

Marine licensing - recovery policy

Summary of responses

August 2015

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Introduction

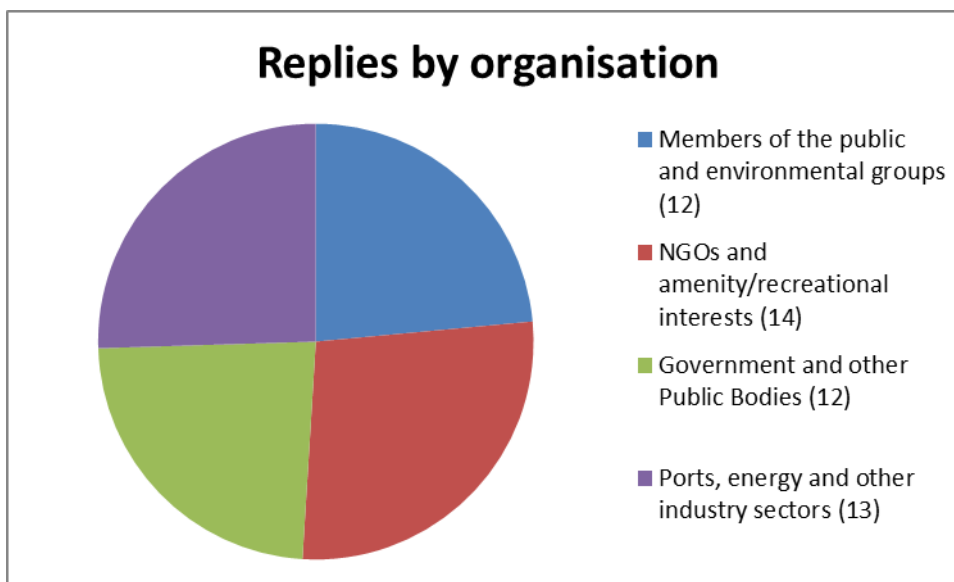
1. Defra launched a six week consultation on 14 January 2015, seeking views from stakeholders on a proposal to introduce a policy change to the determination of certain marine licences regulated under Part 4 of the Marine and Coastal Access Act 2009 (the Act). The marine licensing system is operated by the Marine Management Organisation (MMO) on behalf of the Secretary of State.
2. The proposal is to improve democratic accountability on the most complex licensing determinations by strengthening the ability of locally accountable bodies (Local Planning Authorities (LPAs) and Inshore Fisheries and Conservation Authorities (IFCAs) to seek an independent public inquiry into certain marine licensing cases, with the final decision taken by Ministers directly accountable to Parliament. This can be achieved through a change in the way that Ministers delegate marine licensing functions to the MMO. Rather than the current general delegation of functions, Ministers would make an exception for marine licence determinations that met certain published criteria. These criteria would be designed to ensure that Ministers recovered only the most significant cases that would benefit from an examination in an inquiry. An amendment to the Marine Licensing (Delegation of Functions) Order 2011 is required to implement this change.
3. The policy proposal applies to English waters and the offshore areas of Wales and Northern Ireland where the Secretary of State is the licensing authority. The Secretary of State delegates most licensing functions under Part 4 of the Act to the MMO. The Department of Energy and Climate Change (DECC) issues marine licences for certain oil and gas-related activities and has been consulted on this proposal. The devolved administrations for Wales, Northern Ireland and Scotland are also licensing authorities under Part 4 of the Act and have been consulted.
4. Defra would like to thank all stakeholders (including those who attended the two workshops held during the consultation period) for responding to this consultation. This document summarises the comments received and provides the government's response to the issues raised.

Overview of responses

5. 51 consultation responses were received from a range of interested parties including governmental and other public bodies, conservation bodies and environmental groups, and industries using the existing licensing system. Figure 1 provides a summary breakdown; the majority of those who responded are listed at Annex A (with the exception of one respondent who did not wish their details to be made publicly available.)

6. The main points arising from the consultation were:
- support for increased democratic accountability- members of the public and environmental groups also wanted to extend the right to have cases referred to bodies other than LPAs and IFCAs;
 - proposals to widen the criteria to include, amongst other things, all licensable activities within Marine Conservation Zones (MCZs) and other protected areas;
 - questions, mainly from industry representatives and some public bodies about the need for change. They also raised concerns about assumptions related to timings of the referral and recovery stages, and potential costs;
 - requests for additional guidance on implementation of the policy including how the criteria would be applied and details of the kinds of activity within 'Band 3' of the [Marine Licensing \(Application Fees\) Regulations 2014 \(As amended\)](#);
 - requests for additional guidance and information on the referral and recovery parts of the process (including the inquiry).

Figure 1: Breakdown of responses to consultation



Government's view

7. The government believes this relatively modest policy change will inject much needed democratic accountability into the marine licensing process while retaining the many benefits of the Act. The new approach will enable local communities to have a stronger say in the decision-making process, particularly where the potential economic, social or environmental effects of a development are significant.

8. The Minister will confirm the highly selective nature of the policy through a ministerial statement to Parliament (paragraph 24).

9. The government will:

- enshrine the criteria in legislation (paragraph 23),
- produce guidance to the MMO on implementation of the policy (paragraphs 27-28),
- obtain guidance from the Planning Inspectorate on the inquiry process (paragraph 29).
- update the impact assessment which will be published on .GOV.UK.
- review the impact of this policy 1 year after implementation in order to assess the costs and benefits. This review will be conducted in October 2016.

Summary of responses to the consultation questions

Marine Licensing: recovery of cases

A. Do you have any comments on the government's proposal to enable the Secretary of State to recover certain licence decisions for her own determination?

10. The responses from members of the public (including an Avaaz petition of 107 signatures), some non-government organisations (NGOs) and certain public bodies supported the proposal. They agreed there was scope to strengthen the ability of locally accountable bodies (i.e. LPAs and IFCA's) within the licencing process to ensure that certain marine licencing cases which have potentially significant effects are appropriately scrutinised through an independent inquiry.

11. Some respondents, including representatives of the ports and energy industries, did not believe there was a democratic deficit in the process which would justify this policy change. A few comments asked for clarity on why the proposal was being introduced now rather than after all marine plans have been implemented. Some comments also raised concerns about the potential for increased costs and delays for developers at the referral and recovery stages of the process.

12. Some comments asked the government to consider limiting the new referral provision to applications submitted after the policy comes into effect. Questions were also raised about the implications for marine licence applications on projects that spanned Devolved Administrations boundaries and whether consequential time delays would result from this policy.

13. These respondents and others also asked for further guidance on how the policy would be implemented.

Response

14. A large number of replies recognised the need to improve the ability of local communities to be involved in the marine licensing process, particularly where the case is complex and could have potentially significant effects.

15. The policy will provide a simple mechanism to facilitate local community involvement whilst remaining highly selective. The Secretary of State, or Ministers acting on her behalf, will take the decision on whether or not to recover the application and cause an inquiry to be held using the published criteria. This process should ensure that only a very small number of cases reach the inquiry stage. The inquiry will ensure that interested parties can

submit further evidence and cross-question in an open forum led by an Inspector. The Inspector's report will provide a sound and independent basis for the Secretary of State's decision.

16. Once in place marine plans will act as a key tool in guiding future activity in the marine environment and, as a result of the inclusive process through which they are developed, should help reduce conflict at the permitting stage. However, it is impossible for plans to anticipate all future demands or eliminate the potential for new proposals to give rise to potentially significant effects. The recovery policy will provide a valuable complement to the plan-making process.

17. It is intended that this policy will apply from 1 October 2015 to fit with the government's common commencement date for legislation. It will not apply retrospectively to cases accepted by the MMO before that date.

B. Do you have any comments on the proposed criteria for recovery (see Annex B)?

18. The majority of respondents who supported the proposals (including one petition that contained 107 signatures) wanted to see the proposal widened:

- to allow any individual to make a representation to the Minister and for the criteria to be extended to apply to activities within MCZs and other protected areas.
- to extend the remit of the proposal from 6nm to 12nm or beyond,
- to require all licences for disposal of dredged material at sea to be recovered,
- to remove 'band 3' from the criteria so that applications in other fee bands, which could include fast track cases, would be caught by the policy,
- to consider the impacts of the proposal on tourism, eg. beaches and nationally recognised dive sites.

19. Some industry representatives asked for the criteria to be narrowed by:

- the removal of maintenance dredging from 'band 3'.
- the removal of the second set of criteria - which were considered to be too broad and unclear.

20. There were several comments about the potential difficulties involved with the role that LPAs and IFCA's will have to play and the need for ensuring consistent application of the policy throughout the organisations.

21. There were also requests, particularly from industry and some public bodies, for guidance on how the policy would be implemented.

Response

22. The government notes that there were comments both in favour of widening and narrowing the scope of the criteria for recovery. However, it considers that the proposed criteria strike a reasonable balance between enabling affected communities – through their chosen representatives – to focus on the most significant cases while maximising certainty for developers wherever possible. It should also be noted that the MMO can choose to hold an inquiry into a case in accordance with Section 70 of the Act; this could potentially include cases outside the 6nm limit.

23. The revised Marine Licensing (Delegation of Functions) (Amendment) Order 2015 will include the criteria for recovery on the face of the legislation. The draft criteria (see Annex B) are designed to reduce uncertainty and ensure consistency of application by LPAs and IFCAs. For example, the 6nm limit was chosen because it aligns with the jurisdiction of IFCAs who together with LPAs are responsible for delivery of various statutory functions and duties in the coastal and shoreline areas. The reference to band 3 screens out smaller or less complex projects that are unlikely to give rise to significant effects.

24. The Minister's statement to Parliament (referred to in paragraph 8) will confirm that the policy to recover would be highly selective, i.e. in effect only recovering decisions which genuinely merit going to inquiry.

25. In the light of the comments received about the criteria, the word "novel" has been removed in favour of putting the emphasis on the sufficiency of policy guidance to support decision-making by the MMO. An example where this might occur is an application for a marine licence to use a new ocean fertilisation technique anywhere at sea, including areas outside UK waters.

26. Cases that meet the first set of criteria would have to be raised by local authorities or IFCAs affected by the proposal. It is recognised that in most cases any concerns are adequately identified and addressed during the pre-application phase. (Although not part of the criteria, it is worth noting that this process can be facilitated by the adoption of the Coastal Concordat principles (introduced in November 2013) which help LPAs, other regulators (eg. MMO, EA and NE) and developers to work together.)

27. In response to the requests for guidance, Defra will prepare guidance to the MMO on how to apply the policy, providing indicative time targets for each stage and further advice on interpretation of the criteria. Such guidance is likely also to be useful to developers and other stakeholders.

28. The guidance to MMO will include advice on circumstances for recovery of maintenance dredging cases. Defra does not envisage routine maintenance dredging

cases, where the impacts are well understood and effectively managed, will need to be recovered, since there would be no benefit from an inquiry.

29. The Planning Inspectorate will prepare guidance on the inquiry process. Use of inquiries will ensure that the process meets local concerns about transparency and accountability. It will also ensure it is independent and evidence-based.

C. Do you have any comments on the estimates of costs, benefits alongside treated data and assumptions; and particularly information on type, size, and value of projects potentially affected by this proposal?

30. The consultation document referred to anticipated costs arising from familiarisation with the policy change, the referral and recovery stages and the introduction of any new appeal process, such as use of a First Tier Tribunal. 29 responses made reference to costs and benefits of the proposal.

31. Concerns were expressed about possible increased costs, such as extra time required for referral, recovery and appeal processes and uncertainties associated with variability of size and value of projects. However no robust evidence was provided to suggest that any added costs to business would exceed £1m per year. A final impact assessment will be produced based on best available evidence which will take into account the information provided.

Familiarisation costs:

32. During the workshops, some stakeholders commented that the wage rate of £15 per hour familiarisation with the policy was too low. They suggested the costs needed to take account of people at different grades/levels within an organisation wanting to familiarise themselves with the policy in the event that they were asked to submit a representation or had to deal with a case. One respondent felt that 2 hours was a better estimate of the length of time it would take to become familiar with a policy.

Response

33. The wage rate has been adjusted to take better account of the average wage cost of those people needing to familiarise themselves with this policy. This change will be reflected in the final Impact Assessment.

Referral and recovery costs:

34. The consultation document stated that additional costs to business could arise from the referral and recovery stages but these costs were unknown and unquantifiable. The consultation responses recognise the difficulty in quantifying these costs but very little evidence was provided. One response said that a key factor will be to ensure that any

costs to industry associated with inquiries remain proportionate to the scale of the project in question.

35. Some responses detailed concerns about delays by the MMO in referring cases. They noted the extra work and consequential cost to the MMO and subsequently Defra in dealing with the referral stage. Some comments also raised concerns about delays arising from the Minister considering whether or not to recover the application.

36. A few industry representatives raised concerns about the potential for delays to have direct cost implications as well as miss important seasonal or weather windows in respect of dredging projects. One of those respondents estimated that a delay in reaching decisions could ultimately cost around £100,000 a day depending on the size of a port and its revenue. It also suggested there could be potential wider impacts on other industries. In both cases no supporting evidence was provided.

37. Many comments from industry related to the time and cost implications of the inquiry. Some responses expressed concerns that costs in the recovery stage could arise from delays waiting for an Inspector to request evidence, arrange the inquiry, call witnesses and assess the evidence. Some organisations stated that costs associated with the employment of consultants, lawyers, accountants and attendance of representatives at an inquiry, were likely to be much greater than anticipated. To date, two inquiries have been undertaken on marine licensing related to Harbour Orders. The consultation document assumed that each inquiry resulted in costs to the MMO of around £30,000. No information about the costs to other parties such as applicants or their representatives is available.

38. Two responses queried who would fund the other public bodies associated with any inquiries, such as the LPAs, IFCA, regulators, stakeholders etc and asked for further clarity on these points.

Response

39. As stated previously, this policy is intended to be highly selective. Businesses that enter the marine licensing process are aware that it can be a lengthy process. Given that the power to hold inquiries is a feature of the existing system (see section 70 of the Act) and the proposed criteria for recovery are essentially no different from existing Defra guidance on inquiries businesses would already be likely to make appropriate contingency plans for inquiries including the potential for extra costs and delays. Fundamentally, the new feature of the policy is that the final decision on recovered cases will rest with Ministers.

40. Costs associated with referral and recovery could vary with each case depending on the complexity of the issues. This can only be properly tested after the implementation of the new proposal.

41. We have taken on board relevant evidence in the final impact assessment but do not expect the additional annual cost to business from the policy change to be more than £1m (even though we cannot totally exclude the possibility of higher costs).'

42. Defra has worked with the Planning Inspectorate to provide an indicative timeframe for cases. This will be broadly in line with that for the terrestrial planning regime and is likely to be in the region of 30-40 weeks from the time of the decision to recover to marine licence determination. While it is possible to give indicative targets, the time taken for an individual case will ultimately be dependent on its complexity and the availability of witnesses and evidence and will be considered for the purpose of the final impact assessment. However, it is the intention for any inquiry to focus only on key aspects of the application where there are areas of difference. Information about timescales will be placed on .GOV.UK.

43. Defra intends to meet the cost of the inquiry, the Inspector's time and any costs arising from the MMO in delivering the referral and recovery parts of this proposal. Any costs to other public bodies relating to the referral would need to be met within their existing funding. Any other costs, such as employment of a programme manager, other consultants and/or attendance at the inquiry would be expected to be borne by the applicant.

Appeals:

44. 5 responses raised issues about the appeals mechanism. One response supported the adoption of a similar appeal mechanism to the terrestrial planning appeals process. Other comments included the suggestion that any individual should be able to appeal against an MMO decision not to refer a case and a request for more clarity on the timing of the appeals process.

Response

45. Defra intends to seek clearances through the Ministry of Justice Gateway to use a First Tier Tribunal (FTT). The costs to Defra of preparing a case through an FTT are the same as the costs of preparing an appeal managed by PINS (ie. £30,000). However, there are minor additional costs of the time of a judge and two lay members for the FTT, reflected in the impact assessment. In the longer term, the government intends to amend primary legislation to follow a similar approach to the appeal arrangements under the terrestrial planning regime. Information will be placed on the .GOV.UK website about timings of the appeals process.

The way forward

46. The government is committed to implementing this modest policy change which it believes will increase local democratic accountability on the most complex marine licensing determinations.

47. It will aim to introduce legislation to give effect to this change on 1 October 2015. The legislation will include a transitional provision which will mean that the policy will apply only to applications accepted by the MMO on and after 1 October 2015. The impact of the policy will be reviewed in October 2016.

Information will be placed on the .GOV.UK website.

Annex A: List of respondents

13 Members of the public

Marinet

Barry & Vale Friends of the Earth

The Wildlife Trust

English Heritage

Sussex Wildlife Trust

Trinity House

The Crown Estate

The Law Society

National Oceanography Centre

Joint Nature Conservation Committee

Port of Fowey Race Organising Committee

Royal Fowey Yacht Club

Royal Yachting Association

Member of Parliament for South East Cornwall

Welsh Government

Northumberland IFCA

Eastern IFCA

Southern IFCA.

Tamar Estuaries Consultative Forum

BP Solent Forum Hamble

Local Government Association Coastal Special Interest Group

Adur and Worthing Councils, Coastal Group for England and Wales

Falmouth Harbour Commissioners

Gloucestershire County Council

Port of London Authority

British Marine Aggregate Producers Association

The National Federation of Fishermen's Organisations

Managing director of Scott Trawlers Plymouth

Associated British Ports

United Kingdom Major Ports Group (UKMPG)

British Ports Association

Subsea cables UK

Seabed User and Developer Group

Filippo Locatelli, Renewable UK

Scottish Power Renewables

Tidal Lagoon Power

DONG Energy

EDF Energy

Annex B: Criteria for the recovery of marine licensing determinations by the Secretary of State

Where an application has been referred to the Secretary of State, the Secretary of State must decide whether the specified criteria are met, and if so whether that application should be determined by the Secretary of State:

- 1) the application is one where the MMO has received a formal representation from an LPA or IFCA affected by the proposal seeking determination by the Secretary of State and:
 - (i) the activity falls into band 3 of the Marine Licensing (Application Fees) Regulations 2014 (as amended) – i.e. the more complex cases such as construction projects over £1m or projects requiring an environmental impact assessment or an appropriate assessment under the Habitats Regulations, or dredge disposal operations;
 - (ii) would take place wholly or partly within that part of the UK marine licensing area adjacent to England and extending to 6 nautical miles from baseline; and
 - (iii) is capable of having a significant effect and is appropriate for examination in an inquiry; or
- (2) that the activity to which the application relates raises issues which-
 - (i) are of national significance, not addressed, or for this purpose adequately addressed, by the appropriate marine policy documents as defined in section 59 of the Marine and Coastal Access Act 2009; and
 - (ii) are appropriate for examination in an inquiry.