



Marine Works Licensing: A New Regime Explained

BRIEFING

Introduction

On 6th April 2011 a new licensing regime came into force in England to regulate sustainable development in the marine environment. It aims to minimise adverse impacts on the environment, human health and legitimate users of the sea. It replaces the regimes for approving such development under the Coast Protection Act 1949 and the Food and Environment Protection Act 1985. The framework for the new regime derives from the Marine and Coastal Access Act 2009 (2009 Act) and the detail is set out in a number of statutory instruments. This paper outlines the process a developer will need to follow in order to make a successful application for a marine works licence. It will cover the pre-application process through to appeal.

What activities require a licence?

The 2009 Act specifies a wide range of activities for which a licence is required, including the construction, alteration or improvement of works in English territorial waters, dredging and removing substances or objects from the seabed.

There is a caveat to the need for a licence for disposal of spoil. The 2009 Act provides that a licence is not always required for spoil disposal, which is carried out by or on behalf of a harbour authority, provided it is authorised by a local Act or

by a harbour revision or harbour empowerment order. However, certain conditions have to be met in order for a harbour authority to enjoy the benefit of the exemption. The conditions are that (i) the sediments are not hazardous, (ii) the purpose of the deposit was for land reclamation, managing waters and waterways, preventing floods or mitigating floods and droughts, and (iii) the sediment will be relocated in other surface waters. In practice this means that any disposal at sea of dredged material will normally require a licence.

It is also worth observing that because dredging was not a licensable activity before the establishment of the new regime, transitional arrangements apply so that most dredging activity will not need a licence until April 2012. Dredging (as opposed to spoil removal) by harbour authorities under statutory powers remains exempt under the new regime.

The 2009 Act envisages that certain activities which would otherwise require a licence should be exempt from the regime by virtue of an order-making power. An order has been made listing a large number of modest activities which accordingly do not require a licence. These include coastal protection and flood defence work carried out by or on behalf of the Environment Agency and maintenance of harbour works.

Very major marine operations also fall outside the



scope of the new regime, but are subject to an alternative process. So, authorisation for offshore wind farms with a capacity of more than 100 megawatts and for harbour facilities above the thresholds specified in the Planning Act 2008 go to the Infrastructure Planning Commission for determination.

Pre application matters

The Marine Management Organisation (MMO), which was established in April 2010, is responsible for processing and determining applications (with the Centre for Environment, Fisheries and Aquaculture Science (Cefas) providing marine science expertise). The MMO's involvement with a project is likely to pre-date the submission of an application in many cases. The MMO's Marine Licensing Guidance No.1 particularly recommends engagement where environmental issues are relevant.

There are three circumstances in which pre-application engagement on environmental matters might occur:

- **Screening phase:** this is where an applicant seeks a ruling on whether the submission of an environmental statement is required – as part of this process the MMO will invite views from consultees on whether they think the project is in or has the potential to affect a designated site under the Habitats Directive.
- **Scoping opinion:** an applicant may request the MMO to provide it with its view on the content and extent of the issues which should

be covered in the environmental statement.

- **Environmental Statement review request:** an applicant may ask the MMO to review the environmental statement before submission. This is essentially a quality control check which may uncover areas of inadequacy ahead of submission.

In each case the applicant will need to pay the MMO a fee.

Making the application

Applications will vary in scale and content, depending on their purpose. So, whilst an offshore wind farm developer will need an electricity operational consent for a generating station, very simple applications will not even require environmental assessment. In the case of a developer requiring consent for the construction of a generating station, the applicant must make a separate application under the Electricity Act 1989 (and for which an additional fee is payable). The two applications will, however, be considered together.

The fees payable on submission of an application range from £158 for the installation of a buoy to £7,200 for such projects as renewable energy schemes with a generating capacity of less than 1 megawatt. Fees for bespoke licence applications (e.g. wind farms) will be chargeable by reference to hourly rates. The MMO will charge £80 per hour and Cefas will charge £86 per hour for its work in reviewing the environmental impact of the proposal.

Whatever the nature of the application, it will need to be publicised by the applicant on two separate occasions. The MMO will also undertake its own consultation with such bodies as local authorities, the Environment Agency and the Crown Estate.

Considering an application

Process

The process is not set out in any great detail in the 2009 Act. It does not even prescribe timescales for the consideration of applications (although the MMO has informally agreed some with DEFRA - the most straightforward applications are envisaged to take 6 weeks from receipt to decision). One key factor in determining the length of time an application will take is whether an inquiry is held. The 2009 Act does not require the MMO to call an inquiry – it will decide on a case-by-case basis, taking into account such factors as complexity, opposition and the extent to which the proposal is in accordance with the marine planning framework.

Factors in reaching a decision

The MMO will first need to have regard to the planning framework for the sea. This framework will have two main features. There is first the Government's marine policy statement establishing objectives and priorities for managing the sea in a sustainable fashion. The marine policy statement was published in March 2011 and covers a wide range of topics at a strategic level. Observing that the marine environment will make an "increasingly major contribution" to UK energy

supplies, the statement says that "contributing to securing the UK's energy objectives, while protecting the environment, will be a priority for marine planning". This is clearly supportive of the renewables sector.

An array of marine plans will constitute the second element in the framework. These plans are the equivalent of territorial development plans and will set out how the marine policy statement will be implemented in specific areas, providing detailed policy and guidance. The MMO is responsible for the marine plans and it has announced that the East Inshore and East Offshore areas have been the first to be selected to embark on the process which will result in marine plans, which are expected to be adopted in 2013. Licensing decisions must be made in accordance with the marine policy documents (i.e. the marine policy statement and the marine plans) unless there are clear and convincing arguments to go against the content of such documents. If the MMO does not follow the marine policy documents, it must explain its reasons.

The MMO is also under a number of statutory obligations to which it must pay heed in reaching a decision. Accordingly, it must have regard to the need to protect the environment, human health and to prevent interference with legitimate uses of the sea (ranging from kite surfers to ornithologists). Where an application involves construction work, the MMO must consider the effects of any intended use of the works. It must also give sufficient attention to any objections raised and if the MMO decides that an objection is valid, it must either impose a condition to require



the applicant to modify the scheme so that the objection no longer applies or it must reject the application. If the project engages Environmental Impact Assessment (EIA), the MMO must give EIA consent before making a determination on the licence.

The decision

The MMO's decision will be communicated to the applicant and if the application is agreed to, the applicant will be required to accept any licence terms and conditions within 28 days. Details of the licence will then be included in the MMO's public register. An aggrieved applicant may give notice of an appeal to the Planning Inspectorate against the MMO's decision (including any conditions imposed) within 6 months of its announcement.

Conclusion

As with any new process, only time will tell how effective it proves to be. Given that the marine planning framework is not yet in place, it will be quite a while before conclusions can be reached. The MMO survived the bonfire of the quangos, but ministers can be expected to be reviewing its performance closely to ensure it is fit for its purpose.

For further information please contact:

Richard Bull

DT: 0207 593 5074

E: rbull@wslaw.co.uk