

SALMON WATCH IRELAND

17 June 2011

Mr Pat Rabbitte TD
Minister for Communications, Energy
and Natural Resources
Adelaide Road
DUBLIN 2

Dear Minister


Attached is a submission from Salmon Watch Ireland in respect of the draft Wild Salmon and Sea Trout Tagging Scheme Regulations 2011 published by you on 19 May.

In summary, the key points of our view on the draft regulations are as follows:

1. In so far as the draft regulations provide for a mixed stock fishery in Castlemaine Harbour they constitute a departure from Government policy established in 2006;
2. The advice you have been given in respect of Castlemaine has its genesis in an inappropriate and skewed question posed in 2010 by the then Minister for State at your department;
3. The entire proposal to reinstate mixed stock fishing in Castlemaine is *ultra vires* the Habitats Directive.

We believe and strongly propose to you that the entire Castlemaine project be set aside until the processes set out in Article 6 of the Habitats Directive have been complied with.

Yours faithfully



Niall Greene
Chair of the Board

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Submission to the Minister for Communications, Energy and Natural Resources from Salmon Watch Ireland regarding the draft Wild Salmon and Sea Trout Tagging Scheme Regulations 2011 published on 19 May 2011.

1. On 19 May the Minister for Communications, Marine and Natural Resources ('the Minister') issued new draft Wild Salmon and Sea Trout Tagging Scheme Regulations for 2011 ('the draft 2011 Regulations') which amend the terms of the Wild Salmon and Sea Trout Tagging Scheme Regulations 2010 (SI No 655 of 2010). The main change brought about by the draft 2011 Regulations is to establish a quota in 2011 for salmon to be caught by draft nets in the mixed estuary of Castlemaine, Co Kerry, the fishery having been closed for such exploitation since the Government's ending of mixed stock fishing for wild Irish salmon in 2007.
2. The issuing of the draft 2011 Regulations was accompanied by the posting on the websites of the Department of Communications, Energy and Natural Resources ('the Department') and of Inland Fisheries Ireland ('IFI') of documents connected to the decision in 2010 to carry out a pilot fishery in Castlemaine Harbour¹. That decision resulted from a direction from the then Minister of State at the Department, Mr Conor Lenihan TD, that advice be provided 'on how a commercial salmon fishery could be operated on stocks in the Castlemaine Harbour Special Area of Conservation in a sustainable manner, maximising the opportunities for commercial fishing while ensuring that stocks are not over exploited'².
3. As required by statute the Minister has declared a 30 day period commencing on 19 May 2011 for public consultation on the draft 2011 Regulations and has undertaken 'to pay close attention [to submissions made to him] before reaching a final conclusion'³. This submission sets out Salmon Watch Ireland's ('SWIRL's') views on the matter of reopening Castlemaine Harbour to netting for salmon.

A change in Government policy?

4. In the view of SWIRL the re-opening of the Castlemaine Fishery is a departure from Government policy adopted in 2006 to end mixed stock fishing for salmon. The consistent annual advice for many years from the International Conference for the Exploitation of the Seas ('ICES') to the North Atlantic Salmon Conservation Organisation ('NASCO') (and repeated again this year) has been that 'ICES considers that fisheries should only take place on maturing one-sea-winter (1SW) salmon and

¹ These documents are listed in the Appendix to this submission

² Central and South Western Fisheries Boards (undated) 'Proposal for a pilot salmon fishery in Castlemaine Harbour in 2010'.

³ Department of Communications, Marine and Natural Resources press release 19 May 2011 'Castlemaine Harbour commercial fishing to be re-opened'.

non-maturing 1SW salmon from rivers where stocks have been shown to be at full reproductive capacity. Furthermore, due to the different status of individual stocks within the stock complex, mixed stock fisheries present particular threats to stock status⁴. Since 2006 the Irish authorities have followed this advice and applied it within the context of Article 6 of the Habitats Directive ('the Directive')⁵.

5. An additional major concern of SWIRL with the decision to reopen the Castlemaine Fishery is that it is based on a narrow interpretation of the data collected during the 2010 Pilot Fishery which may set a precedent for other mixed estuaries. SWIRL has no objection in principle to the licencing of commercial single stock exploitation of salmon within sustainable limits but for conservation reasons (and not for any reasons got to do with the economic value of alternative methods of exploitation) is totally opposed to any reversion to mixed stock fishing. Until the publication of the draft 2011 Regulation, and the documents on which it is based, SWIRL believed that this was also the position of the Government.

Castlemaine is a mixed stock fishery

6. There is no question but that Castlemaine is a mixed stock fishery and one within which threatened stocks will be exploited should a quota be determined for draft nets. The report of the Beaufort Fish Genetics Group ('the genetics report') suggests that 88.2% of the catch during the pilot study were from the Laune, Maine and Caragh rivers⁶. The balance of 11.8% is drawn from salmon stocks which are, in the main, under threat. The proportion drawn from this latter group be maybe less, as is suggested in the genetics report, because of misassignment of Individual Assignments⁷, but it may equally, and for the same reason, be greater. But, even at almost 12% of the total, the Castlemaine catch from rivers that are below their conservation limits is significant and may very well be sufficient to result in a breach of the Directive's requirement that a 'favourable conservation status' be maintained for these fish⁸.
7. Overall the concept of having a fishery in Castlemaine Harbour is a retrograde step in that it allows a mixed stock fishery that will be difficult, if not impossible, to control.

⁴ Report of the ICES Advisory Committee to the NASCO 2011 Council (NASCO document CNL(11)8 at p5)

⁵ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992 p.7) ('The Habitats Directive').

⁶ Beaufort Fisheries Genetics Group, [May 2011], 'Genetic stock identification of the Cromane salmon fishery 2010' (University College Cork), p8.

⁷ Ibid, p8.

⁸ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992 p.7) ('The Habitats Directive'), Article 2.

The target of exploiting a surplus in each river through fishing in a mixed stock area is an impossible task and the weaker stocks will be overexploited. The history of this fishery up to recent times has been one of overexploitation, illegal fishing and poaching outside the defined seasons and fishing has regularly taken place during the closed days of each fishery. Such behaviour was evident even in 2010, associated with the operation of the pilot fishery. The cost of policing the fishery by IFI will be disproportionate to any benefit that may be derived by the local fishing community and will be aggravated by having a licenced fishery in the harbour.

Minister Lenihan's question

8. SWIRL contends that the 2010 pilot study and what followed resulted from an inappropriate direct intervention by the then Minister of State, Mr Conor Lenihan TD, in the management of salmon stocks when his role should have been to set overall policy parameters and to adjudicate on advice from his officials. Further, SWIRL holds that that the intervention was based on an politically framed question which enjoined the scientists and managers to which it was addressed to provide advice on 'how' a fishery was to be operated rather than 'whether'. Without any disrespect to the many scientists and officials involved in the provision of the advice to re-open the fishery (whose professionalism and integrity SWIRL regards very highly) it is unreasonable to expect that they could have done other than provide damage limitation advice to such a heavily loaded question. In the case of the Standing Scientific Committee, for example, it is noteworthy that the advice offered is very tentative in its formulation and contains a number of notable disconnects: the assertion, for instance, that 'The pilot study has shown that stocks from all three rivers will be intercepted if a fishery takes place in the harbour and that it will not be possible to manage the catch of fish from each river individually' sits uncomfortably with the suggestion that 'If it is not possible to operate the fisheries within these rivers, then the fisheries should take place as close as possible to the rivers'⁹.
9. Given, in particular, the situation which now arises in relation to the correct processing under the Directive of the proposition that commercial salmon fishing be resumed in Castlemaine Harbour (and which is discussed in the next following section of this paper) a more appropriate formulation of the question would have been: 'Is there a likelihood, based on objective information, that the proposed opening of a commercial draft fishery in Castlemaine Harbour will have a significant effect on the Castlemaine SAC?'

⁹ Standing Scientific Committee, [undated], 'Response from SSC re: Castlemaine Fishery', p5.

Lack of screening and appropriate assessment under the Habitats Directive

10. The documents contain no evidence that an appropriate assessment of the impact of the proposed commercial fishery on the Castlemaine Special Area of Conservation ('the SAC'). Indeed there is an implied presumption in the documents that a commercial draft net fishery will be authorised – a presumption that is hardly surprising given the nature of Minister Lenihan's question. On the other hand the whole rationale for screening and appropriate assessment under Article 6(3) of the Directive is that the project being contemplated is subject to a procedure which will identify potentially damaging plans or projects before deciding on authorisation or to put in place mitigating or compensatory measures if the plan or project is to go ahead.
11. It is established law that the screening and if necessary the appropriate assessment must be carried out *prior* to consent being given for the relevant activity. It is without doubt that a State licenced commercial fishery is a project for the purposes of the Directive and so falls within Article 6(3) and(4) of the Directive. This was established by the European Court of Justice in the *Waddenzee case*¹⁰.
12. There is no evidence of a screening exercise having been carried out by IFI to address the 'significant effect' question posed by Article 6(3) of the Directive. Such a procedure would have applied criteria that would determine the likelihood of a significant effect on issues such as the potential impact on the protected species, the magnitude and complexity of the impact, the probability of the impact, duration, frequency etc of the impact.
13. The threshold for the significant effect needed to trigger an appropriate assessment is quite low. Given that the 2010 pilot study has established that almost 12% of the salmon likely to be taken in the proposed commercial fishery are destined for rivers that are below their conservation limits it is almost beyond doubt that the application of the precautionary principle and the *de minimis* criterion established in *Waddenzee* would identify a significant effect and trigger an appropriate assessment.
14. There are strict guidelines (in both national and EU guidance documents) on how an appropriate assessment should be carried out and most importantly how the assessment of the impact of the proposed project on the conservation objectives for the SAC is conducted. There is no evidence in any of the documents supporting the

¹⁰ Case C-127/02 (2004) *Landelijke Vereniging tot Behoud van der Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*

advice, that a commercial fishery should be permitted, of the likely impact of the proposed draft fishery on conservation objectives for the Castlemaine SAC site.

15. It may be argued that the IFI 'Management Advice to the Castlemaine Fishery' document in itself constitutes an appropriate assessment of the project but this is negated by the fact that conservation objectives for salmon in the Castlemaine SAC have not been established¹¹ and there has been no assessment of alternatives to the carrying out of the proposed commercial fishery – the identification of alternatives to the proposed action or plan is central to the correct application of Article 6 of the Directive.
16. A screening process and an appropriate assessment will have to be carried out in respect of activities in the Castlemaine SAC when the Natura 2000 Plan for the area is finalised¹². There is no justification for the assertion in the IFI document that 'the output of [such an] appropriate assessment process is unlikely to have implications for the management of the salmon fishery in Castlemaine Harbour'¹³. Indeed, given the role which IFI will have to play in both the setting of conservation objectives for the SAC and in any appropriate assessment of the salmon fishery it is arguable that IFI have gone some way towards prejudicing their objectivity in carrying out those tasks.
17. It may, of course, be argued that there are socio-economic grounds for the reopening of the public fishery in such a remote area as Castlemaine. However, given the level of the quota (1,162 fish)¹⁴ it is unlikely that the gross pre-tax income of the 15 licencees (ie approximately 45 people) will exceed Euro 50,000 over the two month season.
18. The general SWIRL position is that our salmon fisheries should be managed in line with scientific advice, especially that of the Standing Scientific Committee. However, in the Castlemaine case we believe that the scientific and management advice has had to be framed to meet the limitations of a skewed question and that, given the policy issues involved, it should be set aside and give way to a precautionary approach to the management of the fishery within the framework of Article 6 of the Directive.

¹¹ Although conservation objectives in the Castlemaine SAC have been established for mussel, oyster and clams ('NPWS (2010a) Conservation Objectives for Castlemaine Harbour SAC (00343) and Castlemaine Harbour SAC (004029' National Parks and Wildlife Service, Dublin, 2010) and an appropriate assessment of the impact of aquaculture on them has been published by the Marine Institute.

¹² European Communities (Habitats and Birds) (Sea-Fisheries) Regulations 2009 (SI No 346 of 2009), s3(7).

¹³ Management Advice to the Castlemaine Fishery 2011, IFI, Dublin, p9.

¹⁴ Inland Fisheries Ireland, [May 2011], 'Management advice for the Castlemaine Harbour salmon fishery', p6.

19. Should the Minister decide to proceed with the granting of a quota for mixed stock exploitation in Castlemaine then SWIRL considers that the following issues need to be addressed:

(a) A statutory instrument needs to be issued to define the area in which it is permissible to fish and set out the temporal limitations on the fishery;

(b) Fishing should not be permitted in Areas A and B (ie off Cromane Beach). The Central and South Western Fisheries Boards note that the SSC had advised that a draft net fishery should not operate at this location¹⁵ and following the completion of the pilot fishery the SSC again stated that 'locations A and Bwere more likely to take salmon from mixed stocks'¹⁶. An even minimalist precautionary approach to the fishery would strongly suggest that these areas be excluded from the fishery.

(c) Furthermore, in respect of Area A, account has to be taken of the fact that this area is subject to wide fluctuation in width at certain tide levels with the area being virtually dry on occasions. As a result fishing is frequently conducted outside the designated fishery area and towards Inch Point, totally blocking the passage of all fish heading into Castlemaine Harbour. This reinforces the need for a highly precautionary approach to the Cromane Beach areas.

(d) During the pilot fishery a number of fishing methods were deployed which are illegal in normal circumstances – these are described as 'modified traditional (staked) method' and 'modified traditional (staked) method using monofilament' in the protocol adopted for the research¹⁷. The use of such 'fixed engines' in fishing for salmon is prohibited by Section 97 of the Fisheries (Consolidation) Act 1959 unless they had been licenced before 1923 and were still licenced at the coming into effect of the Act. It is well known that these 'traditional' methods have been frequently used in Castlemaine Harbour in recent years and it is important that it be made clear to licencees that such practice will not be tolerated in future. SWIRL is particularly concerned to draw this matter to the attention of the Minister because there are references in three places in the IFI management advice to the use in the fishery of monofilament draft nets 'deployed in the same manner as heretofore'¹⁸. If IFI is of a mind to see the law changed so as to permit the use of methods that are currently illegal they should produce a considered case for public consultation on the issue.

¹⁵ Central and South Western Fisheries Boards, [undated], 'Proposal for a pilot salmon fishery in Castlemaine Harbour in 2010', p1.

¹⁶ Standing Scientific Committee, [undated], 'Response from SSC re: Castlemaine Fishery', p4.

¹⁷ Central and Regional Fisheries Boards, [May 2010], 'Protocol for a pilot salmon fishery in Castlemaine Harbour in 2010', p3.

¹⁸ Inland Fisheries Ireland [May 2011], 'Management advice for the Castlemaine Harbour salmon fishery', ps 2, 6 & 8.

(e) The proposal that the fishery should close on 31 July is welcome but uncaught quotas should not then be allocated to the private commercial fisheries. Any uncaught surpluses should be allowed to enter the rivers unhindered. Indeed, it is the SWIRL view that all commercial exploitation of Castlemaine stocks should end on 31 July and the scientific evidence in the genetics report supports this¹⁹.

(f) There is a strong case for allocating the commercial quotas in Castlemaine (ie for both the private and public fisheries) on a temporal basis. The total commercial quota (which in 2011 is recommended to be in aggregate 4,753 salmon) should be divided equally between June and July with no transfer of uncaught fish from June to July. This would help to regularise the fishery and help the overall status of stocks.

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17 June 2011

¹⁹ Beaufort Fisheries Genetics Group, [May 2011], 'Genetic stock identification of the Cromane salmon fishery 2010' (University College Cork), ps 3 & 4.

Documents referred to in the Salmon Watch Ireland submission and/or listed on the Department and IFI websites in relation to Castlemaine Fishery

- Central and South Western Fisheries Boards, [undated], 'Proposal for a pilot salmon fishery in Castlemaine Harbour in 2010'.
- Central and Regional Fisheries Boards, [May 2010], 'Protocol for a pilot salmon fishery in Castlemaine Harbour in 2010'.
- Holmes, T & Gargan, P [December 2010], Report on pilot salmon fishery in Castlemaine Harbour in 2010' (Inland Fisheries Ireland, Dublin).
- Beaufort Fisheries Genetics Group, [May 2011], 'Genetic stock identification of the Cromane salmon fishery 2010' (University College Cork)
- Standing Scientific Committee, [undated], 'Response from SSC re: Castlemaine Fishery'.
- Inland Fisheries Ireland [May 2011], 'Management advice for the Castlemaine Harbour salmon fishery'.
- Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992 p.7) ('The Habitats Directive').
- Fisheries (Consolidation) Act 1959