

AQUACULTURE AND FISHERIES (SCOTLAND) ACT 2013

EXPLANATORY NOTES

THE ACT

Part 1 Aquaculture

Chapter 3 – Commercially Damaging Species

Orders relating to commercially damaging species

Section 11 - Specification of commercially damaging species

32. **Section 11(1)**, as read with subsection (2), provides for the species which the Scottish Ministers may, by order, specify as a commercially damaging species for the purposes of Chapter 3. Section 11(1) defines a commercially damaging species as a species of fish or shellfish, plant, or any other species of animal. It enables Ministers to make an order in respect of such species where they consider the species, if not controlled, would be likely to have a significant adverse impact on the economic or commercial interest of a person who carries on a business of fish farming, and where the species itself of little or no commercial value. For example, the order-making power may be exercised in relation to *Mytilus trossulus*. This species of mussel, which is not commercially viable due to its thin shell and low meat yield, has displaced in some places the commercially viable farming of *Mytilus edulis*.

Section 12 - Movement of species, etc.

33. **Section 12(1)**, as read with section 13 (orders under section 12(1): samples and surveillance), enables the Scottish Ministers to make provision, by order, for or about the prohibition or control of the movement of any commercially damaging species that is present, or suspected of being present in any body of water. The power extends to any other species of animal or plant and any equipment, used in connection with fish farming or shellfish farming, the movement of which may be associated with the movement of the commercially damaging species. It also extends to water in which a commercially damaging species is suspected of being present.
34. **Section 12(2)** details the matters that may be included in an order under section 12(1), including the designation of an area in which movement controls apply. For example, this power may be exercised to prevent the movement of stocks from a site known or suspected of having a commercially damaging species. It is an offence for a person to act in contravention of a section 12(1) order, to fail to take any action required by the order or to otherwise fail to comply with any requirement imposed on the person by such an order (section 12(3)). Offences under section 12(3) are punishable on summary conviction by a fine not exceeding level 5 on the standard scale (section 12(5)).

Section 13 - Orders under section 12(1): samples and surveillance

35. **Section 13** specifies the matters which may be provided for in an order under section 12(1). An order may contain provision which enables an “appointed person” to take samples of fish, shellfish, or material from any fish or shellfish farm and analyse these for the purpose of ascertaining whether a commercially damaging species is present at a fish or shellfish farm. Section 13(1)(d) describes the powers of an “appointed person”, including powers to enter any land, fish farms, shellfish farms or premises associated with the management or operation of such farms and to require the operator of such farms to provide samples. For example, an appointed person may enter onto a fish farm in order to collect samples of mussels to determine whether they are *Mytilus trossulus* or *Mytilus edulis*.
36. **Section 13(3)** contains further provision on the matters that may be provided for in an order under section 12(1), including requiring persons to undertake surveillance programmes or for appointed persons to undertake such action.

Section 14 - Offences relating to persons appointed under section 13

37. **Section 14(1)** specifies the circumstances in which a person commits an offence as regards an appointed person. It is an offence for a person to fail to comply with a requirement imposed by an appointed person or to wilfully obstruct such a person. For example, where a person wilfully obstructs a person appointed by the Scottish Ministers for the purposes of undertaking a programme of surveillance (section 13(3)(b)), the person so obstructing is guilty of an offence.
38. Persons guilty of an offence under section 14(1)(a) are liable on summary conviction to a fine not exceeding level 5 of the standard scale, (currently £10,000), and persons guilty of an offence under section 14(1)(b) are liable on summary conviction to a fine not exceeding the statutory maximum (currently £10,000) and on conviction on indictment to a fine (section 14(4)).

Section 15 - Notification of presence of commercially damaging species

39. **Section 15(1)** creates an obligation for operators of fish farms and shellfish farms, as soon as reasonably practicable, to notify the Scottish Ministers of the presence of a commercially damaging species on the fish farm or shellfish farm. In terms of section 15(2), the notification obligation also applies to any person who is employed, or acts as an agent as regards the fish farm or shellfish farm.
40. **Section 15(3)** specifies the details that must be included in any notification, including the type of the commercially damaging species, and details of the fish or shellfish farm in question. It is an offence, punishable on summary conviction to a fine not exceeding level 5 on the standard scale, for a person to fail to give a notification (section 15(4) and (6)).

Control

Section 16 - Control agreements

41. **Section 16** applies where the Scottish Ministers are satisfied that a commercially damaging species is present on a fish farm or shellfish farm. Section 16(2) requires that Scottish Ministers form a preliminary view as to whether measures should be taken to remove the species, to reduce the incidence of the species, to prevent its spread or to control it, and if so, by what means. For example, where a commercially damaging species is found to be present, Ministers may take a preliminary view that the site may be fallowed to control the presence of a commercially damaging species.
42. Where it is decided that measures should be taken, section 16(3) requires the Scottish Ministers to give notice to the person who carries on the business of fish farming or

shellfish farming at the farm in question, and to consult that person in order to secure their agreement on the measures to be taken, etc. When agreement under 16(3) is reached, the Scottish Minister must prepare a “control agreement”, and section 16(4) specifies the matters that must be contained in such an agreement. Section 16(6) requires the Scottish Minister to send a copy of the control agreement to the person carrying on the business of fish or shellfish farming at the farm in question and section 16(8) makes provision for the control agreement to be reviewed at least once in every 18 months.

Section 17 - Control schemes

43. **Section 17** applies where Scottish Ministers have given notice under section 16(3)(a) of the Act in relation to the presence of a commercially damaging species, and are satisfied either that it is not possible to secure a control agreement, or 6 weeks have elapsed since the notice and no agreement has been reached and Ministers remain of the view that measures should be taken to remove, reduce, prevent or otherwise control the commercially damaging species.
44. **Section 17(2)** requires in certain circumstances the Scottish Ministers to make a “control scheme” in order to ensure that any measures they consider necessary to remove, etc the species in question are taken. Where Ministers make a control scheme, they must notify the person who carries on the business to which the control scheme relates at least 14 days before the scheme comes into effect that the scheme has been made (section 17(3)). Section 17(4) and (5) specify, respectively, the matters which must and may be included in the control scheme, and the date by which any measures to be taken by the person to whom the scheme applies are to be completed. Section 17(6) introduces schedule 1, which makes provision about the making, variation and revocation of control schemes and appeals. Section 17(7) makes provision for the person who carries on a business to which a control scheme relates to take such measures as the scheme may require of them. Section 17(8) requires the Scottish Ministers to review a control scheme at least once every 12 months, and section 17(9) enables Ministers to undertake themselves any requirement of a control scheme where they are of the opinion that a person has failed to comply.

Section 18 - Emergency action notices

45. **Section 18** applies where the Scottish Ministers are satisfied that a commercially damaging species is present on a fish farm or shellfish farm and that unless urgent action is taken, the species will spread quickly and have an immediate and significant adverse impact on other fish or shellfish or their commercial exploitability or the commercial or economic interests of fish or shellfish farmers. Where Ministers are so satisfied, section 18(2) provides an exemption to the notice process described in section 16(3), such that no notice or consultation to secure an agreement need be carried out. Instead, section 18(3) requires the Scottish Ministers to give an “emergency action notice” which notes their intention to take urgent action in respect of the commercially damaging species. Section 18(4) specifies the matters to be included in an emergency action notice, including the measures proposed to be taken to remove the species from the farm in question. Section 18(5) enables Ministers, no sooner than 14 days after the giving of the notice, to take the measures specified in the emergency action notice.

Section 19 - Appeals in connection with emergency action notices

46. **Section 19** creates a statutory right for persons upon whom an emergency action notice has been served to appeal against the notice to a sheriff against the decision to give the notice or its terms. An appeal must be lodged within 14 days of the emergency action notice being given (section 19(2)). Section 19(3) states the sheriff may make any order on appeal he or she thinks appropriate and that the sheriff’s decision is final.

Powers

Section 20 - Power to enter fish farms, shellfish farms, etc

47. **Section 20** enables persons authorised in writing by the Scottish Ministers, and for a purpose stated in section 20(2), to enter any fish farm or shellfish farm and any premises associated with the management or operation of a fish farm or shellfish farm. Section 20(2) sets out the purposes for which the Scottish Ministers may authorise a person to enter such premises, including in order to obtain information that will enable them to determine whether a commercially damaging species is present on a fish or shellfish farm. Section 20(3) states that the power of entry must be exercised at a reasonable hour, except in the circumstances described in section 20(3)(a), (b) or (c). Section 20(4) provides that where a person proposes to exercise powers of entry, they must if so required, produce evidence of their identity and authorisation.

Offences

Section 21- Offences in relation to control agreements, control schemes, etc.

48. **Section 21** makes provision in relation to offences. Section 21(1) makes it an offence, without reasonable excuse, for a person to refuse or fail to comply with any requirement imposed on the person by a control agreement (section 16) or a control scheme (section 17). Section 21(2) makes it an offence for a person to wilfully obstruct a person authorised under section 20(1) from carrying out any of their functions under section 20.
49. **Section 21(4)** provides that a person who commits an offence under section 21(1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, and section 21(5) provides that a person who commits an offence under section 21(2) is liable on summary conviction to a fine not exceeding the statutory maximum (currently £10,000), and on conviction on indictment, to a fine.

Interpretation

Section 22 - Interpretation of Chapter 3

50. **Section 22** provides a definition of ‘commercially damaging species’ as used in Chapter 3.