

From: Roger May
Marine Scotland Licensing Operations
(Renewables)

19 December 2017

Minister for Business, Innovation and Energy

European Offshore Wind Deployment Centre (“EOWDC”) – Safety Zone Application

Purpose

1. To seek your approval of the Application for Safety Zones for the European Offshore Wind Deployment Centre (“EOWDC”).

Priority

2. Routine, but an early response would be appreciated as construction works have already commenced at the EOWDC site.

Background

3. The European Offshore Wind Deployment Centre (“EOWDC”) was consented by the Scottish Ministers on 26 March 2013. The EOWDC will consist of eleven wind turbine generators (“WTGs”) and two buried or mechanically protected subsea offshore export cables, totalling up to ~8km in length and is located approximately 2km east of Blackdog, Aberdeenshire.
4. On the 22 September 2017 Aberdeen Offshore Wind Farm Limited (“AOWFL”) (“the Applicant”) submitted the Application and supporting safety case for a notice to be issued by the Scottish Ministers under section 95(2) of the Energy Act 2004 declaring that areas specified under the Application be safety zones for the purpose of securing the safety of individuals and vessels in the vicinity of the EOWDC during the period of its construction, operation and maintenance.
5. The consultation period ran from 25 September 2017 to 2 November 2017, exceeding the 28 day minimum consultation period set out in legislation and included publication of Public Notices in local and national newspapers and trade journals. Full details on the consultation process are included at Paragraphs 19-20 of this briefing.
6. Copies of the Application and supporting documentation were also available to download from the EOWDC project website and Marine Scotland’s website.

Ministerial Powers

7. Applications for safety zones for renewable energy installations are permitted under section 95(2) of the Energy Act 2004 (thereafter ‘the 2004 Act’). On 1 April 2017 responsibility for determination of Safety Zone applications within Scottish

waters (or an area of waters in a Scottish part of a Renewable Energy Zone) was transferred from the Department for Business, Energy and Industrial Strategy (“BEIS”) to the Scottish Ministers under section 62 of the Scotland Act 2016. This is the first application for a safety zone within Scottish waters to have been lodged since 1 April 2017.

Consideration of Application

8. [The Application](#), as submitted, includes a supporting safety case, an overview of marine traffic survey data presented in the Environmental Statement in support of the Application, and newer data gathered during 2016. It also includes consideration of the impacts of construction works and the implementation of any safety zone(s) on other users of the sea.
9. The Applicant is seeking a notice declaring the following safety zones:

During Construction	A 500 metre radius around each wind turbine generator where construction works are taking place that include sensitive activities being undertaken by vessels Restricted in their Ability to Manoeuvre (RAM). (Rolling programme of implementation)
	A 50 metre radius around partially completed wind turbine generators where work is not underway and the risk assessments identify a need.
	A 50 metre radius around each completed wind turbine generator prior to commissioning and as required by a risk assessment process.
During major maintenance	A 500 metre radius around all major maintenance works being undertaken around the wind turbine generators.

10. “Major maintenance” works are defined in the Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007/1948 as ““works relating to any renewable energy installation which has become operational, requiring the attachment to, or anchoring next to, such as the installation of a self-elevating platform, jack-up barge, crane barge or other maintenance vessel””.
11. The safety zones would be implemented on a ‘rolling basis’, in order to minimise disruption for other marine users. The rolling basis ensures that safety zones are only ‘live’ for those specific areas of the total site in which activities are actually taking place at any one time – the Applicant has stated that during the construction phase, out of the 11 wind turbine generators, no more than two safety zones would be in place at any one time. The safety zones will move with the activity and construction (RAM) vessels. No safety zones will be applied during normal operations.

12. Section 95(2) of the Energy Act 2004 (as amended) states that the Scottish Ministers may issue a notice declaring that such areas as are specified or described in the notice are to be safety zones, if the Minister considers it is appropriate for the purpose of securing the safety of;
- “a) the renewable energy installation or its construction, extension or decommissioning,
 - b) other installations in the vicinity of the installation or the place where it is to be constructed or extended,
 - c) individuals in or on the installation or other installations in that vicinity, or
 - d) vessels in that vicinity or individuals on such vessels.”
13. The Marine Scotland Licensing Operations Team (“MS-LOT”) is satisfied that, due to the high level of marine traffic in the area, it is appropriate to issue a notice specifying a rolling programme of safety zones during the construction, operation and maintenance phases of the project to achieve the objectives set out in section 95(2). The implementation of ‘rolling safety zones’ minimises potential disruption for other marine users, by restricting their implementation to certain circumstances and time-frames and is more proportionate than the implementation of a permanent exclusion zone. MS-LOT believes that the implementation of the safety zones, as described in the Application and supporting documentation, is proportionate in securing the objectives set out at section 95(2) whilst minimising disruption to other marine users.
14. The Scottish Ministers also have the power, under section 95(3)(b) of the 2004 Act to issue a notice declaring safety zones, where no application is made, on their “own initiative”. MS-LOT previously considered requesting the Scottish Ministers to exercise their rights under section 95(3)(b) by virtue of the reasons outlined in paragraph 13 prior to the submission of a formal application by the Applicant. Construction could continue without the implementation of safety zones, however, this may have resulted in increased risk to vessels and installations and individuals on said vessels and installations.
15. Further detail on vessel management during the construction and operation of the EOWDC is included in the [Vessel Management Plan](#) (“VMP”), prepared to fulfil condition 24 of the Applicant’s section 36 consent (this plan received multi-stage regulatory approval on 20 September 2017). The VMP also alludes to the implementation of safety zones and how this relates to other aspects of marine coordination, such as guard vessels and buoyed construction areas. MS-LOT consulted with the Maritime and Coastguard Agency, Scottish Natural Heritage, Aberdeen Harbour Board, UK Chamber of Shipping and Whale and Dolphin Conservation on the VMP (consultation commenced 30 March 2017) and no objections were raised or comments made regarding the implementation of safety zones at this stage.

Policy guidance

16. Section 95 of the 2004 Act is implemented in conjunction with Schedule 16 to the Act and in accordance with the following Department of Climate Change

(“DECC”) Guidance, [‘Applying for safety zones around offshore renewable energy installations’](#) (November 2011).

17. Section 4 of the DECC Guidance (2011) sets out the process for applying for a safety zone, which includes the requirement for an application for consent under Section 36 of the Electricity Act 1989 to consider whether a safety zone is needed as part of the assessment of the impact of the proposed installation on the safety of navigation. The need for, and environmental impact of, safety zones was identified in the original [Environmental Statement](#) (2011) which accompanied the application for consent under Section 36 of the Electricity Act 1989 and the application for a Marine Licence under section 20(1) of the Marine (Scotland) Act 2010.
18. Part 3 of Schedule 16 to the 2004 Act sets out the requirements for safety zone applications. Applications are required to describe, by way of a map, the place where the renewable energy installation is to be, or is being, constructed, extended, operated or decommissioned and the waters in relation to which any declaration applied for will establish a safety zone. Applications are also required to describe the other provisions the Applicant asks to be included in the notice applied for and any other information prescribed in Regulations made by the Scottish Ministers. The Application submitted by the Applicant on 22 September 2017 fulfils all requirements of Part 3 of Schedule 16. All other Parts to Schedule 16 place obligations only on the Scottish Ministers.
19. MS-LOT is satisfied that the Application meets the requirements and therefore, the Applicant has complied with all requirements set out in Section 4 of the DECC Guidance (2011) and Part 3 of Schedule 16 to the 2004 Act.

Public Consultation

20. A Notice of Application (“Public Notice”) was published and served by the Applicant in accordance with the requirements of the Energy Act 2004 and the Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007/1948 (hereafter the ‘2007 Regulations’), which requires the Public Notice to be published for two successive weeks in one or more local newspapers, in Lloyd’s List and in one or more national newspapers, the Edinburgh Gazette and in one or more appropriate fishing trade journals. The Public Notice was published in the Lloyd’s List, Kingfisher Bulletin, Evening Express, Press and Journal, The Herald, Fishing News and the Edinburgh Gazette for two successive weeks.
21. The consultation period ran for a period of 38 days, from 25 September 2017 to 2 November 2017, therefore exceeding the 28 day minimum period required under Regulation 6 of the 2007 Regulations by 10 days.
22. Notices were also issued to the harbour masters of ports likely to be affected by the application and the relevant sector office of the Maritime and Coastguard Agency, with the ports affected requested to display the Public Notice at an address accessibly during normal office hours by members of the public likely to

be affected by the application (such as public noticeboards) for a period of at least two weeks as per the requirements of the Regulations.

23. Copies of the Safety Zone Application were also available on the EOWDC project website and Marine Scotland's website.

24. MS-LOT is, therefore, satisfied that the application was suitably advertised under the terms of the Energy Act 2004 and the Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007.

Consultation responses

25. A range of views about the safety zones were requested by the Applicant. Whilst there was a general acceptance that safety zones of the dimensions and applications set out in the Application were reasonable measures to secure the safety of mariners and those people working on the WTGs (including their foundations, substructures and the cable routes within the EOWDC site), a number of consultees raised issues about aspects of the requested safety zone regime. A summary of the views of individual consultees and the Applicant's response to the points raised is set out below.

- i. *Aberdeen Harbour Board ("AHB")* sought further information, including a plan showing the 500 metre exclusion zone around each wind turbine generator ("WTG") and the cable areas and how these exclusion zones would impact on the MCA anchorage to the south of the EOWDC development area. AHB also noted the possible need for a possible 1 km area where the large construction vessels may have anchors laid whilst engaged on the project. AHB highlighted that this anchorage is primarily used by vessels awaiting entry into Aberdeen for work and any restrictions in the anchorage area could have an impact in pushing vessels further south towards AHB's harbour roads, which may have an impact on AHB's ability to manoeuvre vessels that are entering into or departing from Aberdeen Harbour.

Applicant's response – provided two figures; one showing 500 metre safety zones around each wind turbine location and one showing a likely worst case around two locations. The safety zones are only activated if there are construction vessels present and working of the wind turbine structure, therefore it is unlikely that there will be more than two safety zones active at once (given the number of construction vessel AOWFL are employing). The safety zones do not overlap the anchorage area and are within the buoyed construction area dictated by the NLB. The construction buoys (in consultation with NLB) and safety zones (use of) will be removed following commissioning of the site. 1km anchor cables are worst case and anything outside of 500 metre around a turbine structure would not be covered by a safety zone; instead the vessel would apply standard marine practice. Notice to Mariners will include detail on which wind turbines will have safety zones in place; this information can also be obtained from the Marine Coordinator. Please also be assured that AOWFL have liaised closely with the MCA, NLB and the MoD over the application and use of these safety zones.

Marine Scotland's response – Marine Scotland Licensing Operations Team (“MS-LOT”) is satisfied that the Applicant has fully addressed the points raised by AHB in response to this Application.

- ii. *Blackdog Salmon Fishings Ltd* (“BSF”) objected to the granting of any safety zones which would restrict the owner of Blackdog Salmon Fishings Ltd from exercising its heritable title, stating that any such restriction is unlawful and would be challenged if the Application was granted. BSF stated that no further action could be taken until existing Court proceedings were concluded.

It should be noted that BSF also lodged objections to the implementation of similar safety/exclusion zones during works to clear Unexploded Ordnance found within the EOWDC site.

BSF highlighted that Vattenfall/AOWFL's Crown Estate lease included the caveat that it was “subject to the public rights of navigation and fishing...and all other rights, servitudes, licenses, wayleaves, quasi servitudes, licences and wayleaves exercisable over the Premises and Designated Area.”

In addition, BSF advised that it intends to deploy its salmon/sea trout nets throughout the coming season, commencing on 11 February 2018 until the end of said netting season. BSF also advised that it is in the process of procuring a larger licensed commercial fishing vessel for the deployment of creels and the fishing of dabs, plaice, whiting and other commercially viable species both within and outwith the area for which BSF have heritable title, under the public right to fish.

BSF has articulated its intention to continue object to any matters which may interfere with its right to enjoy its heritable title under Article 1 of Protocol 1 of the European Convention on Human Rights and any other relevant legislation.

Applicant's response – the Applicant responded to the issues raised by BSF, stating that the potential impacts on fishing had been considered and addressed under Paragraph 12.3 of the risk assessment included in the Application, “...noted that there are salmon netting stations located to the west of the development are and the maximum extent of the proposed safety zones. These have not been fished. If the netting is recommenced, it is not anticipated that the safety zones would impact upon their operation.” The Applicant also stated that the risk assessment had concluded that there would be limited impacts on fishing vessels.

The Applicant's response also addressed the comments in relation to adverse impacts on BSF's ability to fish under the public right and exercise its heritable rights. The Applicant stated that the right to undertake netting for salmon and ancillary fish is also subject to further legislative provisions and restrictions beyond the implementation of safety zones.

The Applicant also stated that it had sought to minimise the impact of the safety zones through the implementation of rolling and proportionate safety

zones and that the submissions made by BSF did not challenge the findings of the risk assessment included in the Application.

Marine Scotland's response - Marine Scotland Compliance ("MSC") has confirmed that its records indicated that BSF have not fished since 2008 and the fishing station has been considered as dormant since 2012. BSF has informed MSC that it intends to fish for sea trout in 2017 and 2018 and has inferred, in some correspondence, that it has deployed nets. MSC has advised that, to date, it has received no further information to support these claims.

Marine Scotland Licensing Operations Team ("MS-LOT") notes that a ['Fisheries Mitigation Strategy'](#) has been developed in support of the wider EOWDC project, which includes a process for mitigation should any loss of earnings be incurred as a result of the project. MS-LOT is satisfied that the Fisheries Mitigation Strategy provides a sufficient mechanism to address any loss of earnings resulting from the implementation of the safety zone(s), should BSF choose to exercise its public or heritable rights.

MS-LOT also notes that the BSF did not raise an objection to the introduction of safety zones within the Environmental Statement submitted in support of the application for consent under Section 36 of the Electricity Act 1989. BSF did submit objections citing incorrect information provided in the application documentation (in relation to the impacts on salmon fishery due to electromagnetic fields, noise and vibrations impacting on migratory patterns). However, BSF withdrew these objections in response to the consultation on the Supplementary Environmental Information Statement.

Having fully considered all relevant circumstances, MS-LOT is satisfied that it would be appropriate on the basis of safety concerns for the Scottish Ministers to declare safety zones under section 95 of the Energy Act 2004. MS-LOT is satisfied that the declaration of safety zones is compatible with the provisions of Article 1 of Protocol 1 of the European Convention on Human Rights. A declaration of safety zones, in this instance, would be in the pursuit of a legitimate aim, namely, to secure the health and safety of the renewable energy installation and any other installations or vessels in the vicinity, and the health and safety of any individuals in or on the renewable energy installation and any other vessels or installations in the vicinity (as per Section 95(2) of the Act). Moreover, the adoption of the safety zones specified by the Applicant would meet that aim.

In addition, the restrictions placed on BSF's rights by virtue of the declaration of safety zones would be limited (both spatially and temporally), and any disadvantages to BSF would be outweighed by the public benefit derived from the achievement of the objectives set out in Section 95(2) of the Act.

In particular, MS-LOT is satisfied that, due to the high level of marine traffic in the area, it is appropriate to issue a notice specifying a rolling programme of safety zones during the construction, operation and maintenance phases of the project to achieve the objectives set out in section 95(2). The

implementation of safety zones, in conjunction with other measures outlined in the Application, will provide an additional level of protection against collision, particularly during the early phases of the Development when vessels may not be fully aware of the construction activities or be familiar with the development and reduce the risk of interaction with anchor spread.

The implementation of 'rolling safety zones' minimises potential disruption for other marine users, by restricting their implementation to certain circumstances and time-scales and is more proportionate than the implementation of a permanent exclusion zone. MS-LOT believes that the implementation of the safety zones, as described in the Application and supporting documentation, is proportionate in securing the objectives set out at section 95(2) whilst minimising disruption to other marine users.

Promulgation of the safety zones in advance, through Notices to Mariners, giving sufficient notification of the location of said safety zones, should provide the best means of communication. The Applicant has detailed the proposed communication processes at section 13.1 of the supporting information submitted with the Application. The proposed processes include, but are not limited to; Notices to Mariners, Radio Warnings and Kingfisher – Offshore and Marine Renewables (KIS-ORCA bulletins. The presence of a safety zone will also be identifiable by the presence of a RAM construction or maintenance vessel and a guard vessel (or other nominated vessel) on site at the WTG location. The Applicant also states that the deployment of any safety zones will be promulgated in accordance with the procedures set out in the Navigational Safety Plan ("NSP").

The NSP was prepared to fulfil the requirements of condition 26 of the Applicant's section 36 consent (this plan received multi-stage regulatory approval on 20 September 2017). MS-LOT consulted with the Maritime and Coastguard Agency, Northern Lighthouse Board, Aberdeen Harbour Board, UK Chamber of Shipping and Ministry of Defence in respect of the NSP. Minor amendments were made to this plan in relation to reporting infringements and in respect of a regulatory amendment. The Northern Lighthouse Board confirmed that it was content with the proposals within the NSP and confirmed that it would continue regular communications with the Applicant to ensure mariners were well informed of the works but otherwise raised no concerns or objections to the NSP.

MS-LOT is satisfied that the communication processes set out in the Application, supporting information, NSP and VMP are sufficient to ensure that all other marine users receive adequate notification of the deployment of said safety zones.

- iii. *The Chamber of Shipping* offered no substantive comments on the Application and noted that the Application appeared to follow the agreed protocols;
- iv. *The Cruising Association* offered no substantive comments on the Application;

- v. *The Department for Business, Energy & Industrial Strategy (“BEIS”)* responded to confirm that it no longer has any locus in the consideration of safety zone applications for projects wholly within Scottish waters and, therefore, would not be providing a response to this consultation.
- vi. *The Maritime and Coastguard Agency* fully support and have no objection to the introduction of safety zones as presented during the construction, pre-commissioning and operational phases.
- vii. *The Northern Lighthouse Board* offered no substantive comments on the Application and stated that it was content with the submitted Application and supporting evidence;
- viii. *The Royal Yachting Association (Scotland) (“RYA Scotland”)* confirmed that the proposed safety zones conformed to RYA policy and that it was happy for the application to succeed. However, RYA Scotland indicated that the proposal for rolling safety zones relates to a wider issue around communication of temporary Notices to Mariners to recreational skippers, which the RYA no longer publishes on its website. RYA Scotland suggested that a useful form of mitigation would be the creation of a single website containing all current Notices to Mariners in operation between the border with England and Duncansby Head, or perhaps something akin to the [Traffic Scotland Traffic Info Map](#) that could identify all areas where navigational restrictions or works are expected to be taking place, perhaps via the format of a layer in National Marine Plan Interactive (“NMPi”) which could be updated on a daily basis.
- ix. *The Scottish Fishermen’s Federation* offered no substantive comments on the Application;
- x. *Scottish Natural Heritage* offered no substantive comments on the Application.

26. MS-LOT is satisfied that the Applicant has responded to the consultation responses received and no further updates are required to the Application and the supporting documentation. The proposal suggested by RYA Scotland in relation to the introduction of a NMPi layer to assist recreational mariners is being discussed and considered internally by Marine Scotland.

Objections

27. Part 4 of Schedule 16 to the 2004 Act includes provisions regarding objections to an application. Part 4(3) prescribes that where objections, or copies of objections, to an application have been sent to the Scottish Ministers in compliance with the regulations, the Scottish Ministers must, “consider those objections, together with all material considerations, with a view to determining whether a public inquiry should be held with respect to the application; and if he thinks it is appropriate to do so, must cause a public inquiry to be held...”.

28. The objection received from Blackdog Salmon Fishings Ltd (outlined at Paragraph 22(ii) above) has been considered in detail by both the Applicant and Marine Scotland.

29. MS-LOT is satisfied that a public inquiry would not provide any new or additional material for the Minister's consideration and would advise that a public inquiry is not required in this instance.

Right of appeal

30. Where the Scottish Ministers reject an application, the Applicant may lodge an appeal with the Scottish Ministers within 28 days of the date of the letter rejecting the Application (as set out in the DECC Guidance (2011)). Any appeals will be considered in consultation with the MCA.

31. Please note, however, that any party to the decision has the right to submit an application for judicial review to the Court of Session. Substantive grounds for challenge under judicial review are illegality, irrationality (or unreasonableness), procedural impropriety and proportionality. ECHR considerations (such as the deprivation of private property) are also relevant grounds.

Options

32. The Scottish Ministers may choose to:

- 1) Approve the application for Safety Zones;
- 2) Reject the application for Safety Zones;
- 3) Propose that a Safety Zone notice should be established which is materially different from that applied for; or
- 4) Call a public inquiry.

Recommendations

33. That you grant the application for Safety Zones for the European Offshore Wind Deployment Centre during construction and major maintenance works, noting that a separate application will be made for the decommissioning phase. That you issue a notice, in accordance with the requirements of Section 95(6) of the 2004 Act, declaring that the areas specified under the Application are safety zones for the purposes of securing the safety of the EOWDC and individuals and vessels in its vicinity during the period of its construction, operation and maintenance.

Roger May
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List:	For	For	For Information
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	Action	Comments	Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for the Environment, Climate Change and Land Reform			X		
Minister for Business, Innovation and Energy	X	X	X		

DG Economy
 Director of Marine Scotland
 David Palmer
 Phil Gilmour
 Jim McKie
 Gayle Holland
 Nicola Bain
 Paul Smith
 David Stevenson
 Joanna Dingwall
 Alan Williams
 Fiona McClean
 Norman MacLeod