

AQUACULTURE AND FISHERIES (SCOTLAND) ACT 2013

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

PART 1 AQUACULTURE

CHAPTER 1 – FISH FARM MANAGEMENT

Section 1 - Fish farm management agreements and statements

3. Section 1 makes provision to amend the Aquaculture and Fisheries (Scotland) Act 2007 (the “2007 Act”) with the insertion of provisions for fish farm management agreements and statements.
4. Section 1(2) inserts a new section (4A) into the 2007 Act, after section 4. This provision sets out the requirement for fish farm businesses to be party to farm management agreements or to maintain farm management statements. The amendment will enhance the investigative powers currently available to an inspector (within the meaning of section 12 of the 2007 Act) and provide inspectors with additional powers to take samples of fish and examine/take copies of any documents or records from any fish farm in Scotland. It will also enable the Scottish Ministers to modify the definition of the Code of Practice (within the meaning of inserted section 4A(5)) by order.
5. Section 1(3) replaces section 6(1) (enforcement notices) of the 2007 Act. This amendment will enable Scottish Ministers to serve enforcement notices on those who have failed or are failing to be party to fish farm management agreements or to maintain fish farm management statements and on those who have failed or are failing to ensure fish farms are managed and operated in accordance with such agreements or statements.
6. Section 1(4) amends section 43(3) of the 2007 Act so that an order under section 4A(6) of the 2007 Act is subject to the affirmative procedure in the Scottish Parliament.

Section 2 - Escapes, and obtaining samples, from fish farms

7. Section 2 makes provision to amend the 2007 Act to enhance the investigation powers currently available to inspectors and to provide inspectors with additional powers to take or require samples of fish from any fish farm in Scotland. The amendments will allow the Scottish Ministers to determine from which farms fish have escaped. The information obtained as a result of the exercise of the new investigation powers will assist to inform fish farmers on best containment practices, prevention of escapes, improving productivity, increasing sustainability and minimising the potential for adverse impact on wild salmonids.

8. Section 2(2)(a) inserts a new paragraph (ba) into subsection (2) of section 5 of the 2007 Act (inspections: containment and escape of fish). The provision will enable an inspector (within the meaning of section 12 of the 2007 Act) to carry out an inspection for the purpose of tracing the origin of any fish known or suspected to have escaped from an inspected farm or any other fish farm.

9. Section 2(2)(b) amends section 5(3)(a) of the 2007 Act to clarify that the powers available to an inspector under that section include powers to take samples of fish or material from fish.

10. Section 2(3) inserts a new section 5A into the 2007 Act. New section 5A(1) enables an inspector to take samples of fish or material from fish, on a fish farm for a purpose mentioned in new section 5A(3). Section 5A(2) enables an inspector to require persons who carry on the business of fish farming to provide them with samples of fish, or material from fish, on the fish farm.

11. Section 5A(3) of the 2007 Act specifies the purposes for which the samples referred to in section 5A(1) and (2) may be taken, including assessing the impact of a fish farm's operations on the environment and for research purposes.

CHAPTER 2 – FISH FARMING: EQUIPMENT AND WELLBOATS

Equipment

Section 3 - Technical requirements for equipment used in fish farming

12. Section 3 makes provision for regulations to be made by the Scottish Ministers in relation to technical requirements for equipment to be used for or in connection with fish farming. The regulations will assist fish farmers to contain fish, prevent escapes, improve productivity, increase sustainability, and minimise the potential for any significant adverse impact on wild salmonids.

13. Section 3(1) enables the Scottish Ministers to make regulations which will prescribe equipment requirements to be complied with by fish farmers in their farming activities, and to provide for the enforcement of those requirements. Section 3(1)(b) includes training requirements in the matters to be regulated.

14. Section 3(2) specifies the purposes for which the regulations may be made, including for the prevention of escapes of fish.

15. Section 3(3) makes provision for the matters which may be included in the regulations, including arrangements for the appointment of inspectors to enforce the provisions of the regulations (section 3(3)(b)) and for criminal offences associated with non-compliance with the regulations (section 3(3)(g)). Section 3(7) provides that the sanctions that may be specified in the regulations may include the suspension or revocation of any authorisations required by fish farm operators to operate as such, for example, an authorisation under the Aquatic Animal Health (Scotland) Regulations 2009 (SSI 2009/85).

Wellboats

Section 5 - Control and monitoring of operations of wellboats

16. Section 4 defines “wellboat” for the purposes of Chapter 2 in Part 1 of the Act, and “farmed fish” for the purposes of section 4. Section 4(1), as read with section 4(2) and (3), defines “wellboat” as meaning a vessel containing a tank or well for holding water in which live farmed fish may be taken and subsequently kept for transportation, storage, slaughter, grading or treatment.

Section 5 - Control and monitoring of operations of wellboats

17. Section 5(1) enables the Scottish Ministers to make provision, in regulations, for or about controlling and monitoring the operation of any wellboat in Scotland. Section 5(2) contains provisions detailing the matters which may be provided for in regulations under section 5(1), including the measures that require to be taken to control the risk of the spread of parasites, etc as a result of wellboat operations and the specification of types of equipment that require to be installed in wellboats. Section 5(3) enables regulations under section 5(1) to impose requirements on the master, owner or charterer of a wellboat, as the case may be. Section 5(5) makes it an offence, punishable on summary conviction by a fine of up to level 4 on the standard scale (section 5(8)), for a person to contravene any of the provisions of section 5(1) regulations, or fails to take any action required of them under those regulations. In cases where a section 6 enforcement notice has been served upon a person charged with an offence under section 5(5), section 5(6) prevents proceedings being taken against that person. Section 5(7) creates a reasonable excuse defence for persons charged with an offence under section 5(5). For example, the master of a wellboat may temporarily be unable to comply with requirements under the regulations on equipment where there has been an unforeseen and unpreventable delay in installation, or where installed equipment intended to reduce the spread of parasites is under repair.

Section 6 - Enforcement notices

18. Section 6 makes provision for the service of enforcement notices in relation to failure to comply with the requirements of regulations made under section 5(1).

19. Where the Scottish Ministers are satisfied a person has failed or is failing to comply with any requirements imposed upon that person in regulations made under section 5, they may serve an enforcement notice upon that person. That notice must specify the matters referred to in section 6(3), and Ministers may decide to publish its service (section 6(4)). Where an enforcement notice has been served by the Scottish Ministers, the person upon whom it has been served may appeal against the notice to the sheriff within seven days of the service of the notice (section 6(5)). Section 6(7) provides that the lodging of a timeous appeal stops the effect of the notice, until such time as the appeal is withdrawn or determined.

20. Section 6(8) provides that upon hearing an appeal, the sheriff may make such order as he or she considers appropriate as regards the notice, and the sheriff's decision in the matter is final. Where an appeal is not upheld (i.e. is unsuccessful), section 6(9) provides that the sheriff may specify a date by which the action specified in the enforcement notice must be undertaken. For example, an appeal is made in respect of an enforcement notice which specifies 24 April 2015 as the date by which specified works require to be completed. The appeal is not upheld, and the sheriff specifies 26 May 2016 as the new completion date. The latter date prevails, and the specified works will require to be completed by 26 May 2016.

21. It is an offence, punishable upon summary conviction by a fine of up to Level 4 on the standard scale, for a person upon whom an enforcement notice has been served to fail to comply with the requirements of a notice - section 6(10) and (12). Section 6(11) makes provision for a reasonable excuse defence for persons charged with an offence under section 6(10).

Section 7 - Marine enforcement officers' functions

22. Section 7 contains provisions in relation to the enforcement of regulations made under section 5(1) and enforcement notices served under section 6.

23. Section 7(1) enables marine enforcement officers (MEO), as defined by section 63 to exercise the powers available in Part 7 and section 150 of the Marine (Scotland) Act 2010, for the purpose of enforcing regulations made under section 5(1). Section 7(2) authorises such officers to take any action the officer considers necessary in order to fulfil the requirements of an enforcement notice served by the Scottish Ministers under section 6. Section 7(6) enables the Scottish Ministers to recover any costs incurred by the marine enforcement officer in pursuance of the provisions of section 7(2).

24. Section 7(3)(a) modifies the effect of sections 151 to 155 of the Marine (Scotland) Act 2010 such that references in those sections to the powers conferred by Part 7 of the 2010 Act are to be read as including a reference to those powers as applied by section 7(1) (to enforce section 5 regulations) and as conferred by section 7(2) (to take action to meet the requirements of an enforcement notice under section 6). For example, in practice this means that, where a MEO wishes to exercise search or examination powers available under Part 7 of the 2010 Act in order to determine whether a person has complied with regulations under section 5, the officer may be required by the person to produce evidence of the officer's authorisation to exercise the power in question (section 151 of the 2010 Act).

25. Section 7(3)(b) makes equivalent provision as regards references to the functions of a marine enforcement officer. Sections 151 to 155 of the Marine (Scotland) Act 2010 are modified such that references in those sections to the functions under the 2010 Act of MEOs are to be read as including a reference to those functions as applied by section 7(1) (to enforce section 5 regulations) and as conferred by section 7(2) (to take action to meet the requirements of an enforcement notice under section 6). For example, in practice this means that a MEO who takes action to fulfil the requirements of an enforcement notice issued under section 6 is not liable in civil or criminal proceedings for anything the officer did as regards that action (section 154 of the 2010 Act).

26. Section 7(4) makes provision in relation to the geographical limits of a MEO's powers, specifying that those powers are exercisable in the Scottish marine area (as defined in section 1 of the 2010 Act) and any other part of Scotland. Section 7(7) contains a definition for the purposes of this section.

Section 8 - Power to detain well boats in connection with court proceedings

27. Section 8 provides an enforcement power for MEOs to detain wellboats in connection with court proceedings.

28. Section 8(2) provides that an MEO may take, or may arrange for others to take, a wellboat and its crew to the nearest convenient port for the purposes of detaining it. It allows an MEO to give instructions to anyone who appears to be in charge of the vessel to take it and its crew, to port.

29. Section 8(4) and (5) requires an MEO to serve a notice of detention on the person who appears to be in charge of the wellboat, which must include the reasons for detaining it and the circumstances under which it may be released. A notice of detention under section 9(4) must be withdrawn if any ground of release specified in section 9(5).

Section 9 - Release of wellboat detained under section 8

30. Section 9(2) sets out the circumstances under which a wellboat detained under section 8 is no longer to be treated as detained under that section. This includes where a notice of detention is withdrawn by an MEO, where a sheriff orders the release of the vessel under section 10, proceedings taken against the master, owner, or charterer have concluded, or the court has exercised any power it has to order the wellboat to be detained.

Section 10 - Power of sheriff to order release of wellboats

31. Section 10 provides a process allowing the owners of a wellboat detained under section 8 to apply to a sheriff for an order releasing the vessel from detention. A master, an owner or charterer of a wellboat may apply under section 10(2) to a sheriff seeking the release of the wellboat from detention. A sheriff may order the release of the vessel if satisfied that any of the grounds given in section 10(4) apply. These are that the continued detention of the wellboat 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 wellboat to be detained at any court proceedings as envisaged under section 8(1)(b)(ii).

CHAPTER 3 – COMMERCIALY 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.

CHAPTER 4 – PLANNING PERMISSION

Planning permission for marine fish farms

51. Section 23 amends section 31A of the Town and Country Planning (Scotland) Act 1997 by inserting new subsections (2A), (4A) and (4B) and amending subsection (8).

52. Inserted subsection (2A) enables Scottish Ministers to grant planning permission for the operation of an individual marine fish farm either by order or on an application to them. Inserted subsections (4A) and (4B) ensure that farms for which planning permission had been granted by order are not disadvantaged should the order be revoked before the “appropriate date”. The “appropriate date” is the date after which planning permission is required for the operation of certain marine fish farms and is the later of 31 March 2014 or the date of expiry of the consent in place on 1 April 2007 (under which the fish farm is authorised to operate). The effect is that planning permission will not be required for the farm as a consequence of previous grant of planning permission by the order being revoked until the appropriate date for the fish farm.

53. Section 23(4) amends subsection (8) of section 31A of the 1997 Act to remove the requirement for regulations to specify in which cases applications must be made.

PART 2

SALMON FISHERIES, ETC

Governance

Section 24 - District salmon fishery boards: openness and accountability

54. Section 24 amends sections 44 and 68 of, and inserts new sections 46A to 46G into, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”) to introduce good governance obligations on district salmon fishery boards (“DSFBs”). The Scottish Government intends to issue administrative guidance to DSFBs on these obligations to aid and guide compliance.

55. Section 24(2) inserts a new subsection (1A) into section 44 of the 2003 Act. Section 44(1A) places duties on the clerk of a DSFB in relation to the board’s agreed report and audited accounts, and requires the clerk to publish these documents and to send copies of them to the Scottish Ministers.

56. Section 24(3) inserts new sections 46A – 46G into the 2003 Act. Section 46A places obligations on DSFBs in relation to the content of the annual report required to be prepared under section 44(1)(a) of the 2003 Act. New section 46A(2)(d) of the 2003 Act requires the report to contain a statement on how the board complied in the previous year and how it proposes to comply in the coming year with the good governance requirements, and section 46A(3) provides a definition of “good governance requirements” for that purpose and for the purposes of the provisions mentioned in section 46A(3)(a)-(c).

57. Section 46B of the 2003 Act introduces a obligation on DSFBs to hold an annual public meeting and prescribes matters which must be considered at that meeting (section 46B(2)). Section 46B(4) places obligations on DSFBs regarding participation of members of the public and others who attend or propose to attend the annual meeting.

58. Section 46C(2) of the 2003 Act makes further provision about the annual public meeting held by the board under section 46B(1)(a) and the annual meeting of qualified proprietors held under section 44(1) of the 2003 Act. The provisions place duties on the

clerk of the DSFB to give advance notice to the public of these meetings and prescribes the manner, timing and circulation of that notice (section 46C(2)). Section 46C(2)(a)(iv) underpins the new section 46B(4) duty on boards by requiring the clerk to notify the public of how they may propose matters for consideration at the annual public meeting. The public will not have an automatic right to speak at the annual meeting of qualified proprietors, unless a DSFB decides to afford such an opportunity.

59. Section 46C(3)-(9) of the 2003 Act makes further provision about meetings of DSFBs, including the annual public meeting, the meeting of qualified proprietors and any other meetings the board may decide to hold. In particular, the clerk is required to prepare and publish minutes of the DSFB meetings.

60. Section 46D of the 2003 Act requires a DSFB to compile, maintain and keep under review a procedure for dealing with complaints, and to publicise its terms. DSFBs must keep records of any complaints received and how they were disposed of (section 46D(5)).

61. Section 46E of the 2003 Act requires a DSFB to maintain and review arrangements for registering and declaring the relevant financial interests of board members. “Relevant financial interests” are defined in subsection (4).

62. Section 46F(1) of the 2003 Act enables the Scottish Ministers to modify, by order, the good governance requirements (as defined in section 46A(3)) of the 2003 Act) and to place further requirements on DSFBs for specific purposes. The purposes are specified in subsection (3), and seek to achieve that the order-making power is exercisable so as to ensure the boards’ affairs are conducted in an open and accountable manner and to appropriate standards of propriety and good governance. The order-making power is not exercisable in such a way as would allow Ministers to provide for structural change to DSFBs.

63. Section 46G(3) of the 2003 Act provides that, where Ministers exercise the section 46G(2) reserve power to dissolve, by order, the committee constituting the board, its effect is to prompt the calling of a meeting of qualified proprietors for the purpose of electing a new committee.

64. Section 24(4) is a technical amendment in consequence of section 46F(1) of the 2003 Act, as inserted by section 24(3). Its effect is to ensure that any order under section 46F(1) is subject to the affirmative procedure in the Scottish Parliament.

Section 25 - Duty to consult and report before making certain applications

65. Section 25 amends the 2003 Act to create an obligation to undertake consultation on proposals to submit specified applications under the 2003 Act. Subsection (2) of section 25 amends sections 33(7), 35(3), 36(4) and 37(4) of the 2003 Act to substitute reference to paragraph 9B of schedule 1 (procedure for making certain orders and regulations under the Act) to the 2003 Act for references to paragraph 10 of that schedule where it occurs in those provisions.

66. Subsection (3) of section 25 amends the 2003 Act to introduce new paragraphs 9B and 9C into schedule 1. Paragraph 9B(1) specifies the applications in respect of which the provisions of paragraph 9B apply, that is: applications under paragraph 1, 3, 5 or 7 of schedule 1 (respectively, applications for designation orders under section 35 of the 2003 Act, estuary limits orders under section 36, annual close time orders under section 37 and salmon conservation regulations under section 38). Paragraphs 9B to 15 of schedule 1 to the 2003 Act also apply to regulations under section 33(1) of the 2003 Act (baits and lures) by virtue of section 33(7) of that Act. Paragraph 9B(2) of schedule 1 provides that where an applicant proposes to make an application for such an order or regulations, the applicant must give notice of the proposed application, specify in that notice the period in which representations or objections may be made on that proposal, undertake consultation with persons who may have an interest in or be likely to be affected by the proposal and give such persons notice of the period in which they may make representations or objections on the proposal.

67. Paragraph 9B(3) of schedule 1 requires the applicant to give notice of the proposed application in each of two successive weeks in a newspaper circulating in the district concerned, and paragraph 9B(4) of schedule 1 clarifies the length of the period for the purposes of paragraph 9B(2)(b) of schedule 1.

68. An applicant is required to take into account any timeous representation or objections made on the proposal (paragraph 9B(5)). The applicant must publish a notice containing a summary of reasons for proceeding with the proposed application or not, as the case may be, together with details of where their reasons for this decision may be viewed and how a copy of the reasons may be obtained (paragraph 9B(6)). Paragraph 9B(7) confirms that the costs for compliance with paragraph 9B(2) and (6) are to be paid by the applicant.

69. Paragraph 9C of schedule 1 to the 2003 Act applies where an applicant determines to proceed with a proposed application. At the time the applicant makes the application, the applicant must submit together with the application a report which; states whether and explains how the requirements of paragraph 9B have been met; provides details of who was consulted; explains the content of any representations or objections received; and gives the reasons for making the application.

Management

Section 26 - Carcass tagging

70. Section 26(2) amends the 2003 Act by inserting a new section 21A to enable the Scottish Ministers to make regulations for or in connection with tagging salmon carcasses.

71. Section 21A(2) specifies the matters which may be provided for in regulations made under section 21A(1) of the 2003 Act, including the nature and form of tags and the keeping of records in connection with fishing for, taking and tagging of salmon. Section 21A(3) provides that regulations made under section 21A(1) may make different provision for different purposes and different areas, and may modify Part 5 (enforcement) of the 2003 Act. If the carcass tagging regulations seek to modify Part 5 of the 2003 Act then affirmative procedure will be required as provided for in section 68(4) of the 2003 Act (as

amended by section 26(4) of the Act), which will require draft regulations to be laid before and approved by Parliament.

72. Section 21A(4) makes provision in relation to offences. Subsection (4)(a) of section 21A makes it an offence for a person to sell, offer or expose for sale, or to possess a salmon which has not been tagged in accordance with regulations made under section 21A(1) of the 2003 Act, or which has had a tag removed otherwise than in accordance with the regulations. Subsection (4)(c) makes it an offence for a person to fail to take action required of that person, or to comply with any requirement imposed on that person, by such regulations.

73. Subsection (5) creates a reasonable excuse defence for a person charged with an offence under section 21A(4)(c) of the 2003 Act. A person who commits an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 4 of the standard scale (currently £2,500) and may be convicted on the evidence of only one witness (subsection (6)).

74. Subsections (3)(a) and (b) of section 26 makes technical amendments to section 30 of the 2003 Act (exemptions in relation to fish farming) in consequence of new section 21A.

Section 27 - Powers to take fish or samples for analysis, etc.

75. Section 27 amends the 2003 Act to insert a new section 64A, which provides the Scottish Ministers with powers to take fish and samples of fish for analysis etc, and to undertake tracking and monitoring of fish.

76. Subsection (1)(a) of section 64A provides that an “authorised person” may require a person having rights in a salmon or freshwater fishery to permit them to take and retain fish, and to take samples of material from the fish in the fishery or to have such fish or samples provided to them.

77. Subsection (1)(b) allows an authorised person to affix a tag in order to track or monitor fish (subsection 64A(2)(c)).

78. Subsection (1)(c) provides that an authorised person may enter a salmon fishery or freshwater fishery in order to exercise the powers mentioned in subsection (1)(a) or (1)(b) or in order to track or monitor fish which have been tagged further to the provisions of subsection (1)(b).

79. Subsection (2)(a)-(d) specifies the purposes for which an authorised person may take and retain fish, take samples or require that fish or samples of material from fish are provided to them. These purposes are: analysis of fish or fish samples; ascertaining whether an offence has been committed under section 33A of the 2003 Act (unauthorised introduction of fish into inland waters); tracking or monitoring of fish; and exercising the powers mentioned in subsections (1)(a) or (1)(b).

80. Subsection (4)(a) provides that it is an offence for a person having rights in a salmon fishery or freshwater fishery to fail or wilfully refuse to comply with a requirement made by an authorised officer under subsection (1)(a). Subsection (5) makes provision for a reasonable excuse defence for a person charged with this offence. A person who commits an offence under subsection (4)(a) is liable on summary conviction to a fine not exceeding level 3 (currently £1,000) on the standard scale (subsection (6)).

81. Subsection (4)(b) provides that it is an offence for a person having rights in a salmon fishery or freshwater fishery to obstruct an authorised person in the exercise of their powers under subsection (1)(b) or (c). A person who commits an offence under subsection (4)(b) is liable on summary conviction to a fine not exceeding level 3 on the standard scale or to imprisonment for a term not exceeding 3 months, or to both.

82. Subsection (7) defines “a person having rights in a salmon fishery or freshwater fishery” by reference to section 64(3) of the 2003 Act, i.e. as meaning (a) a proprietor of a salmon fishery; (b) an occupier of such a fishery; (c) an owner of land to which a right of fishing for freshwater fish pertains; (d) an occupier of such a right.

Section 28 - Power of the Scottish Ministers to conduct inquiries and obtain information

83. Section 28(2)(a) amends section 64 of the 2003 Act (power of the Scottish Ministers to conduct inquiries and obtain information) to insert a new subsection (1)(za), which requires persons having rights in a salmon fishery or freshwater fishery to provide information relating to the fishery to the Scottish Ministers.

84. Section 28(2)(b) amends section 64(1)(a) of the 2003 Act to enable Ministers to exercise their powers under that provision without expressly having to ensure no damage is done to the fishery or no interference is caused to the rights of the owner or occupier of the fishery. It is inevitable that the exercise of the section 64(1)(a) powers will give rise to interference with property rights. But the powers in the 2003 Act (which derive from the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 (c.26)), have and will continue to be exercised proportionately and in the vast majority of cases with the full co-operation of the owner, proprietor or occupier of such rights, for the wider public interest of protecting and developing salmon and trout stocks. Accordingly, the amendments secure removal of text no longer considered to be significant as regards exercise of the power.

85. Section 28(3) amends section 64(2) of the 2003 Act to clarify that the provisions of section 64 of the 2003 Act apply to persons “having rights in a salmon fishery or freshwater fishery”. Section 28(4) of the Act inserts a new subsection (3) into section 64 of the 2003 Act to define that term.

Section 29 - Monitoring and evaluation of the effects of orders, etc.

86. Section 29 amends sections 33, 37 and 38 of the 2003 Act to enable the Scottish Ministers to impose requirements to monitor and evaluate the effect of orders and regulations under those sections. The provisions give Ministers powers to ensure that, where measures are granted, appropriate monitoring and evaluation of the effects of such measures on salmon stocks can take place in a consistent manner across Scotland.

87. Section 29(2) amends section 33 of the 2003 Act, which enables the Scottish Ministers to make regulations (“baits and lures regulations”) prohibiting the use of specified baits and lures upon application by one or more DSFBs. New subsection (6A) enables Ministers, in granting an application for baits and lures regulations, to impose requirements on DSFBs to carry out monitoring and evaluation of the effect of the regulations on salmon stocks. For example, where regulations under section 33 of the 2003 Act prohibit fishing with barbed hooks, a DSFB may be required to monitor and record any incidents of fish mortality resulting from fish that were not effectively released after capture. Subsection (6B) makes it an offence for a DSFB to act in contravention of any requirements imposed under baits and lures regulations or to fail to take any action required of the DSFB under such regulations. Subsection (6C) provides that a DSFB charged with an offence under section 33(6B) is liable on summary conviction to a fine of up to Level 4 on the standard scale. Section 143 of the Criminal Procedure (Scotland) Act 1995 makes provision for the summary prosecution of organisations such as DSFBs.

88. Section 29(3) amends section 37 of the 2003 Act which provides for the annual close time for salmon fishery districts in Scotland. Section 29(3)(a) of the Act makes a technical amendment to section 37(2) of the 2003 Act to include a reference to section 38(5)(c) of the 2003 Act (which is inserted by section 29(4)(b) of the Act). This provision enables Ministers to specify in salmon conservation regulations both the annual close time for salmon for a salmon fishery district and a period during that close time in which it is permitted to fish for salmon by rod and line. As a result of these new powers, the qualification to the annual close times specified in section 37(2) of the 2003 Act is amended to include a reference to any period in which it is permitted to fish for salmon by rod and line specified in regulations made by Ministers in reliance of the new powers in section 38(5)(c) of the 2003 Act. A technical amendment is also made to section 37(3) of the 2003 Act in this respect by section 29(3)(b) of the Act.

89. Subsection 29(3)(c) amends section 37 of the 2003 Act to introduce new subsections (3A), (3B) and (3C). Subsection (3A) enables Ministers, in granting an application for a close time order, to impose requirements on DSFBs or proprietors to carry out monitoring and evaluation of the effect of the order on salmon stocks. For example, a DSFB or proprietors may be required to monitor the impact of a season extension (i.e. a period during the annual close time when it is permitted to fish for or to take salmon by rod and line). The programme of monitoring could include: scale sampling; redd counts; and rod catch analysis. Subsection (3B) makes it an offence for a DSFB or a proprietor to act in contravention of any requirements relating to monitoring and evaluation imposed under a close time order, or to fail to take any action required of the DSFB or proprietor by such requirements. Subsection (3C) provides that a DSFB or proprietor charged with an offence under section 37(3B) is liable on summary conviction to a fine of up to level 3 on the standard scale (currently £1,000).

90. Section 29(4) amends section 38 of the 2003 Act, which enables the Scottish Ministers to make salmon conservation regulations. Section 29(4)(b) introduces a new subsection (5)(c) into section 38 which gives Ministers powers to prescribe for any salmon fishery district the dates of the annual close time for salmon and the period(s) during which it is permitted to fish for or take salmon by rod and line during the annual close time. This is in line with the powers in section 37 of the 2003 Act and gives Scottish Ministers greater flexibility as regards potential options to best manage salmon stocks.

Section 29(4)(c) introduces a new subsection (6)(ba) into section 38 which enables Ministers, in granting an application for salmon conservation regulations, to impose on a DSFB or proprietors requirements on monitoring and evaluating the effect of the regulations on salmon stocks as Ministers consider necessary or expedient. For example, Ministers may impose a requirement for a DSFB to assess the effect of catch and release measures on reported rod catches during the period any restrictions apply.

91. Section 38(7) of the 2003 Act makes it an offence, punishable on summary conviction by a fine of up to Level 4 on the standard scale, for a DSFB or a proprietor to act in contravention of salmon conservation regulations or to fail to take any action required of them under, or to fail to comply with any requirement of, such regulations. Section 38(8) provides that a DSFB or proprietor charged with an offence under section 38(7) may be convicted on the evidence of one witness.

Section 30 - Power to vary procedures for orders, etc. relating to certain fisheries

92. Section 30 amends the 2003 Act to clarify the scope of the Scottish Ministers' powers to vary by order the procedural requirements for applications for designation, estuary limits and close time orders, and conservation and baits and lures regulations set out in schedule 1 to the 2003 Act. Separate provision is made in relation to the variation of the procedures as regards regulations made under section 33 of the 2003 Act.

93. Section 30(2) adds a new subsection (8) to section 33 of the 2003 Act (baits and lures regulations). New subsection (8)(a) enables the Scottish Ministers to vary section 33(2) to (5) of the 2003 Act, which subsections contain provision in relation to who may make an application for regulations and what an application must comprise. New subsection (8)(b) makes similar provision for Ministers to vary the provisions of paragraphs 9B to 15 of schedule 1 to the 2003 Act, which also make provision for applications for regulations under section 33 of the 2003 Act.

94. Section 30(3) repeals section 35(4) of the 2003 Act. That provision provided Ministers with a power to vary, by order, certain paragraphs of schedule 1 to the 2003 Act. The effect of the amendments under section 30 is to clarify that Ministers' section 35(4) power was intended to extend to the procedural provisions in schedule 1 to the 2003 Act as regards all orders and regulations that could be made under sections 33 and 35-38 of the 2003 Act. Accordingly, section 35(4) is repealed and clarifying provision is made to amend the 2003 Act in section 30(2) and (4).

95. Section 30(4) amends section 39 of the 2003 Act to add new subsections (2) to (4). Subsection (2) provides that Ministers may by order vary the provisions of schedule 1 to the 2003 Act. The power will enable the Scottish Ministers to vary, for example, prescribed methods of advertisement or consultation to take account of developments in information technology.

Section 31 - Offence of fishing for salmon during annual close time

96. Section 31 is a technical amendment to section 14 of the 2003 Act, which makes it an offence to fish for or to take salmon during the annual close time, and also provides for the circumstances in which the offence does not apply.

97. Section 14(1) of the 2003 Act makes it an offence, punishable on summary conviction by a fine of up to Level 4 on the standard scale, to fish for or take salmon by means of rod and line during the annual close time. Annual close time is defined in section 37 of the 2003 Act. Section 14(2) of the 2003 Act, as modified by section 31, clarifies the circumstances in which the section 14(1) offence does not apply, including where a person fishes for or takes salmon by rod and line during a period within the annual close time when such fishing is permitted by regulations in force in the salmon fishery district in question.

98. Section 29(4)(b) amends section 38 of the 2003 Act to enable the Scottish Ministers to specify in regulations under section 38, periods during the annual close time in which it is permitted to fish for or to take salmon by rod and line. In considering the effect of that amendment, doubt arose whether the reference to “regulations” in section 14(2) of the 2003 Act included a reference to regulations under section 38. The amendment in section 31 is intended to put the matter beyond doubt, and the section amends section 14(2) of the 2003 Act to clarify that the offence in section 14(1) of the 2003 Act does not apply where fishing for or taking salmon by rod and line during the close time is permitted under the measures specified in section 14(2)(a) to (e).

Section 32 - Consents for introduction of fish into inland waters

99. Section 32 amends section 33A of the 2003 Act to ensure that, where introductions of fish or fish spawn take place, they are in line with prevailing good practice and that requirements as to record keeping and monitoring can be imposed. Section 32 also introduces new section 33B into the 2003 Act to enable the Scottish Ministers to modify, by regulation, DSFBs’ functions with respect to consenting to the introduction of salmon and salmon spawn.

100. Section 32(2)(b) amends section 33A of the 2003 Act to introduce new subsections (3A), (3B) and (3C). Subsection (3A) enables Ministers when granting consent to introduce fish or fish spawn to inland waters, and DSFBs when granting consent to introduce salmon or salmon spawn to inland waters within their district, to impose conditions and requirements on the consent. For example, conditions and requirements could include: record keeping; monitoring the impact of the species following its introduction; and bio-security measures. Subsection (3B) makes it an offence, punishable on summary conviction to a fine not exceeding Level 3 on the standard scale (section 33A(5) of the 2003 Act) for a person to act in contravention of any conditions or requirements imposed on a section 33A consent or to fail to take any action required under such condition or requirement. Subsection (3C) makes provision for a reasonable excuse defence for a person charged with an offence under section 33A(3B) of the 2003 Act.

101. Section 32(2)(c) amends section 33A of the 2003 Act to insert a new subsection (4A) which provides that the provisions of section 33A(4) apply subject to the provisions of any regulations made under section 33B of the 2003 Act, which is inserted by section 32(3) of the Act.

102. Section 32(3) inserts a new section 33B into the 2003 Act which gives powers to the Scottish Ministers to make regulations in relation to the functions of DSFBs under section 33A(3)(b) and (3A) of the 2003 Act. Section 33B(1), as read with section 33B(2),

enables the Scottish Ministers to provide, in regulations, that they instead of a DSFB will exercise the consenting function under section 33A of the 2003 Act with respect to the introduction or possession of salmon and salmon spawn; for applications to be submitted to Ministers instead of a DSFB; and for circumstances in which an application referred to them will be determined by Ministers.

103. Section 33B(3) of the 2003 Act provides flexibility for the Scottish Ministers to, for example, restrict the application of regulations made under section 33B(2) to individual salmon fishery districts or specified inland waters. For example, it might be desirable for applications submitted to a DSFB under section 33A of the 2003 Act for a district which lies in a Special Area of Conservation to be referred to the Scottish Ministers for determination.

Section 33 - Offences exempted by permission or consent: power to attach conditions etc.

104. Section 33 amends sections 27, 28 and 30 of the 2003 Act to enable Ministers to attach conditions and requirements to permissions and consents granted under those sections.

105. Section 33(2) amends section 27 of the 2003 Act to introduce new subsections (1A) to (1D). Section 27 of the 2003 Act provides for the circumstances in which a person is exempt from any offence in relation to salmon or salmon roe, where the act or omission otherwise leading to the commission of an offence is for scientific purposes; for protecting, improving and developing stocks of fish; or for the conservation of living creatures, and the person in question has the permission of a DSFB or the Scottish Ministers for the activity in question.

106. Section 27(1A) of the 2003 Act enables the Scottish Ministers, in granting permission for the purposes of section 27(1) of the 2003 Act, to impose conditions and requirements. Section 27(1B) makes it an offence for the holder of such a permission to act in contravention of any conditions or requirements imposed or to fail to take any actions required by any such condition or requirement. Section 27(1C) makes provision for a reasonable excuse defence for persons charged with a section 27(1B) offence, and section 27(1D) provides that a person guilty of an offence under section 27(1B) is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1,000).

107. Section 33(2)(b) is a technical amendment in consequence of section 33(2)(a).

108. Section 33(3) amends section 28 of the 2003 Act to introduce new subsections (3) to (6). Section 28 of the 2003 Act provides for the circumstances in which a person is exempt from an offence in relation to contraventions of the provision mentioned in section 28(2) of the 2003 Act, insofar as fish other than salmon is concerned. Persons will not be guilty of an offence if the act leading to the contravention is for scientific purposes or for protecting, improving or developing stocks of fish and the person in question has the permission of the Scottish Ministers for the activity in question.

109. Section 28(3) of the 2003 Act enables Ministers, in granting permission for the purposes of section 28(1), to impose conditions and requirements. Section 28(4) makes it an offence for the holder of such a permission to act in contravention of any conditions or requirements imposed or to fail to take any actions required by any such condition or requirement. Section 28(5) makes provision for a reasonable excuse defence for persons charged with a section 28(4)(b) offence, and section 28(6) provides that a person guilty of an offence under section 28(4) is liable on summary conviction to a fine not exceeding Level 3 on the standard scale.

110. Section 33(4) amends section 30 of the 2003 Act to introduce new subsections (2A) to (2D). Section 30 of the 2003 Act provides for certain exemptions from the offences mentioned in section 30(1) of the 2003 Act if the act or omission concerned takes place within or in the course of the operation of a fish farm, and the Scottish Ministers have consented to the activity in question under section 30(2) of the 2003 Act.

111. New subsection (2A) enables Ministers, in granting consent under section 30(2) of the 2003 Act, to impose conditions and requirements. Subsection (2B) makes it an offence for the holder of such consent to act in contravention of any conditions or requirements imposed or to fail to take any actions required by any such condition or requirement. Subsection (2C) makes provision for a reasonable excuse defence for persons charged with a subsection (2B)(b) offence, and subsection (2D) provides that a person guilty of an offence under section (2B) is liable on summary conviction to a fine not exceeding Level 3 on the standard scale.

Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003: Crown application

Section 34 – Application of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 to the Crown

112. Section 34 replaces section 67 of the 2003 Act which makes provision for the application of that Act to the Crown. Subsection (1) applies the 2003 Act to the Crown and to Crown land. Subsections (5) and (8) define Crown land and state that for the purposes of section 67 “land” includes salmon fisheries

113. Section 67(2) provides that the Crown cannot be held criminally liable for contravention of the 2003 Act; however this exemption does not apply to those in the public service of the Crown (subsection (4)).

114. Section 67(6) introduces consent requirements prior to exercise of certain powers of entry on to Her Majesty’s private estates under the 2003 Act. It requires that powers of entry under sections 54(1) (powers of constables and water bailiffs to enter land), 64(1)(a) (power of Scottish Ministers to conduct enquiries and to obtain information) and 64A(1)(c) (powers in relation to salmon and freshwater fisheries: sampling etc) are only exercised with the consent of a person appointed by Her Majesty under the Royal Sign Manual or, if no such appointment is made, by the Scottish Ministers.

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.

PART 4 - SHELLFISH

Protection of shellfish waters

Section 54 - Protection and improvement of shellfish waters

146. Section 54 amends the Water Environment and Water Services (Scotland) Act 2003 (the “WEWS Act”) to make provision for the continued protection of shellfish waters following the repeal of the Shellfish Waters Directive (Directive 2006/113/EC).

147. Subsection (2) inserts a new section 5A into the WEWS Act. New section 5A enables the Scottish Ministers, by order, to designate areas of coastal or transitional water as “shellfish water protected areas” where they consider it necessary or desirable to do so for the protection or development of economically significant shellfish production. The Scottish Ministers are required to review any such designations by the dates specified in subsection (3) of new section 5A. These dates are intended to allow the Scottish Ministers to coordinate the process of designating and monitoring shellfish water protected areas with the process of characterising river basin districts under section 5 of the WEWS Act. The new section 5A allows for the Scottish Ministers to identify the coastal water or transitional water to be designated by reference to a map laid before the Scottish Parliament. It also provides that the Scottish Ministers must send copies of any designation order and maps made in pursuance of new section 5A to SEPA.

148. Subsection (3) of section 54 amends section 7 (register of protected areas) of the WEWS Act so that any shellfish water protected area that Ministers have designated is a “protected area” for the purposes of that section and therefore subject to the requirement to be included on the register of protected areas for each river basin district.

149. Subsection (4) amends section 9 of the WEWS Act so that the process of setting environmental objectives for bodies of water in each river basin district, and programmes of measures to achieve those objectives, also applies to shellfish water protected areas. It also clarifies that such objectives for shellfish water protected areas be either necessary or desirable to protect or improve the area to support shellfish life and growth as well as contributing to a high quality of shellfish products fit for human consumption.

150. Subsection (5) amends section 11 of the WEWS Act to add a requirement for SEPA, where the river basin district contains shellfish water protected area, to consult the Food Standards Agency in relation to the statement, summary, and draft river basin management plan that SEPA is required to prepare under that section.

151. Subsection (6) amends section 28 of the WEWS Act to add definitions of “shellfish” and “shellfish water protected area” for the purposes of interpreting Part 1 of the WEWS Act.

Orders as to fisheries for shellfish

Section 55 - Power to make orders as to fisheries for shellfish

152. For the purpose of establishing or improving, and of maintaining and regulating, shellfisheries the Scottish Ministers may make orders known as “several” and “regulating” orders under the Sea Fisheries (Shellfish) Act 1967 (“the 1967 Act”). The 1967 Act allows for orders to be made in the name of a person or body of persons (a grantee) to restrict the right of fishing in a defined area of sea to that person or body. Orders are made in respect of the species of shellfish as are described in the order and remain in force for a set period.

153. Section 55 amends section 1(1) of the 1967 Act to allow for orders to be made for all types of shellfish including those not already listed in subsection (1) of that section and removes the present requirement for regulations to be made each time the Scottish Ministers wish to add a new type of shellfish to the list. The amendment brings the legislation into line in Scotland with that already in place in England and Wales.

154. As a consequence of amending section 1(1), section 15(2) of the Sea Fisheries Act 1968 is repealed.

Section 56 - Contravention of regulated fishery orders

155. Sections 56 and 57 make amendments to the 1967 Act in respect of provisions for regulating fisheries for shellfish. Regulating orders may be granted under the 1967 Act for the regulation and maintenance of fishing for shellfish. Section 3 of the 1967 Act makes provision for the effect of such orders whilst sections 4A to 4D of that Act make provision for enforcement.

156. Section 56 amends the 1967 Act by inserting new subsections (4A), (4B) and (4C) to section 3 (effect of grant of right of regulating a fishery). Where an order under section 1 of the 1967 Act confers the right of a regulated fishery and makes regulations relating to the dredging, fishing for and taking of shellfish, new subsection (4B) 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 regulations introduced through an order made under section 1 of the 1967 Act.

157. Section 56(3) further amends the 1967 Act by adding section 3A. This creates a presumption that applies in proceedings against a person charged with an offence under section 3(3) of the 1967 Act. The presumption is that a person has fished in contravention of an order made under section 1 of the 1967 Act where certain facts, set out at subsection (2)(a) of new section 3A, are proved and it is reasonable to infer from those facts that the person intended to fish in contravention of the regulations or restrictions. New section 3A(4) of the 1967 Act provides that the presumption does not apply where any evidence raises a doubt regarding certain facts.

Section 57 - Enforcement of orders: powers of entry

158. Section 57 also makes amendments to the 1967 Act. Section 57(2) adds a new section 4CA to the 1967 Act which provides a power of entry exercisable by BSFOs in relation to any land other than a dwellinghouse. New section 4CA(1) 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 4CA(2) makes provisions for BSFOs to enter land on foot or with a vehicle and take any necessary person or equipment with them. New section 4CA(4) places a duty on BSFOs that, if requested, they must produce evidence of their identity.

159. Section 57(3) amends section 4D of the 1967 Act to make provision so that a constable may arrest without warrant someone suspected of failing to comply with a requirement imposed by a BSFO under section 4CA(1), or obstructing a BSFO from exercising the new power of entry.

Crown application: Scotland

160. Section 57(5) adds a new section 24A to the 1967 Act which relates to the application of the new section 4CA to the Crown. New section 24A(1) applies the new power of entry in section 4CA 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 24A(5), Her Majesty's private estates are exempt from the new power of entry in section 4CA and new section 24A(3) exempts the Crown from any criminal liability.

Section 58 - Power to appoint inspectors before making orders as to fisheries for shellfish

161. Section 58 amends paragraph 4(2) of Schedule 1 to the 1967 Act to clarify the Scottish Ministers' discretionary power in making decisions on the appointment of an inspector and calling public inquires by removing the requirement to appoint an inspector in cases where an objection raising a material concern is received. The amendment brings the legislation into line with that in England and Wales.

162. This section also replaces "as soon as conveniently may be" in paragraph 4(2) of Schedule 1 with "as soon as reasonably practicable" and in paragraph 6(1) of Schedule 1 replaces "conveniently may be" with "reasonably practicable". These amendments modify the language in each case and make no change to the substance of the provisions.

PART FIVE - MISCELLANEOUS

Charging

Section 59 - Power to charge in connection with fisheries functions

163. Section 59(1) confers a power on Scottish Ministers enabling them to make regulations for or about the imposition of charges in connection with the carrying out of certain fishery functions specified by them in those regulations.

164. Section 59(2) as read with subsection (1), defines the functions in relation to which the Scottish Ministers may impose a charge. These are functions under legislation relating to fish and shellfish farming, salmon and freshwater fisheries and sea fishing. Section 59(8) provides that the term "legislation", means any enactment or EU instrument which contains an enforceable EU obligation or restriction.

165. The "fisheries functions" also includes functions of any person appointed by the Scottish Ministers under that legislation to ensure compliance with that legislation (such as an inspector or British sea fishery officer).

166. Section 59(3) lists examples of provisions that may be made in any regulations with respect to the payment of charges. These include: provision about the determination of the amount of charge payable, including circumstances where the charge is reduced, waived or need not be paid; the circumstances in which a charge is payable including making the carrying out of specified fisheries functions conditional on payment of a charge, and provision for the recovery and collection of charges; the timing of payment of charges, including provision for annual and recurring charges; and provision setting out by whom a charge is payable. The regulations may also contain provisions about how disputes about the amount or liability for a charge may be determined.

167. Section 59(6) also clarifies that regulations under subsection (1) may make different provision for different purposes, which include for different types of fisheries function, different types of person or persons (by whom charges are paid) and with respect to different areas.

168. Section 59(4) clarifies the nature of the charges which may be set out in the regulations. There are two parts to this provision. Firstly such regulations may only require persons to pay a charge if and only so far as that person is someone in relation to whom a specified fisheries function has been carried out. Secondly the charge set out in regulations must not in any particular case exceed the cost incurred in the carrying out of that function, in that case. The charges are therefore limited to being a form of cost recovery for the performance of specified statutory functions.

169. Section 59(5) requires Scottish Ministers to consult those people they consider appropriate before making (or amending) regulations under subsection (1).

170. Section 59(7) clarifies that existing powers to charge remain available to the Scottish Ministers and will not be affected by the introduction of the new provisions.

Fixed Penalty Notices

Section 60 - Fixed penalty notices

171. A fixed penalty notice is a form of sanction that may be offered in certain circumstances as an alternative to seeking a criminal conviction in court. Where a fixed penalty is accepted and paid within a deadline the matter is concluded. The issuing or payment of a fixed penalty is not recorded as a criminal conviction nor can it be treated as such.

172. An alleged offender has the choice of not accepting the fixed penalty by simply not paying the penalty by the deadline set. In these circumstances the matter is thereafter reported to the procurator fiscal and is dealt with in the criminal courts. Marine Scotland currently offers fixed penalty notices for sea fisheries related offences under the provisions of section 25 of the 2007 Act.

173. Section 60(2) amends section 25(2) of the 2007 Act to change the reference to British sea-fishery officer to fixed penalty officer. Fixed penalty officers are persons appointed by the Scottish Ministers and are defined in section 25(3) of the 2007 Act through an amendment introduced through section 60(2)(d).

174. Section 60(2) makes a series of changes to section 25(2) of the 2007 Act to expand the current definition of what offences are eligible for fixed penalty notices. The offences covered by fixed penalty regime is expanded to include those offences in marine and nature conservation legislation in respect of which enforcement officers specified in section 25(2A) of the 2007 Act have compliance monitoring and enforcement functions. Section 60(2)(b) also modifies section 25(2A) of the 2007 Act to add offences under Part 4 of the Marine (Scotland) Act 2010, and offences under section 5(5) (wellboat operations) of the Act to the fixed penalty regime. Section 25(2A) of the 2007 Act is introduced through section 60(2)(c) of the Act.

175. Section 60(2)(c) inserts section 25(2B) in the 2007 Act to allow the Scottish Ministers to amend the definition of a relevant offence or the specification of different enforcement officers by order.

176. Section 60(3) amends section 27 of the 2007 Act to replace the current cap on the maximum fixed penalty notice with one of £10,000.

177. Section 60(4) amends section 31 of the 2007 Act to change the reference to British sea-fishery officer to fixed penalty officer. Again this reflects the fact that it will be fixed penalty officers who will issue fixed penalty notices in future rather than British sea-fishery officers as at present.

178. Section 60(5) of the Act replaces the heading at Part 4 of the 2007 Act with “Fixed penalty notices” to reflect the fact that the fixed penalty provisions in Part 4 will cover areas other than sea fisheries.

Section 61- Fixed penalty notices and civil sanctions under the Marine (Scotland) Act 2010

179. Section 61 amends schedule 2 to the Marine Scotland Act 2010 (“the 2010 Act”) to preclude the possibility of the Scottish Ministers imposing a civil sanction under the 2010 Act either in the form of a fixed or variable monetary penalty in respect of a relevant offence under Part 4 of the 2010 Act, where a fixed penalty notice has been issued in respect of the same offence under section 25 of the Aquaculture and Fisheries (Scotland) Act 2007.

PART SIX – GENERAL

Section 62 - Subordinate legislation

180. Section 62 sets out the arrangements for subordinate legislation under the Act.

Section 63 - Interpretation

181. Section 63 defines terms that are used frequently in the Act.

Section 64 - Ancillary provision

182. Section 64 provides ancillary order making powers for Scottish Ministers to make consequential, supplemental, incidental, transitional, transitory or saving provisions for the purpose of giving full effect to the Act.

Section 65 - Crown application

183. Section 65 deals with the application of the Act to the Crown.

Section 66 - Commencement

184. Section 66 deals with commencement. The majority of the Act's provisions come into force in accordance with orders made by the Scottish Ministers under subsection (2), with some (non-substantive) provisions coming into effect the day after the Act receives Royal Assent.

Section 67 - Short title

185. Section 67 deals with the short title.

Schedule 1 – Commercially damaging species: control schemes

186. Schedule 1 (paragraphs 1-13) is introduced by section 17(6) and makes further provision in respect of control schemes.

Making a control scheme: procedure

187. Paragraphs 1 to 4 of schedule 1 concern the procedure to be followed by the Scottish Ministers when making a control scheme. It includes procedures to be used when an objection is made and when modifications to a control scheme are required.

Variation or revocation of a control scheme: procedure

188. Paragraphs 5 to 9 of schedule 1 specify the process for Scottish varying or revoking a control scheme, with or without the application of a person who carries on a business of fish farming or shellfish farming, and on whom the control scheme has imposed any requirement. Paragraph 6 makes provision for the documents that the Scottish Ministers must serve on every person on whom the control scheme has imposed any requirement. Paragraphs 7 and 8 makes provision in relation to objections made or not made, further to paragraph 6. Paragraph 9 provides the steps that must be taken before a variation of a control scheme can be made. This includes serving every person who has

been served a copy of the draft scheme under paragraph 6 a notice of the proposal to make the modification and each person consenting to the proposal.

Objections

189. Paragraph 10 of schedule 1 enables the Scottish Ministers to require that an objection must state in writing the grounds for it and enables them to disregard the objection for the purposes of the schedule if they are satisfied that the objections is frivolous.

Making, varying or revoking a control scheme: notices

190. Paragraph 11 of schedule 1 makes provision for Scottish Ministers to serve on every person, on whom a notice was required to be served, a notice stating that the scheme has been made, or that a variation or revocation for the scheme has been made.

191. Paragraph 12 of schedule 1 provides that, apart from in appeals under paragraph 13, the validity of control schemes may not be questioned in legal proceedings. This is not intended to exclude judicial review.

Appeals

192. Paragraph 13 of schedule 1 provides for a right of appeal to the sheriff by a person carrying out a business of fish farming to which a control scheme relates, including a provision that an appeal must be lodged not later than 28 days after the date on which the person making the appeal received a notice. Any appeal on a point of law against the decision of the Sheriff would be to the Court of Session.

Schedule 2 – Forfeiture under section 46 or 47

Application of the Schedule

193. Paragraph 1 of schedule 2 defines the circumstances under which the provisions of schedule 2 are to apply. These are that property is being retained by the Scottish Ministers having been previously lawfully seized by a British sea-fishery officer, and that the property is liable for forfeiture under section 46 or section 47 of the Act. In addition it also requires that either no proceedings are being taken against anyone in relation to the property, that any fixed penalty notice issued in respect of any relevant offence has been paid, or that relevant court proceedings have concluded without the property in question being forfeited.

Notice of intended forfeiture

194. Paragraph 2 of schedule 2 describes those to whom the Scottish Ministers must give a notice of intended forfeiture and prescribes what such a notice must contain. Where property has been seized following an inspection conducted under section 39 of the Act, and the Scottish Ministers have taken reasonable steps to identify the owner, the requirement to give notice is modified to one of taking steps to bring the contents of the notice to the attention of persons who are likely to be interested in it.

195. Paragraph 2(4) of schedule 2 limits the ability to forfeit property under schedule 2 to circumstances where the requirement to give notice of intended forfeiture have been complied with or it was not reasonably practical for this to be complied with.

Notice of claim

196. Paragraph 3 of schedule 2 requires anyone who wishes to dispute that their property should be forfeited to serve a notice on the Scottish Ministers. It places a time constraint of such a notice being within one month from when either the Scottish Ministers gave notice of their intention to forfeit property or, where no notice is given, within one month of the seizure of the property.

Automatic forfeiture in a case where no claim is made

197. Paragraph 4 of schedule 2 provides that where no notice of claim is given to the Scottish Ministers within one month of notice of forfeiture having been given, or where the name or address of the claimant is not specified in the notice of claim, then the property is automatically forfeited.

Decision whether to apply for order forfeiting property

198. Paragraph 5 of schedule 2 makes provision that where a notice of claim is given to the Scottish Ministers, they must decide whether they wish to make a forfeiture application to a sheriff to pursue the forfeiture of the property.

Return of property if no application made to the sheriff

199. Under paragraph 6 of schedule 2, where a notice of claim has been given to the Scottish Ministers and they decide not to make an application for forfeiture to a sheriff, they must return the property to whomever they believe to be the owner.

Forfeiture applications

200. Paragraph 7 of schedule 2 provides that where the Scottish Ministers have made an application for forfeiture to a sheriff and the sheriff is satisfied that the property is liable for forfeiture under sections 46 or 47, the sheriff must order the forfeiture of the property, or its return to the owner where the sheriff is not so satisfied.

Appeal against sheriff's decision on forfeiture application

201. Paragraph 8 of schedule 2 makes provision for either the Scottish Ministers or the property owner to appeal the sheriff's decision under paragraph 7 of schedule 2 by applying to the sheriff principal. The Scottish Ministers are required to keep any property during the time required for any appeal.

Effect of forfeiture

202. Paragraph 9 of schedule 2 specifies that the effective timing of any decision under the schedule to forfeit property is to be construed as the time the property was seized.

Disposal of property which is not returned

203. Paragraph 10 of schedule 2 provides that the Scottish Ministers may dispose of property that ought to be returned to its owner after a 3 month period has elapsed and they have not been successful in their attempt to return the property. The Scottish Ministers may dispose of the property in any manner they see fit providing it is not practicable to dispose of it by simply returning it immediately to the owner. This would apply if, for example, the owner of the property was untraceable or did not respond to enquiries.

Provisions as to proof

204. Paragraph 11 of schedule 2 provides that the matters regarding the seizure of property set out in the application for forfeiture under paragraph 7 of schedule 2 are to be taken as fact unless they are disputed and that where a sheriff grants an order of forfeiture, the production of that order or a certified copy are to be considered sufficient evidence of the forfeiture decision.

Power to destroy fish before forfeiture

205. Paragraph 12 of schedule 2 allows the Scottish Ministers to destroy fish before they are formally forfeited under section 47 of the Act. This is essentially a practical consideration where officers encounter fish which are below minimum reference sizes for their retention, landing, storage, or offering for sale. Such under-sized fish cannot be sold and, as they will almost certainly be dead, cannot simply be returned to the sea. Paragraph 12(2) of schedule 2 makes provision for a sheriff to order the Scottish Ministers to pay compensation where the sheriff decides in response to an application for forfeiture under paragraph 7 of schedule 2 that the fish should not be forfeited. This may be, for example, where the sheriff was not satisfied that the fish in question were below the legal minimum reference size set. The value of any compensation is to be determined by the likely value such fish would have fetched had they been sold at the nearest fish auction market to the place where they were seized.

Power to return shellfish to the sea before forfeiture

206. Paragraph 13 of schedule 2 provides that shellfish which may be liable for forfeiture under section 47 may be returned to the sea to continue to grow and mature even when such shellfish have not yet been forfeited under schedule 2 or ordered forfeit by a sheriff in response to an application made under paragraph 7 of schedule 2. This allows for the likely contingency that shellfish found below any minimum reference sizes may still be alive and could continue to grow and continue to contribute to the biomass of the species if they were returned immediately to the sea. Paragraph 12(2)-(5) of schedule 2, which makes provision for a sheriff to order the Scottish Ministers to pay compensation, also applies to shellfish.

PARLIAMENTARY HISTORY

207. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates on which Committee Reports and other papers relating to the Act were published, and references to those reports and other papers.

The Bill as introduced - 3 October 2012 SP Bill 17 - Session 4 2013

STAGE 1

(a) Rural Affairs, Climate Change and Environment Committee

22nd Meeting, 2012 Wednesday 24 October 2012	In private
27 th Meeting, 2012 Wednesday 28 November	<u>Col 1392-1413</u>
28th Meeting, 2012 Wednesday 5 December 2012	<u>Col 1422-1466</u>
29th Meeting, 2012 Wednesday 12 December 2012	<u>Col 1482-1525</u>
30th Meeting, 2012 Wednesday 19 December 2012	<u>Col 1539-1560</u>
1st Meeting, 2013 Wednesday 9 January 2013	<u>Col 1569 - 1616</u>
3rd Meeting, 2013 Wednesday 23 January 2013	In private
4th Meeting, 2013 Wednesday 30 January 2013	In private
Ist Report, 2013 (Session 4): Stage 1 Report on the Aquaculture and Fisheries (Scotland) Bill	<u>Report</u>

(b) Subordinate Legislation Committee

28th Meeting 2012, Session 4 Tuesday 4 December	<u>Col 651-658</u>
30th Meeting 2012 Session 4 Tuesday 18 December	In private
7th Meeting 2013, Session 4 Tuesday 26 February 2013	<u>Col 791</u>
Ist Report 2013 (Session 4): Stage 1 Report on the Aquaculture and Fisheries (Scotland) Bill	<u>Report</u>

