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Firstly, I would like to thank you for taking the time to meet with Scottish Government Officials via teleconference on 3 December 2019 to discuss the US Marine Mammal Protection Act (MMPA) with regards to its regulation of foreign fisheries intending to export fish or fish products to the US. Your ongoing assistance has been immensely valuable to the Scottish Government in planning our future policy.

Following our meeting, we have a number of queries on which it would be helpful to receive clarification and further advice.

Killing, Injuring or Taking Seals

1. Under Section 107 of the Marine (Scotland) Act 2010 (“the 2010 Act”) it is **an offence to kill, injure or take a live seal (intentionally or recklessly)** within Scottish waters. The only exceptions to this offence are in order to alleviate suffering for animal welfare reasons (in accordance with section 108 of the 2010 Act); or where these actions are the result of a licensable activity (in terms of sections 109-110 of the 2010 Act). Section 110(1) of the 2010 Act provides the grounds on which the Scottish Ministers may grant seal licences, namely:
 - a. for scientific, research or educational purposes,
 - b. to conserve natural habitats,
 - c. to conserve seals or other wild animals (including wild birds) or wild plants,
 - d. in connection with the introduction of seals, other wild animals (including wild birds) or wild plants to particular areas,
 - e. to protect zoological or botanical collection,
 - f. to protect the health and welfare of farmed fish,
 - g. to prevent serious damage to fisheries or fish farms,
 - h. to prevent the spread of disease among seals or other animals (including birds) or plants,



- i. to preserve public health or public safety, or
- j. for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment.

2. It is the view of the Scottish Government (“SG”) that the 2010 Act provides a strong regulatory framework for the strict protection of seals from intentional or reckless killing or injury in Scottish waters. To meet the US standards for foreign fisheries exporting fish to the US, in accordance with the Marine Mammal Protection Act (“MMPA”), the SG would seek to adopt an administrative approach, pursuant to which it would not issue any seal licences to fish farms in Scotland, to take effect by the end of 2021. This would mean that the killing, injuring or taking of seals to protect or prevent serious damage to fish farms would not be granted a seal licence, and such activity would constitute an offence under section 107, and therefore be liable to prosecution.

3. However, during our conversation on 3 December 2019, NOAA officials advised that this approach would not be acceptable or compatible with NOAA’s approach to the application of the MMPA. Instead, NOAA officials advised that in order to satisfy the MMPA, the SG should remove the ability of the Scottish Ministers to issue seal licences to fish farms in the future by removing/amending the licensable purposes contained in section 110(1)(f) (“to protect the health and welfare of farmed fish”) and part of section 110(1)(g) (“to prevent serious damage to (...) fish farms”).

→ **Query 1:** In light of our clarification at paragraphs 1-2 above, we would be grateful if you could confirm whether the approach set out at **paragraph 3** continues to represent NOAA’s position and, if so, the basis for this position under the MMPA.

4. [Redacted]

[Redacted]

Non-Lethal Measures (including Acoustic Deterrent Devices (“ADDs”))

5. SG has noted that while predator nets are increasingly being used by the industry, they do not eliminate the presence of seals around fish farm pens and, indeed, simply the presence of a predator in the nearby vicinity can induce a fight-or-flight response in fish which, if allowed to continue, could lead to increased disease susceptibility (e.g., lice, gill health etc.); this, in turn, can lead to mortality. Consequently, ADDs are utilised as an additional mechanism to repel seals from fish cages, thereby reducing this risk. Furthermore, we anticipate alternative measures, such as smart ADDs, may be the only practical option to manage the risk from predators in higher energy locations – thought the most likely sea areas for any future expansion of fish farming - where anti-predator nets may be difficult to deploy due to the practicalities of e.g. fast currents in these exposed locations.
6. During our discussion, it was noted that the US has not published guidance listing acceptable mitigation devices, and it is currently unknown whether ADD usage will be included on any such list. It also remains uncertain whether ADD usage may result in a comparability finding in terms of the MMPA regime. However, you did advise that regulation of ADDs will be required under the MMPA regime for foreign fisheries exporting to the US. As we discussed, the Scottish Government is currently developing its future policy on ADDs (as a separate matter from the US introduction of its updated MMPA regime). Accordingly, it would be very helpful if we could receive some clarity as to your position on these matters, at your earliest possible convenience, so we may take account of this as we develop our future policy in this regard.
7. Under the UK Conservation (Natural Habitats, &c.) Regulations 1994), it is an offence to deliberately or recklessly disturb, kill or injure cetaceans, thereby ensuring their strict protection in Scottish waters. Certain exemptions from these provisions may be available, but these exemptions only apply in certain circumstances meeting three strict tests (namely, the presence of a licensable purpose; the existence of no satisfactory alternative; and in circumstances where the actions authorised will not be detrimental to the favourable conservation status of the species concerned). Any activities that have the potential to disturb, kill or injure cetaceans are considered through this process and only permitted if they meet the three tests.
8. In moving forward, strict mitigation strategies would be applied in relation to ADD use, including criteria concerning the manner in which such devices should be used (e.g., in relation to number, frequency, source level, duty cycle) to increase efficacy and minimise/eliminate environmental impacts. This mitigation would be informed by robust science-based guidance which the SG is currently developing (due in July 2020) and which is intended to increase the effectiveness and mitigate the potential environmental impact of ADDs.

→ **Query 3:** We would be grateful if you could confirm that NOAA accepts that this position set out at **paragraph 7-8** is in accordance with the MMPA.

The Scottish Government is working hard to comply with the MMPA as regards its regulation of foreign fisheries intending to export fish or fish products to the US, but our lack of clarity on these key points noted above is hindering our ability to plan at a strategic level. We would very much appreciate and welcome your further kind assistance in this matter, which would be immensely valuable to us.

I wish you all the very best and a Happy New Year.



HEAD OF AQUACULTURE &
RECREATIONAL FISHERIES