

AQUACULTURE AND FISHERIES (SCOTLAND) ACT 2013

EXPLANATORY NOTES

THE ACT

Part 3 – Sea Fisheries

Enforcement of sea fisheries legislation

Section 35 – Powers of British sea-fishery officers to enforce sea fisheries legislation

115. **Section 35** seeks to modernise and provide a comprehensive set of powers for British sea-fishery officers (“BSFOs”) for the purposes of enforcing sea fisheries legislation in the Scottish enforcement area and in relation to Scottish fishing boats anywhere in the world.
116. **Section 35(1)** makes provision for BSFOs to have access to the common enforcement powers within Part 7 of the Marine (Scotland) Act 2010 and the powers conferred by section 36 (power to detain vessels in connection with court proceedings) and section 39 (power to inspect objects used in commercial sea fishing). In addition BSFOs also have access by virtue of section 35(4) to any other enforcement powers they may have under sea fisheries legislation but constrained by section 35(5) to circumstances where they are unable to exercise a power available to them either as part of the suite of enforcement powers set out in the 2010 Act or the powers contained in sections 36 or 39.
117. **Section 35(7)** modifies sections 151 to 155 of the 2010 Act with the effect that any reference to a power in Part 7 of the 2010 Act is to be construed as a reference to a power applied by section 35(1). This will confer a statutory obligation on BSFOs to provide evidence on their authority (section 151 of the 2010 Act), state their name and purpose, etc (section 152 of the 2010 Act). BSFOs would not be liable in any civil or criminal proceedings by virtue of section 154 of the 2010 Act providing certain conditions are met. Section 155 of the 2010 Act creates a number of offences in relation to BSFOs: these include where a person fails to comply with requirements made of them, provides false information, obstructs, assaults a BSFO or pretends to be one.

Detention of vessels in connection with court proceedings

Section 36 – Power to detain vessels in connection with court proceedings

118. **Section 36** makes provision for BSFOs to detain a vessel either to ensure the attendance of the alleged offenders in court where the BSFO believes that the offender will not attend court unless the vessel is detained or believes a court will order the vessel to be detained following a conviction and a fine. This power may be used where a BSFO has reasonable grounds to suspect that an offence has been committed by the owner, master or charterer of a fishing vessel and there is a real risk that the alleged offenders will not attend court unless the vessel is detained in port.

119. **Section 36(2)** provides that a BSFO may take, or may arrange for others to take, a vessel and its crew to the nearest convenient port for the purposes of detaining it. It allows a BSFO to give instructions to anyone who appears to be in charge of the vessel to take it and its crew, to port.
120. **Section 36(4)** and (5) requires a BSFO to serve a notice of detention on the person who appears to be in charge of the vessel, which must include the reasons for detaining it and the circumstances under which it may be released. A notice of detention under section 36(4) must be withdrawn if any ground of release specified in section 37(5) applies.

Section 37– Release of vessel detained under section 36

121. **Section 37(2)** sets out the circumstances under which a vessel detained under section 36 is no longer to be treated as detained under that section. This includes where a notice of detention is withdrawn by a BSFO, where a sheriff orders the release of the vessel under section 38, proceedings taken against the master, owner, or charterer have concluded, or the court has exercised any power it has to order the vessel to be detained.

Section 38 – Power of sheriff to order release of vessels

122. **Section 38** provides a process allowing the owners of a vessel detained under section 36 to apply to a sheriff for an order releasing the vessel from detention. An owner or charterer of a vessel may apply under section 38(2) to a sheriff seeking the release of the vessel from detention. A sheriff may order the release of the vessel if satisfied that any of the grounds given in section 38(4) apply. These are that the continued detention of the vessel is no longer necessary to secure the attendance of the master, owner, or charterer at court, or that there are no grounds for believing that the court would order the vessel to be detained at any court proceedings as envisaged under section 36(1)(b)(ii).

Inspection and seizure of objects used in commercial sea fishing

Section 39 – Power to inspect and seize objects

123. **Section 39(1)** confers inspection powers on BSFOs to allow them to examine objects which they have reasonable grounds to suspect may be being used in connection with commercial sea fishing. This could include objects discovered in the sea, or on land on the foreshore, or in the vicinity of ports and harbours. Section 39(2) provides a power to lift an object out of the sea for the purposes of inspecting it. Having inspected the object, the officer may decide to seize it by virtue of the power conferred by section 39(3). By virtue of Section 39(7), this can include any contents or anything attached to the object. If the officer decides not to seize the object then section 39(5) requires the officer to replace the object where it was found or, in circumstances where it is not possible to replace the object, section 39(6) provides for the seizure of the object until the owner can collect it.

Section 40 – Reports of inspections under section 39

124. **Section 40** requires a report about the inspection to be completed by the officer who has inspected the object using the powers set out in section 39. Section 40(3) sets out the contents of the report, and where the object is seized the additional information set out in section 40(4) must also be included in the report. Section 40(5) requires a copy of the report to be attached to an object that has not been seized and if the officer cannot attach a copy of the report to the object, section 40(6) requires the officer to make an attempt to provide this report to whoever appears to be the owner of the object. Section 40(8)-(10) sets out the circumstances where the owner of the object should be served a copy of the report. Where the owner of the object cannot readily be identified, section 40(11) substitutes the requirement to serve a copy of the report on the owner of the object with

a requirement to take reasonable steps to bring the report to the attention of anyone likely to have an interest in it.

Section 41 – Retention of objects seized under section 39(3)

125. **Section 41(1)** provides that an object seized under section 39(3) may be retained by the Scottish Ministers. However, if either of the grounds set out in section 41(3) apply, the Scottish Ministers must make the object available for collection. These grounds are that either the procurator fiscal has decided that no proceedings will be taken, or that a relevant fixed penalty notice has been paid, or that court proceedings have concluded without an order of forfeiture being made. The Scottish Ministers are not obliged, however, to make the object available for collection if it is liable for forfeiture as a prohibited item under section 46.

Section 42 – Disposal of objects seized under section 39

126. **Section 42** sets out the process which the Scottish Ministers are required to follow when seeking to either return or dispose of an object. Section 42(2)-(5) defines a notice of collection and requires the Scottish Ministers to serve a copy on every person who appears to be an owner of the object or, in the case that an owner cannot be identified, on persons likely to have an interest in the object. Having served a notice of collection under section 42, the Scottish Ministers may dispose of the object as they see fit at the end of a three-month period.

Retention and disposal of property seized by BSFOs

Section 43 – Retention of property seized by British sea-fishery officers

127. **Section 43** provides the Scottish Ministers with the power to retain property seized in the Scottish enforcement area or on board a Scottish fishing vessel, by British sea-fishery officers (BSFOs) using powers other than those contained within section 39.
128. **Section 43(2)** requires BSFOs to deliver seized property to the Scottish Ministers as soon as is reasonably practicable. Section 43(4) allows Scottish Ministers to retain said property. In accordance with paragraph 13 of schedule 2, in circumstances where the property is live shellfish, BSFOs may, however, return such animals to the sea to mature, without first delivering them to Scottish Ministers.
129. **Section 43(5)** requires Scottish Ministers, in certain circumstances, to release seized property and make it available for collection as soon as is practicable. Release of property is required when a procurator fiscal takes no proceedings in respect of an offence where the property was seized, where a fixed penalty notice has been paid in respect of the offence, and for proceedings which have been concluded without the property being subject to any order for forfeiture.
130. The grounds for release of property under sections 43(5) and 43(6) do not apply to property if it is liable to be forfeited under section 46 or 47.

Section 44 – Power of Scottish Ministers to sell seized fish in their possession

131. **Section 44** gives the Scottish Ministers the power to sell any fish that has been seized by BSFOs and retained by them under section 43. Section 44(3) permits Scottish Ministers to retain the proceeds. These proceeds are to be retained by Ministers until the courts orders forfeiture of the proceeds and, in the absence of the courts making such an order, the Scottish Ministers are required under section 44(5) to return proceeds to owners as soon as is practicable. Return of the funds held is also necessary under section 44(4) if no court proceedings are taken or any fixed penalty notice issued is paid.
132. If the Scottish Ministers have retained the proceeds of any sale for a period of six months (because they have been unable to return the funds to the original owner(s) of the fish)

then section 44(6) allows such funds to be retained by Scottish Ministers and used as they see fit. However, the Scottish Ministers can only dispose of such funds in this way where it was not practicable at the time they exercised the power of disposal to immediately return the funds to the original owner.

133. [Section 44\(8\)](#) requires that fish sold by the Scottish Ministers must be sold at auction and under section 44(9) the owner's views must be taken into account on the manner in which the fish should be sold. Owners may ask for fish to be sold at a particular auction or by a method of sale other than auction. The Scottish Ministers are required by virtue of section 44(11) to take such views into account unless they deem them to be unreasonable.
134. [Section 44\(12\)](#) permits the deduction by the Scottish Ministers of reasonable selling expenses from the proceeds of the sale.

Section 45 – Disposal of property retained by Scottish Ministers under section 43

135. [Section 45](#) sets out the process to be followed for the disposal of property retained by the Scottish Ministers under section 43. Section 45(2) defines a notice of collection and section 45(3) requires the Scottish Ministers to serve a copy on every person who appears to be an owner of the object or, in the case that an owner cannot be identified, then the Scottish Ministers should seek to serve a notice of collection on an appropriate person as defined in section 45(6), or on any person likely to be interested in the object. Having complied with the requirements on a notice of collection, the Scottish Ministers may dispose of the object as they see fit at the end of a three-month period from the date of service of the notice if it is not claimed.

Forfeiture

Section 46 – Forfeiture of prohibited items

136. [Section 46](#) allows the Scottish Ministers to seek the forfeit of any item which has been seized where it would be illegal under Scots law to use that item for sea fishing. This power is available by virtue of section 46(1) to items lawfully seized by BSFOs under sea fisheries legislation either within the Scottish enforcement area or from on board a Scottish fishing boat wherever it is. Section 46(3) allows the Scottish Ministers to dispose of items forfeited under section 46 in any manner they see fit.

Section 47 – Forfeiture of fish failing to meet size requirements

137. [Section 47](#) allows the Scottish Ministers to seek the forfeiture of fish and shellfish which fails to meet minimum size requirements for that species. This power is available by virtue of section 47(1) to items lawfully seized by BSFOs under sea fisheries legislation either within the Scottish enforcement area or from on board a Scottish fishing boat wherever it is. Section 47(3) allows the Scottish Ministers to dispose of items forfeited under section 47 in any manner they see fit.

Section 48 – Further provision about forfeiture under section 46 or 47

138. [Section 48](#) and schedule 2 set out the process to be followed where the Scottish Ministers wish to seek the forfeiture of property under sections 46 and 47, and provide for an appeal process which allows an application regarding forfeiture to be made to a sheriff. Where a sheriff makes a decision on a forfeiture application, that ruling may be appealed to the sheriff principal.

Inshore Sea fishing

139. [Sections 49](#) and [50](#) make amendments to the Inshore Fishing (Scotland) Act 1984 (“the 1984 Act”) and relate specifically to the order making power at section 1 of that Act. Section 1 allows the Scottish Ministers to prohibit, by order, fishing for a specified

description of sea fish (or method of fishing) in a specified area. “Sea fish” is defined as meaning any fish found in the sea including shellfish, salmon and migratory trout (section 9). Failure to comply with any order made under section 1 is an offence by virtue of section 4 of the 1984 Act. In addition the 1984 Act confers enforcement powers on BSFOs at sections 5 and 6. Those powers are exercisable in relation to any British fishing boat within British fishery limits and in relation to any vehicle or equipment all for the purposes of enforcing the provisions of any order made under section 1.

Section 49 - Contravention of orders prohibiting inshore sea fishing

140. **Section 49** amends the 1984 Act. Section 49(2) adds a new subsection (1B) to section 4 of the 1984 Act (offences). That provides that a person commits an offence where the facts at paragraphs (a) to (c) are proved and it is reasonable to infer from those facts that the person intended to fish in contravention of a prohibition introduced through an order made under section 1 of the 1984 Act
141. **Section 49(3)** amends the 1984 Act by adding a new section 4A. This creates a presumption that applies in proceedings against a person charged with an offence under section 4(1) of the 1984 Act. The presumption is that the person has fished in contravention of an order made under section 1 of the 1984 Act where certain facts, set out at subsections (2) and (3), are proved and it is reasonable to infer from those facts that the person was, or had been, fishing in contravention of the order. New section 4A(4) of the 1984 Act provides that the presumption will not apply where it can be shown that any evidence raises a doubt regarding certain facts.

Section 50 - Powers of entry

142. **Section 50** provides further amendments to the 1984 Act and these concern powers of enforcement. Section 50(2) adds a new section 6A to the 1984 Act which provides a power of entry exercisable by BSFOs in respect of any land except dwellinghouses. The power applies for the purposes of enforcing the provisions of any order made under section 1 of the 1984 Act as well as the provisions of section 3. New section 6A(2) provides that BSFOs may do certain things that are necessary to gain entry in relation to any land. This includes opening lockfast places, and removing any obstacles. New section 6A(3) places a duty on BSFOs that, if requested, they must produce evidence of their identity. New section 6A(4) makes provision for an offence where someone willfully obstructs a BSFO or refuses, or fails to, comply with a request made by a BSFO. A constable may arrest without warrant someone suspected of an offence under subsection (4). New section 6A(9) provides BSFOs with certain protection in civil and criminal proceedings for anything done while exercising the new power of entry providing the court is satisfied that they acted in good faith and had reasonable grounds to exercise the power of entry.

Crown application: Scotland

143. **Section 50(3)** adds a new section 10A to the 1984 Act which relates to the application of the new section 6A to the Crown. New section 10A(1) applies the new power of entry in section 6A to Crown land. Most of the foreshore around Scotland is owned by the Crown. By virtue of the definition of Crown land in new section 10A(5), Her Majesty’s private estates are exempt from the new power of entry in section 6A and new section 10A(3) exempts the Crown from any criminal liability.

Enforcement of EU rules

Section 51 – Modification of the Fisheries Act 1981: enforcement of EU rules

144. **Section 51** makes a technical amendment to section 30(1) of the Fisheries Act 1981 to extend its geographic scope to, and to allow enforcement of EU obligations and restrictions on, Scottish fishing boats outside of the Scottish zone.

145. This amendment will allow for new EU regulations to be fully and properly enforced at the point that they come into effect, not only in respect of all vessels within the Scottish Zone as at present, but also in respect of Scottish fishing vessels wherever they are and any persons in Scotland whose activities are subject to EU rules on the regulation of commercial sea fisheries. The changes will simply alter the legislative basis on which a contravention of EU law would be enforced. In other words EU regulations that would otherwise be enforced through a statutory instrument will be directly enforceable under the 1981 Act through the amendment.