

## **FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT**

### **The Marine Works and Marine Licensing (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020, SSI No. 2020/157**

#### **Purpose and intended effect**

##### **Background**

1. The Marine Works and Marine Licensing (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (“the Regulations”) contain amendments to address the implications of public health policy on the marine licensing regime during the current COVID-19 outbreak. These are intended to be temporary until such times as the public health policy deems it appropriate to allow public interaction and when staffing levels and the movement of people allow the existing processes to operate effectively again.

##### **Objective**

2. Given the restrictions on public gatherings and requirements for physical distancing now in place, the Regulations amend a number of requirements placed on applicants making applications for a marine licence under the Marine (Scotland) Act 2010 that would run contrary to those public health requirements. These requirements are: the making available of documents, including Environmental Impact Assessment (EIA) documents, and Ministerial determinations, in physical form for public inspection, by applicants, the requirements placed on applicants to supply hard copies of such documents to the Scottish Ministers, and requirements on applicants to hold pre-application public consultation events at a suitably accessible venue.
3. The amendments align with a wider of package of measures, including general provisions in other legislation removing requirements for public authorities to provide the public physical access to information, such as public planning registers (requiring online access instead, where possible) and powers to exclude the public from local authority meetings on public health grounds.
4. The amendments made by the Regulations are in line with the UK and Scottish Government’s public health policy on minimising the impact of the COVID-19 outbreak. Indeed the Regulations are, in effect, consequential amendments arising from COVID-19 and the public health policy.

##### **Rationale for Government intervention**

5. In the absence of these amendments, the requirements placed on applicants would be at odds with public health policy, and certain marine licence applications would have to be delayed due to an inability to comply with statutory requirements, with potential effects on the ability of the economy to recover post outbreak.

6. National Performance Framework - these measures contribute to the following performance indicators:

- We live in communities that are inclusive, empowered, resilient, and safe.
- We have a globally competitive, entrepreneurial, inclusive and sustainable economy.
- We value enjoy and protect and enhance our environment.

## **Consultation**

### **Within Government**

7. Marine Scotland have engaged with Planning and Architecture Division and Energy Consents Unit on the wider impacts the COVID-19 outbreak will have, and are seeking to align with contingency measures to be adopted in respect of planning and energy consent applications.

### **Public Consultation**

8. Due to the urgency of these measures there has been no public consultation.

### **Business**

9. In the current emergency there has been no time to engage in detail with business. We have engaged in the usual way with marine licence applicants since the current public health policy was adopted. A number of these applicants have highlighted concerns about the effects of the health emergency on their ability to discharge their statutory responsibilities and the effects on their licensable marine activities.

## **Options**

### ***Do nothing***

10. With the current public health policy certain applications for marine licences would be unable legally to proceed. This would create a backlog of applications and potentially derail projects altogether at a time when the effects of the COVID-19 virus are already expected to cause serious negative impacts on the economy.

### ***Suspend the application process***

11. This would be disproportionate and likely to exacerbate the negative impact on the economy caused by the virus.

### ***Suspend public engagement in the marine licensing process altogether***

12. This would be disproportionate when technology can provide alternatives to physical inspection of documents. The approach would also present issues in terms of the EIA Directive. The Scottish Government is committed to maintaining community engagement as far as possible.

***Remove those specific requirements that are contrary to public health policy***

13. This provides a proportionate response, allowing the applications for marine licences to be made and to continue to be processed where possible while providing for public participation by electronic means.

14. Those subject to the relevant provisions of the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 can already utilise electronic communications for most of the statutory requirements. The temporary suspension of the need to make a hard copy available for inspection is likely to have a very limited impact on the public, while there is an overriding need for public safety. Whilst applicants will no longer be required to place EIA reports in a physical place for public inspection, such reports will be made available online.

15. The temporary suspension of the need to hold a pre-application public consultation event at a suitable accessible venue for certain marine licence applications will have limited impact with an online event being held instead.

**Sectors and groups affected**

16. Whilst everyone is affected by the public health policy, the amendments would affect applicants making marine licence applications and members of the public wishing to engage with the applications and EIA process. The process for making documents available, pre-application consultation and the availability of documents for public inspection would be altered.

**Benefits**

***Do nothing***

17. No benefits. Doing nothing would create uncertainty for the public and applicants, and would introduce likely delay in application processing, thereafter impacting on post COVID-19 recovery.

***Suspend the application process***

18. No benefits. Whilst some members of the public may consider that applications should be suspended until such times as they can engage as before, the overall impact on holding up and derailing marine licensable activities has far wider consequences.

***Suspend public engagement in the marine licensing process altogether***

19. No benefits. The lack of any ability for the public to make concerns known about proposals is considered disproportionate and untenable in the circumstances.

20. Similarly for EIA, applicants not having to produce hard copies of EIA reports or hold pre-application consultation events is likely to be a small and limited proportion of the overall cost of undertaking the actual assessment.

***Remove those specific requirements that are contrary to public health policy***

21. This allows the licensing process to continue to function in so far as it is possible in the circumstances and still allows public views of proposals to be considered.

**Costs**

***Do nothing***

22. Certain applications would be incapable of being processed or determined, leading to applicants incurring costs for delays, and causing delays to necessary marine licensable activities. The backlog of proposals and derailment of projects could add significantly to the economic dislocation caused by COVID-19.

***Suspend the application process***

23. As above, but this would have even more significant implications for the whole economy.

***Suspend public engagement in the marine licensing process altogether***

24. As well as general public discontent about being shut out of the various marine licensing processes, this could lead to bad decision making where the public were unable to highlight considerations material to the proposals.

***Remove those specific requirements that are contrary to public health policy***

25. The impact on the public being unable to inspect a hard copy is likely to be limited. The trend for a number of years has been for more information and reports to be made publicly available electronically. The impact of the public being unable to attend a pre-application consultation event is also likely to be limited, if the information can be shared through an online event.

**Scottish Firms Impact Test**

26. There has been no time for a Scottish firms impact test in the current crisis. We are however responding to the concerns of businesses as regards the requirement for physical availability of application documents in public places, which is deemed untenable in the face of public health policy. It is the latter policy and related COVID-19 crisis which will drive any impacts on Scottish firms, beyond the ability of the Regulations to help allow applications to continue to be made and determined.

## Competition Assessment

27. There are no obvious impacts on competition of these procedural amendments as regards obtaining a marine licence. They are designed to allow the continued making and processing of marine licence applications with the minimum of disruption in the circumstances, i.e. to avoid preventing businesses from applying for the marine licences that they may require, and having those applications processed and determined.

- Will the measure directly or indirectly limit the number or range of suppliers?

28. No. It is designed to allow applications to be made and determined given the constraints in the current crisis..

- Will the measure limit the ability of suppliers to compete?

29. No. As above. These are consequential changes driven by public health policy.

- Will the measure limit suppliers' incentives to compete vigorously?

30. No. As above.

- Will the measure limit the choices and information available to consumers?

31. No. As above.

## Consumer Assessment

32. The Regulations are essentially about allowing applicants to continue to have their applications processed so that they can, in so far as that is the purpose of their project, provide marine infrastructure, including offshore renewable energy.

- Does the policy affect the quality, availability or price of any goods or services in a market?

33. No. Any such changes will be driven by the health crisis and related public health policy in relation to which these changes to regulations are consequential.

- Does the policy affect the essential services market, such as energy or water?

34. No. Any such changes will be driven by the health crisis and related public health policy in relation to which these changes to regulations are consequential.

- Does the policy involve storage or increased use of consumer data?

35. No.

- Does the policy increase opportunities for unscrupulous suppliers to target

consumers?

36. No.

- Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

37. In so far as the marine licensing process is a service and the public are its consumers, yes. However, any such changes will be driven by the health crisis and related public health policy in relation to which these changes to regulations are consequential.

- Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

38. No.

### **Test run of business forms**

39. No new forms are involved so this is not applicable.

### **Digital Impact Test**

40. The intention of these changes is to take advantage, where possible, of the option of using digital technologies as opposed to encouraging attendance of the public at public places for the inspection of documents, which is against the current public health policy.

- Does the measure take account of changing digital technologies and markets?

41. Yes

- Will the measure be applicable in a digital/online context?

42. Yes – the intention is to allow such flexibility where possible.

- Is there a possibility the measures could be circumvented by digital / online transactions?

43. No.

- Alternatively will the measure **only** be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

44. This is a consequential amendment driven by public health policy, which itself may drive any such impact.

- If the measure can be applied in an offline **and** online environment will this in itself have any adverse impact on incumbent operators?

45. This is a temporary measure where attendance at public places unless essential is banned, and online options may provide alternative forms of engagement.

### **Legal Aid Impact Test**

46. These consequential changes are to ensure the legal requirements of the marine licensing process can be met in the current crisis and thus avoid questions of legal challenge.

### **Enforcement, sanctions and monitoring**

47. These measures remove certain statutory requirements temporarily during the COVID-19 outbreak. We will monitor compliance with requirements to make information available to the public electronically as we currently do where information requires to be made available in physical form.

### **Implementation and delivery plan**

48. These measures will be implemented at the earliest opportunity and the legislative changes conveyed to applicants and stakeholders by email and the wider public sphere through the Scottish Government's website.

### **Post-implementation review**

49. Scottish Government measures will be subject to review through the course of the COVID-19 crisis to judge when it is appropriate to return to normal arrangements.

### **Summary and recommendation**

The option to remove only those requirements which would be contrary to the current ban on public gatherings and requirements for social distancing is the recommended one.

Doing nothing is not a realistic option given the restrictions imposed by the public health measures in operations. Similarly, suspending the application process or public engagement in that process are considered disproportionate and untenable in the circumstances. The potential economic, social and environmental costs of the other options, in terms of preventing decision making or shutting the public out of the process, outweigh the temporary limitations on public engagement which are in any event necessitated by the current COVID-19 crisis and related health advice.

## **Declaration and publication**

- **Sign-off for Final BRIAs:**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of relevant representative organisations in Scotland. Wider consultation with businesses has not been possible in the current circumstances.

**Signed: Fergus Ewing**

**Date: 20th May 2020**

**Fergus Ewing, Cabinet Secretary for the Rural Economy and Tourism**

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