

Our Reference: P&E/Environ/EN1/JT05

10 October 2003

D Whitmee, Esq.
Consultation (Marine Regulations)
Department for Environment, Food and Rural Affairs
Zone 1/08
Temple Quay House
2 The Square
Bristol BS1 6EB

DIRECT LINE: 020 – 7743 7941
DIRECT FAX: 020 – 7743 7998
MOBILE: 07713 – 654595
E-MAIL: james.trimmer@pola.co.uk

Dear Mr Whitmee

THE OFFSHORE MARINE CONSERVATION (NATURAL HABITATS, & C.)
REGULATIONS 2003

Thank you for your letter and enclosures dated 6 August 2003 and for consulting the Port of London Authority on the above Regulations which the Government has prepared to comply with the judgement handed down in the Greenpeace case (*R v Secretary of State for Trade and Industry ex parte Greenpeace Limited* [2000] 2 CMLR 94)

Prior to commenting on the specific issues raised in the consultation document itself, I feel it is important to provide a synopsis of the PLA, its jurisdiction and responsibilities. The PLA was established as a Public Trust by Act of Parliament in 1908. Its legislative base and context was most recently updated by the Port of London Act 1968 and subsequently through a number of Harbour Revision Orders, the most recent being approved by the Secretary of State in 2003.

The PLA's specific duty, as Port Authority for the tidal River Thames, its tidal tributaries and the outer Estuary (the PLA's seaward limit extends to lines drawn from latitude 51° 37' 00" north, longitude 00° 57' 19" east (Foulness Point in the County of Essex) to latitude 51° 46' 05" north, longitude 01° 20' 32" east (Gunfleet Old Lighthouse) and thence to latitude 51° 26' 36" north, longitude 01° 25' 30" east and thence to latitude 51° 24' 55" north, longitude 00°54' 21" east (Warden Point in the county of Kent)) is enshrined in Section 5 of the 1968 Act (as amended) ('the 1968 Act') and states that: -

"It shall be the duty of the Port Authority to take such action as they consider necessary or desirable for or incidental to the improvement and conservancy of the Thames."

The 1968 Act also provides wide powers for the PLA to undertake or facilitate port and cargo handling operations in the vicinity of the River Thames. Section 5(1A) states: -

"The Port Authority shall have power to provide, maintain, operate and improve such port and harbour services and facilities in, or in the vicinity of, the Thames as they consider necessary or desirable and to take such action as they consider incidental to the provision of such services and facilities"

In order to discharge its statutory duty, the PLA has been provided with very wide powers within the 1968 Act including: -

- Regulation of navigation by means of River Byelaws, General Directions and other associated Byelaws;
- Licensing of river works and dredging;
- Hydrographic surveying;
- Registration and inspection of craft and boats for hire (under 12 passengers);
- Removal of sunken vessels and hazards to navigation;
- Licensing of waterman and lightermen; and
- Maintenance of Richmond Lock and Weir.

The PLA is also the statutory pilotage authority for the Thames Pilotage area and furthermore acts to promote the Port of London and the River Thames to both UK and international cargo handling operators and shipping lines.

The PLA has jurisdiction over the entire tidal River Thames from Teddington in the west to its seaward limit in the Thames Estuary in the east, a length of over 150 kilometres.

Additionally, the PLA owns the vast majority of the riverbed and foreshore of the Thames and associated tidal rivers and creeks to the Mean High Water mark from the upper limit to a line drawn from between the City or Crow Stone (Westcliffe/Leigh) to the London Stone (to the east of Yantlet Creek). Any structure in, on, or over the Mean High Water mark (regardless of ownership) within this area must, by virtue of Section 66 of the 1968 Act, obtain a River Works Licence for the structure from the PLA. A failure to obtain a Licence is a criminal offence under Section 70 of the 1968 Act.

The PLA welcomes the opportunity to comment on these important draft Regulations. Whilst the PLA broadly supports the principle of improving the protection of the offshore marine environment, it has a number of concerns relating to implementation of the 1994 Regulations that it feels should not be translated to the offshore zone. In particular, the PLA feels that legislative protection should be solely based on a well-informed, scientifically robust baseline, and that legislation should recognise the potential implications for those organisations with statutory responsibilities or commercial interest in the offshore zone.

As such, the draft regulations raise a number of important issues for the PLA in relation to its statutory duties and responsibilities and the continued success of the Port of London. The considered response of the PLA therefore addresses both the questions raised in the document and highlights issues specific to certain Regulations and the regulatory impact assessment (RIA).

The PLA is concerned over the application of Regulation 3 to UK and EU registered shipping and consequently whether it conflicts with current UK government policy. It appears to the PLA that Regulation 3 will potentially interfere, within the offshore zone, with the right of navigation currently enjoyed by EU registered vessels. It is of fundamental concern to the PLA if these Regulations alter the right of navigation enjoyed by EU registered vessels. They also

appear to run counter to the government's 1998 shipping White Paper *British Shipping: Charting a New Course*, which aims, at action 24, to facilitate and indeed increase UK ship registration: "...in such a way as to support the aim of encouraging growth in the number of merchant vessels on the UK flag".

Any interference in the right to navigate currently enjoyed by UK vessels in the offshore zone may well decrease the attractiveness of the UK registration in favour of registration in countries outside the EU, which will not be affected by the Regulations. This Regulation will not therefore, in the view of the PLA, lead in the increase in UK vessel registration sought by government and may well cause harm to UK shipping interests. The application of the Regulations, particularly in relation to the issues raised by the PLA in these representations should therefore be clarified and this potential conflict with extant shipping policy considered and resolved.

In relation to the questions raised within the summary, and in particular (b) and (d): -

1. The PLA is well aware of the relative paucity of environmental data in the marine environment and therefore seeks appropriate reassurances that the site selection process will be well informed; scientifically robust; and transparent. In particular, the PLA would like to highlight the following issues: -
 - Care should be taken to ensure that developers are not penalised for providing data, as part of the normal scheme preparation process, that is then subsequently used to justify a designation without due attention also being paid to other locations with (potentially) similar features; and the relative importance of the site. This concern is amplified in comments relating to Regulations 6 (1) and 7 (2) below;
 - Due consideration should be given to the accurate definition of site boundaries. This concern is amplified in comments relating to Regulation 6 (1) below;
 - The site identification and designation process should not be expedited. As the UK is at the forefront of applying the Birds and Habitats Directives to the offshore environment, pressure to conclude the process quickly should be resisted in favour of ensuring a high quality and defensible outcome;
2. The PLA believes that further consideration needs to be given to the competitive position of the UK maritime sector until such time as other Member States undertake a comparable designation process in offshore waters. In particular, the PLA would like to highlight the following concerns, which are amplified in comments relating to section 7.3 of the RIA below: -
 - The approach taken in the UK to date (treating sites put forward for designation as if they were already designated) could put those UK businesses which compete with their European counterparts at a competitive disadvantage even before the designations are confirmed;
 - The UK should not submit sites to the European Commission until other Member States are in an equivalent position. The PLA understands that the Government agreed not to put forward further sites in the 'estuaries' category until the discussions on whether or not to include estuarine structure and function as designation criteria had been concluded. This approach is supported.

3. The PLA is concerned that the RIA accompanying these draft Regulations is inadequate in the following respects: -
- The PLA's experience with the 1994 Regulations, particularly in relation to coastal and inshore environments, indicates that both data collection costs and physical (hydrodynamic) modelling costs can be substantially higher when a proposed development might affect a European Marine Site. Such costs typically rise with an increasing distance offshore;
 - The prescriptiveness that has often characterised the application of the 1994 Regulations means that the costs associated with mitigation measures and, in particular, the requirement to provide like-for-like compensation, can be far higher than for an equivalent development under the EIA Regulations alone.
4. The PLA is concerned that additional costs will only be incurred by businesses which operate in, or in the vicinity of, a European site. Such businesses may well, therefore, find themselves at a competitive disadvantage compared with comparable but unaffected businesses in the UK and in Europe. This concern is amplified in comments relating to Sections 5.7 and 5.124 of the RIA below.

The PLA also wishes to make the following detailed points in relation to the draft Regulations: -

Reg. 6 (1) The PLA recognises that scientific data is often lacking in the marine environment. With some notable exceptions, much of the data available has been collected or is being collected in support of proposed developments. Whilst this process may identify features of interest, such data collection does not necessarily indicate whether those features are typical of a extensive geographic area or, more importantly, whether they are indeed the most valuable examples of their type. The PLA therefore seeks reassurance that the "*appropriate scientific advice*" referred to in this Regulation will comprise an informed process based on the necessary breadth of data.

The PLA similarly understands that boundary definition in the offshore environment can be less than straightforward. Nevertheless, given the potential implications of designation for the PLA's operational development within the Port of London such as dredging, it is important that all possible efforts are made in defining boundaries to accord as closely as possible with the features of interest.

The PLA understands that the UK is in the forefront of the process of designating SPA's and SAC's within the offshore marine environment. Indeed, it is not clear whether any other Member States have embarked on this comprehensive exercise. There should, therefore, be adequate time for the UK Government to ensure that site selection proceeds in a measured, well-informed manner, resulting in a selection of sites which will make the most appropriate contribution to the Natura 2000 network.

- Reg. 6 (7) Annexe III Stage 1 of the Habitats Directive makes reference to the “*relative value of sites at national level*”. This sentiment is not reflected in Regulation 6 (7) (a).
- Reg. 6 (7) (i) & (ii) There have been inconsistencies and uncertainties in interpreting “*the physical or biological factors essential to life and reproduction*” for species protected under the 1994 Regulations. Given the nature of the marine environment and the species which inhabit it, it will be essential to ensure that such factors are carefully and clearly defined prior to the site selection process.
- Reg. 7 (2) (b) The intention to prioritise site designations on the basis, *inter alia*, of the threat of degradation or destruction serves to emphasise the importance of the comments made above in relation to Regulation 6 (1). If the data collected in respect of a project demonstrates the presence of seabed features of interest, it is imperative to ensure that such features are placed in a proper context and their relative importance established prior to the putting the site in question forward for designation, especially if it is to be treated as a priority.
- Reg. 9 (1) The comments made above in relation to Regulation 6 (1) (availability of scientific data) and Regulation 6 (7) (relative value) also apply to this part of the Regulations.
- Reg. 13 (2) Experience with the application of the 1994 Regulations suggests that the initial process of identifying “*Operations which may cause deterioration...or damage*” would benefit from a more pragmatic and, where appropriate, site specific approach. Input from potentially affected stakeholders could well benefit the process by helping to avoid misleading and sometime inaccurate suggestions being put forward. The PLA would be pleased to assist in this process should it ultimately be determined that sites within or in the vicinity of its seaward limits will be considered for designation.

The PLA also wishes to make the following detailed points in relation to the draft RIA: -

- Section 5.2 In addition to the bullet points concerning mitigation (conditions, etc) and compensatory measures, experience with the application of the 1994 Regulations suggests that the costs of data collection and hydrodynamic modelling rise substantially when developments might affect a European Marine Site.
- Sections 5.4 & 5.18 It is not clear what type of project (scale, cost, etc) has been reviewed. However, the experience of the ports industry with the application of the 1994 Regulations indicates that their prescriptiveness and lack of flexibility can result in substantial cost increases compared with projects which are subject only to EIA Regulations.
- Sections 5.7 & 5.14 In practice, costs will only be incurred where European sites are designated. Any difference will be experienced by those businesses which need to operate within the constraints imposed by European

site designation against those experiencing no increased costs as their operations are unaffected by designation. Similarly, the competent authorities will only be applying the Regulations in the area up to 12 nautical miles if sites have already been designated in this area.

If you require any further information or clarification on the PLA's position, please contact me.

Yours sincerely

JAMES TRIMMER
HEAD OF PLANNING AND PARTNERSHIPS

cc J Dempster, Esq. - Director, United Kingdom Major Ports Group
D Chard, Esq. – The Chamber of Shipping