

MARINE AND COASTAL ACCESS ACT 2009: MARINE PLANNING

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Marine planning: purpose and structure

1. The marine environment is already subject to significant pressure and competition for space and usage. The 2009 Act is central to the government's vision for "clean, healthy, safe, productive and biologically diverse oceans and seas"¹ and a regime which can balance the contending aspirations for our waters.
2. The 2009 Act is designed to:
 - a. create a more integrated approach to effective marine management;
 - b. enable the sustainable use and protection of marine resources;
 - c. provide a clearer framework for consistent decision-making which affects the use of the marine environment.
3. At the heart of the new system is the Marine Management Organisation ("MMO"), a centre of marine expertise designed to deliver many of the objectives and functions set out in the legislation. Other papers deal with the wider functions of the MMO. This one focuses on marine planning, in particular its two central features:
 - a. Marine Policy Statement ("MPS"): a document prepared by the UK government which sets out overarching policy objectives for use of the marine environment;
 - b. Marine plans: plans which will be prepared by the MMO to implement the MPS in specific areas, using information about uses and needs in those areas.

¹ See UK Marine Policy Statement: a draft for consultation, para. 2.1.

Marine Policy Statement

4. The MPS will be a document in which the “policy authorities that prepare and adopt it state general policies of theirs (however expressed) for contributing to the achievement of sustainable development in the UK marine area”.²
5. The “policy authorities” are the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Department of the Environment in Northern Ireland and the MPS can be prepared by them acting jointly, or by the Secretary of State and any one or more of the authorities acting jointly, or by the Secretary of State alone (if he has first invited the other authorities to participate in the preparation of the statement).³ At the moment the UK authorities are working towards joint adoption of the MPS.⁴
6. The “UK marine area” to be covered by the MPS consists of:
 - a. the area of sea within the seaward limits of the territorial sea adjacent to the UK (12 nautical miles);
 - b. any area within the limits of the exclusive economic zone (a seazone pursuant to the UN Convention on the Law of the Sea in respect of which the UK has special rights over the exploration and use of marine resources, to be designated by Order in Council – up to 200 nautical miles);⁵
 - c. the area of sea within the limits of the UK sector of the continental shelf (in so far as it is not covered by the exclusive economic zone);⁶
7. It includes the bed and subsoil of the sea within those areas. “Sea” includes any area submerged at mean high water spring tide and the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide.⁷

²S. 44(1) of the 2009 Act. References hereafter to legislative provisions are to the 2009 Act unless otherwise stated.

³S. 45.

⁴See too ss. 46-8 for provisions relating to review, amendment and withdrawal of or from an MPS.

⁵ Until designation any reference to the exclusive economic zone is to be read as a reference to a renewable energy zone as defined under the Energy Act 2004 – an area over which the UK claims exclusive rights with respect to production of energy from water or winds: see s. 42(5).

⁶ S. 42(1).

8. Schedule 5 to the Act sets out the procedure for the preparation and publication of an MPS. In summary this involves:
- a. preparation and publication of a consultation draft MPS;⁸
 - b. preparation and publication of a statement of public participation (“SPP”), ie a statement of policies for the involvement of interested persons in the preparation of the MPS; and a timetable for its production, including the making of representations and adoption and publication;⁹
 - c. a sustainability appraisal of the draft MPS;¹⁰
 - d. the making of representations by any person on the draft;¹¹
 - e. laying copies of the consultation draft before the UK Parliaments and Assemblies¹² (and provision for a response by the appropriate authority to any resolution made by its Parliament or Assembly or a recommendation by a legislative committee);
 - f. adoption of the final text with notice being given by each policy authorities to the others;¹³
 - g. publication of final MPS, with a summary of any differences to the draft and reasons for them.¹⁴
9. The “UK Marine Policy Statement: A draft for consultation” has been published¹⁵ and the consultation period ended on 13th October. The final version is expected in Spring 2011. It describes itself as providing the “high-level policy context” within which marine

⁷ S. 42(3).

⁸Para. 8.

⁹Para. 4.

¹⁰Para. 7. This is done, in part, to meet the Strategic Environmental Assessment requirements of Directive 2001/42/EC.

¹¹Para. 9.

¹²Para. 10.

¹³Para. 12.

¹⁴Para.s 11 and 12. If a policy authority participates in the preparation of an MPS but does not adopt it, this does not affect the validity of the document: paragraph 13.

¹⁵With a Draft Appraisal of Sustainability including a Strategic Environmental Assessment, a Draft Habitats Regulation Assessment and a Draft Equalities Impact Assessment screening.

plans will be developed and “setting the direction for marine licensing and other relevant authorisation systems”.¹⁶

10. The draft MPS does not set out detailed criteria against which marine planning decisions are to be taken. Its format is to identify main policy priorities and issues that will need to be taken into account. The main theme is the need to maximise sustainable economic activity and prosperity whilst respecting environmental limits.¹⁷ It seeks to draw on the regime for National Policy Statements introduced by the previous government, where relevant.¹⁸

11. Economic and social factors including employment are to be taken into account,¹⁹ alongside the need to ensure a halting and, if possible, a reversal of biodiversity loss with species and habitats operating as part of a healthy, functioning ecosystems.

12. The system should ensure healthy marine and coastal habitats across their natural range and resilient and adaptable marine ecosystems, along with the long-term abundance and retention of full reproductive capacity in the marine food web.²⁰ The MMO should identify areas and features of importance for nature conservation²¹ and state policies for in connection with the sustainable development of the area. These should inform identification of policies and locations for marine activities or developments that may result in unacceptable adverse impacts on biodiversity should be designed or located to avoid such impacts. Development should aim to avoid harm to marine ecology, biodiversity and geological conservation interests, including through location, mitigation and consideration of reasonable alternatives. Where significant harm cannot be avoided, then appropriate compensatory measures should be sought. If appropriate

¹⁶p. 17.

¹⁷“Charting Progress 2”, published by the UK Marine Monitoring and Assessment Strategy (UKMMAS) community (which the MPS acknowledges as a major source of the evidence base for the UK marine planning system), estimates that marine-based industry contributed £47billion to the UK economy in 2008.

¹⁸See Consultation on a marine planning system for England, Defra, July 2010, para. 6.15.

¹⁹Para. 2.5 pp. 30-1.

²⁰Para. 2.7 pp. 32-3.

²¹See too the treatment of Marine Protection Zones, below.

compensation and mitigation of the impacts cannot be achieved then the development should be refused.²²

13. The guidance refers to more specific issues raised by marine development, including the need to take mitigate and minimise effects of noise and vibration on wildlife²³ the requirement to consider air quality impacts (eg oil and gas platforms at sea and vehicle emissions as a result of increased coastal activity);²⁴ effects on seascape²⁵ and heritage assets²⁶ and on water quality.²⁷

14. A further objective of the guidance is that “the precautionary principle is applied consistently in accordance with the UK government and devolved administrations’ sustainable development policy.”²⁸

15. The importance of the marine environment in mitigating and adapting to climate change is recognised, including the objectives of: building in sufficient flexibility to take account of climate change impacts, for example by introducing appropriate criteria for selection or de-selection of protected marine areas, changing or moving current uses/spatial allocations, or safeguarding areas for future uses; and promoting development/projects that take account of the impacts of climate change over their estimated lifetime.²⁹

16. Coastal access, erosion and flood risk is addressed, including the need for equitable access for those who use the coast and the contribution to communities that can adapt to coastal erosion and flood risk. Development is to be safe over its planned lifetime and not cause or exacerbate flood and coastal erosion risk elsewhere.³⁰

²²See para.s 2.7 and 2.14 pp. 33 and 41-3.

²³P. 34.

²⁴Para. 2.12 pp. 38-9.

²⁵ Para. 2.13 p. 39. There is no legal definition for seascape in the UK but the European Landscape Convention (ELC) defines landscape as “an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors”. Seascapes should be taken as meaning landscapes with views of the coast or seas, and coasts and the adjacent marine environment with cultural, historical and archaeological links with each other.

²⁶Eg protected wrecks: see para. 2.13 p. 39 and para. 2.9 pp. 34-5.

²⁷Para. 2.14 pp. 40-1.

²⁸Box 1, p. 24.

²⁹Para. 2.10 pp. 36-7.

³⁰Para. 2.11 pp. 37-8.

17. Specific forms of development and activity are considered, illustrating the very broad range of activity that the marine planning system will cover. A great deal of latitude is left to the next tier of the system, the marine plans (see below), to develop policy. The MPS often does not much more than identify fairly obvious issues without being prescriptive as to what is likely to be acceptable or not. Sector-specific considerations include the following:

- a. *energy production and infrastructure development*:³¹ the guidance advises that account should be taken of matters including:
 - i. the national level of need for energy infrastructure, as set out in the Overarching National Policy Statement for Energy (EN-1);
 - ii. the UK's policy objective to maximise economic development of the UK's oil and gas resources (the economic recovery of UK oil and gas resource sustainably is a stated priority in the UK's energy supply and energy security strategies)³²;
 - iii. the positive wider environmental, societal and economic benefits of low carbon electricity generation and carbon capture and storage as key technologies for reducing carbon dioxide emissions (offshore wind³³ is regarded as having the potential to have the biggest impact in the medium-term security of energy supply and carbon emission reductions through its commercial scale output; the potentially significant socio-economic benefits from the renewables sector including employment opportunities, export business and energy security are recognised);³⁴
 - iv. the reality that the physical resources and features that produce wave and tidal energy and form oil and gas fields or suitable sites

³¹Para. 3.3 pp. 44-52.

³² Offshore oil and gas is at present the largest source of UK energy supplies and satisfied about two thirds of primary energy demand in 2008 (91% of oil demand and 73% of gas demand): see pp. 46-8.

³³Pp. 48-9.

³⁴P. 49.

- for gas or carbon dioxide storage occur in relatively few locations and can only be utilised where they are found;
- v. the potential impact of inward investment in offshore wind, wave, tidal stream and tidal range energy related manufacturing and deployment activity (it is anticipated that the amount of wave and tidal energy being generated will increase markedly up to and beyond 2020);³⁵
 - vi. potential adverse effects on marine life from construction noise; and the displacement of marine life as a result of infrastructure development (eg offshore wind turbines)
 - vii. potential socio economic impacts through displacement of fishing activity,
- b. *offshore electricity networks*: reference is made to the socio-economic benefits from such an increase in network capacity, along with the risks associated with such an increase in underwater cabling;³⁶
 - c. *carbon capture and storage*: the expectation is that storage will take place almost exclusively offshore and the impacts are not envisaged as significant;³⁷
 - d. *ports and shipping*:³⁸ account should be taken of the contribution that the development would make to the national, regional or more local need for the infrastructure, against anticipated adverse effects including cumulative impacts;³⁹
 - e. *marine aggregates*:⁴⁰ marine aggregates should contribute to the overarching government objective of securing an adequate and continuing supply to the UK. Permissions to dredge should only be issued

³⁵P.49.

³⁶Pp. 50-1.

³⁷Pp. 51-2.

³⁸Para. 3.4 p. 54.

³⁹Ibid.

⁴⁰ See para. 3.5 p. 55: The UK has some of the best marine aggregate resources in the world. Marine sand and gravel are particularly important in England, accounting for 38% of the total regional demand for sand and gravel in the South East (80% in London).

if the marine plan authority is content that the proposed dredging is environmentally acceptable.⁴¹

- f. *telecommunication cabling*: all effort should be taken to protect and include them in considerations regarding activities in the marine area;⁴² they are anticipated as having a low and spatially minor impact;⁴³
- g. *fisheries*:⁴⁴ decision makers must have regard to the provisions of the Common Fisheries Policy (“CFP”) in developing any plans or proposals affecting fisheries.⁴⁵ Marine plan authorities should consider the potential socio-economic impacts of other developments on fishing activity, as well as potential environmental impacts (eg impacts of displacement and the viability of fish stocks in the alternative fishing grounds) and impacts on fishing communities;
- h. *waste water treatment and disposal*: it is stated that this activity will be subject to the environmental permitting regime,⁴⁶ but it is acknowledged that the location of waste water infrastructure will impact on future marine planning decisions. The physical act of discharging to sea in the form of design and construction of outfalls should be considered by the MMO, and inappropriate development in vulnerable areas should be avoided.⁴⁷

Marine plans

Marine planning regions

18. The second tier of policy-making involves a series of “marine planning regions” which together comprise the UK marine area. These regions are divided into the English,

⁴¹Para. 3.5 p. 56.

⁴²Para. 3.7 p. 58.

⁴³Para. 3.7 p. 57.

⁴⁴Para 3.8 p. 58.

⁴⁵The CFP is being reviewed with the aim of introducing reform by 1 January 2013.

⁴⁶Para. 3.10 p. 63.

⁴⁷ P. 62

Scottish, Welsh and Northern Irish inshore and offshore regions.⁴⁸ Inshore regions are the areas of sea within the seaward limits of the territorial sea adjacent to each country; and the offshore regions are the remaining areas within the UK marine area which are defined by reference to Scottish, Welsh and Northern Irish “zones”.⁴⁹

Marine planning authorities

19. The legislation provides for a series of marine planning authorities for each marine planning region.⁵⁰

20. In England, the SS is defined as the marine planning authority for both the English inshore and off-shore regions.⁵¹ However the MMO has been delegated most of the SS’s functions as marine planning authority for these regions.⁵²

Marine plans for marine plan areas

21. Marine plans are intended to approximate to the development plan that has been an important part of the land use planning system for many years.⁵³ They will set out policies which refine the broad objectives of the MPS.

22. Although the Act provides that a marine planning authority “may” prepare a marine plan for a “marine plan area” consisting of all or part of its marine planning region,⁵⁴ where an MPS governs marine planning in the region⁵⁵ a marine planning authority “must seek to ensure” that all of the region is covered by a marine plan.⁵⁶

⁴⁸S. 49.

⁴⁹See s. 322.

⁵⁰Other than the Scotland and Northern Ireland inshore regions.

⁵¹See s. 50. In Scotland, Wales and Northern Ireland, the devolved administrations will be the plan authority.

⁵²See “Consultation on a Marine Planning System for England (Defra July 2010 p. v].

⁵³The government has also stated that the plans will help the UK its obligations agreed under the Marine Strategy Framework Directive (which requires each member state to put in place measures to achieve good environmental status in its marine waters by 2020) and the Water Framework Directive which requires the UK to achieve good chemical and ecological status in inland and coastal waters by 2015: see “Consultation on a marine planning system for England”, Defra, July 2010.

⁵⁴S. 51(1).

⁵⁵S. 51(7).

⁵⁶S. 51(2).

23. The marine plan area boundaries have been the subject of a number of public consultations, the most recent of which ran from November 2009 to February 2010. This sought views on the scope of marine plan areas within the English marine planning regions and the order in which plans should be brought forward.⁵⁷ Defra has also issued a consultation document on the marine planning system⁵⁸ (consultation closed on 13th October) which refers to the recommendation of 11 marine plan areas to the MMO⁵⁹ and explains that the overall order for work on the plans is the MMO's decision.⁶⁰ It estimated that it would take 2 ½ years to complete each plan and that the MMO would work on 2 plans at a time.⁶¹

24. The process has been continued by MMO, resulting in the selection of the East Inshore and East Offshore sea areas (between Flamborough Head in East Riding of Yorkshire to Felixstowe in Suffolk) as the first two English marine plan areas that will be developed from April 2011.⁶² Plans will be progressed following the publication of the MPS.

25. A marine plan must:

- a. "state the authority's policies...for and in connection with sustainable development of the area";⁶³
- b. "be in conformity with any MPS which governs marine planning for the marine plan area unless relevant considerations indicate otherwise".⁶⁴

26. The inclusion of the words "unless relevant considerations indicate otherwise" contrasts with the requirement on the marine planning authority to take "all reasonable steps to secure that the plan is compatible with" the marine plan for any related marine plan

⁵⁷ "Consultation on marine plan areas within the English Inshore and English Offshore Marine Regions"; see too summary of responses and recommended area boundaries at <http://www.defra.gov.uk/corporate/consult/marine-plan/index.htm>

⁵⁸ "Consultation on a marine planning system for England" (July 2010, updated 1st September), with draft impact assessment: <http://www.defra.gov.uk/corporate/consult/marine-planning/100721-marine-planning-condoc.pdf>

⁵⁹ See <http://www.defra.gov.uk/corporate/consult/marine-plan/index.htm>

⁶⁰ See para. 2.44.

⁶¹ Para. 2.49.

⁶² See MMO Press Release 28.10.2010.

⁶³ S. 51(3)(b).

⁶⁴ S. 51(6).

area, and with the development plan for any related area.⁶⁵ It also diverges with the approach historically taken in the land use planning regime where lower-tier plans are to be “in general conformity” with higher-tier plans.⁶⁶ This could be an area which generates case law, as it has under the terrestrial planning system.⁶⁷

27. During the progression of the Bill, an amendment was proposed which deleted this phrase, on the grounds that decisions whether considerations were relevant or of sufficient weight to justify allowing the plan not to be ‘in conformity’ with the MPS would be liable to challenge. The threat of legal proceedings was however regarded as an adequate deterrent to the marine planning authority relying inappropriately on this part of the subsection.⁶⁸

28. A plan must be prepared in accordance with Schedule 6 to the Act. This essentially involves:

- a. giving notice to related planning authorities, including the SS and neighbouring marine or local planning authorities;⁶⁹
- b. preparing and publishing a SPP in a similar way to the preparation of the MPS;⁷⁰
- c. having regard to matters including:
 - i. the requirements for conformity/compatibility set out above;
 - ii. the effect which any proposal for inclusion in the plan is likely to have on any related area;⁷¹
 - iii. any representations made pursuant to the SPP about what should be in the plan;⁷²

⁶⁵Schedule 6, paragraph 3. “Related” means adjoining, adjacent to, wholly or partly within or affects or is affected by: see Schedule 6 paragraph 3(3). Government has advised that although not a requirement of the 2009 Act, the MMO should during plan preparation acknowledge the weight carried by other statutory plans in the terrestrial system, including River Basin Management Plans (RBMPs), Air Quality Action Plans under the Environment Act 1995 and Local Transport Plans under the Transport Act 2000: see Consultation on a marine planning system for England, Defra, July 2010, para. 6.23.

⁶⁶See eg s. 15(2A) of the TCPA 1990 and s. 24(1)(b) of the PCPA 2004 which requires UDPs and LDDs respectively to be in general conformity with the London Plan; and ss. 36(4) and 43(3) of the TCPA which prohibits the adoption of a local plan which do not conform generally to the structure plan.

⁶⁷See eg *Persimmon Homes (Thames Valley) Ltd v. Stevenage BC* [2005] EWHC 957 (Admin).

⁶⁸Hansard HL Vol. 707 cols 1102-1103, February 10, 2009.

⁶⁹Para.s 1-2.

⁷⁰Para.s 5-6.

⁷¹Para 9(2)(c).

⁷²Para. 9(2)(f).

- iv. any advice received from an expertised person or body in response to a request from the MMO;⁷³
 - v. any plan prepared by a public authority in connection with the management or use of the sea or the coast, or of marine or coastal resources;⁷⁴ and
 - vi. such other matters as the MMO considers relevant⁷⁵ (eg the draft MPS advises that marine plans should identify how they will contribute to delivery of national targets and priorities, including legally binding commitments entered into under the Renewable Energy Directive and our domestic binding target to reduce greenhouse gas emissions by 80% by 2050.⁷⁶ It also advises that in developing marine plans the MMO will identify areas and features of importance for nature conservation and state policies in connection with those areas for marine activities.⁷⁷
- d. carrying out a sustainability appraisal of its proposals for inclusion in a draft plan and publish it and only proceeding “if the results of the appraisal indicate that it is appropriate to do so”;⁷⁸
 - e. preparing and publishing a consultation draft to be consulted upon in a similar manner to the MPS;⁷⁹
 - f. taking into account any representations on the draft plan;⁸⁰
 - g. “consider[ing] appointing an independent person⁸¹ to investigate the proposals contained in the draft and to report on them”, having regard to representations

⁷³Para. 9(2)(g).

⁷⁴Para. 9(2)(h); eg Shoreline Management Plans, AONB management arrangements and biodiversity action plans: see Consultation on a marine planning system for England, Defra, July 2010, para. 6.32.

⁷⁵Para. 9(2).

⁷⁶Para. 3.3 p. 46.

⁷⁷Para. 3.1 pp. 41-3: see below in relation to Marine Protection Zones.

⁷⁸Para. 10. This is intended to meet the requirements of the SEA Directive along with other social and economic issues and it is envisaged that it can incorporate or complement other assessments including a Habitats Regulations Assessment under the Habitats Directive. It is envisaged that sustainability appraisals for marine plans will be informed by the appraisal prepared for the draft MPS: see “Consultation on a marine planning system for England”, Defra July 2010, paragraphs 4.17-20.

⁷⁹Para. 11.

⁸⁰Para. 12.

⁸¹ It is anticipated that this will be an Inspector from the Planning Inspectorate and that independent investigations would take the form of examinations in public as provided for under current terrestrial planning legislation.

received about the inclusion of matters within the plan, any representations on the draft and the extent to which those have not been resolved;⁸²

- h. when settling the text of a marine plan, “having regard to” any recommendations made by a person appointed to examine the draft;⁸³
- i. adopting the plan, if the SS agrees;⁸⁴
- j. publishing the plan, with statements of any modifications that have been made to the draft and reasons for them.⁸⁵

29. The Defra consultation document on the marine planning system advises that a wide participatory approach should be employed by the MMO and that it is vital for organisations that hold regulatory roles in or adjacent to the marine area to be involved at the earliest stages, including Defra, local authorities and National Park authorities, the Environment Agency⁸⁶ and Natural England,⁸⁷ all of whom will be able to assist in gathering a shared evidence base that will enable preparation of the plans.⁸⁸

30. It also suggests the structure and content for marine plans, acknowledging that they are likely to comprise more than one document:

⁸²Para. 13. The independent person would also consider the sustainability appraisal: see “Consultation on a marine planning system for England”, Defra July 2010, paragraph 4.23.

⁸³Para. 14.

⁸⁴Para. 15(2).

⁸⁵Para. 15(7)). See too ss. 52-4 of the Act regarding the amendment, withdrawal (subject to agreement by the SS) and review of marine plans. A table setting out the different stages appears at p. 39 of the see “Consultation on a marine planning system for England”, Defra July 2010.

⁸⁶Key issues will include the relationships between marine plans and River Basin Management Plans prepared pursuant to the Water Framework Directive and Shoreline Management Plans prepared to manage the risks of flooding and coastal erosion.

⁸⁷See too CEFAS (Centre for Environment, Fisheries and Aquaculture Science); and Inshore Fisheries and Conservation Authorities (IFCAs) which are intended to ensure democratic input (each IFCA will include local authorities representatives from the districts covered by the authorities) in the management of inshore fisheries. It is envisaged that IFCAs will be able to undertake functions in the marine environment on behalf of the MMO: see para. 5.46.

⁸⁸See para. 2.28-35 and 5.1-51.

- a. a Strategy Document⁸⁹ including policies and objectives for marine uses, activities, assets and designations in the plan area; and an explanation of the relationship between the plan and other related plans. Area-specific policy could relate for example to busy estuaries, ports and harbours or designations;
 - b. a policy map;⁹⁰
 - c. a delivery framework, comprising an Implementation and Monitoring Plans.⁹¹
31. As with terrestrial development plans, the process of plan preparation will involve collecting and mapping information about ecological, environmental and oceanographic conditions and human activities, identifying conflicts and complementarity and defining a vision for the plan area by projecting trends in human activities and estimating requirements for new demands on marine space and identifying possible alternative futures for the area, before selecting the preferred scenario.⁹²
32. There is no statutory period for the duration of a marine plan, but the government has indicated that they should cover a 20-year period from their adoption date.⁹³
33. Any challenge to a marine plan (or any MPS) must be made pursuant to s. 62 of the 2009 Act, not later than 6 weeks after publication, by way of application to the High Court.

Marine Protection Zones

34. The Government has committed to establishing a well-managed ecologically coherent network of Marine Protected Areas (“MPAs”) in our seas by 2012, to help meet the Marine Strategy Framework Directive requirement for measures contributing to a coherent network of marine protected areas. Part 5 of the 2009 Act contains provisions

⁸⁹See para.s 3.16-27.

⁹⁰See Para.s 3.27-3. See too s. 51(5) of the 2009 Act which requires the plan to identify the plan area.

⁹¹See para.s 3.34-3.61. These are intended to assist with the requirement to monitor and periodically report on the implementation of policies under s. 61 of the 2009 Act.

⁹²Para.s 4.25-39.

⁹³Para. 3.62.

for the creation of a new type MPA, called a Marine Conservation Zone (“MCZ”).

35. MCZs will conserve nationally important marine wildlife, habitats, geology and geomorphology⁹⁴ and can be designated essentially anywhere in English inshore and UK offshore waters.⁹⁵ They will include existing SSSIs designated under the Wildlife and Countryside Act 1981 (although most are on land and intertidal area there are some which extend into the marine environment below low water mark). MPAs will also include European sites subject to European designations (Special Areas of Conservation and Special Protection Areas) under the Habitats and Birds Directives,⁹⁶ along with sites designated under the Ramsar Convention.⁹⁷
36. Any public authority with a function capable of affecting the protected features of an MCZ (or any ecological or geomorphical process on which the conservation of a protected feature of an MCZ is dependent) must exercise it so as to best further the MCZ’s conservation objectives or, if it is not possible to further those objectives, so as to least hinder them. If the authority believes that there is a significant risk of a function or act hindering those objectives, it must inform the relevant statutory conservation body and wait 28 days before acting unless the body says the authority need not wait or in cases of an urgent need to act.
37. Similarly, any application for any authorisation which is capable of having such an effect must not be determined until the body has been informed and the same period has elapsed subject to the same provisos. Authorisation may not be granted unless: there is no significant risk of the act hindering the conservation objectives for the MCZ or there are no other means of proceeding which would create a substantially lower risk; the benefit to the public of proceeding outweighs the damage to the environment; and the person seeking the authorisation will make arrangements for the undertaking of measures of equivalent environmental benefit to the damage which the act will or will

⁹⁴See ss. 117 and 123.

⁹⁵See s. 116(2).

⁹⁶See too the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007/1842, as amended, and the Conservation of Habitats and Species Regulations 2010 2010/490.

⁹⁷See s. 123.

be likely to have in or on the MCZ.⁹⁸

Interaction between terrestrial and marine planning

38. There are number of complex relationships between terrestrial and marine activity: activities on land can have an effect on activities at sea and vice versa; and the activities may overlap. Marine plans will generally extend up to level of mean high water spring tides while terrestrial boundaries generally extend to low water spring tides – a marine plan area will physically overlap with terrestrial plans.

39. As described above, the process of marine plan preparation requires liaison with relevant terrestrial planning authorities. Terrestrial planning guidance and development plan documents already include policy addressing coastal and estuarine planning. The view of government is that marine policy guidance should try and complement it rather than replace or complicate it and that any conflicts can be resolved through the plan preparation process.⁹⁹ Overarching national policy suggests the theoretical scope for this to be achieved, however it remains to be seen how effectively this process will be carried out. It is important to note that there is no reciprocal obligation on terrestrial plans requiring compatibility with any marine plan.

40. As we shall see below however, marine policy must be applied by decision-makers in the terrestrial planning system.

41. Areas where care will be required when addressing the aspirations of terrestrial and marine policy include: the safeguarding of marine characteristics from inappropriate terrestrial interventions (eg loss of deep-water access as a result of new development on land); integrating nature conservation interests across the land-sea boundary (eg relationships between ecosystems potentially some distance apart); coastal erosion and

⁹⁸See ss. 125-6 generally.

⁹⁹Para.s 6.4, 6.8, p. 59.

flooding (currently considered mainly through the terrestrial planning system,¹⁰⁰ but many interventions will be located below mean high water and will require MMO involvement); the physical impact of development on water, (such as development plans giving support for a new port development);¹⁰¹ and considering the effect of marine development on landscape designations (eg effect of marine development on views from a National Park). Further, there would appear to be scope for debate about the proper relationship in decision-making between different regimes, as has occurred in the terrestrial planning system.¹⁰²

Implementation and decision-making

Introduction

42. The importance of the MPS and marine plans is underscored by s. 58(1) of the 2009 Act, which requires all public authorities to take “any authorisation or enforcement decision in accordance with the appropriate marine policy documents, unless relevant considerations indicate otherwise”. If an authority takes such a decision otherwise than in accordance with those documents, it must state its reasons.¹⁰³

43. An “authorisation or enforcement decision” is any of the following:

- a. the determination of any application for the authorisation¹⁰⁴ of the doing of any act which affects or might affect the whole or any part of the UK marine area; and any decision relating to any conditions of such an authorisation; and
- b. any decision about extension, replacement, variation, revocation, withdrawal or enforcement of any such authorisation or conditions.¹⁰⁵

¹⁰⁰And Coastal Change Management Areas identified by local planning authorities drawing on advice from Shoreline Management Plans.

¹⁰¹The draft advice is that when the MMO comes to prepare a marine plan these policies should be supported through the marine plan “unless the MPS or other relevant considerations indicate otherwise” Consultation on marine planning system, para. 6.46 – this does not appear to be the correct approach on the legislation, although cf para. 6.48 which acknowledges the MMO’s duty to seek compatibility with terrestrial plans.

¹⁰²See eg *Gateshead MBC v. SSE* [1995] Env LR 37; *R v. Bolton MBC ex p Kirkman* [1998] Env LR 560; *Hopkins Developments Ltd v. FSS* [2006] EWHC 2823.

¹⁰³S. 58(2).

¹⁰⁴This means “any approval, confirmation, consent, licence, permission or other authorization”: s. 58(6).

¹⁰⁵S. 58(4).

44. It does not however include any decision on an application for an order granting development consent for nationally significant infrastructure projects (“NSIP”) under the Planning Act 2008.¹⁰⁶ Where any decision by a public authority is not an “authorisation or enforcement decision” under the 2009 Act (including an NSIP decision), the authority must still have regard to the appropriate marine policy documents in taking any decision which relates to the exercise of any function capable of affecting the whole or any part of the UK marine area.¹⁰⁷ NSIPs are dealt with further below.

45. An “appropriate marine policy document” is defined to mean:

- a. to the extent that the decision relates to a marine plan area, any marine plan which is in effect for that area;
- b. any MPS for any minister or government department, or other public authority so far as it is carrying out functions in relation to the English inshore or offshore regions.¹⁰⁸

46. The language of s. 58 is similar to s. 38(6) of the Planning and Compulsory Purchase Act 2004, which itself adopted the form of s. 54A of the Town and Country Planning Act 1990, a provision which generated a great deal of caselaw relating to when a decision was “in accordance” with the development plan.¹⁰⁹ This will undoubtedly be relevant to any decisions taken pursuant to s. 58.

47. It will be some time before the first Plans are adopted, or until there are Plans covering the entire English inshore and offshore regions (2011 on current MMO estimates). Once

¹⁰⁶ The coalition Government has stated its intention to abolish the IPC and to return decision-making power on NSIPs to Ministers. The Government must legislate to abolish the IPC, which it is expected to do in the Decentralisation and Localism Bill due to receive its first reading in Parliament in November 2010. The Government intends to replace the IPC with a Major Infrastructure Planning Unit that would be part of the Planning Inspectorate. This Unit would carry out broadly the same functions as the IPC, but final decisions would be made by Ministers based on the recommendations of the Unit.

¹⁰⁷ S. 58(3).

¹⁰⁸ Ss. 59(3) and (5); see too s. 322 which defines the English inshore region to mean the area of sea within the seaward limits of the territorial sea adjacent to England, and the offshore region as so much of the UK marine area beyond those seaward limits but not in the Scottish, Welsh or Northern Irish offshore regions. See also s. 42 for the definition of the UK marine area and sea.

¹⁰⁹ See eg *City of Edinburgh v. SS for Scotland* [1997] 1 WLR 1447; *R (Cummins) v. Camden LBC* [2001] EWHC Admin 1116.

planning is in progress, decisions will need to be undertaken in the context of the MPS, newly adopted and emerging Marine Plans and other relevant and emerging documents. The Consultation on a marine system for England advises that authorisation or enforcement decisions should:

- a. be in accordance with the policies set out in the MPS, unless relevant considerations indicate otherwise;
- b. take into account the relevant policy objectives of any draft MPS or marine plans;
- c. take into account the any clear policies for the marine area that the government has established but which do not for some reason appear in the MPS;
- d. contribute to the achievement of sustainable development and be conducted in a manner that meets statutory requirements under UK and EU legislation and is consistent with our obligations under international law;
- e. take account of other relevant projects, programmes, plans and national policies and guidance; and take account of and be in accordance with existing consents, authorisation and/or licenses;
- f. be taken using a risk-based approach that allows for uncertainty, recognising the need to use sound science responsibly as set out in the high level objectives for the marine area (including the precautionary principle).¹¹⁰

NSIPs

48. The decision-making regime for NSIPs is due to change under the coalition government's Localism Bill, however the distinction between this regime and marine planning legislation appears likely to remain.

49. The Planning Act 2008 procedures, currently involving the examination of applications for NSIPs by the Infrastructure Planning Commission, require the MMO to be consulted on proposed applications for development consent where the proposed development

¹¹⁰Para.s 7.30-3.

would affect or be likely to affect specified areas falling under its responsibility (see below).¹¹¹

50. Relevant projects are most likely to include offshore wind farms generating more than 100 megawatts¹¹² and large harbours.¹¹³ An order granting development consent may include provision deeming a marine licence to have been issued under Part 4 of the 2009 Act.¹¹⁴

51. The MMO must also be notified of an accepted application where it seeks development consent in one or more of those specified areas¹¹⁵ and is an “interested party” for the purposes of the examination in public process relating to such applications under the Act.¹¹⁶

Marine licensing

52. The 2008 Act regime can be distinguished from the new marine licensing regime provided for by the 2009 Act.¹¹⁷ The purpose of the new system is to remove complexity and overlap between the legislative schemes under primarily the Food and Environment Protection Act 1985 (“FEPA”) and the Coast Protection Act 1949 (“CPA”). The new licensing system to be governed by the MMO¹¹⁸ is planned for spring 2011.

53. Thus the 2009 Act includes within its list of licensable marine activities beyond the scope of this paper, but they include the construction of works in or over the sea, or on or under the sea bed, which will include other offshore energy generating installations¹¹⁹

¹¹¹S. 23(2), amending s. 42 of the 2008 Act.

¹¹²S. 15 of the 2008 Act.

¹¹³S. 24 of the 2008 Act.

¹¹⁴See s. 149A of the 2008 Act.

¹¹⁵See s. 23(5), amending s. 56 of the 2008 Act.

¹¹⁶See s. 23(6) amending s. 102 of the 2008 Act. The MMO will enforce the parts of a DCO that relate to a deemed CPA consent or FEPA/marine licence and will be responsible for dealing with any breaches of any conditions of those approvals. Defra has issued Government guidance to the Marine Management Organisation (MMO) on its role in relation to applications, and proposed applications, to the Infrastructure Planning Commission (IPC) for development consent under the Planning Act 2008: <http://www.defra.gov.uk/environment/marine/documents/legislation/mmo-ipc.pdf>

¹¹⁷ See Part 4 generally.

¹¹⁸ See s. 98 of the 2009 Act which enables delegation of licensing functions to the MMO.

¹¹⁹ Currently around the English and Welsh coasts there are approximately 274 wind turbines installed producing around 851.2 megawatts of electricity.

between 1-100 megawatts (the MMO has taken over the electricity consent functions of the SS under section 36 of the Electricity Act 1989),¹²⁰ harbours,¹²¹ pontoons and jetties, marinas, some flood defences, marine mineral extraction¹²² and land reclamation.

EIA

54. Just as the requirements of Strategic Environmental Assessment apply to the making of policy under the new regime, EIA applies to decision-making under the licensing regime. The EIA regime that is well-known to those operating within the terrestrial planning system will therefore continue to apply in a modified form to works covered by the MMO within the marine environment. The MMO must therefore apply the Electricity Works (EIA) (England and Wales) Regulations 2000 (in relation to the applications for consent under the Electricity Act) and the Marine Works (Environmental Impact Assessment) Regulations 2007¹²³ (in relation to regulated activities under FEPA, the CPA and the Harbours Act 1964).¹²⁴

Conclusion

55. The new regime is a legislative milestone for the marine environment. The MMO will be first in the world to develop an integrated planning system for the marine area. The scale of the task is daunting; and the task of resolving conflicting pressures for use of the sea will be just as difficult as that faced by the terrestrial planning system.

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¹²⁰See ss. 12 and 79 of the 2009 Act. Any applications under section 36 of the Electricity Act 1989 made before 1 April 2010 will continue to be dealt with by the Department of Environment and Climate Change (DECC). Licences and consents required also include the Food and Environment Protection Act 1985 and Coast Protection Act 1949.

¹²¹From 1 April 2010, the MMO took over new applications for harbour revision and empowerment orders from the Department for Transport. The MMO also took over the Department for Transport's existing cases, except for those specified in The Harbours Act 1964 (Delegation of Functions) Order 2010. See s. 78 of the 2009 Act.

¹²²The MMO took over from the Marine and Fisheries Agency (MFA) on 1 April 2010 as the consenting authority for marine mineral extraction.

¹²³For a list of recent decisions by the MMO under the 2007 Regulations see http://www.marinemangement.org.uk/works/environmental_decisions.htm

¹²⁴Dredging for marine minerals is regulated under the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007. Similarly, where the project is within or adjacent to a designated conservation site, an appropriate assessment may be required under the Conservation of Habitats and Species Regulations 2010.