National Oceanography Centre, Southampton
UNIVERSITY OF SOUTHAMPTON AND NATURAL ENVIRONMENT RESEARCH COUNCIL

Consultation on secondary legislation for England and Wales under the Marine and Coastal Access Bill: Part 4 Marine Licensing

Response from the National Oceanography Centre, Southampton

The National Oceanography Centre, Southampton (NOCS – www.nocs.ac.uk), has a national remit to act as the UK's primary focus for oceanographic sciences and welcomes the opportunity to comment on the Consultation on secondary legislation for England and Wales under the Marine and Coastal Access Bill: Part 4 Marine Licensing.
This response has been prepared by members of the National Marine Facilities Division at NOCS, which operates the UK fleet of Royal Research Ships and the National Marine Equipment Pool.

We have discussed this consultation with colleagues throughout the NERC Marine community and with representatives of Learned Societies and Professional Bodies. The Directors of the NERC Marine Laboratories have also been appraised of this consultation, and have given their support to our response. In brief, we would like to see the existing exemption for marine scientific research maintained within the Marine and Coastal Access Bill, and set out our reasons in detail in the answers to questions 44 and 45.

The consultation sets out 50 questions, our responses are set out below.

Applications Process

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

Q1 – Yes, we support transposing the requirements of the Environmental Impact Assessment Directive into the main marine licensing process.

Q2. Should we transpose the requirements of the Habitats and Birds Directives 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?

Q2 – In order for the MMO to be a "One Stop Shop' it would be better to have the Habitats Directive Provisions within the Bill.

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? (when answering, please state in what capacity you engage in the process e.g. as an applicant or a consultee)

Q3 – We would be an applicant under the current process. Currently our activities are exempt from licensing under the Deposits in the Sea (Exemptions) Order 1985 3.23 We would strongly support the continuation of this exemption.

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? (when answering, please state in what capacity you engage in the process e.g. as an applicant or a consultee)

Q4 – As per Q3

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?

Q5 – We would like to see a clear and consistent approach to engagement with the licensing authority with well defined guidelines regarding timing of engagement, an explanation of who exactly needs to be approached, and guidelines over the extent to which face to face contact is permitted/expected versus just 'picking up the phone' or sending an email. Re. other interested parties, we would note that some activities may be 'in confidence' pending outcomes of research or publication of results and we would be sensitive regarding the amount of detail that could be provided for open publication at the application phase if it allowed competitors to acquire intellectual property.

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?

Q6 – 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?

Q7 – 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?

Q8 – A Memorandum of Understanding or Service Level Agreement could be appropriate for regular users.

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?

Q9 – This would add a considerable time and cost burden to marine researchers. Currently our predominantly Government-funded activities are exempt from licensing and funding to cover the additional costs associated with licensing would need to be pursued or research reduced.

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?

Q10 – Yes we would welcome the introduction of a standard format if there were a requirement for environmental statements.

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

Q11 – Not applicable

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

Q12 – Only where required – the £47k fee that gives access to specialist advisors would not be sensible in many cases of marine scientific research because by its nature the work is often leading-edge and our own peer-review system comprises the existing expert scientific base. We would be happy however to be available as specialist consultants where appropriate.

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

Q13 – Yes because there is the potential for activities to impact upon scientific activities and research that may be planned in the same area.

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?

Q14 – The general approach outlined is a good model to adopt for the marine license.

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?

Q15 – Preference for set period of 42 days because it forces interested bodies to respond in a given timeframe and prevents delays to project start-up causes by deliberate blocking tactics.

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?

Q16 – We feel that if a key consultee does not respond within the given period the presumption should be that they had no comment or strong concerns about the application.

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

Q17 – We believe that all of the current bodies that currently have a legal obligation to respond should be similarly included (in the new system).

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

Q18 – Agree with proposal to only hold enquiries for particularly complex cases or for developments where there is wide public interest. However wide public interest does not always mean that the public are well informed about a situation, it could be argued that the Brent Spar case a few years ago was an example of a costly delay for a project that subsequent enquiry showed would not have had a particularly deleterious effect on the marine environment.

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

Q19 – Agree that the power to hold informal meetings would be beneficial provided that they are cost-effective and timely – they should not be used as a tool to delay projects. Circumstances could be where:
The proposed activity is novel (this could include several kinds of scientific experiment) and where the impact may not be widely understood, but is of low risk.

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

Q20 – We would agree to a risk based approach, but that the risk should be quantitative rather than qualitative. For example it would be easy to say that

‘sound always harms marine mammals’ but this is not always the case – it depends upon timing, amplitude, frequency and species.

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

Q21 – For risk assessments to be of value they need to be as precise and accurate as possible. Generic assessments may not cover the real issues.

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?

Q22 – The marine plan should be concise, it should define clearly the extent of activities, location, timings – so that the applicant knows exactly the limitations within which he/she needs to operate. The marine plan should also give some indication of what to do if the activity crosses the boundaries of multiple geographical areas. In particular plans should be joined up between bordering authorities, e.g. between England and Scotland.

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?

Q23 – Yes, published timeframes would improve transparency and certainty. Useful if there is a web-based workflow so that all parties can understand the stage that the application has reached; who is currently responsible; action lists; targets and next phases.

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?

Q24 – Yes, applicants should be subject to time limits as well, with an appropriate appeals procedure for special circumstances.

Appeals

Q25. Should we give appellants a right to be heard?

Q25 – Yes, provided that it is not a requirement for the applicant to have to employ a formal legal team, as this would add considerably to costs and add delay.

Q26. Should we enable the appeals procedure to be handled through an inquiry? Are they necessary and if so under what circumstances should we allow them?

Q26 – Yes, the use of an enquiry should be an available option but it may not

be appropriate in all circumstances e.g. small low cost activities etc.

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

Q27 – Need to qualify some issues – the UK has not always recognised international policies, e.g. the International Underwater Heritage Convention is not supported by the UK, so the scope to appeal based on some international Conventions may not always be appropriate.

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?

Q28 – Time limits are essential to avoid appeals being used as tools to delay projects unduly. However these time limits could be set on a case-by-case basis.

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?

Q29 – There should be public notification of appeals that have been lodged. This should be available in a public-accessible part of the MMO website and all of those involved should be automatically notified.

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

Q30 – Via a public website and, where known, to an appropriate email list of interested parties.

Q31. What information should be shared with interested third parties?

Q31 – Decided on a case-by-case basis, with the information that is to be shared agreed by all parties – there will be commercial and politically sensitive information. What about the Freedom of Information Act? Third parties could in some instances be charged for the provision of information – but we would not be automatically willing to give away expensively-gathered data.

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?

Q32 –Yes

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

Q33 – No, we don't agree – scientific evidence in the marine environment is sparse in many areas and subsequent evidence may be gathered that provides a more equitable solution to an appeal. New information may become available that renders an original decision as obsolete.

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?

Q34 – Yes the powers look about right, and no there shouldn't be any other powers.

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

Q35 – Yes, should have same powers. Will there be any further recourse to appeal, e.g. to European courts, and how will this be processed?

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

Q36 – Yes – in the interests of saving public time and money. However some decision should be made on how the costs of the process to date should be attributed.

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

Q37 – Yes in the light of new data or other evidence that has become available.

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 its sees fit? If the latter, in what circumstances would this be appropriate?

Q38 – Yes, but with some exceptions. Some activities such as bottom trawling cause so much damage to certain types of habitat that to allow an activity to continue pending outcome of an appeal may leave a situation where major harm is done before the outcome is known.

Exemptions

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

Q39 – Yes – FEPA 1985 has served its purpose well.

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?

Q40 – Key considerations should include –
Length of time that the activity has been carried out;
During the period of this activity have there been any incidents arising from the activity which would give rise to it's being considered as a licensable activity?
Have the organisations that undertake the exempted activities put in place voluntary codes and registers of their activities?
Can the organisation whose activity is being exempted demonstrate that they have taken a self-regulatory approach to managing their environmental footprint?

Regarding the point 'Should factors be treated equally?' If the factors being cited in support of the exemption contribute to a better understanding of the marine environment or contribute to the sustainable development of the marine environment then these should be given slightly more weighting in support of the exemption.

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?

Q41 – Yes, in particular we would strongly support the maintenance of the exemption listed at No24 in the table (Deposits in the Sea (Exemptions) Order 1985 3.23)

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?

Q42 – No, we agree with the list provided.

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?

Q43 – No

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

Q44 - Within the marine scientific community there are many instances of the deployment of autonomous systems to measure a wide range of parameters. These include moored instruments, autonomous underwater vehicles, floats, drifters and even small electronic tags attached to marine creatures. The present exemption shown at No 24 (Deposits in the Sea (Exemptions) Order

1985 3.23) should be modified to **include the deployment of systems both powered and unpowered (otherwise than for the purpose of disposal) in connection with scientific survey.**

Q45 Preamble - NERC-funded marine scientific research (MSR) is an activity that undergoes a rigorous process of peer review, planning and implementation that that can take up to 5 years from idea to experiment deployment. Not all NERC funded MSR occurs within the waters under UK jurisdiction, in fact a significant proportion of research is carried out on the high seas and in waters under the jurisdiction of other Coastal States. In the case of NERC-funded MSR on the high Seas undertaken from UK registered ships all relevant international legislation is applied, e.g. the UN Convention on the Law of Sea (UNCLOS) part XII (Protection of the Marine Environment) and XIII (MSR). When undertaking MSR in waters under the jurisdiction of other Coastal States a formal application to undertake MSR is made as per part XIII of the Law of the Sea, in many cases the granting of an MSR permit by a Coastal State is granted with associated conditions requiring the activity to have a minimal impact on the marine environment. An example of this is the Irish MSR permitting process, which requires specific risk assessments to be done in relation to activities that may be undertaken in Irish designated marine protected areas,

Currently the public can access the NERC website (http://www.noc.soton.ac.uk/nmf/mfp/mfp.php) which enables anybody to have sight of proposed activities in great detail. We would consider this to be a form of voluntary register of MSR activities undertaken by NERC funded researchers. It should be noted that no one MSR activity is like another. Therefore a general approach to the exemption would be best where a self-regulatory approach is adopted and the detail provided via a suitable Planning website. Where new and novel MSR experiments are planned then currently NERC consults with the appropriate government departments such as MFA to ascertain if there is likely to be an issue with this form of MSR. NERC plan to continue this voluntary consultation under the new legislation even if the current FEPA exemption remains in place.

In a nutshell – even though we want the exemption to continue, NERC wants to act in a transparent and clear manner in UK and other waters. This policy will not be eroded should the exemption remain in place.

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)/time scales/size of operation etc)

Q45A - We would ask to maintain the exemption of licensing for scientific monitoring and investigation of the seafloor, over-lying water column, immediate subsurface of the seabed and low-impact research related to the life-forms therein. Operations would normally be of short duration (minutes, hours or days) and limited to a small area and undertaken by divers (in the case of some shallow water locations) or in most instances by equipment deployed or recovered from ships or small boats, and in some cases by

autonomous sampling systems. Longer-term time series may be obtained by moored instruments, which are designed to have minimal impact on the surrounding ecosystem.

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)

Q45B – We agree that registration of activities is necessary to maintain public confidence in the activities of the marine scientific research community. As per preamble above, we suggest that a voluntary system of self-regulation has worked well up to now and can continue to do so in the future. Scientific activities should be visible on a public website so that interested parties are aware of the research that it being undertaken (within the limits of protection of intellectual property), who the sponsor of the research is, and what the purpose of the research is. In the case of NERC-funded activities there is an existing website, perhaps the MMO should operate a portal through which all relevant marine scientific research being undertaken in licensable waters can be listed or linked.

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

Q45C – There is a risk that non-scientific users could claim science exemption to conceal a commercial project. The strength is that undue delay and cost can be avoided for researchers, and that valuable data can be obtained that will be used to inform the marine licensing regime for other users.

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)

Q45D – Marine scientific research provides the underpinning evidence base upon which future licensing decisions can be based. Research is only approved after peer review and, as previously stated, is the result of a lengthy process under which the harm that could be caused to the marine environment is carefully assessed. We believe that making marine scientific research exempt (though still registered in some way) is for the wider benefit of the wider community and the natural environment.

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)

Q45E – The risk would be if a particular experiment or activity turned out to have a deleterious impact on the marine environment. However we believe that sufficient safeguards are in place via the peer-review process and pre-experiment review that such situations would be rare. Another risk could be

where organisations claimed a scientific exemption to undertake activities that were not in fact scientific research, such as gathering valuable marine specimens or raiding archaeological sites with a commercial motivation.

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)

Q45F – Cumulative impact is a possible risk if so many researchers are visiting a particular area that harm is being done. This could occur in connection with teaching activities or voluntary groups; it is less likely in waters outside of the reach of sports divers or the light equipment typically carried by University-operated small vessels. Registering activities with the MMO should enable multiple visits to a protected site to be monitored.

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

Q46 – Yes, unless new evidence has become available that indicates that harm is being done to an especially valuable location.

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)

Q47 – No, provided it is a long established maintenance dredging operation and not a new location. Exceptions would have to be made where there is evidence of contaminants such as radioactive particles or heavy metals before sediments can be deposited elsewhere.

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?

Q48 – Yes the definitions do accurately cover maintenance dredging and yes a combination would make sense.

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?

Q49 – We would feel comfortable that the existing exemption under FEPA should be on the register with the addition of autonomous systems as previously described under Q45

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?

Q50 – Yes by placing on the register.

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