

EXPLANATORY MEMORANDUM TO
THE MARINE LICENSING (DELEGATION OF FUNCTIONS) (AMENDMENT)
ORDER 2015

2015 No. 1674

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

- 2. Purpose of the instrument**

- 2.1 This Order amends the Marine Licensing (Delegation of Functions) Order 2011 (the Delegation Order). It allows the Secretary of State, on a reference from the Marine Management Organisation (“MMO”)¹ in certain circumstances, to determine a marine licence application (as the appropriate licensing authority), notwithstanding the general delegation of the function of determining such applications to the MMO.

- 3. Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

- 4. Legislative Context**

- 4.1 Part 4 of the Marine and Coastal Access Act 2009 (the 2009 Act) makes provision for the marine licensing system which regulates activities taking place at sea and for enforcement of those regulatory requirements. The marine licensing system came into effect in April 2011.

- 4.2 Under the 2009 Act, the “appropriate licensing authority”, which in English waters (and the areas offshore from Wales and Northern Ireland and for certain reserved matters) is the Secretary of State, exercises certain marine licensing functions. These include powers to require applications for marine licences; to cause inquiries to be held; to determine the licences; to vary, suspend, revoke or transfer those licences; and to take enforcement action against non-compliance. However, most of the Secretary of State’s licensing and licensing enforcement functions are delegated² to the MMO.

¹ Marine Management Organisation was established by under the Marine and Coastal Access Act 2009, Part 1, Chapter 1, Section 1

² Marine Licensing (Delegation of Functions) Order 2011, S.I. 2011/627

- 4.3 This Order amends the Delegation Order so that in certain circumstances the Secretary of State may exercise specified functions as the appropriate licensing authority and determine an application.

5. Territorial Extent and Application

- 5.1 This Order extends to England and Wales, Scotland and Northern Ireland, and applies in relation to those areas and activities for which the Secretary of State is the appropriate licensing authority under the Act.
- 5.2 For the purposes of marine licensing the Secretary of State is the appropriate licensing authority for England's inshore waters (those within the seaward limits of the territorial waters adjacent to England), and the offshore waters of England, Wales and Northern Ireland (those within British fishery limits beyond the seaward limits of the territorial waters adjacent to Wales and Northern Ireland, respectively, and any other waters beyond the seaward limits of the UK's territorial waters but within the limits of the UK sector of the continental shelf, other than waters within the Scottish offshore region).
- 5.3 For this purpose the "Scottish offshore region" is (a) those waters adjacent to Scotland within British fishery limits, other than the territorial sea; and (b) those waters outside British fishery limits but within the limits of the UK sector of the continental shelf, which are nearer to any point on the baselines from which the breadth of the territorial sea adjacent to Scotland is measured than to any point on the baselines in any other part of the UK.
- 5.4 The Secretary of State also remains the appropriate licensing authority for certain reserved matters specified in sections 113(2), (4) and (6) of the Act in (a) the Welsh inshore region and Northern Ireland inshore region (those waters within the seaward limits of the territorial waters adjacent to Wales and Northern Ireland, respectively), and (b) the Scottish offshore region (as defined above).

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 Marine licensing aims to facilitate the sustainable use of the marine environment so that economically beneficial activities within the marine environment such as construction, deposits (e.g. of sediment), removals (e.g. of marine aggregates), and dredging can be permitted whilst minimising negative environmental effects and avoiding interference with navigation.

- 7.2 The fee structure for marine licence applications is set out in the Marine Licensing (Application Fees) Regulations 2014 (as amended) ('fee regulations'). There are three bands of chargeable activity, with the larger or more complex projects falling within band 3. Band 3 projects include those requiring environmental impact assessments or appropriate assessments under the Habitats Regulations; projects worth over £1m or dredge and disposal projects.
- 7.3 The MMO is obliged to take licence decisions in accordance with the Marine Policy Statement³ and relevant marine plans, unless relevant considerations indicate otherwise. In deciding an application, the MMO must consider all relevant matters including the need to:
- protect the environment
 - protect human health
 - prevent interference with legitimate uses of the sea.
- 7.4 The MMO also has the option under Section 70 of the 2009 Act to cause an independent inquiry to be held to assist it in making its decision. Inquiries are only likely in exceptional circumstances, but could be appropriate where the effects of a development are potentially significant or where issues are contentious and would benefit from the added scrutiny that an inquiry would bring.
- 7.5 Having assessed an application, the MMO grants the licence, grants the licence subject to conditions or refuses the application. Conditions will often be used to mitigate adverse impacts on the environment, human health and other legitimate uses of the sea. If an application is refused or conditions are applied to the licence, the MMO will set out a record of its reasons. The MMO issues over 500 marine licences every year, of which around one third fall into band 3.
- 7.6 The purpose of this Order is to strengthen democratic accountability on the most complex marine licence applications. The main aim is to strengthen the ability of locally accountable bodies (i.e. LPAs, IFCA's) to seek an independent public inquiry into certain marine licensing cases, with the final decision taken by Ministers directly accountable to Parliament. It will also enable Ministers to determine cases involving novel activities which are of national significance but in relation to which there is no or insufficient planning policy guidance.
- 7.7 The Government's intention is that the policy will be very selective and that only a very small proportion of marine licensing cases will be recovered. The Order includes the criteria according to which the Secretary of State will consider whether to "recover" an application. In this context "recover" means that an application is to be determined by the Secretary of State.

³ <https://www.gov.uk/government/publications/uk-marine-policy-statement>

8. Consultation outcome

8.1 Defra consulted on the marine licensing recovery proposals in January 2015. A total of 51 responses were received from a range of sectors including governmental and other public bodies, conservation bodies and environmental groups, and industries using the existing licensing system. 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 bodies other than LPAs and IFCA's to have cases referred;
- proposals to widen the criteria to include, amongst other things, all licensable activities within Marine Conservation Zones 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 falling within band 3 of the fees regulations;
- requests for additional guidance and information on the referral and recovery parts of the process (including the inquiry).

8.2 The Government published its summary of the consultation responses in August 2015⁴. The Government confirmed that it would proceed with the policy subject to certain modifications and clarifications. These included confirming the highly selective nature of the policy through a ministerial statement to Parliament; enshrining the criteria in legislation; issuing guidance on implementation and the inquiry process; and reviewing the impact of the policy one year after implementation.

The 2015 Order:

8.3 The Order takes effect as follows.

Article 2 amends several articles of the Delegation Order. Article 3 of the original Order is amended to include references to two statutory instruments which have come into effect since 2011 and to insert a new article 5 that provides the substance of the new policy.

Paragraph (1) of article 5 sets out that the exercise of the delegated functions of the MMO will cease where notification has been given to the MMO that the application

⁴ <https://www.gov.uk/government/consultations/marine-licensing-changing-how-some-cases-are-decided>

for a marine licence is to be determined by the Secretary of State. The Secretary of State will only be able to exercise the functions specified in that paragraph e.g. the determination of an application. The MMO will continue to be responsible for the initial handling of an application, for any subsequent variations or transfers, or for any compliance and enforcement action relating to that application.

Paragraph (2) of article 5 requires the MMO to decide whether an application must be referred or whether it is one which it is appropriate to refer the Secretary of State to enable the decision whether to recover the application for determination.

The MMO must refer any applications which are the subject of a representation by an affected LPA or IFCA stating that in their opinion the relevant criteria are met. These criteria are set in paragraph 7(a) and in essence require that an activity must be a band 3 activity as described in the fees regulations; take place wholly or partly within the six nautical mile area; and be capable of having a significant effect, raising issues which are appropriate for examination in an inquiry.

The MMO must also decide whether the application is one which it considers appropriate to refer, based on the second set of criteria in paragraph 7(b), namely that the activity raises issues of national significance that are not addressed, or not adequately addressed, by the appropriate marine policy documents and that it is appropriate for examination in an inquiry.

The Order also includes provision requiring the Secretary of State to notify the MMO, and for the MMO to notify the applicant of their decision on recovery or referral respectively.

- 8.4 The Regulatory Policy Committee confirmed that the measure could be cleared under the fast track clearance route as it is “low cost”. The Equivalent Annual Net Costs to Business figure is awaiting validation.

9. Guidance

- 9.1 The Secretary of State will provide guidance to the MMO on the implementation of the new policy. Information for applicants, LPAs, IFCA's and other interested parties will also be placed on gov.uk. The Planning Inspectorate, who will manage the inquiry process, are developing guidance for applicants and other interested parties.

10. Impact

- 10.1 The new policy is intended to be highly selective so as not to cause disproportionate uncertainty or delay, with inquiries held in circumstances where it would have been reasonable to expect the MMO to follow a similar route. It is therefore expected that the annual costs to business and other users will be less than £1m. The essential new feature of the policy is the ability of Ministers to recover certain cases in certain circumstances. The main identifiable cost to marine users is in familiarising themselves with the policy change. The referral stage (from the MMO to the

Secretary of State) and the recovery stage (where appropriate) are likely to increase the time it takes to make a licence determination and the impact on business costs would vary in relation to type and size of project.

10.2 The proposals do not include specific exemptions for microbusinesses. However, it is unlikely that many microbusinesses would be directly involved in projects that fall within band 3 of the fees regulations or projects that meet the second set of criteria (for “novel” activities).

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation could potentially apply to small business, though for the reasons given above this is relatively unlikely to happen in practice.

12. Monitoring & review

Defra will review the effectiveness of the new policy, consulting with stakeholder groups by October 2016. A review provision within the Order itself requires a review within 5 years of implementation.

13. Contact

Amanda Furlonger at the Department for Environment, Food and Rural Affairs Tel: 020 7238 6830 or email: Amanda.furlonger@defra.gsi.uk can answer any queries regarding the instrument.