Appendix B

DEFRA Consultation on Secondary Legislation for England and Wales under the Marine and Coastal Access Bill: Part 4 Marine Licensing

UKBCSE & Industry Response to the Consultation Questions

Application Process

Q1 Should we transpose the requirements of the Environmental Impact Assessment Directive into the main marine licensing process as proposed?

We support in principle the streamlining of the marine licensing regime and therefore the incorporation of the requirements of the Environmental Impact Assessment (EIA) Directive. However it is vital that any proposals in respect of the marine licensing area must dovetail in with the proposed treatment of the EIA Directive for onshore developments.

In particular we do not support the introduction of a formal requirement for a Scoping Report, which is not a feature of existing regimes. Scoping may be addressed in other ways (e.g. by reference to an existing ES).

Q2 Should we transpose the requirements of the Habitats and Birds Directive into the main marine licensing process or should we amend the existing conservation regulations as they apply to the marine area to cover all activities that will need a marine licence?

We support in principle the streamlining of the marine licensing regime and therefore the incorporation of the requirements of the Habitats and Birds Directive. However it is vital that any proposals in respect of the marine licensing area must dovetail in with the proposed treatment of the Habitats and Birds Directive for onshore developments. Consistency between regimes is critical because of in-combination assessments. Existing regulations are largely generic, so in general we have a preference for the existing Regulations to be extended.

Q3 Drawing on your experience of the current licensing systems, and their respective strengths which elements do you think should be transferred across into the new system?

We believe one of the key strengths of the existing systems under both CPA 1949 S34 and FEPA 1985 S5, is the flexibility they provide in dealing with a wide range of applications.

Q4 Drawing on your experience of the current licensing systems, where do you think the weaknesses of those systems lie and how could we use secondary legislation to address them?

In terms of weaknesses of the existing licensing system we would make the following comments:

- There is insufficient clarity about the requirements for supporting information. The onshore consenting and licensing regimes as being implemented under the provisions of the Planning Act 2008, provide positive processes for pre-application consultation and scoping procedures, standard application forms and a range of Guidance pertaining to Nationally Significant Infrastructure Projects (NSIPs).

  Similar arrangements, albeit proportionate to the scale and scope of the marine development would be helpful.

- Duplication between consenting authorities and between the CPA/FEPA regimes and local legislation also exists. In particular, duplication of consultation wasting consultees' time and resources should be avoided. As currently drafted, this will not be removed by the new legislation, with in particular, duplication with port authorities' licensing activities etc.

- Scoping Opinions have not been robust or approved, which has lead to requests for further information, often delaying progress.

- Timescales have been vague, and holding responses by statutory consultees have lead to delays in approvals / processing of applications.

- There is currently no clear guidance on exactly who the required consultees are for differing types of projects, resulting in key consultees sometimes being missed, with the inherent delays of then having to consult with them after all the other consultees have been engaged with.

- Whilst conditions have included post-construction monitoring, there is little evidence that the conclusions / findings of such monitoring has been utilised to their full potential, or that lessons learnt are shared. Going forwards it would be very beneficial if this information provides a more focused approach to subsequent similar applications, and therefore this should be acknowledged within the new regime to ensure sharing of best practice / lessons learnt.

- Sufficient and expert resources within the MMO are vital to ensure consistent and timely processing of licensing applications, and single points of contact are vital to maintain continuity, and enable relationships to be built up.

Q5 If you are a potential applicant, what type of engagement would you wish to see with a) the licensing authority and b) other interested parties, such as conservation bodies, before you submit your application for a marine licence?

Early and open engagement with, and access to, the licensing authority, relevant public bodies and statutory consultees is vital for applicants, and the Regulations and Guidance should actively encourage this.

Additionally, it would be helpful to have clear guidance on the information required in support of the particular application. It is vital to include within the pre-application process the option for informal discussions with the licensing authority about scope of information requirements (as available under the IPC process).

Particular areas for discussion will include but is not limited to:

- The extent to which any existing documentation prepared for other consent processes can be re-used
- If so what supplementary information is required
- The content of environmental statements
- Any special information requirements for appropriate assessment (if required).

As far as possible there should be a single point of contact in the licensing authority for any particular application or proposed application, to ensure continuity.

Q6 If you are a conservation body, what type of engagement would you wish to see with a) the licensing authority and b) the applicant before any application for a marine licence is made?

Not applicable.

Q7 If you are another interested party, for example a local authority or other regulator, what type of involvement would you wish to have in the pre-application stage with a) the licensing authority and b) the applicant?

Not applicable.

Q8 How could regulators work more effectively together at this stage? For example, would it be beneficial to enter into a Memorandum of Understanding or Service Level Agreement with the marine licensing authority to define those cases where both regulators should undertake joint production of an Appropriate Assessment or Environmental Statement?

The most important area requiring further clarity is how the marine licensing process will interact with the differing consent processes, both those being managed by the IPC (and Welsh Assembly Government for NSIP projects in Wales) and those being managed by the MMO / Local Planning Authority.

Standing arrangements (under whatever name) would be useful is to govern the relationship between the licensing authority and port authorities or similar bodies established under local legislation, where these bodies are also licensing authorities under that local legislation (e.g. the Port of London Authority, Milford Haven Port Authority, etc.)

There is a lot of overlap between the functions of local and national licensing authorities and it will probably be appropriate to delegate some licensing–related functions to the relevant port authority for applications for works entirely within their area.

Q9 Should the licensing authority be able to require potential applicants to conduct consultation activities similar to those in sections 42 to 49 of the Planning Act 2008 prior to submission of an application for a marine licence for certain classes of development?

For those projects within the marine area which are deemed to be nationally significant infrastructure projects, the Planning Act 2008 provisions lay out appropriate pre-application consultation procedures which the energy industry has supported from the beginning

For smaller, less significant projects in the marine area we do not believe that such comprehensive consultation will be necessary, however appropriate and early engagement with the consenting / licensing authority, any relevant local planning authority, statutory consultees and other affected parties will definitely be vital for developers through a simplified process. In the vast majority of cases which are subject to EIA, the EIA scoping process will require the applicant to consult key statutory parties and this will probably be adequate for most non-NSIP developments.

A requirement for more extensive pre-application consultation exercises, including public consultation exercises for non-NSIP projects, is therefore unlikely to be necessary and indeed would be over-burdensome for both developers and the public, provided that appropriate early engagement with key stakeholders takes place as described above.

Q10 Should we introduce a requirement that environmental statements must be submitted in a standard format? Should that standard format only apply to the marine elements of the project, thereby allowing land-based impacts to be submitted in a form suitable for consideration under terrestrial or other regimes?

We do not support the proposal for Environmental Statements to be in a standard format. This would be likely to require substantial rewriting of existing Environmental Statements and duplication of documentation. It would also put a focus on compliance with EIA legal requirements, rather than the merits of the proposal, to an even greater extent than at present.

We recognise that it can be difficult to find the relevant information in a large Environmental Statement. Therefore we suggest two options:

- To require the applicant to fill in an application form template for EIA applications or applications requiring Appropriate Assessment, designed for the type of application in question (e.g. cooling water intake and outfall works, dredging, quays and jetties, etc.) indicating where the required information can be found in the submitted documents, or

- A ticklist which allows developers to consider whether the environmental statement for a specific project should include individual elements, and which could be submitted to the licensing authority identifying relevant information and confirming that other elements are not applicable.

Q11 Should we maintain this voluntary service for aggregate dredging activities?

N/A to the energy industry – therefore no comment.

Q12 Should we extend this voluntary service to other types of licence applications?

No comment.

Q13 As an interested party to a potential application, would you be willing to engage in pre-application discussions and procedures for marine developments?

Yes - UKBCSE / Industry has consistently supported the establishment of pre-application consultation for NSIPs and therefore sustainable energy developers would of course be happy to continue to engage in pre-application discussions with the relevant consenting / licensing authority, local planning authority (if relevant) and statutory consultees as appropriate. Obviously the level of discussions and detail will depend on the scale and complexity of the proposed project.

Q14 Is the general approach to consultation outlined above for the current licensing regime a good model to adopt for the marine licence? If not, what improvements can be made?

Yes - Given the wide range of applications, any attempt to be prescriptive is likely to impose excessive consultation requirements and costs on smaller and less significant applications, so the proposed flexible approach is welcomed.

Q15 Which of the following, if any, do you consider appropriate for the marine licensing system

- **(a) A 28 day minimum period for consultation like the Planning Act 2008; or**
- **(b) A set period of 42, or other number of, days?**

We support a 28 day period (as the statutory period) for non-EIA applications, and a 42 day period for EIA applications.

Q16 What should happen to the licence application when a key consultee does not reply within the deadline? [can we say this or do we have to wait?] Should we place a status report on the website that highlights what is outstanding and from whom?

We recommend a similar approach to that taken in the Planning Act 2008 – namely that failure to reply within the agreed deadline by a key consultee should be deemed as acceptance, and should not therefore hold up a project.

However, UKBCSE / Industry believes that Government should ensure that statutory consultees have sufficient resources to enable them to reply within the required timescales. Additionally, early engagement with key consultees by developers will ensure that they have the best possible opportunity to respond.

The licensing authority should be empowered to impose time limits, subject to a statutory minimum period, beyond which the consultee will be deemed to have no comment in the absence of a response, or in the absence of a response to a query from the licensing authority. The minimum should be 28 days in all cases but longer for initial response on EIA applications, in line with answer to Q15.

Q17 Do you agree we should leave the bodies to be consulted on any application to guidance rather than in secondary legislation?

Yes – Given the wide range of activities that may be licensed, and the regular rationalisation / streamlining of a range of public bodies, a flexible approach which enables additions / changes to consultees to be easily made is the best solution. We therefore suggested this is dealt with through the provision of Guidance.

Q18 Are there any other cases where it may be appropriate to hold an inquiry?

We do not feel holding of inquiries is relevant and believe that is highly unlikely that it will be necessary to hold inquiries for the majority of sustainable energy projects proposed for the marine area. Equally, we not feel that a hearing would be necessary either, but a hearing would be preferable to a full inquiry. See also answers to Questions 25 – 26.

Q19 Do you think the power to hold hearings to be beneficial, and if so in which circumstances?

As per the Planning Act 2008 provisions, we support the use of written submissions as the primary method of providing comments on licence applications. However, in some cases where proposed developments are either particularly, large, complex, controversial or have the potential to have a major impact on the environment, human health or other legitimate uses of the sea, it may be helpful to hold hearings where the licensing authority can seek face-to-face clarification / ask questions. This will ensure that, where appropriate, relevant interested parties can emphasise the points verbally as well as in writing, however we would not advocate the use of cross-examination by counsel, as we believe this can be unnecessarily confrontational. However, as per the arrangements being set up for the IPC, advice from lawyers to the licensing authority could ensure that questioning is effective / meaningful.

Q20 Do you agree with a risk-based approach to sifting objections and observations?

Yes - Subject to the qualifications that:

- Many objections, especially from the public, are not likely to be of a nature susceptible to a risk-based approach.
- Any comments from any party involved, whether in support of, or against, a proposed development, should be justified through a strong evidence base.
- Comments received will be judged in the context of marine plans, the Marine Policy Statement and National Policy Statements.

Q21 As a consultee, would it be feasible to provide a risk assessment, even in general terms, in your response to a consultation?

N / A to the energy industry.

Q22 As marine plans will apply the objectives of the marine policy statement in more detail, what should a marine plan include to help you, as a potential applicant, make better, more informed decisions?

The marine plan development process involves a comprehensive and inclusive evaluation of geographical areas. We strongly believe that the establishment of Marine Conservation Zones should be an integral part of the marine plan process to ensure holistic consideration takes place.

The level of locational detail in marine plans will need to vary to suit the range and complexity of current and foreseen future uses in different parts of marine plan areas. More detail is likely to be required in an estuary or harbour than in an area of open sea. The application of marine plan policies to different parts of a marine plan area should be identified by reference to a proposals map or chart (c.f. town and country planning practice onshore).

Additionally, it would be helpful for all with an interest in the marine area to have details of a range of existing features e.g. geological, geophysical, existing infrastructure development - both, shipping lanes, MOD flight paths, shipping lanes, fishing areas and MCZs when they are established / other Marine Protected Areas and the location / extent of the protected features.

Q23 Do you think published target timeframes would sufficiently improve transparency and certainty? Are there other measures that we should adopt that would further improve transparency and certainty?

Publication of target timeframes will help to provide transparency and certainty for all involved in the licensing process, which coupled with an assumption that lack of a response from a consultee means they have no comment to make, will ensure that developments are processed within sensible timescales. For NSIPs it is vital that timeframes are aligned with those proposed under the Planning Act 2008, to enable efficient consideration by the IPC (or Welsh Assembly Government for projects in Welsh waters).

Q24 Should we include time-limits in which applicants should respond at certain points in the process? If so, what should happen if applicants fail to submit information in this time-frame?

In view of industry's support for pre-agreed time-limits for the licensing authority and consultees, it would only seem fair to impose the same discipline on applicants. However it will normally be in applicants' interest to progress their responses expeditiously. If an applicant fails to submit required / requested information within specified timescales, then the licensing authority should have the power to either a) explore whether the applicant requires additional time to comply with its request and extend the deadline (in exceptional circumstances) or b) should the applicant not be making reasonable endeavours to provide the answers to a valid request for information, following a further request, the licensing authority, as a last resort, have

the power to deem the application withdrawn, and therefore require the applicant to resubmit its application again at a later date.

Of course, the scale and complexity of the proposed development will very much influence the type and detail of information requested and so there could be a wide range of timescales within which an applicant is able to provide further information. It should be open to the licensing authority to impose a time limit but there needs to be flexibility to allow for the practicalities of assembling or processing data or even doing additional field survey and laboratory analysis work should this be required post-application.

Appeals

Q25 Should we give appellants a right to be heard?

No – the precedent established through the Planning Act 2008 is that the presumption for all representations is that they should be dealt with by way of written representations. The appellant should not be able to require the appellate body to hold a hearing or inquiry, but during discussions with the appellate body both parties may agree that it might be helpful to hold a hearing or an inquiry, but the ultimate decisions should lay with the appellate body.

Q26 Should we enable the appeals procedures to be handled through an inquiry?

The basis for deciding the appropriate appeal procedure, as between written representations, hearings and inquiries should be similar to that for town and country planning appeals, with necessary minimum amendments. As above, to enable maximum flexibility and the best possible decision-making the decision as to the most appropriate method of conducting an appeal should lay with the appellate body.

Q27 Are these the right grounds of appeal? Should we include any other grounds of appeal?

We generally support the grounds for appeal as drafted, but would also suggest the following:

- That the third ground "the decision made is inconsistent with relevant policies, including the marine plan" is extended to also include the Marine Policy Statement and relevant National Policy Statements.

- On evaluation or assessment of evidence by the licensing authority (4th bullet) the ground of appeal should be that the licensing authority made, or appears to have made, an incorrect assessment, etc. Whether the assessment was incorrect may not be clear from any decision notice.

- It should also be a valid ground of appeal that the licensing authority's decision was unreasonable, as per the *Wednesbury* rule.

Q28 Do you agree we should impose time-limits at key stages of the appeals process? Do you have any thoughts on what those time-limits should be?

Sustainable energy project developers require a timely, efficient and cost-effective consents and licensing regime, which should include pre-agreed maximum time-limits for appeals, with the ability to extend those timescales only available in extremis and by agreement of the Secretary of State. This will ensure timely decision-making and greater developer certainty / investor confidence and clarity for other key stakeholders

It would therefore seem sensible to base the requirements on the existing appeal system whereby timescales are enshrined within the planning system already. However, adherence to those timescales needs to be enforced.

In terms of the appropriate timescale for lodging an appeal, given the scale and complexity of some of the sustainable energy projects which need to be built in the marine area, and therefore the likely level of evidence / additional information that might be necessary to support an appeal, we believe that 28 days is too short. It is recognised that, unlike the terrestrial area, there is much still unknown about the marine environment and so therefore data / evidence collection is likely to be more time-consuming. We therefore suggest that a maximum period of 90 days might be more appropriate for lodging appeals for licensing decisions in the marine area.

Q29 Who should be notified of the appeal? Should it be limited to those people who were involved in the original licensing decision or should it go wider to anybody who might have an interest in the outcome of the appeal?

As a minimum, those who have originally been involved in the original licensing application must be informed in a timely manner of any proposed appeal. Additionally, Government may wish to consider whether general publicity of an appeal for an NSIP may be a helpful aid to transparency.

Q30 How should the appeal be advertised in order to bring it to the attention of parties likely to be interested?

Those who have been consulted or commented on a licence application should be either emailed (preferably) or written to as soon as an appeal is lodged. However, general publicity should also be considered, similar to the requirements of the Planning Act 2008.

Q31 What information should be shared with interested third parties?

A summary of the original licence application and the project it is pertaining to, including any additional information such as Environmental Statements etc., the reasons for refusal of the application, and the timescales and format for submissions in respect of the appeals

Q32 Should the applicant have to express a preference for the type of appeal (or exercise their right, depending on the answer to Q26) in the notice of appeal?

See answer to Q26.

Additionally – for questions 28 to 32 the Town and Country Planning Act appeals mechanism provides a good starting point and is well tried and understood. It is therefore suggested that apart from specific points raised in this response, the new marine licence appeals procedures should differ from it only on a *mutatis mutandis* basis.

Q33 Do you agree we should not allow new evidence or grounds for appeal once the statement of case has been submitted?

Yes – generally we would not support allowing new evidence or grounds for appeal once the statement of case has been submitted, to avoid unnecessary delay and uncertainty for all concerned.

Q34 Do the powers as outlined above look about right, including in particular the power to award costs only in the event of unreasonable behaviour by the other party? Should they have any other powers?

Broadly yes. The comments under Q28-32 apply equally here.

Q35 Do you agree the appellate body should have the same powers as the licensing authority when it made the original decision?

Yes - The appellate body should definitely have the same powers as the licensing authority and should be able to reverse licence decisions where appropriate, not just quash them. Equally, it is important that appellate bodies are also able to impose conditions on any resulting licence on the same basis as the licensing authority, which could lead to them being able to award a licence which has been previously refused.

Q36 Do you agree that the applicant should have the right to withdraw an appeal?

Yes – in order to provide maximum flexibility, however applicants should be encouraged to only do so in extremis to avoid unnecessary waste of appellate body resources.

Q37 Do you agree that the licensing authority should be able to alter its earlier decision that is subject to the appeal?

Yes – if a licensing authority subsequently decides that it wishes to alter its earlier decision that is subject to an appeal, then it should be able to do so, thus saving time, resources and money that a subsequent appeal would involve.

Q38 Should the licensing authority's decision be upheld until the resolution of the appeal or should the appellate body have the power to suspend or vary the licensing authority's decision as it sees fit? If the latter, in what circumstances would this be appropriate?

Given that the licensing authority's decision is being appealed by the original applicant, the effect of any change to a decision on appeal will be to relax conditions or grant a licence where none had been granted. Therefore to suspend or vary the licensing authority's decision would be likely to pre-empt, at least in part, the outcome of the appeal, and so it would be appropriate to uphold the original licensing decision pending the outcome of the appeal.

Exemptions

Q39 Do you agree with using existing Food and Environmental Protection Act 1985 and Coastal Protection Act 1949 exemptions / exceptions as a starting point for making decisions on what should be exempt from the new marine licensing regime?

Yes.

Q40 Are there any other key considerations that should be taken into account when deciding whether to exempt or not exempt specific activities? Should factors be treated equally, or do some outweigh others?

There should be a general principle that works and placing or removing materials, equipment and scientific instruments for scientific and, specifically, environmental survey (e.g. for the purposes of environmental impact assessment for a project) purposes, should be exempt, provided navigation safety is safeguarded. It is important that sampling etc. for surveys relating to environmental impact assessment is covered by an exemption in order to ensure the best possible environmental information is gathered and presented.

The placing and removal of instruments and cables temporarily required in connection with other duly consented or exempt works (e.g. to provide electromagnetic guidance for horizontal directional drilling) should also be exempt.

The marine licensing case load on the MMO and other licensing authorities ought also to be taken into account and from this point of view a *de minimis* exemption for physical works and placement of materials should be considered, especially in port and harbour areas

Q41 Do you agree that the activities in Table 1 (subject to necessary deletions / modifications – see Q4 below) should continue to be exempt from the licensing regime under the Marine and Coastal Access Bill?

Yes.

Q42 Are there exemptions (or groups of exemptions) which need to be modified, simplified or deleted other than those we have already identified? Do you agree with what we have identified so far?

Yes - We agree with the modifications outlined in the consultation document in so far as they are relevant to our activities.

Q43 Are there any new key activities or groups of activities listed in the list above which you do not agree should be made exempt from the new licensing regime? Why?

No - We have not identified any new key activities or groups that we can suggest.

Q44 Are there any other activities or groups of activities not listed above that we may wish to consider exempting? Why?

In our view it should be clarified that the exemptions associated with a bored tunnel extend also to a horizontal directionally-drilled hole entirely below the sea bed drilled from onshore, and to all materials and equipment installed therein, including (for example) pipeline(s), in connection with its intended purpose, subject to a planning permission (or other appropriate development consent) having been granted for the onshore elements of the works. This is to provide clarity and avoid unnecessary regulation.

Q45A What should the exempt activity / activities capture / exclude? (i.e. a practical description of the activity / scale of operation (particularly in the case of de minimis activities) timescales / size of operation etc)

A useful practical criterion for *de minimis* exemption of the temporary placement of instruments, cables etc. would be that the instruments etc. can be moved into position and removed manually by a team of not more than three persons either on foot in intertidal areas, or working from a vessel, without the use of any powered winches or other powered lifting equipment.

Q45B What (if any) mechanism/s or conditions should we consider using or placing on the activity in making it 'exempt' under the new regime? (e.g. licensing authority authorisation / restriction on scale of project / location / equipment used / adoption of a voluntary scheme / general binding rules / compulsory registration / tiered registration / time limitations / self-certification)

The approaches taken need to differ depending on the type of works or activity concerned.

For small scale works authorised by a harbour authority under local legislation (not necessarily for port purposes) a simple scale restriction is probably appropriate, based on physical dimensions and possibly timescale. Since such works are authorised by a port authority with records kept by that authority there is no need for additional registration with the licensing authority.

Many minor and like-for-like repair works are likely to involve the use of cement or concrete, which can cause water pollution. It would be appropriate to apply general binding rules to concrete work covered by exemptions.

Q45C Can you think of any particular weaknesses of your preferred exempting mechanism? What are its strengths?

No comment.

Q45D What are the opportunities / advantages of making the activity / group of activities exempt? (e.g. evidence of low risk / avoidance of a detrimental impact on a particular group or industry / better regulation)

No comment.

Q45E What are the risks / disadvantages of making this activity exempt? (e.g. lack of evidence / lack of control / adverse impact on a particular group)

No comment.

Q45F Are there any other factors that should be considered before making the decision to exempt the activity from the new licensing regime? (e.g. cumulative impact / people or groups that may be affected / evidence base / need to review exemption)

No comment.

Q46 Do you agree that low-risk maintenance dredging should be generally exempted (with or without conditions) from the need for a marine licence?

Yes.

Q47 Are there criteria which should be satisfied or limitations placed on a maintenance dredging operation before it should be considered to be 'low-risk' and appropriate to exempt? (e.g. use of only certain types of equipment or techniques / location restrictions / carrying out of sediment analysis?

We are not qualified to comment in detail on this, but would suggest that the methods used and precautions taken to prevent pollution might usefully be the subject of general binding rules.

Q48 If maintenance dredging was to be listed in the exemptions order, do either of the definitions above accurately capture the activity? Should we look to combine these or is there another more appropriate definition?

A combination of the definitions quoted would appear to cover maintenance dredging adequately.

Q49 Are there exempt activities (which could include those mentioned above) or activities which could potentially be exempted, that you agree are not necessary to be placed on the licensing register?

Yes - There are routine activities associated with launching etc. of vessels and fishing activities which do not need to be registered and which it would not be practical to register.

Also there is no need for activities authorised by ports etc. authorities under local legislation to be additionally registered with the MMO or other licensing authority.

Q50 Should certain exempt activities which are not placed on the licensing register be notified, reviewed or recorded by the licensing authority in any other way?

We would suggest that if an exempt activity does not justify registration, then it does not need to be recorded or reviewed in the context of marine licensing. If recording is necessary then the activity concerned should be registered.