impact of over-fishing on the marine environment, such as restricting or improving the type of fishing gear permitted in some areas.

2.10 Without improved fisheries enforcement and control measures designed to safeguard fish stocks and to ensure their long-term sustainability, certain fish stocks risk collapse and this would have a significant impact on the fishing industry.

2.11 Non-implementation of the EU requirement to have a comprehensive and effective sanctioning regime in place could leave the UK open to infraction procedures by the Commission. The Commission takes a close interest in the implementation of fisheries enforcement requirements by Member States. Effective fisheries management is a key requirement in meeting the goals of sustainable development.

3. Consultation

3.1 **Within Government:-** UK policy has been agreed with colleagues in other UK administrations as well as enforcement agencies and COPFS.

3.2 **Public Consultation:-** In the first quarter of 2006 fisheries administrations held a 12 week consultation exercise to seek the views of stakeholders on a proposed system of financial administrative penalties. The consultation document was issued to hundreds of stakeholders in hard copy and was also available online via the SE website. Although numerically the response rate was low, the majority of our key stakeholders were represented by their umbrella organisations and Federations who did respond.

3.3 A mixed response was received. Around half of the respondents were largely in favour of the scheme as outlined in the consultation document although several qualified their support with further comments. These included making sure that any administrative penalty scheme could be

applied equally to both UK and foreign vessels. Other concerns from those in favour included the length of time it will take to set up and the difficulties in establishing offences that might be suitable and the level of penalties they will attract.

3.4 There has also been a series of meetings between officials and stakeholders as well as written correspondence on the policy paper as it has developed. Throughout the process, industry concerns have been taken on board resulting in small adjustments to the proposed system and they are now largely content with the proposal.

4. Options

5.1 All UK fishing vessels and foreign vessels fishing in Scottish waters and/or landing in Scottish ports could potentially be affected by the new measure. Additionally, registered fish buyers, sellers and auction sites may also be affected.

4.1 Three options have been identified:-

4.2 **Option 1** Do nothing – The first option is to do nothing and to continue with the existing regimes of criminal sanctions for fisheries offences i.e. all alleged offences referred to COPFS for possible court action.

4.3 **Option 2** Introduce a system of Financial Administrative Penalties (FAP) which would be offered as alternative to criminal prosecution in certain circumstances. The FAP system would compliment the existing system rather than replacing it. The SFPA will retain the discretion to refer the alleged offence to the COPFS.

4.4 **Option 3** Decriminalising all fisheries offences and providing for an entirely new civil justice system with a comprehensive administrative penalties system.

5. Costs and benefits

Option 1 Do nothing.

5.1 Retaining the status quo would probably continue to provide a reasonable deterrent to rule breakers. However, the criminal system has proved to be a very expensive method of policing the fishing industry for all parties involved. Cases can take a long time to come to court. There are issues with consistency of treatment of offenders and offences by different Sheriffs. Retaining this system would present the UK as rejecting the Commission recommendation to adopt a system of administrative penalties. This may have a negative effect on UK relations with the commission and negotiating positions. Doing nothing will neither increase or decrease current costs of enforcement and prosecution. This option would not add any financial or administrative burdens to the fishing industry. It would not provide any benefits in terms of improving compliance.

Option 1 Impact on costs to fishermen

5.2 Loss of earnings due to interruption of fishing activity may arise during inspection, evidence gathering and the court case itself. Costs are likely to be greater for foreign vessels than for UK vessels, if they are detained for prosecution. It is difficult to estimate with accuracy the level of earnings lost due to interruption of activity. This is because the size, and the value of catch depends on a number of factors, such as length of tow, time of the year, weather conditions, type of fish and abundance.

5.3 Fishermen may also incur costs in terms of legal fees at the interview stage, in preparation for the court case and for any subsequent court appearance. The extent of preparation required will depend on the nature of the offence.

Option 1 Impact on Government Expenditure

5.4. Individual fishermen may be eligible for legal aid to cover legal costs. In this case, the costs of solicitors' fees would fall to the government, rather than to individual fishermen. No legal aid is available for companies or partnerships.

5.5 SFPA officers are also required to attend many court cases to give evidence; attending time can vary from half a day to a much longer period. In addition to staff time, investigations also take a considerable amount of legal time and costs. While, the introduction of administrative penalties will save resources in that respect it does not alter the evidential standard that the SFPA works to in taking forward a prosecution. The SFPA will operate to the same high standards of investigation whether it is an administrative penalty or a referral to the COPFS.

Option 2 Introduce a system of Financial Administrative Penalty –

5.6 This option would not add any administrative burdens on those fishermen who comply with fisheries regulations. The proposal would allow SFPA to offer a FAP to deal with some fisheries offences quickly and effectively without prosecution.

5.7 It is difficult to predict the exact number of cases that will be processed through the FAP system; however, based on the analysis in the table below it appears unlikely on current patterns that FAP cases will exceed 30% of the total number of cases

Year	Cases Referred to COPFS	Cases that would have been eligible for fixed financial penalty
2002	77	23
2003	68	14
2004	134	31
2005	76	21
2006	55	17

Option 2 Impact on costs to fishermen

5.8 FAPs would speed up procedures for dealing with infringements and therefore reduce the administrative burden and costs of legal representation for non-compliant fishermen. Examples of savings include;

- reduction in the amount of fishing time lost during court appearances;
- reduction in the costs of solicitors' fees through avoiding court appearances;
- anticipated reduction in fines and costs payable if found guilty by the courts

5.9 Other potential benefits for the fishermen which would be less readily quantified will include:

- faster conclusion of cases that would previously have been referred to court. Fishermen can experience delays of up to several months in waiting to hear whether they will be prosecuted, which can impose considerable strain upon them. However, the benefits that would be gained from the FAP system will be those related to delays in obtaining a court hearing.
- avoidance of a criminal record, with the associated stigma, by accepting a FAP in place of court hearings;
- providing greater uniformity in penalties for similar offences across the UK – removing the uncertainty caused by wide variations in penalties imposed by different courts and giving a more level playing field.

Option 2 Impact on Government Expenditure

5.10 A system of FAPs for fisheries offences will give rise to potential cost savings for government, and a reduction in the number of cases going to court. The extent of savings will depend on:

- the number of administrative penalties offered;
- the number of such offers taken up by fishermen (who will have the option of refusing, with the alternative that the case is referred to COPFS for criminal prosecution);
- the relative costs to government of a FAP compared to alternatives.

5.11 If FAPs result in a lower administrative burden for government, these resources can be directed to other enforcement activities, which may result in higher levels of detection and compliance. However, there may be some cases whereby the cost savings are not realised, these include the following;

- additional court cases where FAPs are offered in place of written warnings, but are refused by fishermen;
- non-payment of FAPs by fishermen, in which case prosecution would follow; and
- awards of costs by courts foregone i.e. if FAPs are offered investigation costs cannot be recovered;
- the nature of the offence being too serious for a FAP to be offered.

5.12 Another less readily quantified benefit for the government may be faster conclusion of cases that would previously have been referred to court. Avoiding delays related to obtaining a court hearing will save staff time and aid resource planning. There will be a supporting IT system that will record FAPs accepted by fishermen and track whether or not they have been paid. This will be rapidly accessible to enforcement officers, including those operating at sea in SFPA patrol vessels. This will ensure that the level of penalty reflects whether there has been a previous offence or not. Penalties levied by other UK Fisheries' Administrations will also count towards a FAP. The IT system will also be able to show if a written warning had been issued for an offence. For example, there will be a link to data on written warnings, as FAPs will be offered in place of a second written warning for the same offence. It is envisaged that such a system could be set up and operated through modification of the existing MCSS system.

5.13 Other initial set up costs may include staff training and publicity costs. The total cost of training will depend on the number of staff identified for training and the length of the training.

Option 3: Decriminalising all fisheries offences and providing for an entirely new civil justice system with its own appeal mechanism

5.14 This would fundamentally change the way fisheries offences are handled by replacing existing criminal procedures with a comprehensive system of financial administrative penalties, which could include licence suspension/withdrawal for major offences.

Option 3 Impact on Costs to Fishermen

5.15 Removing fisheries offences from the criminal courts would have a major impact on the fishing industry. The costs to those who comply would be unchanged. The costs to those who break the rules would vary on a case by case basis, some vessels may benefit from such a system while others may find it hits them harder than the fines historically meted out by the criminal system.

5.16 A move towards a wholly administrative system would have far reaching repercussions and affect many more people engaged in the industry than is currently the case with the criminal system. Penalties such as suspension of licence could potentially cost fishermen substantially more in financial terms through loss of earnings than the fines that they receive now. The financial impact of a licence suspension would be felt by the entire crew of a vessel as they would be denied the chance to fish and earn their share of the value of the catch. This is a major change from the existing situation where only the owner or master of the vessel are fined as they are deemed responsible for the illegal activities undertaken by the vessel and crew.

Option 3 Impact on Government Expenditure

5.17 The creation of a wholly administrative system of penalties would require substantial Government expenditure. An appeal mechanism/tribunal would require to be set up in the interests of fairness to those accused of breaking the rules. Additionally staff would be required to process all the administrative penalties cases that currently go to the court system. There would also be a risk that the new system proved to be less of a deterrent than the criminal system and the level of compliance in the industry may drop off. This may potentially de-stabilise the longer term sustainability of the industry which could impact on future Government expenditure.

6. Small Firms Impact Assessment

6.1 As explained in section 3, previous consultation carried out on this proposal already included small businesses in the fishing catching sector. The proposal will not have an adverse impact on small firms involved in legitimate fishing activity. Fisheries regulations apply to both small and larger firms in the same way. The types of small business in the fishing sector are individual vessel owners and small fishing companies employing a small number of staff.

6.2 There have been no additional costs highlighted for small businesses. However, we will engage with fishermen during the course of this consultation to confirm that this is still the case.

7. Legal Aid Impact Test

7.1 The proposals will not have a negative impact upon the legal aid system as administrative penalties will, it is hoped, reduce the administrative burden when taking forward prosecutions. The

SFPA will still be able to refer cases to the COPFS for prosecution but this does not alter or undermine an individual's access to the justice system. It does, in the majority of cases, allow them to accept and pay the penalty without venturing into the court system should they elect to do so.

8. Test Run of Business Forms

8.1 In Scotland, the administration of this system will be managed on a day to day basis by the SFPA. In preparation, the Scottish Government and the SFPA along with the other government administrations have been working in partnership to develop changes to the current IT systems so that it can support the proposals. We will consult our stakeholders on the format of these forms and their ease of use. Furthermore, new processes will be established for the collection and payment of fixed financial penalties in consultation with industry representatives. We will monitor the implementation of the new forms, particularly among those fishermen who do not have English as a first language.

9. Competition Assessment

9.1 This proposal would impact directly on the fish catching sector and those involved in the initial buying, selling and transporting of the fish. Overall, there will be no negative impact arising from this proposal.

9.2 The proposal will affect all businesses in the fish-catching sector in the same way and is unlikely to directly affect the market structure or change the number or the size of firms. It will not lead to higher set-up costs for new or potential firms that existing firms do not have to meet. The catching sector is not characterised by rapid technological changes and the proposal will not stop firms providing products or services that they would otherwise provide

9.3 The competition filter has been applied to this proposal and only three of the answers were potentially positive for a limited number of markets. In view of this, it is unlikely that there will be an impact on competition and therefore no requirement to undertake a detailed competition assessment is necessary.

9.4 The costs of the proposal, as with the current system, will only fall on businesses that do not comply with fisheries regulations. The competitive position for legitimate operators may improve as they are more likely to be able to operate on a level playing field.

10. Enforcement, Sanctions and Monitoring

10.1 This proposal relates to enforcement activity which would be undertaken predominantly by British Sea Fisheries Officers operating under and behalf of the Scottish Fisheries Protection Agency.

11. Implementation and delivery plan

11.1 The Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2008 will come into effect on 1 April 2008. The Scottish Government Marine Directorate will be issuing an industry guidance note to assist with the application of the Order.

12. Post implementation plan

12.1 The Scottish Government Marine Directorate will liaise closely with the Scottish Fisheries Protection Agency on the implementation of this Order. The Scottish Fisheries Protection Agency

will report annually on the number of prosecutions referred to the COPFS and administrative penalties through its normal reporting cycle to the Scottish Ministers. We will review the implementation of the Order within 3 years of it being fully commenced.

13. Summary and Recommendations

13.1 The Scottish Government Marine Directorate is committed to implementing a system of administrative sanctions and has received broad support from stakeholders it intention. The Scottish Government Marine Directorate recommends **Option 2** is the best course of action.

14. Regulatory Quality Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....
Date.....

Richard Lochhead
Cabinet Secretary for Rural Affairs and the Environment
Scottish Government