

Consultation Response on the Marine Licensing System for Scotland December 2010

Introductory Comments

Scottish Environment LINK is the forum for Scotland's voluntary environment organisations, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Scottish Environment LINK's Marine Task Force (LINK MTF) welcomes the opportunity to comment on the Marine Licensing System for Scotland. We are largely supportive of the proposals for the marine licensing system. However, we have some specific concerns which are detailed below. Our comments are set out according to the structure of the consultation document and we have answered the specific questions where appropriate.

Section 3: Introduction

We welcome the overall approach to marine licensing as set out by the Marine (Scotland) Act 2010. In particular, we welcome the clear statement that 'Marine Scotland will also make their decisions in accordance with marine policy documents (the UK Marine Policy Statement and Marine Plans). In order to realise the consistency referred to in Paragraph 4 (bringing the licensing system together into one system to apply a consistent approach) it is vital that a robust marine planning system is delivered as quickly as possible. This is of particular importance given the pressure for rapid expansion of developments such as marine renewable energy and aquaculture.

We are concerned that secondary legislation to allow existing licenses to be considered 'deemed' licenses (Page 9, paragraph 3) is not consistent with the planned approach for marine licensing. Whilst we recognise that this approach would allow the new licensing system to be delivered with minimal disruption, consideration should be given to placing a time-limit for review of such 'deemed' licenses until the planning system is in place, to allow them to be reviewed in the light of the planning system.

Page 9, paragraph 4 states that 'The overall objective of the new licensing system is to effectively regulate sustainable development...'. We do not believe that this should be the aim of the marine licensing system. We note that there is a duty on Scottish Ministers and public authorities to 'act in the way best calculated to further the achievement of sustainable development' (Marine (Scotland) Act: Section 3) and that the national marine plan or a regional marine plan is a document which 'states the Scottish Ministers' policies (however expressed) for and in connection with the sustainable development of the area to which the plan applies' (Marine (Scotland) Act: Section 5) and also that licensing decisions will be taken in accordance with marine plans. We therefore believe that the aim of the licensing system should be to ensure that any development in the Scottish marine area is sustainable¹ and does not compromise the protection of the health of the Scottish marine environment. However, given that the various enforcement notices are designed to protect the environment, protect

¹ According to the definition of sustainable development laid out in the UK Sustainable Development Strategy.



human health and prevent interference with legitimate uses of the sea, it would also be appropriate to reflect these principles in the overall objectives of the licensing system.

Q1. What are your views on the overall costs and savings identified in the impact assessments?

No comment.

Section 4: Application Process for Marine Licensing

Deploy and Monitor: Page 15-17 lays out the developing 'deploy and monitor' policy for marine renewables. LINK MTF supports the adoption of 'deploy and monitor' as part of an adaptive management approach to regulation of wave and tidal renewable developments.

We have serious concerns with the policy as laid out in the consultation, however, we understand that this section was included for information only, and Marine Scotland are not seeking views on the policy in this consultation.

We look forward to addressing our concerns with the relevant sections of Marine Scotland in the near future. Once the proposed 'deploy and monitor' policy has been finalised we would welcome a separate full and open consultation on the entire policy and we will reserve comment on this section until the policy is finalised.

Pre-application consultation: LINK MTF are of the view that the pre-application consultation should be cast as wide as possible from the outset. We agree with Scottish Renewables, who stated in their Stage 2 (day 1) briefing², 'SR would prefer to see an approach that builds on early engagement with stakeholders through regional marine partnerships ensuring that all relevant interests can manage the use of the sea in a planned and certain way.'

Q2. Do you agree that the projects detailed above should be subject to the pre-application consultation process?

We believe that the deployment of 'wet' renewable devices, where the environmental impacts of such devices are unknown or uncertain should be subject to the pre-application consultation process. We would seek clarification that the deployment of such devices would be covered by the last bullet point (Activities which are new to the Scottish marine environment and whose wider repercussions may be difficult to predict). If this proves not to be the case and instead wet renewable devices were covered by bullet point 4 (Installation of renewable energy devices with a capacity to produce more than 30MW electricity) we would have significant concerns about this approach given that the current capacity of 'wet renewable' devices is much lower than that for wind turbines.

It will be important to ensure that the current consultation procedures for EIA scoping and assessment continues no matter what the threshold for pre-application consultation is. Currently, NGOs such as RSPB Scotland are consulted on the EIA process for offshore renewable developments and we would ask that this procedure remains unchanged.

Q3. In addition to statutory consultees (see chapter 6) who else should be consulted on pre-application projects?

The pre-application consultation process will only be effective if a wide variety of opinions are sought at an early stage. As the consultation states, consultation with communities and stakeholders will add to the quality of the proposal. We therefore believe that everyone (including individuals) should be able to comment as part of the pre-application consultation

² Available at: <http://www.scottishrenewables.com/MultimediaGallery/d9bf6ac6-9f36-4cd5-b660-e4f5a97a36e8.pdf>



process. In addition to raising public awareness in the usual ways (local newspaper notices etc), the non-statutory consultees on page 23 should be actively asked for comment.

Q4. Do you foresee any difficulties with our proposed approach for updating and revoking existing EIA Regulations and updating Conservation Regulations?

No. We look forward to being consulted on the draft updated Conservation Regulations to help ensure they are fit for purpose.

Section 5: Fee Structure

Q5. Do you consider that the categories of fees are appropriate?

Yes – LINK MTF supports the principle of full cost recovery and the polluter pays principle.

Section 6: Statutory and non-statutory consultees for marine licensing applications

Q6 Do you agree that the statutory consultees set out in the draft order should be SEPA, SNH, NLB, MCA and MPPs?

Yes

Q7. Do you agree with the list of non-statutory consultees who would be routinely consulted on marine licence applications?

No – We believe that the Whale and Dolphin Conservation Society should also be included.

One stop shop for marine licensing: LINK MTF support the intention that marine renewable consents should be sent out for consultation as a package.

Section 7: Appeals against licensing decisions

Page 24 states that the policy intention reflected in section 38(1) of Marine (Scotland) Act and section 73(1) of the Marine and Coastal Access Act is not to allow third party appeals against licensing decisions, as any objections to a licence application should be raised and considered during the pre-application and application processes outlined in earlier sections of this document.

We support the pre-application consultation process as a way of addressing potential concerns early on. The role envisaged for the pre-consultation process emphasises the need for all stakeholders to be consulted on a wide range of projects (see our comments above). However, we believe that the pre-consultation procedure does not negate the need for standing in relation to appeals against licensing decisions to extend beyond the licensee.

As we made clear throughout the passage of the Bill, we believe that the 'public concerned' should be able to appeal a licensing decision in line with the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). Recent case law has found aspects of English and Welsh law to be not compliant with the Convention (see draft findings ACCC/C/2008/33 of the UNECE Aarhus Convention Compliance Committee) and there is a strong case that Scots law is similarly non-compliant.

Therefore, we reiterate our view that restricting standing in relation to appeals against licensing decisions is not compliant with principles of the Aarhus Convention.

Section 8: Public register

Q8. Do you agree that the draft Regulations give appropriate legislative effect to the proposals presented?

We note that in some instances the draft regulations require that alternatives are detailed (e.g. section 6 – Deposit of substances or objects; section 12 – Incineration or loading vehicles etc for incineration). However, no alternatives are required for section 7 (Scuttling), section 10 (Dredging) or section 11 (Deposit or use of explosives). We believe that suitable alternatives should be considered for all licensable activities with the potential to impact the marine environment and that these should be set out in the public register.

Section 9: Exemptions

Whilst we agree with the list of exemptions (subject to our comments below) we would expect that the list could and would be altered in the light of new evidence of environmental impacts. We also recognise that fishing by any method is not a licensable activity. In order to ensure that fishing in the Scottish marine area is sustainable³ and does not compromise the protection of the health of the Scottish marine environment, it will therefore be crucial, once Marine Planning Partnerships (MPPs) are in place, to ensure effective cooperation between MPPs and groups constituted for the purpose of managing inshore fisheries.

Q9. Are there waste management activities other than ship breaking that are better regulated under the Waste Management Regulations than under marine licensing?

No comment

Q10. Have we correctly identified the cases where an exemption for emergency action is needed?

No comment

Q11. We welcome your views on the proposed exemptions, in particular:- Do you agree with the proposed Exemptions Order as drafted?

Fishing and Aquaculture: We do not agree a blanket exemption for fishing vessels returning accidentally trawled or dredged items to the sea is appropriate. We understand there may be a necessity on safety grounds where large items affect the stability of the vessel, however, a blanket exemption is not consistent with the Scottish Government's stated desire to reduce marine litter. We believe all accidentally trawled or dredged items must be returned to shore, except in extraordinary circumstances where the safety of the vessel would be put at risk.

We note from section 9 of the proposed regulations the exemption of deposits by way of return to the sea any fish during the course of a fishing operation. While we do not object to this exemption, we believe that it places renewed urgency on the Scottish Government to call for the elimination of discards in EU fisheries, for example through the reform of the Common Fisheries Policy and associated technical measures.

We note from P29 of the consultation document and section 10 and 11 of the proposed regulations that deposits and removals connected with the propagation or cultivation of fish and shellfish are exempted, except where it causes, or is likely to cause obstruction or danger to navigation. It is our understanding that this is consistent with the requirements of the Coastal Protection Act. However, we are unclear how the licensing system will protect the environment from the potential negative impacts of aquaculture. We understand that operators

³ According to the definition of sustainable development laid out in the UK Sustainable Development Strategy.



will still require a CAR license, but we would seek clarification on how the licensing system will address the potential cumulative impacts of aquaculture developments in particular locations (and the environmental limits for such an area). We would see this as being broader than the CAR process as it would include effects beyond those of organic enrichment, chemotherapeutants and antifoulants (e.g. negative effects on priority marine features and other biodiversity; wider effects on wild salmonids from sea lice infestation). The only mechanism for addressing such issues in the future would appear to be the marine planning system and therefore it is vital that the planning system is fit for purpose and able to take into account these issues. We note however, that planning consents for marine fish farms are delivered under the terrestrial planning system. Alternatively, the scope of the marine license should be expanded to include issues relating to the protection of the wider environment.

Navigation: We do not understand why the removal of biological growth is (correctly) included here with regard to the deposit of alien species, whereas discharging water to maintain the stability of the vessel is exempted. Whilst we recognise the need for safe navigation, we believe that there is a clear and previously documented possibility of the deposit of alien species from ballast water.

Page 30 (paragraph 2): Harbour (and marina) developments, particularly those that may negatively impact Natura species or habitats, should not be exempt from licensing. For example, pile driving is receiving increasing attention due to the noise generated locally and potential impacts on numerous marine species. There have been marina developments in the inner Moray Firth recently that would have benefited from consultation and licensing at the national level.

Pollution Control and Litter: Page 31 (para 6) we would seek clarification for the exemption to 'apply to substances used to remove surface fouling matter from the sea or seabed'. We would only support this exemption if, similar to the situation for approved oil dispersants, it were limited to emergency situations.

Page 32 (paragraph 2) Natural beach debris, including fresh and dried seaweed, driftwood, marine egg-cases and other non-anthropogenic and non-faecal matter, should be left on the beach as a natural part of the strandline environment, whether a designated site or tourist/amenity beach. These natural materials form an essential part of the beach ecosystem, providing foraging habitat for crustaceans, shorebirds and other littoral species, and, through their decomposition, nutrients to support communities of dune grasses and other coastal habitats. The latter are important for coastal biodiversity, coastal protection and recreation. This section (and section 21 of the draft regulations) should therefore be amended to make clear that this exemption would only be valid for mechanical removal of dead seaweed that is no longer attached to the substrate, has been washed onto the beach and has accumulated in such abundance and in such proximity to private homes or public amenities, such as cafes, harbours or slipways, that it could - through decomposition and/or entanglement with sewage-related debris, dead animals or other hazardous litter items - pose a public health hazard, should the debris be left to decompose. Hand-picking of beach litter should be encouraged wherever possible to support sand stability, coastal protection and coastal biodiversity.

Tunnels: We would seek clarification that the condition included with the exemption for bored tunnels '*that the construction of the tunnel does not adversely affect the environment of the UK marine area or the living resources that it supports*' includes the potential effects of marine noise.

Oil and gas-related activities and carbon dioxide storage: While we understand pipelines are regulated under the Petroleum Act 1998, there remains confusion over the regulatory process for storage of carbon dioxide. Until we can be assured there is a robust regulatory regime in place for the injection and storage of CO₂ in the marine environment, we cannot



support its exemption from the marine licensing process. It is essential that mechanisms to regulate oil and gas related activities, and carbon dioxide storage are secured.

Section 11: Registration of activities below specified threshold of environmental impact

Q12. Do you agree that public forums with stakeholders and expert bodies are necessary to properly determine the thresholds for registerable activities?

No: LINK would seek further clarification as to what exactly is being proposed here. We do not believe that it is appropriate for stakeholders to set the thresholds for registerable activities. What would qualify those attending public forums to make such a judgement? We believe that any such thresholds should be set according to science by expert bodies such as Marine Scotland Science, SEPA and SNH as appropriate. Following this initial step, it would be appropriate to seek the views of stakeholders.

LINK MTF also believe that it is vital that the potential cumulative effects of registered activities are also considered as part of this process, and that the precautionary principle should be adopted in this regard.

Section 12: Appeals against statutory notices

Q13. Do you agree that it should be for the sheriff court to deal with all appeals against a statutory notice?

Yes

Q14. Do you agree with the sheriff's proposed powers in relation to appeals against statutory notices?

Yes

Q15. Do you agree that requirements in only specific notices are automatically suspended pending determination of an appeal?

No. We do not believe that any notices should be automatically suspended pending determination of an appeal. We agree with the consultation document that it is inappropriate for urgent action not to be taken while an appeal is lodged and considered.

As currently drafted the regulations in Annex E allow variations of licenses, and compliance and remediation notices to be automatically suspended. While we acknowledge that urgent action may not be warranted in all circumstances, we would argue that urgent action may be warranted. Therefore, statutory notices issued under s43, s44, s55 and s57 of the Marine (Scotland) Act and changes to licences under s30 of the Act, should not be automatically suspended pending determination of an appeal.

Q16. Do you believe that the marine licensing system discriminates disproportionately between persons defined by age, disability, sexual orientation, gender, race and religion and belief.

No comment

Other Issues

All cetacean species in Scotland (and some other species, including otters and turtles) are given protection under the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) as European protected species (EPS). If injury or disturbance is likely to result from



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an activity, an EPS disturbance license is required in order for that activity to be carried out legally. Where the potential disturbance is in the course of research on cetaceans, or if the proposal is for conservation purposes in inshore waters, SNH is currently the appropriate licensing authority. Licensing of other more commercial activities that might affect cetaceans, such as seismic surveying or testing, or installing renewable energy devices in inshore waters is the responsibility of Marine Scotland (within 12 nm). We understand that EPS licenses currently administered by SNH will also be transferred to Marine Scotland.

We believe that there are also a number of other activities which may potentially disturb cetaceans and therefore should also be subject to licensing. For example, it appears somewhat incongruous that an EPS license is required to photo ID cetaceans for conservation purposes but commercial wildlife watching operations do not require a license to approach sensitive species. There are a number of other potentially sensitive species in Scottish waters that are the focus of such commercial wildlife watching activities, such as basking sharks, seals and seabirds. For example, the Marine Conservation Society has received recent reports of people approaching basking sharks in a manner inconsistent with the Scottish Marine Wildlife Watching Code in Lewis and near Dunure on the Southern Clyde. Wildlife watching operators regularly return to the same site or individuals of a particular species.

There is currently no means of monitoring or limiting the number of operators or boats which can work in a particular area and therefore potential cumulative impacts of numerous operators cannot be addressed. Tourism around Scotland is increasing, and as a result of this, there are now more commercial wildlife watching operations than ever before. Wildlife watching operators around Scotland currently work under a voluntary code of conduct. This is monitored in the inner Moray Firth under the Dolphin Space Programme (DSP), but is not monitored elsewhere in Scotland. A recent independent report by the Sea Mammal Research Unit⁴ suggested that the inner Moray Firth may already be at carrying capacity for recreational vessels. When you add commercial craft (including fishing vessels, dive boats, power boat schools and dolphin watching operations) it is likely that this capacity is being exceeded. If Scotland is to become Europe's most sustainable tourism destination by 2015, oversight of the size, distribution and potential impact of the industry is required. There is currently no such overarching framework for monitoring the industry at a national and regional level.

There is also no mechanism for local authorities to understand the existing regional scale and impact of the industry in their environmental decision making, including regarding expansion of marinas and harbours. It is not currently possible to understand the scale of marine tourism on a regional basis or what potential impact the current or an increasing number of commercial operators is having on Scotland's marine species and habitats, especially migratory, Natura 2000 and European Protected Species, including those which may use more than one region. As we suggested in our response to the Marine (Scotland) Bill consultation, it may therefore be necessary to include all commercial wildlife watching operations as licensable marine activities under s21(3) of the Marine (Scotland) Act.

This response was compiled on behalf of Scottish Environment LINK's Marine Task Force and is supported by:

Hebridean Whale and Dolphin Trust
Marine Conservation Society
National Trust for Scotland
RSPB Scotland

Scottish Wildlife Trust
WWF Scotland
Whale and Dolphin Conservation Society

⁴ Donovan, C., Mackenzie, M., and Hastie, G.D. (2009). Analysis of at-sea distribution of vessels within the Moray Firth SAC . Report to Scottish Natural Heritage. SMRU Ltd, Scottish Oceans Institute. Report number: MERA 0309SNH_1.



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RESPONDENT INFORMATION FORM

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