

# Decision Notice

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## **Decision 199/2017: Salmon and Trout Conservation Scotland and the Scottish Environment Protection Agency**

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### **Information concerning sea lice medicine**

Reference No: 201701419

Decision Date: 30 November 2017



Scottish Information  
Commissioner

## Summary

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SEPA was asked for information relating to a paper on the use of a medicine for the treatment of sea lice.

The Commissioner found that SEPA was not entitled to withhold the information under the exception in regulation 10(5)(f) of the EIRs. He found that the information related to emissions, with the result that the exception could not apply.

The Commissioner required SEPA to disclose the information.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (5)(f) and (6) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. In this decision, all references to Salmon and Trout Conservation Scotland (S&TCS) should be read as including S&TCS's solicitors, acting on its behalf.
2. On 12 May 2017, S&TCS made a request for information to the Scottish Environment Protection Agency (SEPA). The request concerned a paper (AMT(16)045) considered by SEPA's Agency Management Team in February 2016. The information requested was:  
  
*"All correspondence with and record of meetings with the salmon farming sector and other relevant information held as referred to in para 8.2 of AMT(16)(045), to include any recording of the teleconference, if one was taken."*  
  
S&TCS also requested other information which is not the subject of this decision notice
3. SEPA responded on 9 June 2017. SEPA disclosed some information to S&TCS. SEPA also informed S&TCS that it was awaiting feedback from a third party in respect of one document (which had not been disclosed at this stage).
4. SEPA responded again on 22 June 2017. SEPA informed S&TCS that it was withholding one document under the exception in regulation 10(5)(f) of the EIRs. This was a report provided to SEPA regarding a study into the use of a medicine for the treatment of sea lice ("Slice") in the Scottish aquaculture industry.
5. On 22 June 2017, S&TCS wrote to SEPA requesting a review of its decision. S&TCS did not agree that the information was excepted from disclosure under regulation 10(5)(f). Additionally, in S&TCS's view, the information related to emissions. Consequently, in view of regulation 10(6) of the EIRs, it was not open to SEPA to withhold the information under this exception.

6. SEPA notified S&TCS of the outcome of its review on 20 July 2017. SEPA upheld its decision that the information was excepted from disclosure in terms of regulation 10(5)(f) of the EIRs. SEPA also disagreed with S&TCS's view that regulation 10(6) of the EIRs applied.
7. On 7 August 2017, S&TCS wrote to the Commissioner. S&TCS applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. S&TCS stated it was dissatisfied with the outcome of SEPA's review as it disagreed with the application of the exception in regulation 10(5)(f) of the EIRs. Additionally, S&TCS submitted the information withheld under regulation 10(5)(f) comprised information relating to emissions and, therefore, could not be withheld under this exception.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that S&TCS made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 15 August 2017, SEPA was notified in writing that S&TCS had made a valid application. SEPA was asked to send the Commissioner the information withheld from S&TCS. SEPA provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and answer specific questions, focusing on the application of regulations 10(5)(f) and 10(6) in this case.
11. SEPA responded, providing submissions on its application of the exception in regulation 10(5)(f) of the EIRs. SEPA also provided submissions explaining why it did not consider regulation 10(6) of the EIRs to be relevant to S&TCS's request.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both S&TCS and SEPA. He is satisfied that no matter of relevance has been overlooked.

### **Regulation 10(6) of the EIRs**

13. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(f)) to the extent that it relates to information on emissions.
14. In this case, the information under consideration comprises a proposal for consultancy to support a study into the potential effects on marine fauna living on the seabed following the use of Slice in salmon aquaculture. The work involved in the study includes sampling, monitoring and data analysis. This includes collection at sites where chemical residue is likely to be present.
15. S&TCS noted that SEPA had stated (in its review outcome) that the information formed part of a study into the use of Slice in the Scottish aquaculture industry. S&TCS pointed out that the use of this kind of medicine always entailed its release or emission from the affected fish

farms into the wider environment in the form of uneaten medicated feed pellets that fall through the nets to the seabed, or in residues excreted by fish. In S&TCS's view, it was clear that the project related to emissions of Slice into the wider sea loch environment.

16. S&TCS referred to the ruling of the European Court of Justice (CJEU) in *Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*<sup>1</sup>. S&TCS noted that the Court had given guidance on the concept of "information on emissions into the environment" and had confirmed that the concept was not to be interpreted narrowly.
17. In SEPA's view, the substance of the withheld information did not relate in a sufficiently direct manner to the emissions into the environment and so did not fall within the scope of regulation 10(6) of the EIRs. Therefore, SEPA continued to be of the view that the exception in regulation 10(5)(f) could be applied.

#### *The Commissioner's view*

18. The term "emissions" is not explicitly defined in the EIRs or in the European Directive on public access to environmental information (Directive 2003/4/EC<sup>2</sup>) which the EIRs are intended to implement. The Aarhus Convention: An Implementation Guide (Second Edition 2014)<sup>3</sup> notes (at page 88) that the term "emission" has been defined in the Industrial Emissions Directive<sup>4</sup> as a:

*"direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources ... into air, water or land".*

19. The Commissioner considered the definition of emissions in *Decision 191/2017 Salmon and Trout Conservation Scotland and the Scottish Ministers*<sup>5</sup>. In that decision, having taken account of the view of the CJEU, the Commissioner did not consider that a restrictive interpretation on the meaning of regulation 10(6) should apply.
20. In the present case, the Commissioner is satisfied that the withheld information relates to information on emissions. The information comprises a proposal to support a study investigating the potential effects on marine crustacea caused by the use of chemical feeds in salmon aquaculture, specifically Slice, which are discharged as residue onto the seabed and wider environment. It includes details of how samples would be obtained and tested for residue.
21. In the Commissioner's view, the definition of emission referenced in the Aarhus Implementation Guide clearly would encompass chemical discharges into the marine environment from fish farms. The CJEU ruling referenced above states (at paragraph 86) that to ensure a general principle of access to environmental information held by public authorities, *"the public must have access, not only to information on emissions...but also to*

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<sup>1</sup>

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d693a5a5349680406cb44ab3723191c962.e34KaxiLc3eQc40LaxqMbN4Pah4Qe0?text=&docid=185542&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=652085>

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

<sup>3</sup>

[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:334:0017:0119:en:PDF>

<sup>5</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701293.aspx>

*information concerning the medium to long-term consequences of those emissions on the state of the environment”.*

22. Having considered the nature of the withheld information, the Commissioner is satisfied that it relates to information on emissions. Therefore, it falls within the definition contained in regulation 10(6) of the EIRs.
23. Having concluded that the information under consideration falls within the ambit of regulation 10(6) of the EIRs, the Commissioner cannot accept that SEPA was entitled to refuse to make the information available under the exception in regulation 10(5)(f).
24. As the Commissioner is satisfied that SEPA was not entitled to withhold the information under regulation 10(5)(f) of the EIRs, he will not go on to consider SEPA’s application of this exception. The Commissioner now requires SEPA to disclose the information to S&TCS.

## Decision

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The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Salmon and Trout Conservation Scotland (S&TCS).

The Commissioner finds that the information relates to information on emissions, so SEPA was not entitled to refuse to make the information available under regulation 10(5)(f) of the EIRs. The Commissioner requires SEPA to disclose the information to S&TCS by **15 January 2018**.

## Appeal

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Should either Salmon and Trout Conservation Scotland or the Scottish Environment Protection Agency wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If the Scottish Environment Protection Agency (SEPA) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SEPA has failed to comply. The Court has the right to inquire into the matter and may deal with SEPA as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**30 November 2017**

### The Environmental Information (Scotland) Regulations 2004

#### 5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-  
...  
(b) is subject to regulations 6 to 12.  
...

#### 10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure....
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-  
...
  - (f) the interests of the person who provided the information where that person-
    - (i) was not under, and could not have been put under, any legal obligation to supply the information;
    - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
    - (iii) has not consented to its disclosure; or...
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).  
...

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