



BWEA

BWEA response to JNCC Deliberate Disturbance Guidelines

4th June 2008

Introduction

BWEA welcomes the opportunity to respond to the guidance on deliberate disturbance in the Habitats Regulations and Offshore Marine Regulations.

Representing over 380 corporate members, BWEA is the UK's leading representative for the wind, wave and tidal energy industry. The membership of the BWEA includes all of the companies currently developing offshore wind projects, the majority of the wave and tidal industry and a diverse range of the support industry.

BWEA feel that the increased detail and clarity on the interpretation of this legislation will give increased confidence to the industry. However we are concerned over the implications of some aspects of the interpretation.

Benefits of offshore renewable energy

The core benefit of renewable energy is the mitigation of climate change. The consequences of climate change warrants considering action to prevent it as being of over-riding public interest. Offshore renewable energy presents one of the best ways of making a large reduction in carbon emissions. This is reflected in the significant Government target to deliver 33GW of offshore wind by 2020. An attitude that causes the project by project erosion of the renewables programme will lead to failure to achieve this target and to tackle climate change.

Offshore renewable farms and arrays potentially offer additional benefits, including areas of refuge to marine mammals from the effects of shipping, fishing or other disturbances. While further study is needed in this area, it is worth bearing in mind these beneficial opportunities.

In relation to the negative impact of offshore renewable energy on the environment, developers continue to devote considerable time, money and resource to exploring, assessing and mitigating impacts. This is done both at individual project level and collectively, for example through COWRIE where industry has worked with government and stakeholders, awarding some £3million to furthering our understanding and advance data collection.

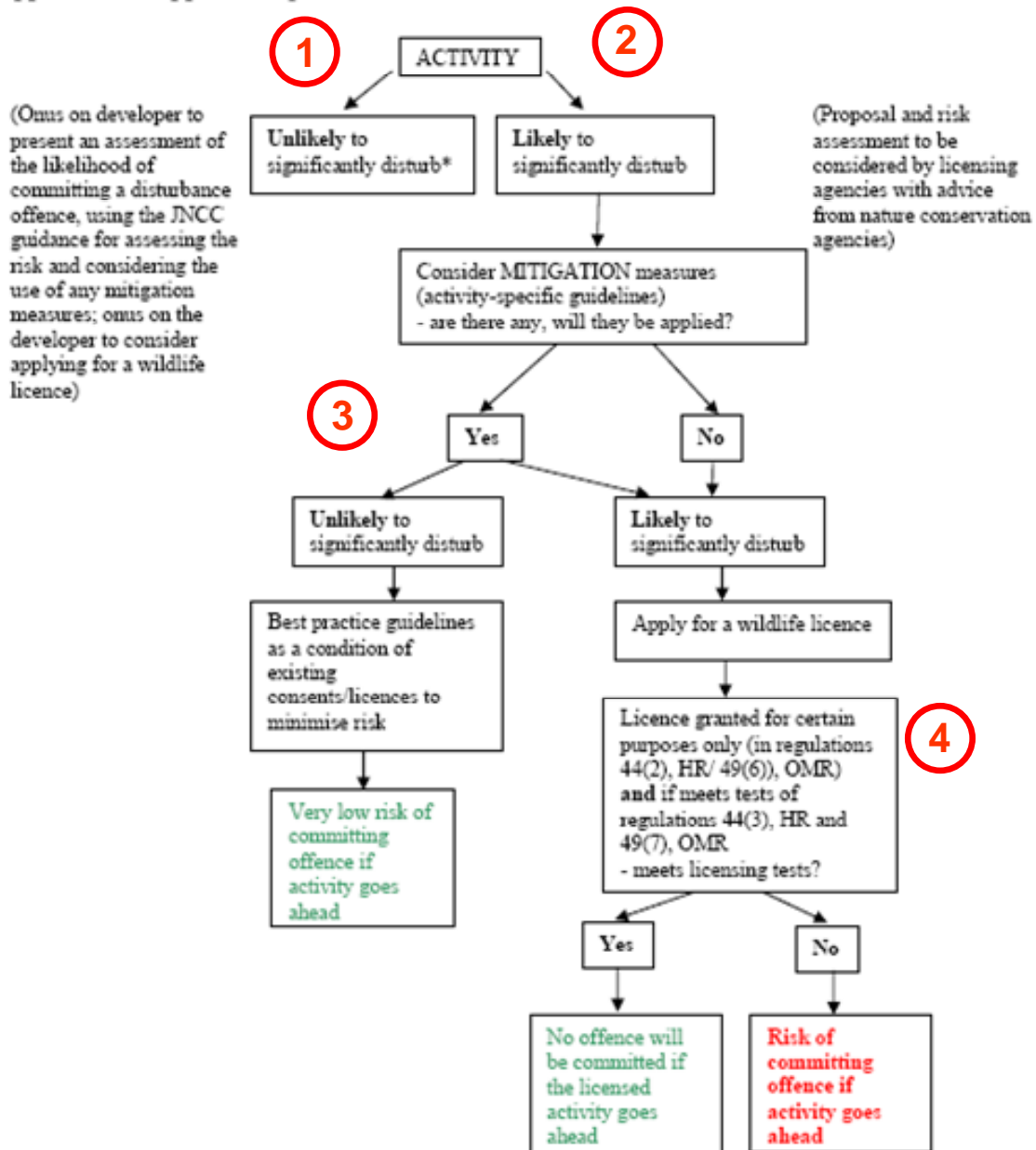
Offshore renewable energy is subject to appropriate precautions and a generally careful approach to development offshore renewable energy has already been shown to have minimal impact on the marine environment. In addition it is clear that offshore renewable

energy developers take very great care in evaluating and presenting information on the impacts of development on the marine environment. Offshore wind now has many years of experience to draw upon and wave and tidal energy is showing progress, in both cases a large number of potentially negative impacts have either not been observed or have been seen to have a temporary effect (such as displacement).

The current programme to construct 33 GW of offshore wind sites by 2020 should be a consideration when producing this guidance. The effect of the current interpretation of the regulations on this programme should be measured when evaluating the impact of the regulations.

Areas of Clarification

Appendix II - Application process



Area 1 – Projects that fall below the significant threshold

A developer who after performing an EIA, considers that their project is unlikely to significantly disturb will require some form of comfort that they are not liable to be prosecuted for an offence if the project goes ahead. The best option to provide comfort is that when a regulatory body issues a consent, a statement is made by the issuing body that they consider that all reasonable steps have been taken to assess the likelihood of a disturbance based on current evidence and therefore an offence will not occur. The regulatory body, with appropriate expert advice, will be best placed to make an assessment of whether all necessary steps have been taken as they will have all the information in the Environmental Statement concerning this issue. Without an appropriate form of comfort a developer will need to progress the project without knowing whether or not they are committing a criminal act.

BWEA also believe that prosecution guidance should be issued along with these guidelines, which would outline the circumstances under which an enforcing officer would bring about criminal charges.

Area 2 – Distinction between Significant Threshold and FCS

The guidance notes state that it is possible that a project may be above the level of significant threshold, but not affect the Favourable Conservation Status (FCS) of a species (section 1.3, p.4. parag 3). Projects that breach the significance threshold, as defined by the guidance, are able to gain a license to disturb. However, a license cannot be granted for projects that are likely to have an adverse affect on the FCS (Reg 49 7a).

The distinction in the Guidance between the significant threshold level and adverse effect on FCS is very unclear. For this reason, it is not clear whether it will be possible to gain a license to disturb for an activity that is considered to cause significant disturbance.

For example: with regard to bottlenose dolphin, is the significant disturbance to 2-4 (4-8) individuals of a coastal population considered to adversely affect the FCS of that coastal population* (*using the definition of population given in Annex III of the guidance)? If not then what is the threshold at which FCS is adversely affected and a license would not be granted?

As the threshold for bottlenose dolphin is set at such a low figure, any project located in waters in which bottlenose dolphin have been recorded is likely to have the potential to give rise to a disturbance effect on a small number of individuals. The guidance passes the burden of evidence to the developer to show that any impact is of minimal ecological significance or that FCS will not be affected, in effect requiring evidence to be provided of absence of adverse affect – a very similar test to that required for Appropriate Assessment of marine mammal populations within SACs – in essence these guidelines are therefore creating an SAC designation for bottlenose dolphin in all of UK waters, something which is not apparent from the commentary and is presumably not the intent of the regulations. Some balance needs to be introduced into the tests of a development to recognise this point.

BWEA request further guidance on how the distinction between significant threshold and FCS is determined. The significant threshold levels provide an important guideline, but may not always be a practical measure of significant disturbance.

Area 3 – Mitigation against disturbance

BWEA request clarification that if best practice mitigation methods are implemented then it will be considered that a disturbance has not occurred. Developers require a clear understanding of what will be viewed as acceptable mitigation to allow projects to progress.

Piling noise mitigation methods (MMO and PAM) have only been implemented to date for a couple of Round 1 offshore wind projects. However, the majority of Round 2 projects currently have this condition in their FEPA Licence. In addition the use of acoustic deterrents and other methods are currently being examined as providing additional protection. The guidance paints an overly negative picture of the possibility of deterrents to be practical mitigation solutions. A deterrent in itself may require licensing, but this should be a standard and straightforward process.

If all best practice actions are taken then BWEA do not consider that a deliberate disturbance will occur.

Area 4 – Under what circumstances would a license be issued?

What evidence would be required to demonstrate that there was an over-riding interest that a project should be licensed? What level of detail would be requested and what evidence on alternatives would be required?

Other Considerations

Requirements of the Developer

Generic problems should be examined by generic research and should not be examined by individual projects. Developers should be required to refer to the latest research, but that research should be driven by industry-wide initiatives and not placed as an onus on every individual project.

The need to obtain more data about the marine environment is an ongoing process that will never cease. The perceived need for more data should not lead to overly onerous restrictions on the construction or operation of offshore wind farms. BWEA believe that there is currently enough data available to consent projects within a process of continued monitoring and evaluation.

Wave and Tidal energy

Wave and tidal stream energy has many aspects that make their environmental impacts unique. While there are a range of devices being considered, in the most part they follow types of design that can be analysed and planned for. Many devices are now being tested as full scale devices and the first pre-commercial arrays are being prepared. The knowledge obtained from these first projects must be included as this guidance is revised.

The guidelines specifically refer to the risk of collision. A lot of work is ongoing to find engineering solutions to this potential problem and studies are being performed to see if it is a risk is real. The guidance should not be pessimistic that this potential problem will be seen.

While uncertainty remains over the impacts of wave and tidal stream devices, this will decrease as projects are trialled. Mitigation and best practice can mean that impacts are minimised. Exemption from some of the requirements of the regulations for initial wave and tidal stream projects should be considered in order to allow learning to take place.