

## **Proposal for the North & East Coast Region Inshore Fisheries Group for resolving offshore renewable developments and commercial fishing interactions issues, to achieve co-existence: -**

### **1. Background**

Following requests from Marine Scotland MORE (Marine Offshore Renewable Energy), and Marine Scotland LOT (Licence Operations Team), as well as a mandate from the NECRIFG Management Committee, Chairman Iain Maddox represented his members and the other RIFG Chairs at FLOWW, the Interactions meetings in Dundee and various other meetings, seeking to promote co-existence between offshore renewables developers and commercial fishing interests.

- Marine Scotland MORE and LOT requested RIFG representation to compliment the Scottish Fishing Federation (SFF), who have borne much of the burden and cost of providing representation for Scottish commercial fishing interests to date.
- The NECRIFG Management Committee mandate arose from various complaints received by members of disruption, displacement, spatial conflict and gear loss without any or inadequate compensation, in apparent breach of best practice guidelines and common law.

Progress reports have been provided for NECRIFG meetings and discussions minuted, which record unanimous agreement that from fishing interest's perspective, the best practice guides are not working in practice and common law is being ignored.

### **2. Best Practice Guides**

These are the two key reference documents:

1. FLOWW Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Liaison – January 2014
2. FLOWW Best Practice Guidance for Fishing Industry Financial and Economic Impact Assessments - August 2012

Following a proposal by Iain Maddox at the 11<sup>th</sup> February 2019 FLOWW meeting, it was agreed that a review of the Best Practice Guides was now needed and a workgroup has been set up to conduct the work.

- It was accepted that not having definitions of all the key terms does not provide clarity or consistency, but leads to individual interpretations being made.
- It was accepted that some clauses appear to contradict each other leading to ambiguity and confusion.
- It was not accepted that these guidelines are converted in to a legally binding agreement to provide certainty they'd be applied in a consistent and timely manner.

Consequently, by not having a binding agreement there remains the opportunity for renewables developers to apply these guidelines without recourse to any enforcement, without which fishing interests will most likely continue to experience disruption, displacement, spatial conflict and gear loss without any or inadequate compensation.

### **3. Law Issue**

It has been a regular complaint that developers supply vessels do not adhere to the Safe Passage routes resulting in static gear getting towed away in fishing grounds already identified to the developer. Evidence presented to the 24<sup>th</sup> August 2018 NECRIFG meeting recorded compensation claims were problematic and took months to resolve, if at all.

- Supply vessel skippers cite their Right to Navigate and the fishermen cite that towing away gear is a Gear Vandalism offence.

NECRIFG requested clarification of the law from MS MORE but they have been unable to assist so far, the situation remains ambiguous. In practise, if there are sufficient number of substantiated complaints, MS LOT will issue a Deconfliction Notice to the developer.

### **4. Issues with how the Best Practice Guides are being interpreted**

Whilst FLOWW was set up to foster good relations and encourage co-existence between the fishing and offshore renewable energy sector, the presumption is that windfarm developments will impact fishing over the lifetime of the installation albeit *'the aim should be to allow fishing to continue wherever possible'*.

- NECRIFG has formally recommended to Marine Scotland Inshore, MORE, LOT & MPP that the presumption should instead be to protect food sources as stipulated by General Planning Principle No1 of the National

Marine Plan. Hence, windfarms should not be built on fishing grounds, spawning grounds, nurseries or critical habitats and these should be protected as national assets.

FLOWW Recommendations for Fisheries Liaisons states: *'If co-existence is not possible, mitigation for disruption and displacement of fishing activity should be considered as the first priority, and commercial compensation should only be used as a last resort when there are significant residual impacts that cannot otherwise be mitigated'*.

Whereas FLOWW Recommendations for Fisheries Disruption Settlements and Community Funds states that disruption settlement is: *'Monetary payment for demonstrable loss of fishery access or economic disadvantage caused directly to active fishing vessels by disturbance or displacement by an OREI (Offshore Renewable Energy Installation)'*.

- NECRIFG's recoded position is that co-existence is very possible as there are more areas in the sea where we don't fish than where we do. If care is taken to identify fishing grounds, spawning grounds, nurseries and critical habitats, then no spatial conflict will ever occur.
- The guide advises the types of mitigation which should be considered and refers to a further document (COWRIE fisheries mitigation document; community project fund; disruption compensation), but NECRIFG is not aware of any such mitigation being discussed with or offered to fishing interests.
- That compensation to individual fishermen is considered a *'last resort'* explains why developers have been able to ignore the clause stating disturbance and displacement should receive compensation.

Furthermore, developers take the position that if a fisherman can fish elsewhere there is no displacement, whereas fishing interests would define displacement as having to fish elsewhere.

Developers also state that to receive compensation for displacement, fishermen have to prove *'Actual Loss'* which suggests that a fisherman has to first prove in court that a Contract was formed (offer, acceptance & consensus ad idem) then *damnum injuria datum* i.e. loss wrongfully caused. It is highly unlikely that any fisherman will take a developer to court as challenged.

FLOWW requires developers to gather *'records on commercial catches'* for the EIA (Environmental Impact Assessment) and *'emphasis should be placed on*

*early dialogue between the OREI developer and the affected fisheries stakeholders in order to understand the importance of the fishing ground. It is important to understand whether the area in question is heavily or lightly fished, how and when it is normally fished, the tradition of fishing activity in the area, and the revenue that can usually be earned from the area.'*

But, FLOWW also states '*There is an obligation upon affected fishermen to provide evidence (such as three years' worth of catch records) to corroborate any claims.'*

- MS MORE confirmed for NECRIFG that it was/is the developer's responsibility to gather fishing data for their planning application. Developers should already have all the fishing data required for compensation claims unless their EIA was data deficient.

There should be no excuses for evading, avoiding or delaying paying compensation for disruption and displacement.

HOWEVER, the following statement negates any value whatsoever the best practice guides may have for fishing interests:

*'It is not within FLOWW's remit to provide prescriptive advice on how settlements related to disrupted and displaced fishing activity should be decided and calculated.'*

## **5. Proposal**

Accordingly, co-existence between offshore renewables developers and commercial fishing interests will not be possible without a binding agreement which provides certainty for fishing interests how disruption, displacement, spatial conflict and gear loss will be resolved in a consistent, timely and enforceable manner.

Given that developers are unwilling to be bound by an enforceable agreement and that fishermen's complaints are consuming considerable time of Scottish Ministers, Marine Scotland and fishing representatives, the solution available is to create a standard set of rules to incorporate in to each Fisheries Management & Mitigation Strategy (FMMS) which would form part of the Consent Conditions.

In essence, these rules would be a condensed and clarified version of the FLOWW best practice guides. This would be binding on developers to give

fishing interest the certainty they require and binding on fishermen via the agreed compensation claim process. If a fisherman does not adhere to the claim process, which will also protect developers from fraudulent claims, they will not be eligible (albeit his rights in law remain, he may take the developer to court if he wishes).

This is a practical and pragmatic solution to pave the way for co-existence and I propose to the NECRIFG Management Committee they make the following recommendation to Scottish Ministers and Marine Scotland:

- **Following the Decision Making Process, the NECRIFG Management Committee recommends to Scottish Ministers and Marine Scotland that a standard set of rules are incorporated in to each Fisheries Management & Mitigation Strategy which creates a binding agreement to provide certainty for both offshore renewable developers and fishing interests how disruption, displacement, spatial conflict and gear loss will be resolved in a consistent, timely and enforceable manner.**

Should a consensus be achieved, the suggested process would be set up a workgroup who will draft these rules and following consultation within NECRIFG and other RIFG's, submit a final draft to Marine Scotland for their consideration.

We will seek Marine Scotland advice how to progress our Recommendation to achieve the recommended outcome.

It is anticipated that successful implementation will negate the need for the FLOWW and Dundee mediation meetings and work could begin in earnest to plan and implement the COWIE recommendations to deliver constructive co-existence.

I commend this recommendation to the NECRIFG Management Committee.

Iain Maddox  
NECRIFG Chairman  
12<sup>th</sup> April 2019