

Response to Consultation on Legislative Consent Memorandum January 2009

Scottish Environment LINK is the umbrella body for Scotland's voluntary environmental organisations, representing around 500,000 members. Scottish Environment LINK's Marine Task Force and its campaign for a Scottish Marine Bill is supported by:

Hebridean Whale and Dolphin Trust
Marine Conservation Society
National Trust for Scotland
RSPB Scotland

Scottish Wildlife Trust
WWF Scotland
Whale and Dolphin Conservation
Society

Overarching Comments

Scottish Environment LINK's Marine Task Force (LINK MTF) welcomed the agreement between the Scottish and UK Governments on a UK-wide approach to marine planning, and further executive devolution of powers over marine nature conservation. We therefore welcome the opportunity to comment on the Legislative Consent Motion as detailed in the Legislative Consent Memorandum on the UK Marine and Coastal Access Bill. We have included a number of detailed points below, many of which have arisen from the close working arrangement that LINK MTF member bodies have with our sister UK bodies. Therefore several of the concerns expressed below result from detailed legal analysis of the provisions of the UK Marine and Coastal Access Bill which is being carried out on behalf of Wildlife and Countryside Link (WCL).

LINK MTF are supportive of the principle of the Legislative Consent Motion as detailed in the Legislative Consent Memorandum in order to secure effective joint-working between the UK and Scottish Governments. However, we still have a number of concerns with the UK Bill/Legislative Consent Motion that are set out below and we also believe that there are several issues which may now not be covered by either the UK or Scottish Marine Bills. For example, it is currently unclear who will be responsible for the planning of reserved matters in the Scottish inshore region, as the Scottish inshore region is not covered by the UK Marine and Coastal Access Bill (Clause 48(1)(a)). Additionally, there would appear to be no provision for the creation of byelaws for protection of MCZs or order-making provisions in the Scottish Offshore, whereas these powers exist for MCZs in England (Clause 125). In the absence of an equivalent clause covering the Scottish offshore region, the ability to protect MCZs in Scottish waters would appear to be compromised.

General

The new Bill does not include any general duty on all public bodies in exercising "marine functions" (e.g. as defined in Clause 14(2)) to have regard to the purpose of conserving biodiversity. In light of this, it is important to ensure that the scope of the Biodiversity Duty contained in the Nature Conservation (Scotland) Act 2004 be extended from 12nm to 200nm, as suggested in *Sustainable Seas for All: a consultation on Scotland's first Marine Bill*. Such a Biodiversity Duty should apply to all UK bodies operating in the offshore area adjacent to Scotland.

Marine Management

Clause 2(2): There is a need to ensure consistency and coordination between the MMO and Devolved Administrations. Where there are activities within the UK marine area delivered by Devolved Administrations, there is currently no requirement in the Bill for the MMO to coordinate with that Administration. This is important to ensure an ecosystem approach to marine resource

management, and we believe that this urgently needs to be addressed under the MMO's general objective.

UK Marine Policy Statement

LINK MTF support the principle of all UK administrations signing up to a joint UK Marine Policy Statement.

- Clause 42(1)(a) (Marine policy statements): We believe that this clause should have a stronger sustainable development purpose, and further reflect the UK-wide approach to marine planning.
- Clause 44 (Review of statement) has been added, but there is still no timetable for the review. Whilst it is recognised that flexibility is desirable, we believe that as a minimum there should be a longstop date for review.
- Clause 45 (Amendment of statement): It is unclear as to whether amendment of the MPS requires the agreement of all the policy authorities or whether one can alone amend the MPS. We believe that there should be agreement of all the policy authorities for any amendment to be made.
- As drafted, clause 43 enables individual Administrations to 'opt out' of jointly preparing and adopting an MPS with the Secretary of State and the other Devolved Administrations. We believe that there must be an incentive in the legislation for the Administrations to reach agreement on the document and show political buy-in. At present, the opt-out is subject to no constraints with the only concession being that the Secretary of State must not prepare an MPS unilaterally unless he has first invited the other policy authorities (i.e. Devolved Administrations) to be involved. At the very least there should be carefully prescribed circumstances in clause 43 as to when 'opt-out' is acceptable and where an Administration does opt out, it should be required to publish its rationale.
- We believe that Strategic Environmental Assessment (SEA) should be applied to not only marine plans but also to the Marine Policy Statement (MPS). The SEA Directive obliges the UK "*to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development*". We assume that the MPS would be subject to SEA in Scotland but we believe that this should be the case across the UK.

Marine Planning

LINK MTF believe it is vital that Scottish Ministers work with the UK to produce a coherent regional-seas approach to marine planning, that follows biogeographic regions. In addition we believe it is important that such plans cover the whole UK marine area.

- Currently, there is no obligation to produce marine plans or to ensure that marine plans cover the whole UK marine area (Clause 49: Marine plans for marine plan areas). We believe that, where an MPS is "*in effect*", i.e. has been prepared, adopted and published, there should be an obligation (not discretion as at present) on the marine planning authority to bring into effect a marine plan(s).
- Clause 49 (1) & (2): This clause does *not* seem to allow for the possibility for joint marine plans to be made by 2 or more marine plan authorities. Such provisions will clearly be required in areas such as the Solway Firth, Irish Sea and North Sea, if a biogeographical regional seas approach is to be delivered.

Marine Licensing

- Clause 66(3) & (4) (Determination of applications): There is no procedure set out here as to how/when consultation and the submission of representations by third parties should be undertaken, or details of this consultation procedure. There should be a clear obligation to consult with interested third parties and 'experts' including statutory nature conservation bodies in all cases. The licensing decision should be required to include details of how the licensing

authority has dealt with the expert's observations and to give reasons where the advice has not been followed.

- Clause 71: The UK Marine & Coastal Access Bill provides no environmental safeguards, controls or checks in relation to licensing exemptions. For example, there is no requirement for assessing impacts prior to exemption, no description of the types of activities that could qualify for exemption and consultation on exempted activities is not mandatory. At the very least, it should be compulsory for the licensing authority to be notified every time an exempted activity is carried out, and for this information to be included in the proposed 'register of licensing information' (Clause 98). This would ensure that as a minimum, licensing and planning authorities would be able to base decisions on a complete record of all licensable activities, including those exempted from licensing, happening in the marine area at any time and allow them to properly determine the cumulative impacts of these activities on the marine environment.
- Clause 82 (4)(a) (Breach of requirement for, or conditions of, a licence): We do not believe that a £50,000 maximum fine is high enough for breach of requirement for, or conditions of, a licence, as to some industries, this fine would be inconsequential.
- Clause 87 & 88 & 99 (Compliance notice/Remediation notice/stop notice): We believe that the lack of a definition for "serious harm" and "serious interference" creates unnecessary ambiguity. We believe that enforcement tools should be available where an activity has caused/is causing/is likely to cause any harm or interference. The enforcement authority can then chose the most appropriate tool or combination of tools to use to deal with the offence. We note that under Clause 87(4) the reference to "serious harm" has been dropped and replaced with "harm" and we believe that the term "serious" should also be removed from Clauses 88(5) and 99(5).
- Clause 100 (1)(b) (Further provision as to stop notices): We believe that it should be an obligation, not a discretion, to serve the stop notice also on the licensee.

Marine Conservation

LINK MTF support the 3 pillar approach to marine nature conservation as set out in *Sustainable Seas for All: a consultation on Scotland's first Marine Bill*. As such an approach is not delivered through the UK Marine & Coastal Access Bill, we believe that it is important to ensure that wider seas measures such as marine planning and the biodiversity duty (see above) can be applied consistently in Scottish waters out to 200nm. We believe that there should be a *duty* to create an ecologically coherent network of marine protected areas for all UK seas.

- Clauses 113, 114 & 119 (with regard to designation of MCZs): The current drafting of these clauses is unnecessarily ambiguous and should be amended in order to clarify that there is a **duty** and not merely a power to designate MCZs in order to contribute to an ecologically coherent network of sites.
- Clause 113 (6) states that Scottish Ministers may not designate any area as an MCZ without the agreement of the Secretary of State. This clause might be amended to reflect the need for agreement between Scottish Ministers and the Secretary of State in the designation of MCZs.
- Clause 114 (Grounds for designation of MCZs): Post-designation, it is essential that that the conservation objectives (Clause 114 (2)) are used to develop a management plan/scheme for each MCZ which translates the conservation objectives into clear management guidelines. A management plan/scheme will facilitate monitoring of the status of the site and reporting against the delivery of the conservation objectives. We believe that the Bill should include a duty on the appropriate statutory conservation body to produce a management plan/scheme as soon as reasonably practicable after designation.

- Clause 121 (General duties of public authorities in relation to MCZs): This clause should be amended to seek to ensure that **activities outside an MCZ** that will affect the MCZ are included within the scope of the duty.
- Clause 121 (2)(b): This allows an authority to hinder the achievement of the conservation objectives of an MCZ, on the basis of its own assessment of what causes least hindrance. It would be preferable for the assessment of **least hindrance** to be made by the appropriate statutory nature conservation body.
- We note in Appendix 3 (Paragraph 3) of the Legislative Consent Memorandum that “there will be a duty on the UK Government to contribute to a network of sites that will assist in the conservation or improvement of the marine environment in the UK marine area”. Further, “Scottish Ministers will be required to report to the Scottish Parliament on the extent to which the MCZs designated in the Scottish Offshore Zone, taken together with other MCZs and any European Marine Sites that have been established in the UK marine area, form an ecologically coherent network of protected sites”. Whilst we recognise that new sites delivered through the Scottish Marine Bill are not part of the UK Marine and Coastal Access Bill, they clearly have a vital role to play in delivering a coherent network of sites. It is therefore important that selection of sites through both the UK and SMBs is done to ensure, together with Natura sites, that an ecologically coherent network of sites is delivered throughout UK seas, including on a regional seas basis.
- Appendix 3 (Paragraph 4) of the legislative Consent Memorandum states that “sites will be selected on the best available evidence, with consideration of social and economic consideration integrated into the decision making process”. However, Clause 114 (7) states that “In considering whether it is desirable to designate an area as an MCZ, the appropriate authority **may have regard** to any economic or social consequences of doing so”. New sites designated through the Scottish Marine Bill are proposed to be selected according to science-based ecological criteria and we believe that the provisions in the UK Bill **do not** require a different approach to be adopted in the offshore area adjacent to Scotland. We firmly believe that the approach proposed for the Scottish Marine Bill is the correct one and that all sites throughout UK waters should be designated according to science-based ecological criteria alone. It should be stressed that there is no legal obligation (either domestic, European or international) to take socio-economic matters into account when making decisions about conservation, provided that those likely to be affected have the opportunity to state their case in a proper way.

Enforcement

- Clause 226(9) and 227 (13(b)): The Scottish offshore region is excluded in relation to enforcement of the marine licensing regime and enforcement of nature conservation legislation, with the exception of Clause 233 (Enforcement of MCZs in Scottish offshore region). Clause 233 relates only to Clause 136 (Offence of damaging etc protected features of MCZs), whereas Clause 227 deals with enforcement of nature conservation more generally and relates to the Conservation of Seals Act 1970, Wildlife and Countryside Act 1981, Conservation (Natural Habitats, &c) Regulations 1994, and Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007. We are therefore concerned that the exclusion of the Scottish offshore region from Clause 227 will compromise marine conservation measures in Scottish offshore waters outside MCZs.

Scottish Environment LINK Marine Task Force
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For further information please contact.

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