

PE1637/G

Petitioner submission of 16 June 2019

Cromarty Rising response to Minister for Business, Innovation and Energy submission of 30 January 2018 (PE1637/F) – June 2019

Subsequent to January 2018 the Port of Cromarty Firth (PoCF) have decided not to pursue another application for STS transfers of crude oil inside the Moray Firth SAC. This however does not address the process failures which remain a threat for all Scottish coastal waters. We still have serious concerns regarding the accountability and regulation of Trust Ports in Scotland as custodians of important public assets. Our comments are process based and apply to all Scottish ports, however we have used examples relating to Port of Cromarty Firth to illustrate the issues. Through freedom of information (FOI) requests, we have discovered that a senior official in the Maritime and Coastguard Agency (MCA) stated:

“The STS regulation 2010 as amended has perhaps unintentionally further complicated the adjudication pathway. The determination process is multi-faceted and key capability, ie. analysis of the Appropriate Assessment and statistical data specialist, does not exist within the MCA and it has not been openly declared in support of the determination process.”

This is an outrageous process failure. The MCA are the competent authority for assessing the effect of a proposal on a European protected area, however, they state that they do not have the capability to analyse an Appropriate Assessment. MSN1829 states: “Applications will be carefully scrutinised by the MCA to determine likely significant effect on a European site.” This means all MCA awarded Ship to Ship (STS) licences for oil transfer in Scotland may well have not undergone the proper environmental scrutiny required by the regulations. Indeed SNH have no record of being consulted for the Nigg STS licence in 2012.

During the PoCF 2015 STS application, the MCA, with the fully delegated authority of the Secretary of State for Transport under "The Merchant Shipping (ship-to-ship Transfer) Regulations 2010, as amended, have confirmed that the Scottish Government Directorate, Marine Scotland, were formally consulted during that STS application and as such had full scientific and marine operational input duties. MCA confirm that they, again with fully delegated Authority of the Secretary of State under the STS regulations, nominated Intertek to send the consultation packages to all invited consultees. Marine Scotland scientists raised concerns and produced a well-developed response that was never submitted to the MCA. With such scientific evidence to hand, why would the Scottish Government choose not to input to the STS award process? Furthermore, no consideration was given to European Protected Species licensing, which is under the control of Scottish Ministers (a formal complaint has been raised with the European Commission with regard to these matters **which is still open**). FOI information shows that the process of devolving STS decision-making powers from MCA to the Scottish Government has been fully considered and the steps required mapped, assessed and made available.

Further, Scottish Port Policy is wholly devolved to Scottish Ministers. Yet this power to intervene in the protection of species has been repeatedly hidden from public view and omitted from advice given to the public petitions committee. Trust Ports are public assets yet it is clear there is **no accountability** to the Scottish public. Why not?

STS is not the only issue - in recent months various oil rigs and high-speed servicing vessels have been evident inside the Moray Firth SAC on a regular basis. A young Minke whale being found with a severed tail-fluke by the Invergordon lifeboat crews (Press & Journal 6th January 2016), a porpoise with severed tail fluke was found on Cromarty beach last summer and a high-speed rig-servicing vessel forced protected bottlenose dolphins to take evasive action to prevent injury. Rigs continue to use the Moray Firth SAC as a routine servicing facility. On every complaint, despite the requirements of Scotland's National Marine Plan and Port Policy power being devolved, the Scottish Government and Highland Council claim they have no powers. Recently a rig was moored inside the SAC for months on end with engine exhausts facing directly onto the town of Cromarty. The impact on the interests of the designated site was not considered and neither was the impact on tourism and residents in Cromarty. Complaints made to the Highland Council resulting in the investigating officer taking these up with PoCF – while limited progress was made, the officer replied: “We don't have any powers to stop the siting of rigs...”

A large Transocean drilling rig was recently moored inside the Moray Firth SAC close to the highest population density area of bottlenose dolphin activity. A generator ran 24 hours a day and a number of support vessels were around it. The photo below was taken on 8th June 2019 - a chemical cloud (likely to be cement) can be seen clearly being released from the left of the rig and covering surface of the sea and the nearby coastline – this happened on at least 3 occasions with the dust spreading over the settlement of Nigg.



Again, there has been no consideration of the impact on the interests of the SAC for any of these operations which is contrary to EU law. Furthermore, there has been no consideration of the impact on humans. The matter of the cement release has been raised with SNH who raised the matter with SEPA and the PoCF – no one knows who's responsibility it is to control and assess the impact of this operation. Both SEPA and SNH are clear it is not their responsibility. The matter was raised with the MCA - they are unclear and are seeking advice from the Department of Transport. There would appear to be a complete regulatory vacuum where oil facilities are docked in Trust Ports. It raised the questions:

1. Who approved mooring that rig inside the SAC?
2. Who is responsible for the release of material from the rig?
3. Crucially, which agency is responsible for investigating the incident & regulating the activity?

With a view to understanding how Trust Ports are regulated, especially with regard to oil related structures, we would like the PPC to write to the MCA, Police Scotland Commissioner, SEPA, SNH, Marine Scotland, Scottish Government and the Health and Safety Executive to ask these 3 questions. To illustrate the ridiculous situation – if a person was to throw litter in the street or let their dog foul the pavement they could very rightly be fined. However, an oil rig sitting in a protected area throws several tonnes of cement powder into the sea or the atmosphere in Scotland absolutely nothing happens – no warning, no fine, no prosecution as it is no-one's responsibility.

Scottish Trust Ports would appear to be able to do whatever they want and the only redress after complaining to the port, is for stakeholders to take legal action. This is inequitable, unjust and simply not feasible due to the financial cost. In England however, stakeholders, if not satisfied with a trust port's response to a complaint, stakeholders can appeal to the Department for Transport (DfT) to intervene. In Scotland there is no such provision.

The recent Greenpeace protest and the ease with which an oil rig moored in the Cromarty Firth was boarded on several occasions, raises the further question of security. Indeed the protestors stated that they boarded the rig because it was so close to land and easy to do so. This is just one of several security breaches - security is clearly a low priority for some Trust Ports however this has much wider implications for the general public if any of the structures were subject to a more malicious event. Who is responsible for Trust Port security?

The Scottish Government is effectively allowing these violations to continue on a routine basis as a result of having given away the power to regulate its own Trust Ports. Furthermore communities living on the doorstep of the port activities need to be heard - Trust Ports need to be accountable for their actions and there needs to be public scrutiny of Trust Port activities.

We ask the committee to challenge Scottish Ministers on these violations which occur during business activities of Scottish Trust Ports so that marine mammals, other protected species and indeed local communities living on the shores of Trust Ports can all be protected. Licence award-making powers and regulatory powers must be clearly demarcated with a clear system of regulation

in place whether it be for Ship to Ship transfers or emissions from structures or ships in Trust Ports.

The governance of Trust Ports is also ineffective – Ports are accountable to their board yet they appoint their own boards, a process undertaken completely outwith the public appointments process required for other Scottish public servants. The governance of Scottish Ports has become progressively less democratic. As an example, The Cromarty Firth Port Authority was established by the "Cromarty Firth Port Authority Order Confirmation Act 1974". This order required the local authority to nominate three board members to the port's board, "which shall not be less than six and not more than seven in number" thus establishing a significant level of external control. This was important, given the permitted development rights the order contained which effectively allowed the Port to operate outwith the planning system and local biodiversity plans. However, Scottish Statutory Instrument (SSI) 2003 No 491 "The Cromarty Firth Port Authority (Revisions) Order 2003", issued by Scottish Ministers, transferred all Ministerial Authority of the 1973 Order from Westminster to Holyrood. The SSI removed all requirements for local Authority involvement in the selection of board members. In England & Wales however, the Secretary of State for Transport still appoints the chair of the five largest trust ports – Dover, Harwich Haven, Milford Haven, the Port of London Authority and the Port of Tyne as well as some non-executive directors.

Under Article 3 of the Marine (Scotland) Act 2010 Consequential Provisions) Order 2010 all UK wide Agencies and Directorates must comply with Scottish Ministers National Marine Plan, which specifically includes "reserved functions" - therefore STS applications and indeed any other general port activities are required to meet Scottish Minister requirements.

In 2012 when Scottish Ministers issued "The Scottish Government Guidelines for Modern Trust Ports" they removed all ministerial responsibility from the Scottish Government and, as evidenced by Mr Wheelhouse's response, have created a situation where members of the public must attempt to seek re-dress through the courts at massive costs. Indeed, when Cromarty Rising threatened legal action against the UK Government in connection with its granting of a licence for STS at Nigg in 2012 there was complete rebuttal. However, a FOI request reveals that a UK government official wrote to to the MCA in connection with this challenge stating "I have increased the copy list somewhat as I do have concerns about the validity of the licence". The next paragraph is even more revealing:

"I remain of the view that, given that we are still in correspondence with [redacted] (redacted) and their letter of 20 January 2017 does not purport to be a pre-action letter, we should respond robustly. It is also possible that they will drop this potential challenge if the anticipated application is unsuccessful. However, if they pursue these matters, my initial view is that there is a medium high risk of a judicial review being brought, and that if that challenge is brought then, based on the information available to me at the moment, the risk of that challenge being successful is high."

After receiving the "robust response" Cromarty Rising decided not to pursue the challenge on the basis of the financial cost. Unfortunately the Petitions

Committee rules prevent us submitting the email in evidence, however it is clear on reading that the process of awarding of STS licences in Scotland is at best seriously flawed. However, there is simply no viable procedure to challenge without significant cost. Furthermore, there would appear to be no oversight by Scottish environmental agencies or the Scottish Government.

Scotland's Marine estuaries are an economically and ecologically important part of our economy. This has such a high level of importance for the future that it cannot be left uncontrolled by ministers as things stand. We ask the committee to consider the situation with our Trust Ports to bring this significant element of GDP under the control of Scottish Ministers.

Scottish Ministers Guidance for Modern Trust Ports indicates that "Trust ports operate in a commercial environment with no direct public funding" However, as an example in the recent expansion of the Port of Cromarty Firth (PoCF) several million pounds of tax-payer money was given for development costs. We ask the PPC to request a review of Scottish Trust Port Governance - do ports receive public funding or not? We also ask why Scottish Ministers guidelines are not enforceable by Scottish Ministers? It is effectively up to a port to police itself.

With regard to sub-companies, as an example, Port of Cromarty Firth Services Ltd was sold off in February 2018 as recorded in Companies House. No details are available to the public as to how this deal was brokered, the value of the assets that were transferred (this included a new million-pound crane) and how the new owner was chosen and indeed how any of this represents best value for stakeholders. Given this company was effectively a part public owned asset - are the Scottish Government satisfied that best value was achieved by competitive tendering? Does the Scottish Government have any powers at all should non-compliance be found within a Scottish trust port and indeed who has the power to audit Scottish Trust Ports in their financial transactions and their dealing with stakeholders?