

## **UKBCSE**

### **Proposed amendment to the Habitats Regulations 2004, the Offshore Marine Conservation Regulations 2007, and the Environmental Damage Regulations 2009**

#### **UKBCSE / Industry Commentary**

##### **Introduction**

Obviously, we have yet to see the draft Regulations and therefore the detail of the proposed amendments, however in principle we support the need for these amendments – namely the need to incorporate the provisions of the Marine and Coastal Access Act 2009; the decision to executively devolve certain functions in the Scottish marine area to Scottish Ministers; and to consolidate the various amendments made to the 1994 Regulations over the past 15 years.

The UKBCSE and industry have consistently supported the objectives of the Marine and Coastal Access Act 2009 and the Government's commitment to ensuring all three pillars of sustainable development – environmental, social and economic – are considered when implementing the provisions of the Act. Our comments are therefore provided within this context and are as follows:

##### **Changes arising from the enactment of the Marine and Coastal Access Act 2009**

###### ***Transfer of Licensing Functions from Natural England to the Marine Management Organisation (MMO)***

As the strategic delivery authority for the marine area the MMO, and following the assurances given in the Minister Huw Irranca Davies MP's letter of 22 October, we support the transfer of licensing functions to the MMO on the understanding that there will be full consideration of all three pillars of sustainable development. The Minister's letter confirms that the MMO will be appropriately resourced to ensure the Government's energy policy objectives and the detail of the types of development, their impacts and appropriate mitigation are fully understood, represented and taken into account. We welcome this confirmation and reiterate our offer to assist MMO colleagues in any way that might help e.g. organising site visits to various types of development, providing technical information of technologies, their impacts and how to mitigate them.

However, given Natural England's landscape and biodiversity expertise and statutory remit, we would welcome confirmation that they will continue to play a key role, through being a statutory consultee.

###### ***Consequential Changes to the 1994 and 2007 Regulations***

Without seeing the draft Regulations it is difficult to provide definitive commentary, however, in principle we support the streamlining and updating of the Regulations in this way, on the understanding that such consequential changes are merely updating the Regulations to align them with, and insert appropriate references to the Marine and Coastal Access Act 2009 without making fundamental changes.

## ***Enforcement Provisions***

The UKBCSE and industry always seek to minimise the environmental impact of their developments, and therefore, we support in principle the enforcement of compliance with robust, workable and balanced conditions required as part of licences granted under the Habitats Regulations. However, without sight of the detail of the Draft Regulations, it is difficult to provide definitive comments, and would welcome a copy as soon as possible.

## ***Delegation of Secretary of State's licensing powers to the MMO – Regulations 44(2)(e) to (g) and 49***

With the above provisos concerning balancing the three pillars of sustainable development, we support in principle, the transfer of the Secretary of State's powers to grant licences for the purposes listed in Regulation 44(2)(e) to (g) and 49 to the MMO. Whilst not directly part of sustainable energy developments, these activities e.g. granting of a licence for scientific or educational purposes, which could be helpful in enabling developers to assess environmental impacts of existing or developing / future technologies.

Regulation 49 refers to considerations of overriding public interest as part of general provisions to protect European sites, and is based on the premise that the competent authority may only agree to a project or plan if it is satisfied that there are no alternative solutions and where it is needed for specific reasons such as human health or public safety.

UKBCSE / industry are absolutely committed to protecting priority natural habitats / species, and therefore would only look to propose developments within European Marine Protected Area sites if absolutely vital. However, as additional SACs and SPAs, and Marine Conservation Zones (under the Marine and Coastal Access Act 2009) are brought forward, it is essential that the role of the marine area in addressing climate change and continued security of energy supplies is recognised, and which is also of overriding public interest. Whilst there are nearly always alternative sites available, they may not be suitable for a variety of other environmental or other reasons. Additionally, certain technologies have particular characteristics that may make many areas unsuitable e.g. the geological constraints associated with underground gas storage.

## **Changes to the 2007 Regulations and Environmental Damage Regulations 2009 to executively devolve certain functions in the Scottish offshore marine region**

We note Government's intention to 'executively devolve' certain powers to Scottish Ministers to enable them to become the lead competent authority for most marine conservation functions. We are pleased that Government are driving for an integrated approach, and therefore would welcome an early understanding of the extent of discussions between the Scottish and UK Governments to ensure that the associated regulations, guidance and processes are aligned. This is vital to ensure clarity and consistency within the different countries that make up the UK.

## **Consolidation of the 1994 Regulations**

We welcome the Government's proposal to consolidate and streamline the 1994 Regulations to simplify them and provide greater understanding. We also welcome the assurance that there will be no substantive changes in policy or legal duties, powers or requirements stemming from the Regulations. However, until we have seen the draft Regulations we cannot comment fully.

The intention to repeal the existing 1994 Regulations in England and Wales but leave them in place in Scotland out to 12 nautical miles, is not desirable and we encourage the UK and

Scottish Governments to work together and to both implement changes at the same time i.e. for the Scottish Government to use their powers to amend and consolidate the Regulations in the same way and as closely together in time as possible.

### **Timetable and Next Steps**

We note the Government's intentions for the consolidated 1994 Regulations and the amendments to the 2007 and 2009 Regulations to take effect on 1 April 2010. However, as mentioned above and as per our request to DEFRA colleagues, we would welcome early sight of the draft Regulations as soon as possible, as without the detail we are unable to give full commentary.

### **Annex**

#### ***Executive devolution of nature conservation in offshore waters adjacent to Scotland***

We note Government's intention to, and objectives in, proposing to executively devolve nature conservation in the Scottish offshore region, in order to make the Scottish Ministers the lead competent authority for most marine nature conservation functions. We understand the intention that this will mean that a single authority has primary responsibility for protection and conservation of marine species and habitats, thereby facilitating a more integrated approach and better co-ordination. However, it is imperative that the UK and Scottish Governments work together to ensure alignment in both granting of licences and enforcement to ensure parity of treatment across all the countries of the UK.

We note that it is proposed that Scottish Ministers should become responsible for:

- Identifying and designating European marine sites in the Scottish offshore region;
- Considering matters of overriding public interest and adequacy of compensatory measures within EU marine sites;
- Licensing of activities that would otherwise constitute an offence under the 2007 Regulations (Regulation 49);
- Enforcement of the 2007 Regulations;
- Other miscellaneous functions;
- Enforcement responsibilities in the Scottish offshore region with respect to the Environmental Damage (Prevention and Remediation) Regulations 2009.

However, other activities will remain the responsibility of the Secretary of State, which may potential result in confusion and inconsistency in regulations and their application e.g. preventing, controlling and remediating damage caused by oil and gas related activities, gas storage / unhandling, CO2 storage-related activities, and for preventing and controlling damage caused by shipping activities.

We note that the UK and Scottish Governments intend to develop a Memorandum of Understanding with relation to specific enforcement duties relation to the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (as amended), The Environmental Damage (prevention and Remediation) Regulations 2009 and the 2007 Regulations.

We also note and support the proposal to develop a concordat between the UK and Scottish Governments, setting out Ministers' shared understanding and commitment to co-operate in making the respective marine arrangements work.

We welcome these proposals, but would a) suggest that for all of the devolved responsibilities both Governments ensure the maximum level of alignment / consistency – either through ideally developing aligned regulations and processes, or at the very least

through ensuring that the joint concordat has sufficiently robust wording to deliver maximum consistency of approach and wording, in order to minimise confusion and avoid any unintended skewing of the market which might favour or disincentivise sustainable energy (and other) development in one country as opposed to another within the UK. .