

THE DRAFT MARINE BILL: WILL IT DELIVER ENVIRONMENTAL PROTECTION FOR SEA FISHERIES?

A comparison between the draft provisions and existing legislation

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On 3 April 2008, Defra published a draft marine bill to modernise the regulation of UK waters.¹ At 687 pages (with guidance notes), the bill is certainly comprehensive but does it deliver? The sensible place to start this analysis is to look at those activities which cause the greatest threat to the fecundity of the sea and to test what effects the bill will have in their regulation.

Global fish landings have been declining since 1988 at the rate of 500,000 tonnes per year.² Current projections estimate that fish availability will be down to 70 per cent of today's levels by 2050. Not only does this represent an appalling destruction of biomass in terms of conservation but, given the current crisis in global food supplies, it is a significant threat to the stable supply of cheap food we have come to expect. It is therefore appropriate to explore the bill from the perspective of changes to fisheries management.³

The bill is separated into a number of sections:

- for the creation of a marine management organisation
- enabling marine spatial planning
- creation of a one-stop shop for licensing decisions
- nature conservation
- managing marine fisheries
- reform of migratory freshwater fisheries management
- enforcement
- administrative penalties
- access to coastal land.

Devolution has created some interesting issues. Broadly speaking, England and Wales are promoting joint legislation, while Scotland and Northern Ireland are formulating their own position.

Given the size of the bill, it is beyond the scope of this article to go into detail about all these sections. Instead this article will focus on the nature conservation and licensing sections, and parts of the managing marine fisheries section, comparing the proposed regime with the existing regime to identify the improvements.

MARINE NATURE CONSERVATION

Under the OSPAR convention, the United Kingdom has a duty to implement an ecologically coherent network of marine protected areas by 2010.⁴ There are two potential existing zonal mechanisms for the delivery of such a network; the first is through the Habitats Directive⁵ and the second is under the marine nature reserve provisions contained within the Wildlife and Countryside Act 1981. There are problems with both processes.

Habitats Directive

Under the Habitats Directive, a list of potential protected habitats and species has been agreed at a European level. Sites are proposed by the UK's statutory nature conservation advisers and then confirmed at the EU level.⁶ Once a site has been proposed, the United Kingdom must treat it as if it has the full protection of the directive.⁷ Sites can be designated out to the 200-mile limit and to the edge of the continental shelf.⁸

The protection given to the site is set out under Article 6 of the directive. The UK Government has to:

- (1) create administrative measures to protect the ecological requirements of the site
- (2) take steps to avoid the deterioration of natural and species' habitats and the disturbance of species
- (3) any plan or project not directly associated with the management of the site must be subject to an appropriate assessment if alone or in combination it is to have a significant effect on the site in view of the site's conservation objectives.

These are important obligations; if the UK Government fails to meet them, the EU Commission can take infraction proceedings. The loose obligations under Articles 6(1) and 6(2) would make it difficult to prove breach in law. It is easier to show a breach of the procedure of Article 6(3). Conservationists in the Netherlands succeeded in drawing the European

1 <http://www.defra.gov.uk/marine/legislation/index.htm> (3 April 2008).
2 C Roberts *The Unnatural History of the Sea* (Island Press 2007) 317.
3 Royal Commission on Environmental Pollution *Turning the Tide* (HMSO 2004) 6.

4 Annex V OSPAR Convention.

5 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992) OJ L 206 (Habitats Directive).

6 *ibid* art 4(2).

7 *ibid* art 5(4).

8 *R v Secretary of State for Trade and Industry ex p Greenpeace Limited* [1999] QBD CO/1336/1999.

Commission's attention to the lack of an appropriate assessment under this Article for licensed scallop dredging in the Waddenzee, which is a special area of conservation, protected under the directive. In 2004, the European Commission took a successful action against the Dutch Government to the European Court for breaching the directive.⁹ Complaints can be made by an individual to the European Commission, and the draconian measure of infraction proceedings ensures that individual competent authorities in the United Kingdom carry out their obligations.

There are, however, inherent weaknesses in the legislation. The numbers of marine species and habitats listed in the directive's annexes are limited. Adding to the list is a cumbersome process and one which is particularly difficult in the marine environment, where so little is known about how marine ecosystems function and it is so expensive to collect data. A more comprehensive protection mechanism could be set up by ring-fencing a significant proportion of representative habitats in protected areas, rather than identifying individual sites based on a rather limited list of conservation features of European importance. Secondly, the disparate nature of the list of protected species and habitats makes it hard to make ecological coherence of any series of designated sites. In short, although the directive provides an effective enforcement mechanism, the scientific constraints contained within its drafting have limited its effectiveness.

Wildlife and Countryside Act 1981

Under the Wildlife and Countryside Act 1981 (WCA), the secretary of state may designate a marine nature reserve (MNR) up to three miles out from the UK baseline. There are two such MNRs in England and Wales, one off Skomer Island and one off Lundy. Designation criteria for the MNRs are very broad:

- (a) conserving marine flora and fauna or geological or physiographical features of special interest in the area; or
- (b) providing under suitable conditions and control, special opportunities for the study of, and research into, matters relating to marine flora and fauna and the physical conditions in which they live, or for the study of geological and physiographical features of special interest in the area.¹⁰

Designation is, however, only half the story. Once a MNR has been designated, the activities within that area must be controlled for the designation to have any meaning. Under the WCA, there are two methods for controlling activities. First, the appropriate conservation authority (meaning Natural England or CCW) can propose a byelaw under section 37 or secondly, the relevant authority can pass a byelaw using its existing powers (there is a list of such bodies in the Act and they include local authorities and sea fisheries committees). There is no requirement for these authorities to pass byelaws to pursue the conservation

objectives of the site or actively manage it as a nature reserve. The powers of the statutory nature conservation authorities under section 37 to pass byelaws are limited such that they cannot 'Interfere with the ... right of any person whenever vested'.

Since most commercial and recreational fishing operates under the public right to fish¹¹ and vests in the public, it is not certain that MNR byelaws brought by the statutory nature conservation agencies under section 37 can affect fishing. Indeed, the Lundy no-take zone was implemented via a byelaw from the Devon Sea Fisheries Committee rather than from Natural England.

With no duty on authorities to implement any conservation objectives on the site, the MNR is merely a paper designation. Of course, the MNR could have provided a springboard for relevant authorities to implement controls, and indeed the Lundy no-take zone could be a sign of success in that area. However, without broad support MNRs have failed to be taken up.¹²

Marine conservation zones

In the draft bill, the Welsh Assembly or UK Government may designate marine conservation zones (MCZs) within their respective territorial waters, within the UK EEZ and to the edge of the continental shelf.¹³

The grounds for designation are broad:

- ... for the purpose of conserving:
 - marine flora or fauna;
 - marine habitats or types of marine habitat;
 - features of geological or geomorphological interest.¹⁴

There is helpful interpretation within the draft bill:

- [r]eferences to ... conserving marine flora or fauna or habitat include references to conserving the biodiversity of such flora, fauna or habitat, whether or not any or all of them are rare or threatened.¹⁵

It goes on to give a broad interpretation:

- Any reference to conserving a thing includes references to –
 - a) assisting in its conservation
 - b) enabling or facilitating its recovery or increase.¹⁶

The bill specifically mentions that the appropriate authority may take into consideration the economic and social effects of designation in deciding to establish MCZs.¹⁷

Before designation, the bill includes the long consultation provisions prevalent in modern, rather bloated, legislation. In terms of restrictions on fishing rights this does not make particular sense. The list of parties who should be consulted¹⁸ includes all persons who appear to the appropriate authority to have any

11 T Appleby 'The Public Right to Fish: Is It Fit for Purpose?' (2005) 16 WL 6 201–205.

12 P Jones 'Marine Nature Reserves in Britain; Past Lessons, Current Status and Future Issues' (1999) 23 Marine Policy 4–5, 375–96.

13 Draft marine bill (n 1) s 105.

14 *ibid* s 106(1).

15 *ibid* s 106(3).

16 *ibid* s 106(4).

17 *ibid* s 106(5).

18 *ibid* s 107(5).

9 *The Waddenzee Case* [2004] ECJ C-127/02.

10 Wildlife and Countryside Act 1981 s 36.

property interest or rights over any part of the MCZ. The public right to fish belongs to the general public. Therefore, for this provision to make sense, the bill would technically require consultation with the entire populace before designation. Such inclusive lists are dangerous, and this sort of detailed drafting is bound to lead to needless confusion and potential for procedural challenge.

The draft bill sets out the process of designation and the contents of the MCZ orders.¹⁹ These must identify the boundaries of the area designated, state the protected feature, and list the conservation objectives of the site. While protected features are well defined in the bill, conservation objectives are left undefined, although an explanatory note in the draft covers their interpretation. According to the notes, the conservation objectives could include the exclusion of certain activities.

The bill then provides a mechanism for designation, after consultation, of MCZs. So far it differs little from the WCA, except that the bill is potentially more restrictive in its designation criteria and procedure.

However, there are certain additions. Section 109 requires that public authorities operating inside MCZs must: 'exercise those functions in the manner which the authority considers best furthers the conservation objectives stated for the MCZ'.²⁰ Rather strangely, it goes on to state: 'where it is not possible to exercise its functions in a manner which furthers those objectives, exercise them in the manner which the authority considers least hinders the achievement of the objectives'.²¹ This second part somewhat defeats the first.

Although the section goes on to confirm that the public authority must have regard to the advice from the statutory nature conservation agency, if the public authority fails to live up to its obligations in this section there is scope for the statutory nature conservation agency to seek an explanation for that authority's failures.²² This does not seem to be the most draconian of punishments.

Other aggrieved parties would be left to take judicial review proceedings. The *Wednesbury*²³ rules mean that any failure of duty would be very difficult to prove in practice and would have to be proved on the grounds of the irrationality of a chosen course of action, unless some form of procedural impropriety or unfairness could be shown – which could be difficult.

Section 110 includes a procedure to follow when applying for activities which affect (other than insignificantly) the protected features or ecological and geomorphological processes which support them. For some reason this section does not specifically require the application to take into consideration the conservation objectives of the site, and this would seem to be an oversight. The public authority may not grant permission for an application unless:

- it does not significantly affect the features
- it is impractical or impossible to carry out elsewhere
- the benefit to the public outweighs the damage caused by the activity
- the person seeking the authorisation will undertake ... measures of equivalent environmental benefit to the damage which the act is likely to have in or on the MCZ.

Once again, failure to comply with section 110 could result in the requirement for an explanation to the statutory conservation agency.²⁴ However, it might be less difficult for aggrieved third parties and interest groups to achieve judicial review, as any breach of the procedural requirements contained in this section would be easier to prove.

This is undoubtedly a powerful section, although there is a question mark over its likely effect in terms of fisheries management. It has been argued that fisheries are an unlicensed activity, since they originate in the public right to fish.²⁵ It is not clear whether fishing vessel licences, which would authorise commercial fishing vessels to operate inside a MCZ, would be the subject of this section. The draft bill might then lead to a strange situation where a multi-million pound proposal, which would have a small but significant effect on the protected feature, could be stopped, while a small private fishing vessel would be able to carry out the same damaging action in the name of the public and face no regulation at all.

It is to be hoped that fishing under these circumstances would be regulated either by the reinvigorated Inshore Fisheries and Conservation Authorities (IFCA), under the Fisheries Acts, under the Marine Conservation Order sections in the bill, or under the Common Fisheries Policy. The likelihood of action by the IFCA's is discussed in greater detail later on, and the existing Fisheries Acts are outside the scope of this article.

The draft bill sets provisions by which the minister may make Marine Conservation Orders (MCOs). These are creatures of the proposed new Marine Management Organisation (MMO) and the Welsh Assembly Government rather than the statutory nature conservation agencies, and they do not contain the same statutory restrictions on byelaws which made MNRs under the WCA so ineffective.²⁶ They only cover the inshore regions of England²⁷ and Wales²⁸ (12 miles from the baseline), so offshore activities are not to be regulated under this section, but they do contain provision for temporary urgent orders and there is a maximum fine of a more appropriate £50,000.²⁹ It would be better if this figure were left to the minister to decide as inflation will eat into it over time.

Outside the 12-mile limit it seems that the designation does not bring with it the potential comfort of MCOs. How other public authorities will regulate MCZs is

19 *ibid* s 108(1).

20 *ibid* s 109(2)(a).

21 *ibid* s 109(2)(b).

22 *ibid* s 112.

23 *Associated Provincial Picture House v Wednesbury* [1948] 1 KB 223.

24 Draft marine bill (n 13) s 112.

25 T Appleby 'Damage by Fishing in the UK's Lyme Bay: A Problem of Regulation or Ownership?' (2007) 18 WL 2 39–46.

26 Note 10, s 37.

27 Draft marine bill (n 13) s 113.

28 *ibid* s 118.

29 *ibid* s 233.

therefore left to section 110. Fishing is in a peculiar position because of international obligations. In the 6–12 mile zone, certain other EU Member States can fish in UK waters under historic bilateral treaties; these are regulated by the EU, not the United Kingdom, under the Common Fisheries Policy (CFP). Outside the 12-mile limit all fishing is regulated by the EU under the CFP. This brings with it an interesting jurisdictional conflict, as regulating for conservation is not a fisheries but a conservation matter. Therefore it could easily be argued that the United Kingdom, rather than the EU, has prime jurisdiction in this area. If that is the case the United Kingdom could, if it chose, regulate foreign fishing vessels under its own domestic conservation legislation, in the same way that it regulates foreign vehicles on UK roads.

The position for MCZs outside the 12-mile limit will be different for the proposed offshore marine sites designated as special areas of conservation (SACs) under the Habitats Directive between the 12-mile limit and the edge of the continental shelf.³⁰ Offshore SACs will have the power of European legislation behind them. SACs are sponsored by DG Environment, while fisheries management measures are the preserve of DG Fish under the CFP. As De Santo and Jones³¹ point out, improvements in communication between DG Fish and DG Environment are needed, but at least both bodies are ostensibly operating at the same level. Domestically promoted MCZs will need to be supported at the EU level by DG Fish if they are to succeed. Whether that can be achieved remains to be seen and it must be hoped that under the CFP,³² DG Fish will pass fisheries regulations to enforce the MCZs. Since the position of environmental responsibility for EU waters is not clear, it is a shame that MCOs cannot be made outside the 12-mile limit (and appropriate powers given to fisheries officers to enforce them), to keep the potential for domestic enforcement should the UK Government fail to convince Brussels.

Although the MCZ provisions go further than the existing MNR provisions, they may still fail. The MCZ has greater potential in terms of its geography and the stated involvement of other parties. However, MCZs as proposed do not really grasp the fisheries issue at source by bringing in requirements for fisheries in designated MCZs to be regulated under the licensing provisions of section 110, rather than just the potential for them to be regulated by MCOs and fisheries management. Admittedly there are issues which urgently need to be resolved at a European level to avoid disputes, but the United Kingdom has total control as far as the six-mile limit. This area, at least, should be properly regulated.

30 Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 SI 2007/1842.

31 E M de Santo, P J S Jones *Offshore marine conservation policies in the North East Atlantic: Emerging tensions and opportunities* Marine Policy 31 (2007) 336–47.

32 D Owen *Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directive* (April 2004) IEEP Briefing www.ieep.eu/publications/pdfs/2004/natura2000cfpfinalreport.pdf (5 May 2008).

FISHERIES MANAGEMENT

Sea fisheries committees

Sea fisheries committees (SFCs) have managed inshore fisheries since the eighteenth century. The last major shake-up in their organisation took place under the Sea Fisheries Regulation Act 1966. Technically, they have the potential to cover an area up to the 12-mile limit.³³ However, as a result of jurisdictional issues with the CFP, in practice they have been limited to an area six miles from the baseline. They can cross the borders between England and Wales (as does the North Western and North Wales SFC). SFCs have been most successful in resolving gear conflicts, which can have conservation spin-offs.³⁴

SFCs have powers to regulate sea fisheries through the creation of byelaws.³⁵ These may be for marine environmental purposes.³⁶ Marine environmental purposes in this context is a broadly defined term:

Conserving or enhancing the natural beauty or amenity of marine or coastal areas (including their geological or physiological features) or of any features of archaeological or historic interest in such area; or

Conserving flora or fauna which are dependent on, or associated with marine or coastal environment.

Moreover, under section 40 of the Natural Environment and Rural Communities Act 2006 (NERC), SFCs have a duty in exercising their functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

While the NERC biodiversity duty could be restrictively construed according to a biodiversity list,³⁷ SFCs, as a relevant body under the Sea Fisheries (Wildlife Conservation) Act 1992, should:

- (a) have regard to the conservation of marine flora and fauna
- (b) endeavour to achieve a reasonable balance between that consideration and other considerations to which ... they are required to have regard.

It would therefore be possible for SFCs to use their powers to make byelaws for marine protection and ecosystem-based conservation beyond the restrictive protection of the listed species and habitats contained in the Habitats Directive. The drawback to these byelaws is that the minister may take a long time to sign them off and breaches currently carry a maximum fine of only £5000.

As they stand, it is plain that SFCs have considerable marine conservation duties and powers. These are new duties which have been grafted on to existing organisations; there are historic reasons why SFCs have not become champions of marine environmental protection, despite their undoubted responsibilities.

33 Sea Fisheries Regulation Act 1966 s 1(1).

34 R Blythe et al *An Example of Conservation and Exploitation Achieved Through a Voluntary Fisheries Management System* (Putting Fishers' Knowledge to Work Conference Proceedings, Fisheries Centre University of British Columbia) 409–22.

35 Sea Fisheries Regulation Act 1966 s 5.

36 *ibid* s 5A.

37 Natural Environment and Rural Communities Act 2006 s 41.

Their current membership structure does not lend itself to factoring environmental implications into the decision-making process. They currently comprise:

- 50 per cent local councillors
- one person from the Environment Agency
- persons with expertise in environmental matters
- persons acquainted with the needs and opinions of the fishing interests of that district.³⁸

This may seem to strike a balance between conservation and exploitation; however, the practical implication of such a structure is that the membership of SFCs is likely to be riven with potential conflicts of interest.³⁹ In addition to strong representation from commercial fisheries on the committee, anecdotal evidence suggests that many of the local councillors appointed to the committees also have connections with the fishing sector. The Town and Country Planning Acts do not require persons acquainted with the needs and opinions of the property development sector to sit on planning committees and it is arguable that the same approach should apply here. Ideally, the basis of appointment to the SFCs should be that members are financially and professionally disinterested in their decisions. As a result, despite their nominal responsibilities under the Sea Fisheries (Wildlife Conservation) Act and the NERC Act, SFCs have not been successful in generating their own conservation regulations. Even where they are relevant authorities for MNRs, they have not been able to square their responsibilities. Despite its status, large scale potting still continues in the Skomer Island MNR. Attempts to create a no-take element within the MNR in 2005 were out-voted by the South Wales SFC.⁴⁰

Inshore fisheries and conservation authorities

Inshore fisheries and conservation authorities (IFCAs) will replace sea fisheries committees. The addition of conservation to the name is presumably to enhance its standing in the new organisation. The draft bill contains minimum requirements for the new IFCA constitutions, which is an improvement on the current ad hoc SFC constitutions.⁴¹ It also sets out established responsibilities for IFCAs to: 'manage the exploitation of sea fisheries resources in that district' and in so doing:

- ensure that the exploitation of sea fisheries resources is carried out in a sustainable way
- seek to balance social and economic benefits ... with the need to protect the marine environment from ... the effects of such exploitation
- seek to balance the different needs of persons engaged in the exploitation of sea fisheries resources ...⁴²

Furthermore, where the IFCA covers a MCZ, it must ensure that the conservation objectives of the MCZ are advanced.⁴³ The language of the new constitution seems a little half-hearted. If the Royal Commission on Environmental Pollution (RCEP) and the plethora of other scientific reports are to be believed, marine fisheries require fundamental reform. Whether the envisaged closures of 30 per cent of marine fisheries, as proposed by many conservationists and marine scientists, could balance social and economic benefits in the short term is open to question. If the industry is to have a future it seems that fundamental reforms are necessary and that in seeking balance the IFCAs may be qualifying their previous aim of sustainable exploitation.

In reality, whether IFCAs will achieve the sustainable management of fisheries depends on who sits on their boards. This is dealt with at section 140. IFCAs will be made up of:

- persons who are members of the relevant council
- persons acquainted with the needs and opinions of the fishing community of the district
- persons with knowledge of, or expertise in, marine environmental matters.⁴⁴

This is no different to the SFCs. It is hard to imagine such a body passing a measure with purely conservation goals. Certainly it is unlikely that such a body would be able to take the steps recommended by the RCEP, unless the board were made up of disinterested parties.

The draft bill has tidied up some of the anomalies. For instance, it will provide for model codes of conduct so it is hoped that members of some SFCs will no longer be able to avoid declaring their interests;⁴⁵ the maximum fine has been raised from a paltry £5000 to a more realistic £50,000 (although perhaps it would be better if this figure were left to the minister to decide, given that it took over 40 years to reform the last statutory figure), and there are provisions for emergency byelaws to avoid interminable delays.

The overall result is a mixed bag of reform. Clearly the draft bill could potentially deliver some much-needed operational modernisation, but whether a body which has such vested interests contained within it can successfully deliver conservation is very much open to question.

MARINE LICENCES

The marine bill white paper stated:

We intend to introduce legislation which is ... effective – targeted on things that need to be controlled for environmental reasons, to ensure that a proper balance is struck between competing uses, and to use finite marine resources sustainably.⁴⁶

38 Sea Fisheries Regulation Act 1966 s 2.

39 J Eagle *Democracy in Natural Resources: British and American Approaches to Public Participation in Fishery Management* (The British Council 2004).

40 http://news.bbc.co.uk/1/hi/wales/south_west/4634691.stm (2 May 2008).

41 Draft marine bill (n 1) s 141.

42 *ibid* s 142(1).

43 *ibid* s 143(1).

44 *ibid* s 140.

45 *ibid* s 140(7).

46 *Defra A Sea Change: A Marine White Paper* (March 2007).

It is therefore surprising that commercial fishing remains an unlicensed activity. This has a number of anomalous consequences. Since fishing is arguably authorised under the public right,⁴⁷ the true limit of the right to fish has been left to the courts to decide at common law. Since the nineteenth century, the courts have been sending strong messages that the right to fish needs to be limited by statute.⁴⁸ Fishing has been limited by restricting the number of vessel licences rather than licensing the activity; the equivalent to limiting the number of cars on the road by restricting the available number of driving licences. The bill provided the opportunity to licence commercial fishing on a more comprehensible basis. A licensing process would at least enable the state to take control of fishing and properly define its nature and extent. It could mean that those activities which cause excessive harm should not be considered as fishing. It also

requires the provision of an environmental impact assessment before a licence is issued. So while the new bill makes provision for the licensing of numerous activities, the most damaging remain outside its scope.

CONCLUSION

When the potential effect of the draft marine bill is considered through the lens of the most damaging and poorly regulated activity which takes place in the sea, even with its 687 pages the bill has left some gaping holes. That is not to say that the draftsmen have not attempted to iron out many of the quirks of the existing regime. It should not be allowed to fail and it is worth pursuing, but the bill does leave the horrible impression that it may have dodged the main issue. 'Forget the view, let's tinker with the window.'⁴⁹

47 Appleby (n 11).

48 *Adair v National Trust for Places of Historic Interest or Natural Beauty and another* [1998] NI 33 at 35, *Commonwealth of Australia v Yarmirr* (2001) 206 CLR 1 at 282, *Goodman v Mayor of Saltash* (1882) 7 App Cas 633-56 at 654.

49 G Mckeone 'The Creepy Cult of Management Consultancy' *The Independent* (6 May 2008) 29.