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3 December 2010

CRES1031
Central Scotland Scanning Unit
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Dear Sirs

Marine Licensing for Scotland Consultation

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to Government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by the Scots Law Working Party, which I convene.

UKELA's current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level.
- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved.

UKELA works on a UK basis, and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

The UKELA Scots Law Working Party, which I co-convene, focuses on environmental law in Scotland. The Working Party has the following comments on the questions raised in the consultation. Where there was no legal aspect to the question, we have not commented.

General

The proposals are welcomed, especially if they can reduce uncertainty and delay, which will be critical in assisting Scotland in developing its off-shore and marine renewable energy capability. It is hoped that the proposed regulations will result in further efficiency rather than in the continuation of the status quo.

The consultation document is unclear on how long each licence will endure. Whilst it is assumed that a licence will be issued prior to the commencement of a regulated activity, and will be valid for the lifetime of the consented works, this is not clear, and it would be helpful if clarification could be given.

From our perspective, and to create legal certainty, we also consider that time limits should be provided, where applicable, especially when dealing with appeals to the Sheriff Court.

Introduction

- Q.1** It would appear that the costs of the licences are based on the scale of activity rather than on the scale of the impact to the environment. This is inconsistent with the polluter pays “principle”, although it is acknowledged that it may be difficult to reconcile how an anticipated effect on the environment can be quantified in monetary terms.

Application Process for Marine Licensing

Unlike applications made under the Town and Country Planning Acts there is no time limit for a consideration on an application. Whilst we acknowledge that different types of projects will require a different response time a long-stop date for a deemed refusal should be given.

We also note that there is no question regarding the section dealing with “deploy and monitor” policy for marine renewables. A question was raised at the recent Marine Energy Conference in Inverness when it was confirmed that a risk based approach would be adopted. Of concern would be the uncertainty created whereby the apparatus placed in the water may have to be removed if it is shown to have an adverse impact on the environment. The consultation document does not say if there is an appeal process against this decision. Clearer guidance on the Deploy and Monitor Policy is requested.

- Q.2** The definitions of the projects subject to pre-consultation application process appear too vague. There is no legal certainty as to whether a proposed project would fall within the application process or not.
- Q.3** No comment. There is no pre-eminent marine charity in Scotland.
- Q.4** We do not foresee difficulties with the proposed approach.

Fee Structure

- Q.5** Whilst no comments on the categories of these that are appropriate, we would question if there is an incentive to run the licensing scheme efficiently. We would ask if there would be a review to lower costs if it was seen that this could be achieved, through, for example, economies of scale or through familiarity with applications.

We would also ask that fees are not raised on the annual basis, but raised on a three-yearly or five-yearly basis, with advance notice given on the new levels of fees, so as to create certainty.

Statutory and Non-Statutory Consultees for Marine Licensing Applications

- Q.6** We have no comments to make on the statutory consultees. However, we would wish to see clarity on the threshold of activities which would be referred to the consultee.
- Q.7** No comment.

Appeals against Licensing Decisions

More information is required on appeals against licensing decisions. For example who needs to be notified and what documents require to be lodged.

We would also ask whether a Sheriff has jurisdiction. Will the sheriff court closest geographically to the project be the correct forum to hear the appeal, or should appeals of this nature be heard in one of the larger sheriff courts, such as Edinburgh or Glasgow?

UKELA would be in favour of a separate environmental tribunal, rather than rely on a local sheriff court which may not have experience in dealing with such matters.

From the consultation there appear to be no time limits on appeals. There should be a process for appeals, such as notification of interested parties. In that case should all statutory and non-statutory consultees involved in the application be notified?

Whilst we assume that no new evidence can be led during the appeal, we would question if there would be an opportunity for applicants to vary their application during the appeal process.

Public Register

Q.8 The consultation document does not disclose if the register will be available on-line, as in the case with other forms of environmental licences.

Exemptions

Q.9 No comment.

Q.10 We would suggest that biological threats should also be included where an exemption for an emergency action is required. For example the appearance of a dead swan, suspected of carrying the HSN1 virus at Cellardyke, Fife, may have required emergency action to have been carried out to the beach and foreshore.

Q.11 No comment

Registration of Activities below specified threshold of environmental impact

Q.12 We consider that this question is vague. We agree that some form of public consultation is required. We assume that the dates of the forums would be set in 2011 not 2010.

Appeals against Statutory Notices

Q.13 We would draw your attention to our comments in relation to Question 7, dealing with appeals against licensing decisions.

UKELA would prefer to see a dedicated environmental tribunal to deal with appeals or against statutory notices, and for all environmental matters.

Q.14 We repeat our comments from Q.7.

Q.15 We agree with the requirements as detailed.

Equality Assessment

Q.16 No comment.

Q.17 No comment.

Please do not hesitate to contact me if you wish to discuss any of the above or if you would like any further information about UKELA and the Scots Law Working Party.

Yours faithfully

Richard Leslie
Co-Convener – UKELA Scots Law Working Party