

MINUTES - SNH / MS DISCUSSION ON ADDs AND EPS : Tue 8 November 2016

11.30 – 15.30. Silvan House meeting room 2, Edinburgh

Attendees:

SNH: Cathy Tilbrook (Chair); George Lees; Suz Henderson; Liam Wright; Caroline Carter; Karen Hall.

MS: [REDACTED] (t/c for part)

Apologies: [REDACTED] (all MS).

Aims:

- To reach an agreed policy position on requirement for EPS licensing for use of ADDs in aquaculture.
- To discuss and agree approaches to monitoring and regulating the use of ADDs within the Inner Hebrides and the Minches cSAC.

1. Intro / context to ADD/EPS Issue

- CT explained context and objectives for meeting, including summary of previous (April 2015) meeting and recent developments such as harbour porpoise cSAC and aquaculture consents review. CT concluded that SNH recognises that it is for MS / SG to determine their approach on this issue, but that SNH requires a clear and formal policy statement that sets out the government position, especially where this seems to diverge from published guidance.
- CC delivered short presentation, providing background and recent research on the issue of ADDs and aquaculture, including:
 - Diversity of applications for ADDs
 - Maps illustrating the range of audibility of ADDs in NW Scotland, and increasing persistent detection over last decade
 - Areas within cSAC which recent studies have identified as being ensonified
 - Ranges of audibility of differing ADDs.

2. EPS Legislation and MS Marine EPS Guidance

- CT suggested it would help to re-visit the decision-making flowchart in the MS Marine EPS guidance and offered SNH's view on the likely responses to each question in turn:
 - Q1 Are EPS likely to be present? => Yes.
 - Q2 Are you planning an activity which could potentially cause injury or disturbance to marine EPS? => Yes (noting that the guidance itself indicates this, for ADDs).
 - Q3 Can the impact be fully or partially mitigated? => potentially, there being various options here (eg see Annex 2). However, any such mitigation needs to be enforceable (eg via planning conditions) to ensure delivery.
 - Q4. Will an offence be committed despite mitigation plans? Yes, in some cases – leading to requirement for EPS licence
- Q4 prompted [REDACTED] to outline recent legal advice received by MS on the definition of 'reckless'. The advice received was not definitive but, in case law, implied 'culpable indifference and blameless disregard'. Examples of recklessness in a driving context were also given. It was MS's opinion, on the basis of this advice that ADD use *by the aquaculture sector*, is not 'reckless', the intention of ADD use being different for aquaculture to that for other industries where ADDs may be applied to 'deliberately' scare / disturb EPS (cetaceans).

- MS considered that, unless there was an identified negative effect of ADDs used in aquaculture upon EPS species, and that operators had been made aware of the negative consequences of their actions, potentially via guidance which informed operators that what they were doing could disturb cetaceans, and provided them with routes by which they might avoid this, it would be difficult to infer recklessness.
- Further to this, [REDACTED] argued that since ADD use for aquaculture was (in MS opinion) not, by this token, reckless and not therefore a criminal offence, there was no basis for introducing an EPS licensing regime. Rather, regulators should promote good practice to help achieve safeguard of EPS.
- SNH questioned this interpretation, indicating that the objective of the EPS legislation was to minimise or avoid disturbance and harm to protected species and, given our understanding of the potential risks to cetaceans from exposure to certain levels of underwater noise, that a reasonable interpretation of the legislation and accompanying guidance would conclude that disturbance through ADD use (irrespective of the sector employing it) falls within its scope. SNH further queried the interpretation of 'reckless / deliberate' for use of ADDs, where there has been widespread discussion with industry on potential risks to EPS, such that an operator would be 'aware of the likelihood that disturbance would result from his actions...'.
 - **Action 1. MS ([REDACTED] or [REDACTED]).** To provide SNH with a copy of the legal question raised by MS and the advice received from lawyers on defining reckless behaviour and written confirmation of how MS interpret that advice (as set out in the meeting). Also in relation to Reg 39 (2) issue raised later.
 - **Action 2. SNH (CT).** To investigate the potential for SNH to obtain a separate legal opinion on defining 'reckless / deliberate behaviour' (in the context of the EPS) and perhaps also in relation to Reg 39 (2), noting that SNH lawyers may not wish to offer advice on the same question asked by MS.
- [REDACTED] & [REDACTED] indicated that legal advice received on the definition of 'reckless' within the MS Marine EPS Guidance would, need to be fully considered.
- **Action 3. MS ([REDACTED] or [REDACTED])** to advise SNH of plans / timescales for guidance revision. NB As when first drafted, SNH will be keen to support MS in any re-drafting required.
- [REDACTED] emphasised that, given the implications for shooting seals and the balance of seal control and aquatic animal welfare, there is a need to understand the 'end game' and asked SNH what they sought to achieve through an EPS licensing process for ADDs. MS expressed concern at introducing an administrative process, without clear understanding of the effects of ADDs on EPS and what positive outcomes are expected, against a backdrop of reducing the administration of other aspects of fish farming control.
- CT (and others) outlined three objectives:
 - Securing a mechanism for monitoring and managing the use of ADDs, so as to safeguard EPS (and especially HP within the cSAC) in the face of growing use of ADDs, increasing scientific evidence of their potential to cause disturbance and a growing aquaculture industry;
 - Reducing or preventing the risk of legal challenge / infraction of MS, in relation to non-delivery of its statutory functions, under the Habitats Regulations (insofar as they apply to EPS) and noting high levels of public/ NGO scrutiny on such issues;

- Consistency with other industries in Scotland that are using or planning to use ADDs.

3. Practical Measures for Regulating and Managing ADD Use

- CC continued her presentation, focusing on the cSAC, and covering:
 - Details of ADD use supplied by fish-farmers
 - Sound propagation models
 - Modelled maps of ADD sound propagation and potential zones of disturbance to HP around relevant fish-farms, and the caveats that apply to their interpretation
- LW & SH outlined initial discussions with industry on best practice use of ADDs within the cSAC, including managing the:
 - Frequency of devices (use those to which HP / other cetaceans are less sensitive)
 - Duration of disturbance (ensure no continuous noise emission / use automatically triggered devices and limit duration of use)
 - Zone of disturbance (use devices with reduced range of noise output)
- ■ observed that recent research by SMRU, around salmon netting stations in NE Scotland, indicated that triggered use of ADDs was less effective than constant use, in terms of seal deterrence. The seals appeared to be more willing to tolerate the triggered ADD output in the knowledge that a potential food source is available (which they would, under constant ADD use, have been unaware of).
- ■ observed that, in relation to fish-farm management we (collectively) are trying to manage a range of competing impacts, namely: escaped fish, shot seals and disturbed cetaceans. By changing the approach we take to management of any one of these (eg cetacean disturbance) we risk increasing other, undesirable impacts. ■ emphasised that improved management may be better delivered through guidance than a legislative approach.
- SH & LW suggested that, as the cSAC has policy protection, measures to protect the qualifying species would need to be enforceable, and hence the need for a legislative approach (whether that be via EPS legislation, planning legislation or another mechanism). **Action 4. SNH (SH/LW) to confirm with Greg Mudge.**
- ■ noted that Scottish Govt is strongly advocating the streamlining of aquaculture regulation and that any introduction of a new licensing regime (irrespective of the justification or otherwise for that) would be inconsistent with this. ■ also indicated that any new EPS licensing regime would be a huge administrative burden for MSLOT and effectively undeliverable with current resources.
- In response, CT and others outlined various options for reducing this burden, based in part on advice received previously by Ben Ross (SNH Licensing Mgr). An effective licensing regime could, in SNH's view, be introduced that would not be onerous on MS or developers. Options covered included:
 - **Introducing EPS process for all aquaculture ADDs**
 - Introduce a 'class licence' which permits use of ADDs in less sensitive locations, subject to registering devices with regulator and providing certain information (such as model, location, whether or not linked to triggering mechanism etc). Operation may be permitted without restrictions or subject to general terms and conditions applicable to all devices covered by the Licence

- In sensitive locations, require a site-specific licence which sets out site-specific mitigation to be conditioned
 - **Using planning conditions as first stage mitigation**
 - Condition 'best practice' mitigation at all sites through planning (likely to be through an Environmental Management Plan).
 - Any breach of these conditions would breach planning consent but could also be considered reckless disturbance and a potential offence, leading to requirement for an EPS licence.
 - For sensitive locations, 'best practice' mitigation may not be sufficient and so additional mitigation may be required (potentially including no ADDs without an EPS license or that use of ADDs would be inappropriate in certain locations).
- The pros and cons of these and other options for managing ADD use, whether via EPS or development management under the planning system, were discussed. [REDACTED] emphasised that planning legislation can't be used to address and manage impacts covered under other regulatory regimes (such as EPS legislation). A view on whether ADD use for aquaculture is encompassed by the EPS legislation, or not, is therefore a prerequisite before options for control via the planning system are investigated. [REDACTED] later also advised that if management via the planning system is considered the most appropriate mechanism for addressing this issue then any subsequent discussions need to involve LA representatives.
- SH & GL asked MS whether they shared the SNH view that this (ADD use by the aquaculture industry) was an issue that needed to be addressed and managed. Without agreement on that, the discussion and identification of a practical option for managing ADD use was premature.
- MS ([REDACTED]) were less certain that there is an outstanding concern, at this time, which can't be managed under current working practices. NB. IW later offered the view that EPS licensing of ADD use by aquaculture was appropriate in some circumstances.
- **Action 5. MS (Policy and LOT)** to confirm whether, in their opinion, the concerns raised by SNH regarding ADD use, by the aquaculture industry, inside and outwith the cSAC, require to be addressed and whether they justify changes to current regulatory practices.

4. Additional Perspective from MS Policy & Concluding Remarks

- [REDACTED] joined the meeting by t/c. [REDACTED] has led on the EPS guidance within MS Policy, and [REDACTED] indicated that she would be best placed to advise on the issues being covered by the meeting, on her return, but in summary:
 - He did not believe there was a significant policy issue at the moment regarding ADD use. In his experience, SNH advise when they have concerns about a particular deployment and MSLOT respond accordingly, generally in accord with SNH advice
 - The introduction of the HP cSAC did not change that position.
 - The Marine EPS Guidance would need to be updated, in relation to its description of Reg 39(2).
- SNH noted that the wording of section 1.2.3 of the Guidance is confusing as it brings in EPS test 3 (would actions be detrimental to FCS of species) as a potential defence against an offence being committed (and therefore whether an

EPS licence is needed?). SNH interpretation of the Regulations section 44 (3) is that the FCS test is considered later in the process, when determining whether to grant an EPS licence. This is in line with the flowchart in the current EPS Guidance.

- **Action 6. MS ()** to clarify advice received on Reg 39(2) and implications for need to revise the marine EPS Guidance
- **Action 7. SNH (CT/AII).** To compile a list of questions for MS and also to include, for further discussion, our initial views on possible approaches that could be implemented (whether via EPS legislation or otherwise) to address the concerns we are raising. See Annexes 1 and 2.
- SNH emphasised the opinion that ADD use by the aquaculture industry, and the associated EPS licensing issues, is an issue of growing concern, that needs to be addressed to ensure safeguard of HP and compliance with European legislation.
- **Action 8. MS** To provide a timetable to SNH for addressing the points raised at today's meeting.

George Lees.
8 December 2016.

Annex 1. Actions / questions for Marine Scotland in relation to ADD use by the aquaculture sector.

1. MS to provide SNH with a copy of the legal question posed and the advice received from lawyers on defining reckless behaviour (and on Reg 39 (2)) and provide written confirmation of how MS interpret that advice (Actions 1 and 6).
2. The aquaculture industry widely acknowledges that ADDs can impact cetaceans. Our understanding is that the legal advice received by MS regarding the definition of reckless is 'culpable indifference and blameless disregard'. Does MS conclude that an ADD left on continuously throughout the production cycle, with no mitigation, and given common understanding of potential risk to cetaceans, is not a reckless action which could result in the disturbance of cetaceans? If so then what is the justification for this conclusion?
3. MS to clarify which parts of the Marine EPS guidance they intend to update e.g. the definition of reckless and/ or description of Reg 39(2); and set out timescales / process for this revision (Action 3).
4. In areas of higher cumulative pressure it seems logical that there is an increased risk to cetacean species. In some areas this could theoretically result in their exclusion from significant areas for significant periods of time. Do MS agree this is a reasonable conclusion and if so what are the implications in relation to Regulation 39 (and within the HP cSAC, the ability to achieve Conservation Objectives on avoiding significant disturbance and maintaining access to all parts of the cSAC)?
5. Does MS consider that the concerns raised by SNH regarding ADD use for aquaculture inside and outwith the cSAC, require to be addressed? If not, what is the basis for that decision? If so, does this justify changes to current regulatory practices and do the options in annex 2 merit further consideration? Can MS clarify their timescale for providing a clear and formal policy statement that sets out the government position (Action 5 and 8)

Annex 2. Potential approaches for addressing concerns about impact of ADD use on cetaceans and ensuring compliance with legislative requirements.

- **Options for EPS licensing for all aquaculture ADDs:**
 - Introduce a 'general licence' which permits the use of ADDs in less sensitive locations, provided that they comply with general mitigation conditions (e.g. advertised on website and promoted to industry). Note that this approach does not require any application process and therefore no information on devices is submitted, which would make future monitoring of cumulative impacts more difficult. An offence is still committed if non-compliance with conditions can be demonstrated.
 - Introduce a 'class licence' which permits use of ADDs in less sensitive locations, subject to registering devices with regulator and providing certain information (such as model, location, whether or not linked to triggering mechanism etc). Operation is permitted subject to general terms and conditions applicable to all devices covered by the Licence. An offence is committed if these conditions are not complied with. This approach may provide a good trade-off between provision of information and potential for compliance monitoring via a light-touch and simple approach to licensing process.
 - Individual EPS licence may still be required for sensitive / higher risk locations, with specific mitigation conditions attached to the licence.
- **Using planning conditions as first stage mitigation**
 - Condition 'best practice' mitigation at all sites through planning (likely to be through an Environmental Management Plan).
 - Any breach of these conditions would breach planning consent (enforcement action?) but could also be considered reckless disturbance and a potential offence, leading to requirement for an EPS licence?.
 - For sensitive locations, 'best practice' mitigation may not be sufficient and so additional mitigation may be required (potentially including no ADDs without an EPS license or that use of ADDs would be inappropriate in certain locations).
 - Issues with this approach are that it is not deemed competent for planning conditions to cover matters that are dealt with under other legislation, and LA may be reluctant to condition issues over which they have little control / experience. This approach could only be applied gradually as sites apply for planning consent for other aspects, so would mean a piecemeal approach to managing ADDs and difficulties in monitoring and managing any cumulative issues.

Potential mitigation conditions (currently under discussion with industry):

- No continuous use of ADDs at any site.
- Use of automatic triggered devices (with some guidance on frequency / duration of triggering)
- Use of low frequency devices
- Reporting requirements (to be agreed)
- Use of strategic area-wide approach to ADD deployment?
- Seasonal restrictions on ADD use?
- Consideration of cumulative impacts and possible further restriction / no ADD use in areas of highest risk (NB Further work and discussion is required to clarify the location of such areas and the basis for their identification).