Wildlife and Countryside Link response to Defra's consultation on secondary legislation for England and Wales under the Marine & Coastal Access Bill: Part 4 Marine Licensing

Marine licence application and decision making procedures; appeals against licensing decisions; and exemptions from marine licensing

Wildlife and Countryside Link (Link) is a coalition of the UK's major voluntary organisations concerned with the conservation, enjoyment and protection of wildlife, the countryside and the marine environment. Taken together, our members have the support of over 8 million people in the UK.

We welcome the opportunity to provide some initial views on how key parts and processes of the new marine licensing regime in the Marine and Coastal Access Bill should work in England and Wales. As one of the main mechanisms for managing human impacts on the marine environment, the regime must ensure that at the same time as streamlining licensing and reducing the burden on applicants, there is proper consideration of marine biodiversity and environmental limits.

This response is supported by the following member organisations:

- Marine Conservation Society
- Royal Society for the Protection of Birds
- The Wildlife Trusts
- Whale and Dolphin Conservation Society
- WWF-UK
- Zoological Society of London

Applications process

Q1; Q2: Link considers that it may not be the best approach to either transpose the requirements of the EIA Directive or the Birds and Habitats Directives directly into the regulations specifying the marine licensing process or to make a number of disparate amendments to the existing Regulations (such as the Conservation (Natural Habitat) Regulations 1994), as this may result in confusing and complicated provisions and processes. Instead, we recommend having a set of stand alone, coherent regulations transposing the EIA, Birds and Habitat Directives which specifically relate to the Marine Act licence. One set of 'fit for purpose' regulations covering all the issues under a new system avoids a lack of understanding regarding the relationship between the Regulations and the Marine Act licence, duplication of effort to produce the regulations, inconsistency between regulations with slightly different variations and thus avoids confusion and increases understanding and transparency for users and stakeholders alike.

Q3; Q4; Q8: Link members are predominately consultees, though some member organisations may also be applicants with regard to the management of coastal land holdings. The key aims of the Marine and Coastal Access Bill/Act[1] licensing regime are: to protect the environment, protect human health and prevent interference with legitimate uses of the sea (Clause 69). Therefore, the Bill goes further than just "*minimising adverse impacts*" on the environment, human health and other uses of the sea (see pg:4 Executive summary; pg:8 Introduction; & pg:9 Aims of the new system). Consequently, in making their decisions, licensing authorities must go further and actively look to avoid adverse effects and impacts on the environment, human health and other uses of the sea.

To avoid the weaknesses of the old system, the new Marine Act regime will have to be clear, consistent and transparent. There must be clear and open channels of communication between the remaining and new regulators in the waters covered by this consultation, e.g. between the MMO, WAG, DECC, IPC, Local Authorities etc. Furthermore, there must be good working relationships with regulators and planning bodies in the other Devolved Administrations to ensure a consistent and coherent approach.

Q6; Q9; Q13: Link believes that there should be early, open and consistent engagement from both the licensing authority and applicants with statutory advisers, conservation bodies and other interested persons. Early discussions can highlight and help resolve potential conflicts and environmental impacts at an early stage in the process, creating the opportunity to consider and develop alternative options, mitigation measures, and often improving the quality of applications and thus decision speeds.

Relevant Link members are willing to engage in pre-application discussions where they may have an interest in a particular application. We would like to see that engagement comprise:

- written notice from the applicant advising of the intention to submit an application for a marine licence;
- provision of all relevant information to consider the proposals;
- meetings with the applicant to discuss all issues associated with the proposals and how the applicant intends to address impacts, conflicts, etc;
- proactive engagement from the applicant and a willingness to resolve conflicts and disputes.

The Consultation document suggests that the same pre-application process would not be required for "small, simple or routine work" (pg:16). Link submits that the need for pre-application engagement is likely to be just as useful for this type of work as it is for big projects. Perhaps the scale of engagement could be adjusted to be proportionate to the nature of the development or use, provided that appropriate thresholds are adopted.

Regarding pre-application engagement, we consider that the following sections of the consultation document should be amended:

- 'Pre-application for a marine license' (pg:16-17): the statutory nature conservation body/bodies (and third party conservation bodies) must be consulted when the competent authority screens as well as scopes Environmental Impact Assessment (EIA) and Appropriate Assessment (AA); and
- 'Routes through pre-application' (pg:17): if the applicant manages the EIA scoping process (the second of three options presented), appropriate checks and balances need to be in

[1] Hereafter referred to as the Marine Act.

place so as to ensure all relevant issues are considered and all relevant stakeholders are involved (at appropriate stages) in the process.

We consider that Annexes 1 and 2 of this consultation would also benefit from being amended:

- Annex 1: to include consultees and statutory advisors (as per our comments above) also having the opportunity to input into EIA screening advice (as opposed to only AA screening advice).
- Annex 2: the inclusion of the public (nature conservation bodies and the general public) in pre-application consultation. Currently, it is unclear as to where the interested parties can input into the pre-application process. However, in response to **Q13**, we are keen to be involved in pre-application discussions and consider there can be substantial benefits from relevant parties being engaged early in the consenting process.

Page 17 mentions three phases for EIA and Appropriate Assessment as part of the pre-application processes. The first phase is screening, a common process adopted under both EIA and AA procedures for those projects which are not automatically required to undertake assessment. The paragraph mentions that a screening opinion could be provided as either an informal decision or a formal opinion. Link questions whether an "informal decision" would comply with the requirements of the EIA Directive[2]. Article 4 of the EIA Directive requires the Member States to determine, either on a case-by-case basis or through set thresholds or criteria, whether an EIA is required. Such determination is to be made available to the public. Whilst it is not entirely clear what an "informal decision" would encompass, Link considers that it may not be of the same nature as a "determination" which must be available for public inspection. For this reason, Link suggests that any screening opinion provided for the marine licensing regime is of the same nature as that used in current practice.

Pre-application consultation – such as that required by potential applicants in sections 42 to 49 of the Planning Act 2008 – prior to submission of an application for a marine licence – can and does provide clear benefits. However, Link agrees that it may not be proportionate to require such procedures in respect of all applications for a marine licence, but would encourage mandatory procedures at least for those proposals requiring an EIA or AA. If different procedures are to be adopted for different proposals, such a requirement needs careful consideration and clearly defined thresholds as to what projects do and do not necessitate such consultation activities.

Q10: Link considers that a standard template for an environmental statement may be difficult to develop and use. Standard application formats are only valuable if they are flexible enough to deal with all eventualities and simultaneously do not require lots of unnecessary additional work. The Marine Act licence covers projects which are very different in nature and consequently so are their potential environmental impacts. It would be unfortunate if a standard format approach resulted in important information being missed or ignored. It may be more beneficial to produce a list of minimum requirements or best practice guidance, which may cover formatting, structure or the information to be addressed (provided it complies with the requirements of the EIA, Birds and Habitats Directives).

[2] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)

Q11; Q12: If there is benefit from the voluntary chargeable pre-application service, then it should be retained and extended to activities other than dredging.

Q14: The general approach to public consultation outlined appears reasonable. However, Link would like to suggest a couple of potential improvements.

We note that while the applicant will have the opportunity to formally respond to any issues raised during the consultation (within an undefined time frame), it is unclear whether the relevant party/parties will have the opportunity to follow up the applicant's response. Dialogue between relevant parties as opposed to a right of reply from the applicant only might be more appropriate and constructive. Link suggests that it may be appropriate to allow the licensing authority to adopt case management and/or dispute resolution procedures to enable resolution of conflicts and disputes between the relevant parties using informal means, such as meetings, mediation, etc.

In respect of the notice requirements, Link recommends that the requirement to publish notice of the application is too general and should be more prescriptive. It is best to prescribe minimum requirements for publication of notices, to ensure accessibility for all and a proper start to sound public consultation. We suggest that both hard and electronic versions of the notice be published, in varying publications and locations, to ensure notice is received by those without access to the internet who may be interested in the application.

Q15; Q16: Link considers that a 28 day consultation period (option (a)) should be the minimum consultation period. However, to ensure that consultees have appropriate time to consider the issues arising from an application, it might be suitable to consider a longer time-period, such as that suggested in (b) (as is often the case in the current marine licensing systems). For larger and often/potentially more complex applications, it might be suitable to set, on a case-by-case basis, a longer consultation period, e.g. 3 months as is also often the case at the moment. Providing a clear timeline for all involved parties, such as via publishing target timeframes, will further certainty in the consultation and decision making processes.

In our experience, key consultees reply within the original (or agreed extended) deadline in the vast majority of cases. Reasons for delay may be down to particularly complex issues, and, for example, lack of awareness of an application. It is therefore key to ensure a suitable consultation period occurs and that the application is adequately advertised. It would be inappropriate to consider an application without the advice and views of a 'key' consultee or a statutory advisor being considered.

Q17: Link considers that the statutory consultees should be set out in secondary legislation rather than guidance, with a requirement for them to be consulted but without a requirement for an answer, thus limiting the regulatory burden. Placing this in legislation will ensure that applicants have a clear direction as to who the relevant consultation bodies are and who, at a minimum, should be consulted. We note that regulations under the Planning Act 2008 have prescribed statutory consultees who are to be consulted at both pre-application stage and during examination of applications. Link understands that the rationale used in listing statutory consultees was to ensure consultation with those bodies that have statutory roles that may be impacted by either policy or development proposals. Link considers that such an approach could also be adopted for the Marine Act licences, provided that it is recognised that consultation must extend beyond the statutory consultees and include all interested parties as required.

Q18; Q19: For particularly complex applications or developments of sufficiently wide public interest, and/or those that are particularly controversial, it may be necessary to hold an inquiry . Link considers that informal hearings can, depending on the case and issues involved, be a suitable and quality method of inquiry. Assessment and discussion with all relevant parties, as to the most suitable type of inquiry, would be needed on case-by-case basis.

Q20; Q21: Accessible and transparent guidelines detailing how the licensing authority determines applications (e.g. detailing specific thresholds etc) will be necessary to ensure all parties have an understanding of how the licensing authority takes decisions including with a risk-based approach to sifting objections and observations. Otherwise, decision making may be seen as lacking transparency and thus faced with a lack public confidence. Risk assessments should be done by the applicant and submitted with the application rather than being provided by consultees. However, it may be appropriate for a person/body engaged in the consultation and examination processes for an application to submit evidence in relation to their objections, and such evidence may provide an assessment of the likelihood and impact of their concerns.

Q22: While not a potential applicant, Link supports the principle of marine planning and believes that it should help marine licensing authorities make better, more informed decisions.

Q23; Q24: Link supports the suggestion to provide published timeframes in the manner suggested, as these may assist all relevant parties with keeping up to date with progress on the application as well as ensuring active engagement. However, it must be clear to all parties that such timeframes are not legally binding in nature (i.e. such that penalties will apply if missed) and options for change to deadlines made available should they be required. A certain level of flexibility will need to be adopted to ensure varying circumstances can be accounted for.

For delays of anything other than ‘minor’ delays, it might be useful to provide the applicant and all interested parties (e.g. via electronic communication and/or a dedicated ‘project page’ on the licensing body’s website) with information as to the status of the application, consultation responses and relevant deadlines etc. Similar processes adopted within the terrestrial planning system may provide useful guidance on how this could be achieved.

Links agrees with the suggestion to impose time limits on when an applicant is required to respond at certain points in the process. Failure to submit information on time simply serves to delay the decision making process. Therefore, the onus is on the applicant to respond within the set time. However, including time limits for applicant’s responses would ensure that the requirements placed on consultees are also fairly placed on applicants.

Appeals

Q25; Q32: Link considers that oral evidence and cross-examination are often a suitable method of gaining the facts of a case and testing the evidence. The terrestrial planning system, at both planning application and appeal stage, provides both applicants and other interested parties with a right to be heard orally. We therefore believe that appellants must be given the right to request an oral hearing in an appeal, either through a less formal hearing where an inquisitorial process is adopted or through an inquiry. It seems appropriate that appellants can/are required to express their preference to the type of appeal in the notice of appeal. It should then be up to the appeals body to determine whether oral evidence is

necessary, having considered, for example, the size, complexity and public interest of the case. Link considers that it may be beneficial to adopt an appeals system that is consistent with the procedures adopted in respect of planning appeals under the Town and Country Planning Act 1990.

Q26: Yes, Link believes that it should be possible for the appeals procedure to be handled through an inquiry. Whether an inquiry is necessary depends on the nature and size of the proposal, but there should be an opportunity for them to be requested and used in an appeal. Inquiries are often the most suitable procedure for bringing together the facts of a complex and/or controversial case, and for ensuring that all parties have equal opportunity to present their case. Again, guidance may be obtained from the terrestrial planning appeals process to assist in determining what type of appeals may require an inquiry.

Q27: Link suggests that before specifying the grounds for appeal, it is necessary to define the circumstances in which an appeal can be brought. For instance, a right to an appeal normally applies where there is a refusal to grant a licence or permission.

Q28: It seems appropriate to set time-limits for key stages of the appeals process, as is currently the case in planning appeals under the Town and Country Planning Act. Setting time-limits ensures that that all parties are working to the same requirements and that the appeals process is not unduly delayed by the slow provision of information, consultation responses etc.

It would seem appropriate to have guidance on appropriate time-limits, but with flexibility built in to allow time-limits to be set depending on the type of appeal (inquiry, hearing or written representations) and on the case in question. For example, a particularly large and/or complex proposal may necessitate longer time-limits than a comparatively smaller and/or less complex proposal. It is also important to ensure that processes are in place to ensure that all parties to the appeal are properly informed of the time-limits. Furthermore, there should be provision for extensions to deadlines to be granted where circumstances necessitate this.

Q29; Q30: Appeals should be publicly notified to ensure that all parties that might have an interest in the application and outcome/decision are aware of the appeal. Public notice of appeals is in the interests of transparency and inclusivity, and will help to further the key aims of the Marine Act (that of protecting the environment, protecting human health and preventing interference with legitimate uses of the sea). This would also be consistent with the procedures adopted for terrestrial planning appeals, which allow third parties to become involved at the appeal stage and be kept up to date with progress on the appeal.

Therefore, as well as direct communication with the relevant parties, there should be public advertising, for example via the internet and newspapers. It may also be beneficial to provide notices in prominent public places, such as local authority offices or libraries. Link considers that consideration needs to be given to ensuring accessibility for those persons who may not have access to computers or the internet, but who may wish to be involved in or kept updated on an appeal.

Q31: Third parties should have access to all information relevant to the case, including, for example, original application documents, the environmental statement, and (if provided) information submitted by the applicant to inform an Appropriate Assessment. Third parties should also be entitled to receive copies of all correspondence relevant to the appeal and any documents or information submitted during the course of the appeal. Allowing the sharing of

information relevant to the original proposal and the appeal will ensure that third parties can participate as fully as possible in the appeals process. Furthermore, documents related to, for example, a terrestrial planning appeal are generally public documents, subject to perhaps some very minor exceptions. For this reason, it would seem contrary to freedom of information principles for restrictions to be placed on what information should be provided to third parties.

Q33: Link agrees that new evidence or grounds for appeal should not be allowed once the statement of case has been submitted, unless all interested/relevant parties agree that the information should be submitted because of, for example, its relevance to the appeal or because it will further the understanding of the impacts of the application.

Q34: The powers outlined in the consultation document with regard to conducting appeals appear reasonable, including the power to determine the type of appeal and conduct similar applications to be heard in parallel. Clear guidelines on conducting appeals will clearly be important, whilst clear definitions will also be necessary, such as with regard to 'unreasonable behaviour'. In principle, the idea to 'employ the services of an independent specialist', appears sensible. However, further information on their role and status is needed, and we reserve the right to provide further comment on this.

Q35: Link believes that the appellate body should be independent from Government to guarantee impartiality and meet expectations of accountability and transparency. In order to act independently it will therefore be necessary for the appellate body/independent tribunal to have the same powers as the licensing authority.

We note that the outcomes of the appeal seem to imply that an appeal will largely relate to a decision to grant a licence, not refuse one. As mentioned in our response to **Q27**, it is necessary to clarify the circumstances in which an appeal can be made and ensure that the powers of the appellate body in deciding an appeal are appropriate. In particular, if there is a right to appeal against a refusal of a licence, the appellate body must have the power to grant a licence and impose conditions if it disagrees with the decision of the licensing authority.

Q36: Yes, the applicant should have the right to withdraw an appeal, although they should have to face the prospect of a costs award from relevant parties.

Q37: No – the licensing authority should not be able to alter its earlier decision that is subject to the appeal. Once the licensing authority has made its decision, and an appeal has been lodged, it should only be in the remit of the appeals body to make a decision. However, the licensing authority should clearly have the opportunity to submit its case to the appeals body and have similar rights as to other parties with regards to, for example, altering its position, the submission of evidence etc. We note that this would not prevent the applicant from submitting an alternative application to the licensing authority, which may result in a licence being granted and the consequent withdrawal of the appeal.

Q38: We consider that it will be appropriate to allow the appellate body to have powers to suspend the licensing authority's decision upon appeal, particularly where the decision appealed includes a grant of a licence. This would ensure that neither the applicant nor the licensing authority undertakes premature action to either implement or enforce the terms of the marine licence that results in either unnecessary costs or irreversible damage. A decision subject to an appeal can never be taken as a final decision, because it is subject to change based on the decision of the appeal. For this reason, it would be inappropriate to allow an

appellant to commence development or an activity under a permitted licence which is subject to an appeal and may be quashed or altered in the future.

Exemptions

Q39; Q41; Q43; Q44; Q45A: All exemptions – existing and new – must be reviewed before they are formally exempt from requiring a new Marine Act licence. Such a review would ensure that exemptions meet the licensing aims of the new Marine Act regime – to protect human health and the environment and prevent interference with other users.

All activities particularly new activities or groups of activities must be assessed against their impacts – direct, indirect, in-combination and cumulative – before a decision can be taken on whether they can be exempt from requiring a Marine Act licence. Proposals for exemption must first be subject to Environmental Impact Assessment, possibly Strategic Environmental Assessment, and where necessary, Appropriate Assessment under the Habitats Directive. Such environmental assessments will determine whether any modification(s) or the addition of conditions is appropriate. We therefore welcome Defra and WAG's commitment to carry out a review of the existing exemptions, and call for a commitment to an environmental assessment.

Q40; Q45A; Q45B; Q45E; Q45F: In addition to the need for environmental assessment, other factors to consider when deciding on whether an activity should be made exempt or not, include delivering legal compliance, and compliance with international obligations. Where there is a lack of evidence, a precautionary approach must be used and such activities must not be subject to an exemption. Therefore, the need to collect new data – about particular locations, effects, etc – should also be considered. A review period should be built into the exemptions process, to take account of new data, new information on impacts or unexpected effects as a consequence of the exempted activity. Exempted activities should only be permitted where/when they are in accordance with the MPS and the marine plan(s);

Q43; Q44; Q45A: Link recommends that you do not confuse small-scale or temporary activities with low impact or risk. Exempting activities based on their size/scale (i.e. *de minimis* activities) is not an acceptable or effective regulatory process. Rather as stated above, environmental impacts must be assessed prior to exemption.

Q45C; Q45D; Q45E: A strength of our preferred approach is that exempted activities are less likely to result in environmental damage, thereby reducing risk. Such risks include:

- unexpected or new impacts;
- impacts going unnoticed;
- lack of precise control;
- lack of monitoring of effects;
- lack of information regarding where and when marine activities are occurring, which will result in inaccurate cumulative effects assessments.

Q46; Q47: Low risk maintenance dredging should only be exempted (with or without conditions) from the need for a marine licence following an environmental assessment that confirms the activity is 'low risk', at that location. We are concerned that there is an assumption that where an activity has been carried out for many years, there is little or no impact – a history of activity or exemption is not an indicator of 'low risk' without evidence. If an assessment has not been conducted or is old, it must not be presumed that the activity is 'low risk'. Site specific environmental assessments of impacts/effects must be carried out

before an activity can be determined as ‘low risk’. The outcomes of these assessments will determine the type of conditions, if any, that are appropriate at specific sites.

Q49; Q50: Activities that are to be regulated and hence registered, under alternative regimes should not require registration under the exemption process as this could lead to duplication on the licensing register However, consideration must be given to the whether or not that other regime has environmental safeguards of the same minimum standard as those in the Marine Act licence.

The problem is how to register exempted activities where no other record would be made of where and when that activity occurs. Link believes that a record should be kept of all marine activities to fully inform the development of marine plans, to ensure decisions taken in the marine area are based on all the information and to support effective assessments of cumulative effects. This may require different mechanisms for different activities – e.g. registration in other formats, block registration for repetitive activities, or notification schemes, etc.

Wildlife and Countryside Link
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