TRANSPORT AND THE ENVIRONMENT COMMITTEE

AGENDA

23rd Meeting, 2002 (Session 1)

Wednesday 4 September 2002

The Committee will meet at 9.30 am in Committee Room 2, to consider the following agenda items:

1. **Water Environment and Water Services (Scotland) Bill (in private):** The Committee will consider possible areas of questioning for witnesses.

2. **Item in Private:** The Committee will consider whether to take agenda item 5 in private.

3. **Water Environment and Water Services (Scotland) Bill:** The Committee will take evidence at stage 1 on the general principles of the Water Environment and Water Services (Scotland) Bill from—

   Ray Mountford, Commercial Development Leader, BP Grangemouth

   Pat Mennie, Senior Partner, Grigor & Young, Malt Distillers Association of Scotland

   David Sigsworth, Generation and Environment Director, Scottish and Southern Energy plc.

   Graeme Neillie, Production Manager, Gleneagles Spring Water Company Ltd, Highland Spring Group

   Ralph Baillie, Adviser, Scottish Quality Salmon.

4. **Highlands and Islands Ferry Services:** The Committee will consider a reporters’ paper.

5. **Work Programme:** The Committee will consider its work programme.
The following public papers are relevant for this meeting:

<table>
<thead>
<tr>
<th>Submission</th>
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<tbody>
<tr>
<td>Submission from Malt Distillers Association of Scotland</td>
<td>TE/02/23/1</td>
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<tr>
<td>Submission from Scottish and Southern Energy plc.</td>
<td>TE/02/23/2</td>
</tr>
<tr>
<td>Submission from Scottish Quality Salmon</td>
<td>TE/02/23/3</td>
</tr>
<tr>
<td>Reporters’ paper on Highlands and Islands ferry services</td>
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THE MALT DISTILLERS ASSOCIATION OF SCOTLAND

WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) BILL:

STAGE 1 EVIDENCE

1. Introduction

This Association represents virtually all the Companies who own Malt Distilleries in Scotland. There are 83 such Distilleries located in various parts of Scotland with particular concentrations in Speyside (45) and the surrounding catchments and also on Islay (7). The Association inter alia deals with environmental matters at production level for the whole of the Scotch Whisky Distilling Industry covering both Malt Distilling and Grain Distilling. We operate in close liaison with The Scotch Whisky Association, who have a wider strategic role in environmental matters affecting the Industry and who have also been involved in the preparation of this submission.

We are pleased to note that in the Consultation Paper "The Future for Scotland's Waters - Proposals for Legislation" that the Scottish Executive stated that the Water Framework Directive, on which the present Bill is based, will be implemented in the way that best suits Scottish circumstances. This represents an opportunity to tailor the legislation to circumstances in Scotland which may differ from the position in other parts of the United Kingdom, e.g. available abundant water resources of good ecological status negating the requirement for abstraction control.

The Bill - General

The Bill is a comprehensive piece of proposed primary legislation. The approach in providing for the basic principles of the legislation, with detailed requirements being introduced by way of secondary legislation, is the practical way forward. It is essential that interested and affected bodies are consulted at every stage now and in future.

Section 2 of the Bill notes that Scottish Ministers, SEPA and the responsible authorities, in exercising their functions to secure compliance with the requirements of the Directive, must have regard to the social and economic impact of the exercise of those functions. Many of the Malt Distilleries are situated in fragile local communities where assessment of economic impact could be of particular importance.

Chapter 2 - River Basin Management Planning

We have no particular concern as to the number of River Basin Districts. Individual rivers and indeed different stretches of the same river each have their own character. In the development of river sub-basin plans as part of the overall management scheme it is essential that all business interests are represented to take account of the economic and social objectives.
Identification of water bodies used for abstraction of drinking water  This is unlikely to apply to distillery private water supplies as the volume and number of persons served are less than 10 m² per day and 50 persons respectively. These parameters will only apply for the purposes of Section 6.

SEPA will have an obligation under the Bill to characterise each River Basin District and produce a River Basin Management Plan. The Distilling Industry has provided SEPA with information on its private water supplies and usage of water, and member companies are co-operating with SEPA technical representatives to enhance the information.

Section 8 deals with Monitoring and allows Scottish Ministers to make regulations …. (b) requiring persons other than SEPA to carry out the monitoring and analysis in relation to each river basin district. Since this work is a requirement of the Directive, the cost of monitoring by third parties, including stakeholders on behalf of SEPA, should be met by SEPA or the Scottish Executive.

We support the provisions in Section 11, relating to the publicity and consultation concerning the River Basin Management Plans. In particular, we support the obligation on SEPA to consult those carrying on any business which relies on the water environment within the River Basin District and the fact that, in preparing the draft plan, SEPA must take into account any representations made by those consultees.

Section 18 will give power to SEPA to serve a notice on anyone to provide information in connection with the River Basin Management Planning. The specific requirement to produce information “in the form and manner specified in the notice” in some cases may not be practical or achievable at a reasonable cost. It is the information which is important not the format in which it is provided. Another concern we have is that the information requested by SEPA may not be in the possession of the person concerned. In these circumstances, a response that the information is not available should be accepted. What would not be acceptable is a situation where the person on whom the notice is served requires to take steps to find out the information requested and incurs substantial costs in so doing. The ultimate obligation for obtaining the information for the River Basin Management Plans and for meeting the cost of obtaining the information must lie with the Scottish Executive and SEPA. Furthermore it is not appropriate that Scottish Ministers are the arbiters of any dispute. SEPA should be required to refer the matter to the Sheriff as an independent authority.

We are of the view that SEPA is the appropriate lead body for River Basin Management Planning. However, in view of the sustainability dimension SNH should have a significant input. The social and economic aspects will also require independent research.

Chapter 3 - Measures for Protection of the Water Environment - Controls
In terms of Section 12 the Scottish Ministers may make provisions for regulating a controlled activity. This includes abstraction. This is an area in which the Scotch Whisky Distilling Industry has a particular interest.

Most of the malt distilleries are situated in rural areas, the locations being selected because of the availability of suitable water - quality and quantity - for the mashing process and also for cooling purposes.

In developing their distilleries the companies either acquired the land containing the water source or, alternatively, acquired the water rights to utilise the water, allowing control of their essential raw material. The cost of acquisition of the rights to the water was often substantial as has been the investment in the infrastructure of drains, collecting chambers and pipelines. The rights to the water are very valuable and longstanding.

Production water for mashing can be drawn from springs, water courses, lochs and bore holes. Cooling water, which is only borrowed and returned without any change in its quality and represents 90% of the volume used, can come from the same sources and also larger water courses and can be conveyed by pipe or, in some cases, by way of lades. At or near the distilleries a volume of water is often accumulated using small dams as malt distilling is a batch process.

The volume of water used by the Industry is minimal in relation to the resources of the catchments involved. (See Annex for details)

Malt Whisky Distilleries have existed sympathetically with the environment in rural areas for, in many cases, more than a hundred years. There is a traditional production cycle which takes into account summer water volume and the rise in temperature which does not create the best production circumstances.

Many Distilleries are situated on small water courses, where the flow of water generally used for cooling purposes rather than mashing, becomes reduced during the summer. At such sites production can be is arranged so that the "silent season" (a period of non-production for maintenance, holidays, etc.) coincides with the warmer months of the year.

Article 11 (e) of the Directive allows Member States to exempt from controls abstractions or impoundments which have no significant impact on water status. We are pleased that the Bill allows for this exemption to be operated by use of the word "may" in Clause 12 (1).

In the Consultation Paper "Future of Scotland’s Water” it is stated that mandatory controls will be deployed only where necessary to protect the environment and that these should be selective, proportionate and streamlined. This is a key principle to the application of any controls.

To impose controls and regulation and water use licences where there is no significant impact on water status is not within the requirements of the Directive, would be an inappropriate use of resources and would involve unjustifiable expense to the regulator, to the stakeholders involved and to the taxpayer.
We are pleased to note from Section 21 of the Bill that before making any Regulations Scottish Ministers must consult industry and must have regard to any representations submitted.

Section 23 of the Bill gives Scottish Ministers power to make Regulations concerning charges for water services, including abstraction and impoundments. The Distilling Industry would strongly oppose any proposal to make a charge on Distilling Companies for the use of their own private water resources. The use of charges would promote additional energy use against climate change policy and create the risk of exposure to legionellosis and pollution from biocides. A holistic approach requires to be taken to achieve the best practical environmental result.

We noted from the Consultation Document on the Future of Scotland’s Water paragraph 3.11 that Water Use Licences, where they are required, will be activity and site specific and will not normally be subject to any time limit. As proposed the Licences will become an addendum to the Common Law rights and be carried by any transfer of land or rights involved. This is a practical approach.

We also note that there will be powers to review the Licence where the activity is not in fact taking place. The nature of the distillery industry operations will require to be taken into account. Malt Distilleries generally have a silent season which can be for a short period or an extended period. From time to time distilleries are taken out of production and mothballed for several years and then reopened as and when market conditions generally, or unit specific production, requires this. Where a Water Use Licence has been required for a particular distillery it would be totally unacceptable to have a situation where, if mothballed, the distillery could suddenly become valueless at the stroke of a pen by withdrawal of its Water Use Licence. Any such withdrawal could, in any event, contravene Article 1 of the First Protocol of the European Convention on Human Rights.

Many malt distilleries have small dams which would fall into the category of impoundments. These are normally related to abstraction arrangements whether for mashing water or cooling water or both. The dams have created water bodies which are “artificial” or “heavily modified”. It has been suggested that a weir across a water course should not be within the definition of an impoundment as it does not enclose the water body as the current flow of water passes over it. It does however create a larger or deeper area of water which would not have existed naturally prior to the construction of the weir and to that extent part of the water body could be said to be “artificial” or “heavily modified”. In many cases the water environment has been enhanced as a result. There are also many weirs on water courses which have existed for hundreds of years having been developed for mill motive purposes. These situations will require to be taken into account in the legislation.

Sustainable Development

In general terms the provisions of the Bill do not appear to be in conflict with other policy areas. In any event, if this were the case the policies would require to be changed. Where Regulation is required in terms of the Bill, this will assist in ensuring the resources of the water environment are used in a sustainable way. The requirement for the application to the regulator for any new water use activity will
allow the local position to be considered. It should be borne in mind that there are sustainable development issues in the application of controls where social and economical considerations might dictate a requirement to accept some environmental impact. There are some small water courses arising from springs in the ownership of a distillery where the water is used for production purposes and as a result the flow of water is substantially reduced from what would be the natural output of the springs. This "modification" of the original natural position may have existed for more than one hundred years. Such modifications will require to be recognised as acceptable.

**Policy Memorandum**

The main policy objectives make reference to providing the framework for comprehensive controls over water abstraction, impoundment and engineering works. It should be clearly understood that "comprehensive" applies to the controls and should not be interpreted as applying to the abstractions and impoundments etc. The understanding is that controls will only be applied where these are necessary.

**Financial Memorandum**

The actual figures can only be, to some extent, speculative. In paragraph 152 it is rightly stated that SEPA is likely to bear significant up-front costs in the development of the monitoring etc. and preparation of the River Basin Management Plans. It is also stated that, in the longer term, SEPA will be able to recover the large majority of these costs through charges. This statement is ambiguous. If it means that SEPA will attempt to recover the cost of the preparation of the River Basin Management Plans, which is a preliminary requirement for the new regime, we do not think that this is appropriate as the cost of this must fall on the Member State. Where controls require to be put in place, SEPA will be able, in due course, to recover from the individual or company directly concerned the cost of dealing with the application and the ongoing monitoring of the particular site.

**Appeals - Clause 20 and Schedule 2 Part 1 Para.14**

There are legal and technical issues involved with regard to licensing and enforcement. An appeal to the Sheriff would be the most appropriate, with an appeal on a point of law either to the Sheriff Principal or the Court of Session. The independence of the appeal procedure must be transparent and comply with the European Convention on Human Rights. There could also be a case for an arbitration procedure in negotiations with SEPA regarding the terms of any water use licences before these are imposed.

We have not commented on **Part II** of the **Bill** as this is principally the concern of Scottish Water.

We hope that the foregoing information is of assistance to the Committee in their consideration of the terms of the Bill.

W. P. Mennie
9 August 2002
## ANNEXATION

**Malt Whisky Distilling Industry Abstraction Volumes**

<table>
<thead>
<tr>
<th>Catchment</th>
<th>Total Flow m$^3$ per annum</th>
<th>m$^3$ Used per annum Mashing Water</th>
<th>m$^3$ Borrowed per annum Cooling Water</th>
</tr>
</thead>
<tbody>
<tr>
<td>River Spey Basin</td>
<td>2,020 M</td>
<td>1.81 M</td>
<td>27.15 M</td>
</tr>
<tr>
<td>River Lossie Basin</td>
<td>81 M</td>
<td>0.27 M</td>
<td>1.87 M</td>
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<tr>
<td>River Deveron Basin</td>
<td>378 M</td>
<td>0.39 M</td>
<td>7 M</td>
</tr>
<tr>
<td>River Dee Basin</td>
<td>1,450 M</td>
<td>0.007 M</td>
<td>0.2 M</td>
</tr>
<tr>
<td>River Nairn Basin</td>
<td>Not available</td>
<td>0.04 M</td>
<td>0.5 M</td>
</tr>
<tr>
<td>River Tay Basin</td>
<td>Not available</td>
<td>0.07 M</td>
<td>1.1 M</td>
</tr>
</tbody>
</table>
Dear Mr Thomson

WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) BILL: STAGE 1 EVIDENCE

Scottish and Southern Energy (SSE) is grateful to members of the Transport and the Environment Committee for the opportunity to submit evidence on the general principles of the Water Environment and Water Services (Scotland) Bill. SSE is one of the largest Scottish-based FT-SE 100 companies and is responsible for 66 hydro electric plant with an installed capacity of more than 1,000 megawatts. It is the largest generator from renewable resources in the UK, owning and operating around half of the total renewable generation capacity.

Key Issues
In response to the Committee’s request for written evidence on the Bill, SSE has identified two particularly significant broad issues for MSPs to consider during their deliberations.

The first key issue arising from the Bill is that its provisions could, ultimately, lead to a reduction in the amount of electricity generated from Scotland's hydro-electric schemes and thus seriously jeopardise the achievement of the various targets that have been set for the generation of renewable energy in Scotland and the UK.

The second key issue arising from the Bill is the role envisaged for the Scottish Environment Protection Agency (SEPA). In particular, SSE has strong reservations about the extent to which SEPA would be expected, under the Bill, to combine policy-making and regulatory roles.

These two key issues are examined in more detail below, and suggestions for addressing them are also included. MSPs seeking more information on any of the following points are more than welcome to contact me.
Impact on generation of renewable energy - issue
The Bill would require River Basin Management Plans (RBMPs), prepared by SEPA, to set specific environmental objectives for each water body. In this context, it is envisaged that the environmental objectives for a water body would be based on the ecological quality of water and the ‘maximum ecological potential’. This could, in turn, lead, for example, to restrictions on reservoir ranges and increased compensation flows - factors which would reduce the output of renewable energy from existing hydro schemes. This could also affect the economic viability of SSE’s plans to invest further in the refurbishment of hydro power stations.

While the consultation document The Future of Scotland’s Waters - Proposals for Legislation made reference to environmental objectives for a water body taking account of ‘wider’ environmental priorities, as well as those of the water environment, SSE is concerned that the absence of more explicit safeguards in terms of hydro schemes could lead to the Bill having the effect of reducing the output of renewable energy from the schemes. This flies in the face of the Executive's recently-stated ambition of having 30% of Scotland's electricity coming from renewable sources by 2020.

The potential impact of the Bill could be seen in a recent project, chaired by the Executive, which examined the impact of classifying waters affected by hydro-electric schemes as 'heavily modified'. It estimated that in one river catchment area alone - the Tummel Valley in Perthshire - the loss of renewable energy production, even with 'heavily modified water' classification, was likely to be about 19GWhrs (gigawatt hours). This is equivalent to the output of a large windfarm with 80-90 turbines.

Impact on generation of renewable energy - mitigation
To mitigate this significant risk, the Bill should establish a much tighter framework in terms of the powers to be given to SEPA as the lead authority for RBMPs (and thus the lead authority for the implementation of the Water Framework Directive in Scotland). In its current form, the Bill will give Ministers the power to issue guidance to SEPA about how it carries out its responsibilities in river basin management planning. As part of this, SEPA should be given an explicit duty to have regard to relevant social, economic and wider environmental considerations in carrying out this function, by means of a Regulatory Impact Assessment (RIA) - see also below. This would ensure that the wider benefits yielded by the generation of renewable energy from hydro-electric schemes are fully taken into account.

All of this also point to a more active role for Ministers than is perhaps envisaged in the Bill. While the Bill gives Ministers powers to endorse or modify RBMPs prepared by SEPA, the tone of the Executive's consultation document gave the clear impression that Ministers' role would be largely passive. It stated that 'most conflicts of interest or opinion should have been addressed and resolved before plans come to Ministers'. It is vital that there are sufficient safeguards in place to ensure that Ministers, supported by their officials, are able to undertake a rigorous analysis of the plans, and apply to them a fair and balanced judgement. The preparation of RIAs would also assist in this process.

The consultation document stated that the 'bottom line' is that SEPA will have to ensure that the objectives of the Water Framework Directive are met. SSE believes that the 'bottom line' should be, explicitly, that SEPA is responsible for ensuring that the Directive's objectives are achieved within a policy framework clearly laid out by Ministers, taking account of Ministers' wider social, economic and environmental policies.
Combination of policy-making and regulatory roles - issue
The Bill provides that SEPA be the regulator of the water abstraction and impoundment control regime in Scotland and be the policy-maker in terms of determining what level of controls on each abstraction or impoundment is required in the light of the relevant environmental objectives. In fact, the Bill proposes to introduce a licence for both abstraction and impoundment.

It proposes to allow SEPA, as the regulator, to review such licences when 'necessary', to impose conditions and to develop a charging scheme in keeping with the 'polluter pays' principle. It is envisaged that SEPA should have 'wide discretion' to impose conditions on water use provided those conditions are 'reasonable'. All of this amounts to SEPA being assigned the traditionally separate roles of policy-maker, policeman and, in some cases, judge and jury.

The principle of 'polluter pays' is understandable (although the generation of energy from hydro-electric schemes involves the use, rather than the pollution, of water). What is less understandable is the proposal that SEPA be empowered to develop charging schemes for each of the control regimes that are introduced - control regimes which SEPA itself would be responsible for. The risk inherent in this particular application of the 'polluter pays' principle is that it gives SEPA no incentive to control costs if it is simply allowed to pass them on to industry (indeed, the reverse might be the case).

Combination of policy-making and regulatory roles - mitigation
A variety of steps can be taken to mitigate the risk that the combination of policy-making and regulatory roles has a negative effect. For example, as a general principle, SEPA should be required to assess formally the risk from regulatory proposals or decisions. It should carry out Regulatory Impact Assessments as a matter of routine, and these assessments should consider whether the proposal or decision will help to achieve the Executive's wider environmental policies, including its objectives in terms of renewable energy.

In addition, in terms of the possible imposition of conditions on water use, a much clearer definition of what 'reasonable' means is required, and there should be a requirement on SEPA to demonstrate that the imposition of conditions meets the definition of 'reasonable' and is fully justifiable (as per the previous paragraph).

Moreover, there must be due regard to the interaction with existing abstraction and impoundment consents, such as those which are contained in the Constructional Schemes under the Hydro-Electric Development (Scotland) Act 1943. If they were to be brought into a common system, they should form the basis of SSE’s licences. It should be recognised that any alterations to these existing licences, which reduce the volumes of water abstracted, would lead to a reduction in renewable energy output.

Summary
It is widely acknowledged that the Bill is enabling legislation, partly reflecting the long-term nature of the implementation of the Water Framework Directive. Nevertheless, it is a cause for concern that
consideration of so many details is to be deferred to the future. Against this background, it is vital that the activities of SEPA are closely maintained and kept fully in line with Executive policy, by means of Regulatory Impact Assessments.

The Bill contains within it the potential to reduce the amount of renewable energy generated in Scotland, with damaging consequences for Scotland’s environment and for the Executive’s policy aspirations. It is vital that safeguards are in place to prevent this happening.

Yours sincerely

David Sigsworth
Generation Director and
Lead Director for the Environment
SCOTTISH QUALITY SALMON

Response to the Transport and Environment Committee’s call for evidence on the Water Environment and Water Services (Scotland) Bill

Introduction

Scottish Quality Salmon is pleased to respond to the call for evidence from the Scottish Parliament’s Transport and Environment Committee as part of its Stage 1 consideration of the general principles of the Water Environment and Water Services (Scotland) Bill.

Scottish Quality Salmon is a quality assurance led membership organisation which offers whole chain assurance from fish feed company to salmon farmer to smoker and processor. Membership is strictly dependent on adherence to independently inspected and internationally accredited quality standards encompassing fish health and welfare, production processes, product quality and environmental considerations (EN 45011 and ISO 14001). Members account for around 65% of the tonnage of the salmon produced in Scotland. This salmon is marketed in the UK under the Tartan Quality Mark and in France under the prestigious Label Rouge accolade, granted by the French authorities to only the very highest quality foods.

Overview

Scottish Quality Salmon welcomes the broad objectives of the Bill, as outlined in Chapter One, Purpose, General Duties and Definitions that a clean and unpolluted water environment is essential to the efficiency and sustainability of our industry, and is of vital importance to ensuring the integrity of Scotland’s natural environment.

Our submission focuses primarily on the following aspects of the stage one consultation:

- the Bill’s provisions in respect of River Basin Management Planning
- the role envisaged for SEPA as the lead body
- public participation in river basin management planning
- the framework for controls over diffuse and point sources of pollution
- the Financial Memorandum

1. RIVER BASIN MANAGEMENT PLANNING

In general, Scottish Quality Salmon is pleased to support the Bill’s provisions in respect of River Basin Management Planning, so far as they are clarified in the Bill as introduced, and with the exception of issues covered in other sections of this submission, where they relate to the role of SEPA, Public Participation and Pollution. However, we would also wish to submit the following observations for consideration by the Committee:

Number of River Basin Districts (Chapter 2, Part 4). Scottish Quality Salmon is conscious of the fact that there will be a range of opinions on the subject of the number of river basin districts to be created. Our position is to favour the designation of one river basin district, at least in the first instance, as this would ensure that, strategically, there is a level playing field for standards across Scotland, although flexibility may be required at local level to address particular local issues.
Register of Protected Areas (Chapter 2, Part 7). We are unable to comment specifically on this section until it is clear what criteria SEPA are going to use to decide which areas need protection and will form the register.

Sub-Basin Plans (Chapter 2, Part 15, Subsection 2.d). Scottish Quality Salmon agrees that all interested parties should be offered the facility to take part in any consultation process and stresses that salmon farmers must be specifically identified in the list of consultees (Chapter 2, Part 11, section 6 (a) – (i)).

We are seeking consistency throughout the River Basin Management Planning, but recognise that there will be issues which can be dealt with more effectively on a local basis. Local catchment management planning involving salmon farmers would seem appropriate.

River Basin District Advisory Groups (Chapter 2, Part 17, Subsection 2). With regard to the status of advice given to SEPA by River Basin District Advisory Groups, the Committee may wish to consider that provision be made in the Bill to ensure that, if such advice is rejected by SEPA, the reasons must be published.

2. THE ROLE ENVISAGED FOR SEPA

Mindful of the fact that SEPA has recently issued a consultation document, ‘The Future of Scotland’s Water’, on the subject of its powers and functions in relation to its role in performing some of the duties proposed in the Bill, Scottish Quality Salmon welcomes the general provisions and the consultative process undertaken by SEPA.

However, we would like to draw the attention of the Committee to the following points:

General Duties (Chapter 1, Part 2). With regard to the proposal that SEPA ‘must have regard to the social and economic impact of those functions’, Scottish Quality Salmon is concerned that the requisite expertise to perform such assessments needs to be developed in a relatively short time frame. The Financial Memorandum indicates a commitment to increased funding for SEPA. It is essential that funding to facilitate this particular function is ensured.

Secondly, we would like to suggest to the Committee that the criteria by which social and economic impact assessments are considered should be published to ensure transparency.

Monitoring and Environmental Objectives (Chapter 2, Part 8 and Part 9) Scottish Quality Salmon is pleased to support the general provisions outlined in the Bill for SEPA to function as the main body responsible for both establishing and monitoring standards in the river basin districts, so long as its operations, in pursuance of those functions, are open, accountable, transparent, inclusive, consistent and, where possible, subject to consultation.

River Basin District Advisory Groups (Chapter 2, Part 17, Subsection 3). The number of Advisory Groups and their membership should be determined between SEPA and the Scottish Executive in line with Chapter 2, Section 11, part 6 (a) – (i) which should be amended to include salmon farmers within the list of consultees.
3. PUBLIC PARTICIPATION

Scottish Quality Salmon is conscious of the fact that the Water Environment and Water Services (Scotland) Bill is enabling legislation and that, therefore, many details will lie in future Statutory Instruments (SIs). We submit that, in the interests of openness and accountability, and in keeping with the principle of participation, it is vitally important that future SIs relating to this Bill be made available for public consultation. Scottish Quality Salmon is particularly concerned that this principle is stated clearly in the Bill and allows for a minimum of 28 days consultation. We are particularly concerned that this principle is applied to the following areas (where the future need for SIs is indicated):

- Characteristics of River Basin Districts (Chapter 2, Part 5, Subsection 5)
- Register of Protected Areas (Chapter 2, Part 7, Subsection 5)
- Environmental Objectives (Chapter 2, Part 9, Subsection 3)
- General Regulation-Making Power (Chapter 2, Part 19, which covers river basin management plans and sub-basin plans)

In this regard, we are pleased to note that the principle of consultation is enshrined in Chapter 3, Part 21 of the Bill (Controlled Activities Regulation: Procedure) and merely propose that this principle be extended. Indeed, the recommendations of each Advisory Groups should be made public.

4. POLLUTION

Diffuse Pollution.

Scottish Quality Salmon is pleased to note that the Policy Memorandum (Page 11, Paragraph 47) acknowledges the importance of the need to take account of diffuse pollution. However, it is noted that there are no particular references in the Bill to diffuse pollution with regard to standards, monitoring, or the provision of information. We submit that particular mention of diffuse pollution needs to be made in order to ensure that SEPA functions effectively with regard to its central (proposed) role in ensuring quality in the water environment and in implementing the objectives of the European Water Framework Directive. In this proposal we are mindful that such sources of diffuse pollution as agricultural land, industrial estates and forestry are not currently covered by SEPA in a systematic or coherent way.

Power to Obtain Information and Documents etc. (Chapter 2, Part 18, Subsection 10).
Scottish Quality Salmon believes that the sources of diffuse pollution should also be subject to the same requirements and penalties as other sectors.

Regulation of Controlled Activities (Chapter 3, Part 20, Subsection 2.a and Subsection 3).
Scottish Quality Salmon would like to be consulted before regulations on controlled activities become law.

Regulation of Controlled Activities - Definition of ‘Substances’ (Chapter 3, Part 20, Subsection 6 – regarding “pollution”).
Scottish Quality Salmon draws the Committee’s attention to the fact that clarification of the specific meaning of the term ‘substances’ as referred to in relation to “pollution” is required. In SEPA’s consultation document, ‘The Future of Scotland’s Water’, table 4.6 (on page 34 of that document) provides a list of the Priority Substances Identified Under the Water Framework Directive. We suggest that the Committee may wish to consider that where the Bill refers to
‘substances’, clarification is given as to whether or not that term relates to the contents of that table.

**Remedial and Restoration Measures (Chapter 3, Part 22).**
Scottish Quality Salmon welcomes the principle of restoration as a key part of the measures necessary to ensure the quality of the water environment, upon which a sustainable aquaculture industry depends. However, we suggest that the Committee considers the need for the Bill to clarify that the Scottish Executive will specify what is meant by ‘improving or restoring the characteristics of any body of water’ (Subsection 2.b). As the characteristics of the water environment change over time, even without human intervention, what will be the benchmark or standard against which a restored water environment will be judged? The point at which SEPA undertakes a “characterisation” survey (as detailed in Chapter 2, Part 5), is a problematic starting point as it will need to take account of, and identify, the effects and sources, of historic human activity. It is suggested that this point ought to be clarified in specific regulations which should be subject to consultation.

**Remedial and Restoration Measures – Responsibility (Chapter 3, Part 22, Subsection 3).**
Scottish Quality Salmon proposes that the Committee may wish to consider, in relation to the powers of SEPA to determine which ‘other persons’ bear responsibility for remedial or restorative measures, that the regulations which make this provision be subject to consultation, and that the Bill provides for a right of appeal on the part of any person so identified by SEPA.

**Financial Memorandum.**
Scottish Quality Salmon notes with concern that the Financial Memorandum states: “Additional pollution controls may be necessary in the aquaculture industry. It is difficult to determine their extent and cost at this stage.”

We have recently become aware of some of the thinking on the nature of potential costs that seeks to influence the decision making process and are dismayed to discover that the WRc report as it relates to marine salmon farming is based on the outdated and unproven concept of effluent treatment as an integral part of cage operations. The introduction of this concept in the report runs counter to both the concept of an Allowable Zone of Effect (AZE) accepted by SEPA and the conclusions in a recent independent report to SE CRU which describes only very localised and temporary impact on the sea bed in the vicinity of fish farms. Furthermore, the suggestions for treatment facilities and costs arising therefrom are totally disproportionate to such impacts and run counter to current thinking on the economic sustainability of the industry which is an important tenet of the development of a National Aquaculture Strategy currently being undertaken by the Ministerial Working Group on Aquaculture.

1 Costs and Benefits of the Implementation of the EC Water Framework Directive (200/60/EC) in Scotland produced by the WRc

2 Review and Synthesis of the Environmental Impacts of Aquaculture produced by the Scottish Association for Marine Science and Napier University

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TRANSPORT AND THE ENVIRONMENT COMMITTEE

Subject: Tendering of Highlands and Islands Ferry Services

Meeting No: 23rd Meeting

Meeting Date: 4 September 2002

Author: Committee Reporters

Introduction

This paper outlines the key issues emerging from recent meetings held by reporters on the draft service specification for the tendering of Highlands and Islands ferry services. The purpose of this paper is to inform the Committee’s consideration of this issue prior to its evidence taking session with the Deputy Minister for Enterprise, Transport and Lifelong Learning at the meeting on 11 September.

Background

On 23 January 2001 the Minister for Transport announced the Scottish Executive’s proposals for the tendering of Highlands and Islands Ferry Services. The proposals were subsequently put to the European Commission for consideration as required under the Regulations on State Aid to Maritime Transport.

The Committee considered the proposals on 28 February 2001 and agreed to appoint Des McNulty and Maureen Macmillan as reporters.

A paper considered by the Committee on 22 May 2002 detailing the progress of the tendering process, the reporters’ remit, the reporters’ work and the work of Committee as a whole on the issue is attached at Annex A.

Draft Service Specification

The Executive released the draft service specification for the Highlands and Islands Ferry Services network at the end of June 2002. The consultation period for the draft service specification is 12 weeks.

The Committee indicated at its meeting on 26 September 2001 that it wished to be involved in the consultation on the draft service specification, and that the reporters would progress this matter in the first instance. The Committee further agreed, at its meeting on 30 January, that the reporters would take responsibility for reporting back to the Committee once the draft service specification has been published.

At its meeting on 22 May 2002 the Committee agreed a programme for reporters to consult on the draft service specification. The Committee further agreed that the Committee as a whole would then take evidence from the Deputy Minister for Enterprise, Transport and Lifelong Learning on the specification. Finally, the Committee agreed that, following this evidence taking session, Reporters would
produce a report on the specification for the Committee to consider and amend as necessary which would then be submitted to the Scottish Executive’s consultation.

Reporters’ Work on the Specification

The reporters consulted on the specification during the Summer Recess. Reporters carried out trips to the Clyde and Western Isles area and spoke to individuals who will be involved in the tendering process regarding the possible impact of the proposed service specification. Reporters met with local authorities, representative groups of local service users, local service users, academics, economic development bodies, trade unions and representatives of Caledonian MacBrayne.

Reporters also met with the Executive officials who are taking forward the development of the service specification and also the structuring of VesCo in order to discuss the main proposals of the specification and also those aspects of VesCo which fall outwith the remit of the service specification.

The key issues emerging from these meetings include:

- Bundling of services
- Local employment issues
- Fares and service levels
- Service development
- Competition
- Integration
- Provision of last resort

These issues are explored further below:

Bundling of Services

- The draft service specification proposes that the Highlands and Islands ferry services network (services considered eligible for subsidy by the European Commission and subsidised by the Scottish Executive) should be tendered as a single bundle. It also proposes the inclusion of routes within the single bundle which were previously outside the network, the creation of new routes and the inclusion of mainland to mainland routes (namely Gourock-Dunoon and Tarbet-Portavadie) following the Commission’s confirmation that these services are eligible for subsidy.
- Reporters found that there was general support for extending the network and tendering it as a whole as this is likely to reduce the potential for “cherry picking” of routes and will aid the integration of ticketing and marketing services.
- The main point of contention expressed by various organisations regarding the bundling of the network is the proposal that the Gourock-Dunoon service should be restricted to a passenger only service. It was conceded by the Executive in January 2001 that EC competition rules meant that a vehicle ferry across the Clyde did not qualify for a subsidy as a lifeline service since there was an unsubsidised private sector competitor operating a vehicle service nearby. However a subsidy was allowed for the passenger only service. Towards the end
of 2001, following discussions with the Commission, the Executive announced that the passenger service would continue as a stand alone service. It was considered that the current passenger and vehicle service could not continue to carry vehicles and subsidise only the passenger service as this allowed for ‘subsidy leakage’.

- Various individuals, in particular Professor Neil Kay, have questioned the logic of this, arguing that ‘subsidy leakage’ would not occur as the vehicle service, in his view, ran at a profit and therefore would not take any of the passenger subsidy following tendering. The removal of this service would cause a substantial fall in the revenues made from the service. The importance of the issues relating to this route to the tendering of the network are explored further within the section below on Competition.

Local Employment Issues

TUPE and Pensions

- The specification states that the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations will apply to the tendering process is a matter of law and whether it applies to the tendering process will not be confirmed unless the issue is taken to court. Consequently the specification does not dictate whether or not the successful bidder must comply with TUPE. However, the specification does include a proviso that the OpCo should work on the assumption that TUPE does apply and, if it is found by the courts that it does not, the subsidy will be reduced by the equivalent amount that enforcing TUPE would have cost the OpCo. It is intended that this proviso will remove any financial gains to be made by the OpCo from mounting a legal challenge against TUPE regulations. The specification includes a similar proviso for the application of the Cabinet Office Statement of Practice in relation to the transfer of pensions.

- Reporters found that groups were keen to retain the expertise of the CalMac workforce and therefore wished to see TUPE implemented during the transfer of services. Trade union representatives in particular argued that the specification should contain a contractual requirement that would ensure the effective application of TUPE regardless of whether or not it is found to apply by the courts as the specification is a legally binding document in itself.

Gaelic

- The specification states that ferries should have announcements and signs in Gaelic as well as English. It does not include any requirement for ferry crews to have any knowledge of Gaelic as the Executive has concluded that prescribing Gaelic speaking crew is against EC procurement rules.

- Argyll and Bute Council and Western Isles Council noted that the ferry routes serve communities with a strong Gaelic tradition and that certain islands have a high population of people who are native Gaelic speakers. The Councils therefore considered it important for the specification to require each of these routes to be served by at least one crew member who could speak fluent Gaelic, particularly in the event of an emergency.

- Trade Union representatives were of the opinion that the Council’s proposal would not contradict EC procurement rules as the ability to speak Gaelic would
not need to be a statutory requirement of all staff. Union representatives stated that if the Council’s recommendation was found to contradict European law, the wording of the specification should be strengthened to strongly encourage the successful bidder to take into account the importance of having at least 1 Gaelic speaking crew member on board ferries serving certain routes.

Fares and Service Levels

- Within the specification the Executive has expressed a preference for the protection of current fares and service levels by specifying that the successful bidder must not exceed current maximum fares and must run all the services according to the Summer and Winter timetable operated by Calmac prior to the transfer.
- Reporters found there was strong support from the vast majority of individuals for the Executive’s proposal on fares and service levels as it was considered important to assure service users that the tendering process would not destabilise the network. In addition, HITRANS noted the importance of prescribing sailings on lifeline routes as there is no financial incentive to provide these services.
- Concern was expressed, in particular by HIE, that the main priority following the tendering exercise should be an increase in the number of sailings to the Argyll islands e.g. Coll where there are currently no weekend sailings meaning school children have to stay in hostels on the mainland during term-time.
- The Calmac User’s Consultative Committee considered that the specification should encourage the successful bidder to investigate the advantages of discount schemes such as transferable discount cards or ferry passes for purchase by frequent users. A Shipping Services Advisory Committee suggested that the specification should encourage alternatives to peak fares as peak fares on lifeline routes are inappropriate and that the onus should be placed maximising the number of people on board paying lower fares rather than maximising revenues.

Service Development

- Private competitors have laid on ferry services in competition to Calmac on routes such as Stornoway-Ullapool and this has served to flag up unmet demand to Calmac. As a consequence Calmac has tapped into this demand by laying on extra services in competition with private companies. The specification acknowledges the existence of this unmet demand and encourages the OpCo to try to tap into this demand by stating that the successful bidder can put on extra sailings or extra routes. The specification provides an incentive by allowing the OpCo to keep any profits arising from these initiatives.
- Trade unions requested that the specification should state that any additional services should comply with the same safety levels, performance levels and staff conditions as those services prescribed by the specification.
- Local residents and service users have stressed the importance of flexibility within the provision of the ferry services in order to allow it to respond to changes in levels of demand and changes in the needs of local residents e.g. the needs of growing industries of importance to island economies such as fish farming. However, it was recognised that OpCo may lack the resources to experiment with new initiatives as it will be seriously constrained by prescription of rigid fares and
service levels within the specification. Consequently, it was widely recognised that there was a need for a structure separate from the OpCo which would look into new initiatives for inclusion into future specifications. The ability of VesCo to carry out this task was questioned as it is publicly owned and would have little incentive to investigate new initiatives. Organisations suggested schemes which would explore new initiatives including:

- HIE and HITRANS suggested proposals for a route development fund jointly funded by economic development bodies such as themselves and the Executive. Local authorities could then bid for funds to run new routes and ascertain the demand and potential improvements these routes could provide. A route enhancement fund was also suggested which would try to maximise the potential of variable costs on existing routes.
- Trade union representatives endorsed the idea of a strategic working group to examine proposals for service development.
- The Calmac Users’ Consultative Committee suggested requiring the bidders to produce a bid for the actual specification and also a bid detailing suggestions for the service if the bidder was not constrained by fares and service levels similar to the ‘enhanceable franchise’ idea developed by the Strategic Rail Authority.

**Competition**

**Gourock-Dunoon**

- It has been suggested that a passenger only ferry run by OpCo on this route will not be able to compete with the private competitor, Western Ferries, and therefore the service may cease. Concerns have been expressed that this will create a private monopoly, with freedom to charge high fares, on a route which has been deemed a lifeline ferry service and therefore worthy of subsidy.
- Organisations have suggested that the restraints placed on the OpCo in terms of service levels and fares may prevent it from competing with private companies such as Western Ferries which may be set up on similar routes where aspects of the ferry service runs at a profit. The result may then be the creation of private monopolies on these routes which, it has been suggested, amounts to ‘cherry picking’. It is argued that a consequence of this would be that the least profitable routes would remain available to tender and this may not be a financially profitable venture for future potential bidders and therefore they may be deterred or the subsidy may have to be increased.
- Another issue emerging from the idea of private monopolies on lifeline routes is the possible problems that would arise if the private company stopped servicing the route. It was suggested to reporters that any service considered a lifeline route should have a provision for last resort regardless of whether or not OpCo ran the ferry service on the route.

**Freight**

- The specification does not include a provision for the current discount scheme for hauliers as it is seen to contradict European competition law.
- Haulage companies have suggested that if no discount scheme is operated on the tendered service it will be less expensive for them to set up private services
carrying freight in competition with subsidised routes. e.g. this occurred on the Ullapool-Stornoway route and hauliers on Colonsay are currently considering running a service. Hauliers suggested that the revenues they currently provide to Calmac subsidises domestic users and tourists on many of its routes and its removal would definitely lead to an increase in fare levels and possible jeopardise the continuation of the services.

- Calmac representatives detailed a discount scheme which they are currently developing which they believe is acceptable under EC competition law. A Shipping Services Advisory Committee suggested that the specification should require bidders to propose such schemes within their bid.

Integration

- The performance levels outlined in the specification are tighter than those currently applied to Calmac.
- Although good performance levels were deemed to be of importance, various organisations suggested that the rigidity of those in the specification prevented ferries from linking up with other forms of transport which run late and this is very important, particularly when ferries may only sail 3 times a week to certain islands.
- Stronger encouragement of potential bidders within the specification to develop integration with other forms of transport, an increase in marketing of the Highlands and Islands and an integrated ticket purchasing service was considered important by many organisations in order to increase the profile of the Highlands and Islands and encourage tourism.

Provision of Last Resort

- The specification states that VesCo will be responsible for the provision of last resort and that if the OpCo fails to run a service for 7 consecutive days the VesCo will have the right to ensure provision of services.
- A representative from Argyll and Bute Council considered 7 days to be too long a period to leave isolated islands such as Colonsay without a ferry service.

Recommendation

The Committee is invited to consider this paper in preparation for its evidence taking session on the specification with the Deputy Minister for Enterprise and Lifelong Learning at the meeting on 11 September.

Des McNulty MSP  
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29 August 2002