

PE1637/E

Petitioner Submission of 15 June 2017

Response to submission from the Cabinet Secretary for Environment, Climate Change and Land Reform (PE1637/D)

We agree with the broad statement that licensing of ship-to-ship oil transfers is the preserve of the UK Government, however it is incorrect to say that the Scottish Government “have no regulatory powers over the process for determining whether a ship to ship oil transfer licence should be granted or not”.

The Merchant Shipping (Ship-to-Ship Transfers) Regulations 2010 as amended (“the STS Regulations”) provide that the Secretary of State (as represented by the Maritime and Coastguard Agency (MCA)), after deciding who are to be “the consultation bodies” for any new application, must either supply, or direct the applicant harbour authority to supply, a copy of the application to the chosen consultation bodies, and invite them to make representations. The consultation bodies therefore have powers to influence the process for determining whether a ship to ship oil transfer licence should be granted or not in any case.

Documents obtained from Marine Scotland via a freedom of information request show clearly (1) that, despite all Ministers’ public statements to the contrary, the Cromarty Firth Port Authority (CFPA) did send them a copy of the application and formally invite them to comment, thus making the Scottish Ministers one of the consultation bodies in this case, (2) that Marine Scotland prepared 4 drafts of a response based on comments from in-house scientists; and (3) that in the end the Scottish Government made a policy decision to send no response, thereby knowingly waiving the opportunity to influence the MCA’s determination of the application.

The latest draft Marine Scotland response raised concerns not mentioned by the other consultation bodies. For instance, although SNH had pointed out that the River Moriston Special Area of Conservation (SAC), designated for salmon, had been overlooked by the applicant, that fish returning there from the Atlantic would use the inner Moray Firth, and that migrating salmon are vulnerable to oil spills, Marine Scotland’s draft response alludes to the more widespread socioeconomic consequences not only of an accidental oil spill, but of the intended regular movement of ships and discharge of ballast water, at any time of year:

“All the main potential environmental impact factors identified could have potential risks to diadromous fish including salmon and sea trout. There are many important salmon and sea trout rivers in the local area and both species are important for conservation and for rod fishing, particularly within the rivers. Salmon smolts leaving local rivers and adult salmon returning to the rivers will pass close to or through the proposed new transfer area. The peak time for salmon smolts is likely to be mid-April to mid-June and returning adults could be present in any month with a summer peak. Some returning adult salmon

associated with rivers further afield may also enter the proposed new transfer area or be in its vicinity. ... Sea trout are also important in the local area and should also have been mentioned. The report should also have clarified whether there has been any net fishing for salmon and sea trout in recent years in the local area which could be directly or indirectly affected."

Rod fishing on local rivers is a key regional tourist attraction, providing a major income stream for the Highlands, but was not mentioned by other consultees. Neither was the risk to jobs, and other aspects of the wider regional economy, of the potential impacts of the proposal on both rod and net fishing.

The Scottish Government did therefore have a role in this licence application, and had useful information to contribute to the MCA's assessments, but failed in its duty to carry out the role. Why did the Scottish Government fail to respond? The documents obtained show that Ports and Harbours branch of Transport Scotland appear to have been behind this decision. Scottish Government officials effectively buried the duly prepared Scottish Government response and fabricated a party line that the Scottish Government had not been consulted. This has led to both the UK and Scottish Parliaments being misled in this regard. Trust ports are supposed to operate independently of the Scottish Government, and there is no evidence to suggest that the CFPA asked for the Scottish Government response to be shelved, in which case Ports and Harbours must have been acting on their own initiative. The Scottish Government's decision not to respond, together with its deliberate public misrepresentation of the true position, needs independent investigation at the earliest opportunity to establish exactly what happened. **We seek the Committee's support to ensure this is done.**

With regards to trust port governance the Scottish Government response confirms that trust ports are their own judge and jury. To quote the Cabinet Secretary, *"it is for their boards to ensure they operate effectively in this way, taking account of stakeholder views, but also to ensure they are complying with the powers set out in their legislation and acting in the best interests of the port overall"*. Boards of trustees are self-appointed by the trust port and there is no independent oversight or accountability to Scottish Ministers or any other public authority. The Scottish Government Guidelines for Modern Trust Ports are not enforceable in law bringing a lack of governance and ministerial accountability. **This point has not been answered.**

The Cabinet Secretary also states: *"Trust Ports are statutory bodies in their own right and their constitution requires them to ensure that the harbour facilities are fit for purpose and are secured for future generations. There are no shareholders and any profits made must be returned to the harbour for this purpose."* We are not convinced that all trust ports operate as described. For example, the creation of the Port of Cromarty Firth Services Company Ltd is potentially an avenue for profits to be diverted away from CFPA stakeholders. No attempt has been made to demonstrate that this arrangement has benefited, or can benefit, stakeholders. **This point has not been answered either.**

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Response to submission from SNH (PE1637/A)

The penultimate paragraph of SNH's response to our petition says:

"To identify appropriate locations for ship to ship transfers, it may be appropriate for the MCA to carry out a strategic overview of the activity in UK waters. This would allow for an assessment of the environmental effects on potentially sensitive sites at that strategic level".

We take this to be a reference to **Strategic Environmental Assessment (SEA)** as required by European Directive 2001/42/EC, and would argue that SEA of ship-to-ship (STS) oil transfers in UK or Scottish waters may be not only "appropriate", but a legal requirement. **This matter has not been fully considered by the Public Petitions Committee.**

Scotland has seen contentious and environmentally questionable proposals in both the Firth of Forth and the Moray Firth, so this strategic aspect needs to be addressed urgently to determine what suitable sites we may have for STS activities in Scotland which will allow trust ports to make appropriate plans for their sustainable development. Marine Scotland has undertaken SEA in respect of matters as diverse as marine renewables and wild seaweed harvesting. Why should STS transfers be any different?

We note that in their response to the petition, as in their response to the 2015 CFP application, SNH provided limited advice on European Protected Species (EPS), other protected species and Priority Marine Features. EPS include bottlenose dolphin, harbour porpoise, minke whale, otter and Atlantic salmon, all of which occur in the Inner Moray Firth, and it is clear that STS transfers at the proposed location are likely to disturb at least the bottlenose dolphin population, so the requirement for an EPS licence – for which Marine Scotland would be the determining authority – should also have been highlighted. **The matter of EPS licensing also needs to be followed up by the Public Petitions Committee.**

Response to submission from SEPA (PE1637/B)

SEPA make some important points. Specifically:

"SEPA considers the scope of the legislation should be sufficient where the competent authority is mindful of the standards set by Scottish domestic legislation and Scottish regional policies as well as the concerns raised by the responsible conservation and environmental agencies. Decisions related to ship to ship transfers are subject to the objectives and policies set out in Scotland's National Marine Plan which includes ballast water management and the risk of transferring non-native species."

In relation to the CFP application, we are of the opinion that Maritime and Coastguard Agency (MCA), as competent authority for STS licensing, has not been mindful of the standards set by Scottish domestic legislation and

Scottish regional policies. For example, there was and has been no reference whatsoever to Scotland's National Marine Plan. Marine Scotland's draft response did refer to it, and "in particular to policy 13.30 relating to ballast water exchange", as it should, but of course that response was never sent. **The matter of compliance with Scotland's National Marine Plan also needs to be followed up by the Public Petitions Committee.**

Policy 13.30 of the National Marine Plan states:

***“Biological pressures:** Ballast water is internationally accepted as a key vector for incidental movements of aquatic species around the world. The IMO Convention for Ballast Water Management has been drawn up in an effort to reduce the risk of transfer of marine non-native species. While the convention has not yet been ratified, OSPAR's contracting parties have agreed interim voluntary guidance on water exchange standards. Ballast water treatment and management methods are being developed to ensure that the ballast water is treated to a known discharge standard i.e. any organisms in the discharged ballast water will have to be below a certain abundance to comply with the Ballast Water Management Convention.”*

“Water exchange standards” is a reference to the IMO D-1 standard, while reference to treatment to “a known discharge standard” is a reference to the IMO D02 standard. SEPA's response says:

“SEPA welcome the undertaking that ballast water discharges would be only to IMO standards. SEPA recommend that where D-2 compliant treatment systems are available these must be used. The D-2 standard offers a much higher level of protection from biological species than D-1.”

In relation to the above-quoted ballast water management policy in the National Marine Plan, we wish to point out to the Committee (a) that the IMO Convention for Ballast Water Management comes into force on 8 September 2017, from which date any STS licence must comply with the standards mentioned, and (b) that new technology for shore-based treatment of ballast water to achieve the D-2 standard is now available, making the Nigg alternative even more attractive in terms of minimising environmental impacts. With ballast water holding tanks already available, Nigg facilities also have the capability for ballast water re-cycling without ballast water discharge to the SAC.

Response to submission from Maritime and Coastguard Agency (PE1637/C)

While the MCA appears to have taken the latest CFPA application seriously due to public pressure and our threat of legal action, it appears not to have been treated the previous CFPA application with the same level of attention to legal requirements, including those of the STS Regulations.

Cromarty Rising supports the use of the existing STS facilities at Nigg, for which CFPA already has a licence under the STS Regulations, in preference to the Moray Firth proposal. However, it is clear that that licence was granted in breach of the Regulations, and potentially in breach of Article 6 of the Habitats Directive too, after MCA decided - without seeking SNH's advice as the Regulations require (SNH have confirmed this) - that no appropriate assessment was needed because in its opinion there was unlikely to be a significant effect on any SAC or SPA – despite the fact that Nigg jetty is only just outside the boundary of the Inner Moray Firth SAC.

Although it is too late for a legal challenge to the Nigg licence, **we seek the Committee's support in ensuring that, if CFPA decides to resume STS activities at Nigg, the MCA and/or CFPA will seek SNH's advice about the potential impacts on the bottlenose dolphin population for which the SAC was designated, and how to prevent or mitigate them.**