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15th March 2024

Dear Redact

Sea Lice Regulatory Framework – Implementation

The purpose of this letter is to set out a number of observations from an industry perspective in relation to SEPA's implementation of the Sea Lice Regulatory Framework (the "**Framework**").

As the trade body representing the Scottish salmon farming sector, we can offer a valuable perspective on a number of key issues which we trust will be of assistance to SEPA in relation to the implementation of the Framework.

Important issues on data collection

A number of Salmon Scotland's members have, we understand, been issued Information Notices by SEPA under Regulation 36 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011, in connection with SEPA's implementation of the Framework. We understand that these Information Notices have been issued to our members in broadly similar terms.

It will, of course, be for individual licensees to respond to those requests. However, we offer a number of observations on critical issues which SEPA must be cognisant of when handling any information it may receive pursuant to these Information Notices.

Purpose of information collection

Regulation 36 Information Notices must, of course, be issued consistent with SEPA's statutory functions and duties – in particular those relevant under the 2011 Regulations, and under the Water Environment and Water Services (Scotland) Act 2003. SEPA must, when exercising its functions more generally in this area (and not just in relation to the issuing of Information Notices), have regard to the factors set out in Section 2(4) and 2(5) of the 2003 Act.

We remind SEPA of its obligations to act in line with its statutory functions and powers, both in relation to the specific Information Notices but also in ongoing information gathering and monitoring activities, including (without limitation), the need to have regard to the social and economic impact of such exercise of those functions (section 2(4)(a) of the 2003 Act) – in other words to give proper consideration to the cost of its regulatory interventions.

In particular, we are concerned about the nature of the Implementation Assessment undertaken by SEPA in its [May 2023 Consultation and updated for its December 2023 Response](#), which lacks any substantive economic analysis or assessment on the economic implications of the Framework to farmers and the wider industry. Rather, the Implementation Assessment is broad, high level, and does not evidence that SEPA has properly engaged with its statutory duties.

Our members have also told us about their serious concerns around the scope of the Information Notices and their compatibility with SEPA's legal obligations. In particular, it is not at all clear why the provision of data outside of the salmon migratory period is relevant or otherwise has a causal link to the objectives

of monitoring the impact on wild fish activity. As such, our members do not see how the request for such data supports SEPA's stated policy objectives under the Framework, nor how the request for such data aligns with SEPA's statutory remit under the 2011 Regulations – in particular under Regulation 3, the regulation of activities which have or are likely to have *"a significant adverse impact on the water environment."*

Our members also continue to have concerns about serious gaps in the evidential base underpinning SEPA's Framework – in particular the lack of robust baseline information for wild fish (both salmon and sea trout). This is critical, as without this baseline, SEPA will not be able to interpret (from any information which may be provided under the Information Notices) whether there is any potential impact of farming activities on wild fish populations.

We would urge SEPA to take its legal obligations seriously. Our members will of course evaluate this point in considering any response they make to the Information Notices.

Handling of confidential information

In its communications accompanying the Information Notices, SEPA states that it will issue further Information Notices towards the end of 2024, and that from March 2025, SEPA will require the reporting of such information on a weekly basis for each licence. Accordingly, through this envisaged process, SEPA would be provided with contemporaneous, detailed information on the conditions and numbers of fish in our members' production locations at a granular, site-specific level. SEPA then indicates that *"On receipt, the information will be placed on SEPA's public register"*.

Having taken legal advice on this issue, Salmon Scotland remains concerned around what appears to be SEPA's 'default' stance as to the handling of this information. Publication and availability of essentially 'real time' data on the status and condition of individual farms on the SEPA register would risk facilitating (tacitly or otherwise) coordination amongst producers – a potential breach of Chapter I of the Competition Act 1998. Disclosure of this information in the way SEPA proposes, when combined with existing information on biomass available on Scotland's Aquaculture website, would risk permitting industry-level visibility of future harvest numbers and size on a site-by-site level. This is, by nature, highly sensitive and strategic information, disclosure of which would prejudice to an unreasonable degree our members' commercial interests.

SEPA will note that the Competition and Markets Authority (the "CMA"), in its [2021 Merger Clearance Decision in relation to Scottish Sea Farms and Grieg Seafood](#), found that, amongst other things, a lack of *granular* information as to future production volumes meant that coordination was unlikely to be effective (see paras 65 to 68). Our members consider that commercial confidentiality concerns around this data only reduce at a point after the completion of all commercial activities following a harvest cycle – publication before this presents unacceptable risks to our members in terms of their compliance with applicable laws.

SEPA's proposals to include this information on the public registry *"on receipt"* risks seriously undermining the CMA's conclusions and would result in SEPA facilitating a breach of the 1998 Act in spite of our members' repeated and consistent concerns around the commercial sensitivity and strategic value of this information.

In addition to this, the risk of facilitating coordination through publication of this commercially confidential information is not limited to our members' activities. Publication in the way SEPA proposes would also permit coordination on the part of purchasers of our members' products.

It is imperative that SEPA does not act in a way, nor compels our members to act in a way which jeopardises our members' compliance with law. As SEPA may well be aware, the obligation to comply with a regulatory requirement does not absolve a person from a breach of competition law. Our members take compliance with their legal obligations seriously and continue to have material concerns around SEPA's purported approach to handling this information.

In light of this, we urge SEPA to (1) be confident that the information request is in line with its statutory functions and duties and be transparent with our members on the basis which it reaches that conclusion; and (2) to consider any claims made by Salmon Scotland's members under Regulation 39 of the 2011 Regulations are assessed rigorously and with proper regard the commercial and competition law sensitivities outlined above.

SEPA's approach and its legal obligations

We also draw SEPA's attention to Regulations 38 and 40 of the 2011 Regulations. In particular these provide:

- That confidential information may only be included in the public register with the consent of the person providing it (following SEPA's determination that the information is commercially confidential); and
- That where it appears to SEPA that any information to be included in the register might be confidential, SEPA must give the person providing the information a reasonable opportunity to object to its inclusion in the public register and to make supporting representations as to why the information should be considered commercially confidential.

On this basis, given the factual background and the fact that SEPA, in its own words is "*aware of concerns raised that some of the information we are requiring may be commercially confidential*", we are very concerned that SEPA's purported 'default' approach appears to pre-empt the outcome of the processes detailed in Regulations 36 – 43 of the 2011 Regulations which seems likely to be unlawful.

Accordingly, we expect SEPA to diligently carry out its functions, as it is required to do so in line with the relevant provisions of the 2011 Regulations, so that our members' rights under law and their legal obligations are fully protected and respected throughout this process.

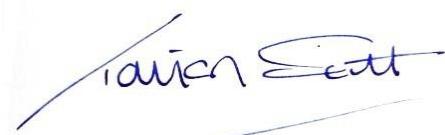
Conclusion

I would, of course, welcome the opportunity to discuss these issues directly with SEPA staff at an appropriate time.

In the meantime, I would appreciate if SEPA could respond to this letter, in particular providing/ confirming the following:

- (a) Confirm SEPA's commitment to act solely within and consistently with its statutory functions in relation to the implementation of the Framework;
- (b) Provide industry with substantive details of SEPA's economic assessment of the Framework and in particular the implications on licensees of the economic impact and implications of the proposed ongoing data collection and monitoring proposals;
- (c) Confirm SEPA's commitment not to take any steps which would jeopardise Salmon Scotland's members' compliance with competition or other laws;
- (d) Provide a statement as to how SEPA proposes to manage our members' concerns around the commercial confidentiality of data requested under the Information Notices; and
- (e) Salmon Scotland's members consider that confidentiality concerns around publication of data only reduce once all commercial activities following the completion of a harvesting cycle have ended. Please confirm whether SEPA agrees. If not, why not?

Yours sincerely



Tavish Scott, CEO