

# MARINE (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### THE ACT

#### Part 4 – Marine Licensing

##### Requirement for licence

###### *Section 20 - Requirement for licence*

30. [Section 20](#) indicates that anyone carrying out an activity mentioned in section 21 must obtain a licence from the Scottish Ministers. Exemptions or special cases are provided for in sections 32 to 37.

##### Licensable marine activities

###### *Section 21 - Licensable marine activities*

31. [Section 21](#) lists the licensable marine activities. The list is similar to that applying under existing requirements, except that all forms of dredging will become licensable under this section. In summary all vessels, aircraft or structures, regardless of their country of origin, will need a licence to deposit or incinerate any object or substance within Scotland's marine area. All vessels, aircraft or structures, regardless of their country of origin, will need a licence before they are loaded in Scotland or in Scotland's marine area with any substance or object for incineration at sea. Section 21(1) does not apply to fishing by any method.
32. [Section 21\(3\)](#) permits the Scottish Ministers to add or remove any activity from the list of licensable marine activities by order. Section 21(4) states that the Scottish Ministers must have regard to the need to protect the environment, to protect human health and to prevent interference with legitimate uses of the sea, and to any other matters that Ministers deem relevant when making an order to add or remove an activity from the list of licensable marine activities.

##### Pre-application consultation

###### *Section 22 – Pre-application consultation: preliminary*

33. [Section 22](#) states that Scottish Ministers may by regulations prescribe classes of licensable activity, which will require a pre-application notice and report to be prepared prior to a licence application. If the prospective applicant is unsure as to whether the activity fits in the class that requires a pre-application notice or report to be submitted, they may request clarification from the Scottish Ministers.
34. If Scottish Ministers are satisfied that a prospective applicant is applying for a marine licence in relation to an activity, which has previously been carried out at that site or which is similar to a previous activity at that site, then they may decide that section 23 does not apply.

### ***Section 23 – Pre-application consultation: compliance***

35. **Section 23** states that those applicants whose activity falls within a class requiring a pre-application consultation report must give notice of an application for a marine licence at least 12 weeks in advance of the application itself. Section 23 states what details are to be included in the notice. Section 23(4) states that regulations may specify who is to be notified and who is to be consulted, and in what form, with respect to the proposed application. Section 23(6) and (7) state that Scottish Ministers have 21 days after having received the notification in which to notify the applicant if they require the notice to be given to additional people or if additional consultation is required (or both). When considering this, Scottish Ministers must have regard to the nature, extent and location of the proposed activity and to the likely effects of the activity.

### ***Section 24 – Pre-application consultation report***

36. **Section 24** states that, prior to submitting a relevant application for a marine licence, applicants must comply with section 23 and a report must be produced to show what has been done to comply with the conditions in that section.

## **Licences**

### ***Section 25 - Application for licence***

37. **Section 25** allows the Scottish Ministers to specify in what form an application for a marine licence should be submitted. They may also make regulations setting out the fee to be paid for an application.
38. The Scottish Ministers may require an applicant to supply such information or articles necessary to enable them to determine the application. If they consider they are unable to determine the application based on the information supplied the Scottish Ministers may require the applicant to permit such investigations, examinations and tests as they believe is necessary. The Scottish Ministers may charge a fee towards such an investigation. If the applicant fails to provide information or fails to pay a fee, then the Scottish Ministers can refuse to proceed with the application.

### ***Section 26 - Notice of applications***

39. **Section 26** provides that the Scottish Ministers or the applicant must publish notice of an application to bring it to the attention of interested parties. If the Scottish Ministers publish the application, then they may require the applicant to pay a fee towards the costs of the publication. Section 26(6) allows the Scottish Ministers to decide whether publication is necessary or not. The Scottish Ministers may consider that the impact of the application is so minor that it would serve no purpose to publish the details.

### ***Section 27 - Determination of applications***

40. **Section 27** indicates that the Scottish Ministers must have regard to the need to protect the environment or human health or prevent interference with legitimate uses of the sea and to any other matters which they consider relevant when determining an application. Section 27(2) indicates that the Scottish Ministers must have regard to any alternative method of dealing with the substance or object where the activity to be licensed is one detailed in section 21(1) (item 1 and 2). The Scottish Ministers must consult any persons or bodies as specified by order and may consult any other person or body who they consider appropriate. They must also take into account comments received from interested parties. Section 27(5) indicates that the Scottish Ministers must allow the applicant the opportunity to make representations regarding any of the comments received from interested parties.
41. **Section 27(7)** allows the Scottish Ministers to set out further details in regulations concerning the procedure for applications and the grant of licences. This may include

the time period within which any function is to be exercised and provision about notifying the applicant of any licensing determination.

### ***Section 28 - Inquiries***

42. **Section 28** allows the Scottish Ministers to cause an inquiry to be held in connection with their determination of an application for a marine licence. Section 28 also allows Scottish Ministers to cause two inquiries to be held together.

### ***Section 29 - Grant or refusal of licence***

43. **Section 29** allows the Scottish Ministers to grant a licence unconditionally, refuse the application or impose conditions on any licence they grant. Examples of the sorts of conditions that may be imposed are given in section 29(2) and include precautions to be taken, works to be carried out or monitoring of activities. The licence could include conditions governing the use of a marine structure and how it should be dismantled and removed from the sea once its active life is over.

### ***Section 30 - Variation, suspension, revocation and transfer***

44. **Section 30** allows the Scottish Ministers to vary, suspend or revoke a licence in certain circumstances. These could include a breach of conditions or where there has been a change in circumstances relating to the environment or human health. The Scottish Ministers may also vary a licence on application by the licensee if the variation is not material. A licence may not be suspended for more than 18 months. On receipt of an application from a licensee, the Scottish Ministers can transfer a licence from one named person to another.

### ***Section 31 – Pre-variation, suspension or revocation procedure***

45. **Section 31** outlines the procedures which apply when the Scottish Ministers propose to vary, suspend or revoke a licence under section 30. The Scottish Ministers must notify the licensee as to their reasons for wishing to vary, suspend or revoke the licence. They must also allow the licensee to make representation to an ‘appointed person’ within 28 days if the licensee so wishes. The Scottish Ministers may by regulations make provision as to who may be an ‘appointed person’ and the procedures to be followed at a hearing.

## **Exemptions from licensing requirements**

### ***Section 32 - Exemptions specified by order***

46. **Section 32** allows the Scottish Ministers to specify by order activities which will not need a marine licence. The Scottish Ministers must consult persons they consider appropriate as to any order they propose to make. When deciding under section 32(1) to specify an activity which does not need a marine licence, Scottish Ministers must have regard to the need to protect the environment, the need to protect human health, the need to prevent interference with legitimate uses of the sea, and any other matters considered relevant by those Ministers.

### ***Section 33 - Activities below specified threshold of environmental impact***

47. **Section 33** allows the Scottish Ministers by regulations to permit licensable marine activities which fall below a specified threshold of environmental impact to be registered rather than licensed. The regulations may define the meaning of “fall below”, “registered” and “specified threshold of environmental impact”. The regulations may also include provisions for who will be responsible for the register and for offences for those who do not register.

### ***Section 34 - Oil and gas, defence or pollution***

48. **Section 34** lists activities within the reserved sphere to which this Part does not apply.

### **Special provision for certain cases**

### ***Section 35 - Special procedure for applications relating to certain electricity work***

49. **Section 35** applies when both a marine licence and a consent under section 36 of the Electricity Act 1989 are required for the same activity. Section 35 allows the two applications to be considered together with the procedural provisions of the Electricity Act applying to the marine licence application. The Scottish Ministers may modify by order the procedural provisions of the Electricity Act to allow this single process to operate satisfactorily.

### ***Section 36 - Electronic communications apparatus***

50. **Section 36** provides that the Scottish Ministers must not issue a licence to carry out any activity which involves the exercise of a right conferred by paragraph 11 of the electronic communications code in Schedule 2 to the Telecommunications Act 1984 unless they are satisfied that adequate compensation arrangements have been made.

### ***Section 37 – Submarine cables***

51. **Section 37** applies where a stretch of exempt submarine cable is proposed to be laid, is being laid or has been laid, outside the seaward limits of the territorial sea. The Scottish Ministers are required to grant any application for a marine licence for the carrying out of any licensable marine activity done in the course of laying any stretch of the cable in the Scottish marine area. The Scottish Ministers are able to attach conditions to these licences as they are to any other marine licence. Part 4 does not apply to anything done in the course of maintaining a stretch of cable within the Scottish marine area. Definitions are provided for terms used in this section.

### **Appeals against licensing decisions**

### ***Section 38 - Appeals against licensing decisions***

52. **Section 38** requires the Scottish Ministers to make regulations allowing any person who applies for a marine licence to appeal to the sheriff against a decision under section 29. The regulations may include provision about the procedure to be followed in any appeal.

### **Offences**

### ***Section 39 - Breach of requirement for, or conditions of, licence***

53. **Section 39** indicates that it is an offence for a person to carry out a licensable activity (as defined in section 21) without a licence or to breach any condition of a licence.
54. A person who is bound by specified conditions in a licence (by virtue of section 29(5)) cannot be considered to have committed an offence unless the Scottish Ministers have issued notice to that person stating that particular conditions must be complied with and the person has subsequently failed to comply with that notice within the period specified in it.
55. **Section 39(4)** states the maximum penalties for committing an offence under the section.

### ***Section 40 - Defences: action taken in an emergency***

56. **Section 40** provides that, if a person undertakes a licensable activity without a licence but does so for the purpose of securing the safety of a vessel, aircraft or structure, or

for the purpose of saving life, they have a defence against any charge brought against them. However, this is dependent on the person informing the Scottish Ministers within a reasonable timeframe of the matters listed in section 40(2), on the steps taken being reasonable, and on it not being the fault of the person that the emergency occurred.

#### ***Section 41 - Defences: electronic communications: emergency works***

57. Section 41 gives a defence against any charge brought under section 39(1) for operations conducted by an operator or undertaker and which are classified as emergency works within the meaning of the electronic communications code in Schedule 2 to the Telecommunications Act 1984.

#### ***Section 42 - Offence relating to information***

58. Section 42 indicates that it is an offence for a person to knowingly supply false or misleading information in trying to obtain a marine licence or get it varied or transferred. Section 42(3) sets out applicable penalties.

### **Enforcement notices**

#### ***Section 43 - Compliance notice***

59. Section 43 provides that a person carrying out a licensed activity in a manner that breaches licence conditions can be issued with a notice requiring compliance. Such a notice is called a “compliance notice”.
60. The Scottish Ministers can issue a compliance notice where licence conditions have been breached and where the activity has not caused (nor is likely to cause) serious harm to either the environment or human health or serious interference with legitimate uses of the sea. A compliance notice may be served, for example in the case of a technical breach. The Scottish Ministers will use other enforcement tools available to them, such as a stop or remediation notice, where the breach has led to serious harm to the environment or human health.
61. A compliance notice must state the Scottish Ministers’ reasons for issuing the notice, any steps the Scottish Ministers require to be taken, and the time period within which any steps should be completed.

#### ***Section 44 - Remediation notice***

62. Section 44 indicates that a person who has carried on or is carrying on a licensable activity, either without a licence or in a manner that breaches the conditions of their licence, can be issued with a notice requiring them to put right any damage caused by their activity, pay for another body to put right that damage, or to undertake steps elsewhere in compensation for the damage caused. Such a notice is called a “remediation notice”.
63. The Scottish Ministers can issue a remediation notice in cases where harm to the environment or human health has occurred, or is likely to occur, or where the activity has interfered with other legitimate uses of the sea, or is likely to do so.
64. The Scottish Ministers may only issue a remediation notice after they have consulted the person to whom they intend to issue the notice.
65. The remediation notice may require the person to take steps to protect the environment, prevent, minimise or mitigate the effects of harm or interference caused, or restore a site to an appropriate condition had the harm or interference not been caused. In addition, the remediation notice may require steps to be taken at a site other than the one affected by the harm or interference. It may not be reasonably possible to restore a site so steps to be taken at another site may be deemed more appropriate. A remediation notice could be served in addition to a stop notice (see below). This would be the case, for example,

where the Scottish Ministers sought to put an immediate halt to a damaging activity and then to require the operator to put right the damage already caused.

66. A remediation notice must state the Scottish Ministers' reasons for issuing the notice; any remedial steps or payment to be made as a consequence of the offence or to protect the environment, human health or prevent interference; and the time period within which any steps required should be completed or sum paid. The requirements contained in a remediation notice must be reasonable.

#### ***Section 45 - Further provision as to compliance and remediation notices***

67. **Section 45** indicates that all compliance and remediation notices must be served on the person undertaking or in control of the activity in question, and may, if a licence has been granted for that activity and the person is different, also be served on the licensee. Notices can be varied or revoked by issue of a further notice.
68. It is an offence to fail to comply with a compliance or remediation notice.

#### **Civil sanctions**

#### ***Section 46 - Fixed monetary penalties***

69. **Section 46** allows the Scottish Ministers to make provision by order about the imposition of fixed monetary penalties.
70. The Scottish Ministers may only impose a fixed monetary penalty on a person when they are satisfied beyond reasonable doubt that the person has committed an offence under Part 4.
71. The amount of any fixed monetary penalty will be specified by order. Different provision may be made for different cases.

#### ***Section 47 - Fixed monetary penalties: procedure***

72. **Section 47** details the minimum requirements that the Scottish Ministers must ensure are included within any fixed monetary penalty regime. In particular, when imposing a penalty Scottish Ministers must be required to issue a notice of intent to the person setting out the information specified in section 47(3) and providing the person with an opportunity to discharge their liability by payment of a prescribed sum. Alternatively a person is to be entitled to make representations, in accordance with section 47(2)(c) (i). Where the Scottish Ministers decide to impose a fixed monetary penalty, they must issue a final notice setting out the information specified in section 47(5). A person on whom a final notice is served has a right of appeal to the sheriff. Section 47(6) sets out the minimum grounds for appeal that must be available.

#### ***Section 48 - Variable monetary penalties***

73. **Section 48** allows the Scottish Ministers to make provision by order concerning the imposition of variable monetary penalties.
74. The Scottish Ministers may only impose a variable monetary penalty when satisfied beyond reasonable doubt that the person has committed an offence under Part 4.
75. The Scottish Ministers will determine the amount of any variable monetary penalty on a case-by-case basis.

#### ***Section 49 - Variable monetary penalties: procedure***

76. **Section 49** details the minimum requirements that the Scottish Ministers must ensure are included within any variable monetary penalty regime. In particular, when imposing the penalty the Scottish Ministers are required to issue a notice of intent to the person

setting out the information specified in section 49(3) and providing the person with an opportunity to discharge their liability by payment or an undertaking to take action (for example, remediation works or another kind of activity). Alternatively a person can make representations against the imposition of the notice. Where the Scottish Ministers decide to impose a variable monetary penalty, they must issue a final notice setting out the information specified in section 49(6). A person on whom a final notice is served has a right of appeal to the sheriff. Section 49(7) sets out the minimum grounds for appeal that must be available.

### ***Section 50 - Further provision about civil sanctions***

77. **Section 50** introduces schedule 2 which sets out further provision in relation to the civil sanctions that may be imposed under Part 4.

## **Delegation**

### ***Section 51 - Delegation of functions relating to marine licensing***

78. **Section 51** indicates that the Scottish Ministers may by order delegate any of their licensing functions listed in this section to a public authority or an unincorporated group of persons. Those functions specified in section 51(6) are excepted functions and cannot be delegated.
79. The Scottish Ministers may not continue to exercise any function which has been delegated unless the order explicitly permits them to do so. There is no minimum or maximum period for which the delegation can apply. Different functions can be delegated to different persons.

### ***Section 52 - Orders under section 51: supplementary provisions***

80. **Section 52** enables further provision to be made in an order concerning the delegation of functions. Section 52(4) provides a list of the aspects of the licensing process that the Scottish Ministers may want to specifically regulate in the order. These include the manner in which the delegate is to exercise the function, the process for application to the delegate, matters to which the delegate must have regard when determining the applications and the form and content of any licence granted.

### ***Section 53 - Directions to delegates as regards the performance of the marine licensing designated functions***

81. **Section 53** applies where any functions are exercised by a delegate by virtue of an order made by the Scottish Ministers under section 51. It enables the Scottish Ministers to give directions to a person to whom they have delegated functions, setting out how those functions should be performed. Section 53(4) requires the person to comply with any such directions, which must be published by Ministers in accordance with section 53(5).

## **Register of licensing information**

### ***Section 54 - Register of licensing information***

82. **Section 54** requires the Scottish Ministers to maintain a register of information relating to applications and licences. They must make it available to the public. The Scottish Ministers must also set out in regulations further provision regarding the maintenance of the register.
83. Information is not to appear on the register if the Scottish Ministers determine that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate commercial interest. Review of the excluded information must take place after four years. There is a presumption that after this period the excluded information will be

made public unless both the person to whom the information relates and the Scottish Ministers agree that it should remain confidential, in which case it will be reviewed in a further four years. The existence of commercially sensitive information must be recorded in the register.

## **Stop notices and emergency safety notices**

### ***Section 55 - Notice to stop activity causing serious harm etc.***

84. **Section 55** allows the Scottish Ministers to issue a notice to a person prohibiting them from carrying on a licensable marine activity if that activity is causing or will cause serious harm to the environment or human health or is causing or will cause serious interference with legitimate uses of the sea. Such a notice is called a “stop notice”.
85. The Scottish Ministers can issue a stop notice regardless of whether the person has a marine licence or not and (if they have a licence) regardless of whether they are operating in accordance with the licence conditions.
86. A stop notice must state the Scottish Ministers’ reasons for issuing the notice, the date and time that the activity must cease being carried out and any steps required by the Scottish Ministers to ensure safe cessation.
87. An initial stop notice can be in effect for up to seven days. The stop notice may be extended but only up to a combined total period of 35 days.
88. This limit does not apply where an activity is being carried out without a marine licence. In such cases, stop notices can remain in effect until a marine licence is granted for the activity in question.

### ***Section 56 - Further provision as to stop notices***

89. **Section 56** indicates that stop notices must be served on the person undertaking or in control of the activity in question, and may, if a licence has been granted for that activity and the person is different, also be served on the licensee. A notice can be revoked or varied.
90. It is an offence to fail to comply with a stop notice.

### ***Section 57 - Emergency safety notices***

91. **Section 57** makes provision relative to navigational safety. The Scottish Ministers can issue a notice to a person if it appears that serious interference with legitimate uses of the sea is occurring, or is likely to occur, as a result of marine works. The notice can require the provision of lights, signals or other aids to navigation or the stationing of guard ships until the serious interference, or threat of interference, is removed. An emergency safety notice must state the Scottish Ministers’ grounds for believing that serious interference with legitimate uses of the sea is occurring or is likely to occur, state the date and time from which the requirements are to take effect and require the person to take such steps as the Scottish Ministers consider appropriate to ensure compliance with the requirements.

### ***Section 58 - Further provision as to emergency safety notices***

92. **Section 58** indicates that an emergency safety notice must be served on the licensee. Where a stop notice relating to the works is in effect, the emergency notice must also be served on any person on whom the stop notice was served. Section 58(2) allows the Scottish Ministers to revoke or vary an emergency safety notice.
93. It is an offence to fail to comply with an emergency safety notice.

## **Other powers**

### ***Section 59 - Power to take remedial action***

94. In circumstances where a licensable activity has been undertaken either without a licence or in a manner that breaches conditions of a licence, section 59 allows the Scottish Ministers to carry out any works that will protect the environment, protect human health, prevent interference with legitimate uses of the sea, limit the effects of the licensable activity, and restore the condition of any place affected. This power is not limited in use to those circumstances where the authority has issued a remediation notice.

### ***Section 60 - Power to test and charge for testing certain substances***

95. **Section 60** allows the Scottish Ministers to carry out, on the request of any person, tests on substances for their effect on the marine environment and to recover the expenses of that testing. Tests can be carried out if a substance is to be used for treating fouling matter and in this context “fouling matter” means oil or chemicals, or algae or other living or dead organisms.

## **Appeals against notices under this Part**

### ***Section 61 - Appeals against notices***

96. **Section 61** requires that the Scottish Ministers by regulations make provision allowing any person issued with certain types of notices to appeal to the sheriff against the notice. The notices include compliance, remediation, stop and emergency safety notices. Section 61(4) indicates that the regulations may include provisions with regards to the procedure to be followed with respect to an appeal, suspending the notice pending determination of the appeal and the powers of the sheriff to whom the appeal is made.

## **Offences: supplementary provision**

### ***Section 62 - General defence of due diligence***

97. **Section 62** provides a defence for a person charged with an offence under this Part if the person can demonstrate they took all reasonable precautions and exercised due diligence to avoid committing that offence. Section 62(2) to (5) outline some circumstances in which the defence is available and sets out procedures which apply to the proving of this defence. Section 62(2) includes defences where the accused acted under an employer’s instructions or acted in reliance on information supplied by another person.

## **Power by order to provide marine fish farming is not “development”**

### ***Section 63 - Power by order to provide marine fish farming is not “development”***

98. **Section 63** amends the Town and Country Planning (Scotland) Act 1997 by the creation of a power for Ministers to specify by order that the construction of marine fish farming works in specified waters is no longer to constitute “development” for the purposes of the 1997 Act. An order can only be made with the agreement of the planning authority for the relevant waters.

## **Interpretation of Part 4**

### ***Section 64 - Interpretation of Part 4***

99. **Section 64** sets out how certain terms in Part 4 of the Bill are to be interpreted.