

## Evidence presented to the Rural Affairs and Environment Committee June 2009

### Marine (Scotland) Bill

#### Summary

- **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 UK and Scottish Marine Bills 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

This evidence complements individual submissions by some of the above organisations.

- Scottish Environment LINK's Marine Task Force (LINK MTF) welcomes the introduction of the Marine (Scotland) Bill to Parliament and the opportunity to provide written evidence to the Rural Affairs and Environment Committee to inform its scrutiny of the general principles of the Bill.
- We are pleased to see that the Marine (Scotland) Bill provides for a system of marine planning, a streamlined licensing system in which decisions are made in accordance with marine plans, and proposals for improvements in marine nature conservation, including new marine protected areas.
- We believe that the Marine (Scotland) Bill as introduced has the potential to improve on existing provisions for the protection and sustainable development of the marine environment, allowing Scotland to play its part in meeting a range of international commitments. Amendments to specific parts of the Bill, as outlined below, will significantly improve the contribution the Bill makes in this regard.
- We are concerned however, that the provisions in relation to environmental recovery are much weaker, with no provisions to **improve** or **recover** the ecological status of Scottish waters beyond the boundaries of marine protected areas. The requirement to promote recovery of the marine environment as a whole is enshrined in various international and national agreements, including the Convention on Biological Diversity, the Marine Strategy Framework Directive and the recently published UK High Level Marine Objectives. The key outcome of the Bill, the one by which its ultimate success is measured, must be a healthy, well functioning and biodiverse marine environment. In order for the Bill to contribute to this outcome we believe that objectives relating to the health of marine species, habitats and ecosystems (marine ecosystem objectives) must play a pivotal role. Such objectives must provide direction to, and underpin evaluation of, the effectiveness of the marine planning system. There must be a duty on public bodies to contribute to their achievement. We are concerned that the Bill allows for ecosystem objectives to be traded-off against short-term social and economic objectives, resulting in a continued deterioration of both the sea's health and its productivity.
- There must be an independent, transparent appeals process against licensing and planning decisions which is accessible to applicants and appropriate third parties. Such an appeals process must inspire the confidence of all stakeholders, and help Scotland meet the requirements of the Aarhus Convention. This is particularly important as the licensing body, Marine Scotland, is part of Scottish Government.

## General Duties

1. We believe that the Marine (Scotland) Bill should provide the framework for the protection, recovery and sustainable development of the marine environment, based on the ecosystem approach<sup>1</sup>. Therefore we believe that there should be specific duties on Scottish Ministers to further the achievement of sustainable development, and to deliver an ecosystem approach. We note that Part 1 of the recent Flood Risk Management (Scotland) Bill contained the General duty on Scottish Ministers, SEPA and responsible authorities to '*act in the way best calculated to contribute to the achievement of sustainable development*' and we believe it would be appropriate to have an additional Part 1 in the Marine (Scotland) Bill with similar provisions. In *Sustainable Seas for All: a consultation on Scotland's first marine bill* the policy intention to place a duty on Marine Scotland to deliver ecosystem management was included (Paragraph 55). This duty does not appear in the Marine (Scotland) Bill and given that an *ecosystem-based approach* is a requirement of the Marine Strategy Framework Directive (MSFD) and such an approach was signed up to by all four UK administrations<sup>2</sup> we believe that a duty should be placed on Scottish Ministers to deliver an ecosystem approach to marine management. Finally, as science and data in the marine environment is often limited, there will be a continuing need to adopt the precautionary principle, a general principle of EU environmental law required by the MSFD. Reference to the precautionary principle, and the need to protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected, should also be made in the new Part 1 of the Bill.

## Part 2 - Marine Planning

2. The Bill lacks both a definition for marine planning and a statement of purpose for the Marine Planning part of the Bill. We believe that a statement of purpose in relation to protection, recovery, prevention of deterioration and sustainable development is necessary to provide the context and direction for marine plans in the light of our international commitments.
3. We believe that a major potential strength of the Marine (Scotland) Bill is the 3-pillar approach to nature conservation. As part of the first pillar (wider seas measures), marine planning would be expected to play a major role (Policy Memorandum, para 45). As such, marine planning should be used to, 'protect, preserve, prevent deterioration and, where practicable, restore marine ecosystems in areas where they have been adversely affected' as required by the MSFD. It is also vital that there should be a duty (rather than discretion as at present) on Scottish Ministers to prepare and adopt both national and regional marine plans. We believe that the ecosystem approach should be delivered through planning at a regional seas scale. In order to achieve this, that there must be plan coverage for the whole Scottish marine area, including regional marine plans covering the entire Scottish inshore.
4. We believe that all plans must be underpinned by marine ecosystem objectives. There should therefore be a duty (rather than discretion as at present) to include marine ecosystem objectives in both national and regional plans. There should also be a further duty requiring public authorities to contribute to the achievement of marine ecosystem objectives.
5. Section 4 states that a national or regional marine plan comes into effect when the plan is published by Scottish Ministers in accordance with schedule 1. As is the case in the terrestrial planning system, it should be policy that *draft* marine plans are given material consideration status.
6. Section 6 sets out provisions for the withdrawal of marine plans. It is unclear under what circumstances withdrawal of a marine plan could occur. We believe that a marine plan should not be withdrawn unless or until a new plan has been drawn up and agreed.
7. We are concerned that Section 11 does not secure strong compliance with marine plans. The inclusion of the phrase '*unless relevant considerations indicate otherwise*' (11(1)), with regard to public authorities making authorisation or enforcement decisions in accordance with marine plans, appears to give public authorities excessive discretion to disregard marine plans. We

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<sup>1</sup> As defined by the Convention on Biological Diversity (Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity) (2000).

<sup>2</sup> Safeguarding our Seas: A Strategy for the Conservation and Sustainable Development of our Marine Environment (2002); Review of Marine Nature Conservation (2004).

have taken legal advice on this matter and no relevant judgements could be found to interpret the phrase *'relevant considerations indicate otherwise'*. We assume that the term *'relevant considerations'* carries the same connotations as the term *'material considerations'* that is used for terrestrial planning, and consequently, could have the same general interpretation. It may therefore be appropriate to use the term *'material considerations'* as is used on land, so that the interpretation is clear. We recognise however, that the use of a terrestrial term would bring with it a body of case law that is terrestrially focussed and therefore not suitable for use in the marine area. We therefore believe that if the term *'relevant considerations'* is used for marine planning, there should be a requirement to produce guidance that would prescribe the circumstances under which decisions are allowed to deviate from the agreed marine policy. Although the public authority has to state their reasons under section 11(2) for taking a decision against the marine plan, this section does not require the public authority to justify such a decision.

8. The circumstances provided for an appeal against a marine plan (Section 13) are very limited. Our legal analysis of the Bill suggests that the limited scope of judicial review may fail the third part of the Aarhus Convention<sup>3</sup> (access to justice). There is some legal debate as to what the scope of the Convention is, and whether the rights particularly to access to justice cover all environmental matters or alternatively just those secured by the Convention. This is a wider issue that will need to be addressed for appeal mechanisms across a wide range of legislation and therefore the effects on marine legislation should be revisited at some point in the future, for instance, following the Gill Review.
9. A three tier planning system was proposed in *Sustainable Seas for All: a consultation on Scotland's first marine bill*. However, the Marine (Scotland) Bill only refers to the national tier and the regional tier. We assume that the third tier refers to the Marine Policy Statement (MPS), but there is no mention of this in the Bill. Following agreement at the Joint Ministerial Committee, should Scottish Ministers be content to adopt the final MPS, any marine plans prepared by Scottish Ministers must be in conformity with the MPS. The text of the Joint Ministerial Committee also states that *...Scottish Ministers would take any appropriate action to reinforce this in the Scottish Bill*. Whilst we recognise that Scottish Ministers have an option to opt out of the MPS we believe that, given the relative importance of the MPS to marine planning in Scotland, there must be some reference made to the MPS (should it be adopted) or to any alternative arrangements that would be made should agreement fail to be reached.
10. In order for marine management to deliver an ecosystem approach it must follow ecological rather than political or administrative boundaries. This would require administrations to work together across administrative boundaries. We believe that users would benefit from joint planning, especially in the Solway Firth and northern North Sea and that we should avoid situations arising where more than one plan is produced for a regional sea or estuary. We believe that a formal concordat between the UK and devolved governments should be drawn together to facilitate effective joint planning across boundaries.
11. *Sustainable Seas for All: a consultation on Scotland's first marine bill* raised the issue of extending the biodiversity duty to 200nm. We believe that Scottish Ministers should include a provision to promote biodiversity in the Scottish National Plan within the Marine (Scotland) Bill. This could then extend to 200nm under the executive devolution of marine planning, following agreement of the UK Government. Following the statement by Lord Hunt of Kings Heath that the UK Government could see no reason to object to a plan on the grounds that it contained such a provision<sup>4</sup>.

### **Part 3 - Marine Licensing**

12. We believe that notice of applications (Section 19) should also be published on a dedicated website. This would help accomplish 19(2) and allow interested parties to monitor all applications. We also believe that all licence applications should be published (Section 19(6)).
13. Section 24 gives the power to Scottish Ministers to exempt certain activities from requiring a licence, or to give a licence automatically if certain conditions are satisfied. This has the potential

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<sup>3</sup> UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

<sup>4</sup> See <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90512-0006.htm> column 959

for a wide range of activities to be exempted. No criteria are given in the Bill as to what activities would be exempted. It would be desirable to have some threshold of criteria included in section 24 in a similar way to section 25.

14. Whilst we agree in principle with the approach taken in Section 25 (similar to Controlled Activities Regulations - CAR) we recognise that there are a number of problems with the CAR approach. It is vital that cumulative impacts can be taken into account when registering activities and a mechanism to take account of such impacts must be included. It is also important to ensure that a mechanism is put in place to recognise different sensitivities in different locations.
15. We believe that provisions for appeals against licensing decisions should appear on the face of the Bill rather than in regulations (Section 29). This is an area of considerable uncertainty, and we are not clear on how such appeals can occur in a transparent manner. In addition, we believe that in order to secure compliance with the Aarhus Convention, there should be an appropriate third party right of appeal on all licensing decisions.
16. We are unclear as to the threshold between '*serious harm*' and '*harm*' (Sections 34, 35 and 46). We believe that reference to *serious* should be removed from Section 46(4) as these enforcement tools should be available where an activity is causing/is likely to cause *any* harm.
17. We are concerned that marine fish farming will not come under the licensing provisions in the Bill. Marine fish farming is potentially harmful to marine ecosystems and this omission risks undermining the objectives of the Bill.

#### **Part 4 – Marine Protection and Enhancement: The Scottish Marine Protection Area**

18. In line with our international commitments under OSPAR, WSSD and MSFD we believe that it is necessary to place a duty on Scottish Ministers to designate MPAs (rather than discretion as at present - Section 58) in order to contribute to an ecologically coherent network of well-managed MPAs. Currently, the only reference to a network comes under Section 91 (Reports to Parliament). Protection of marine fauna, flora, habitats and ecosystems cannot be achieved through the designation of stand-alone sites. Rather an ecologically coherent network of sites is required, on the basis of best available science. It should adhere to the principles of: representation (the network should include examples of the full range of marine features present in the marine area); replication (each feature should be represented in multiple sites, which are of adequate size and quality to protect against accidental loss, spread the risk of damaging events and long term changes and ensure the natural variation of the feature is covered); and connectivity (sites within the network should be located so as to allow for the movement of flora and fauna of different life stages (spores, eggs larvae, juveniles and/or adults) between sites). We believe that it is vital that the Bill is amended to place a duty on Scottish Ministers to deliver an ecologically coherent network of MPAs that includes the principles of representation, replication and connectivity.
19. We believe that the conservation objectives for an MPA are a crucial element of the MPA provisions in the Bill and as such, it is essential that the body tasked with producing these objectives has the necessary expertise. We believe that the appropriate statutory nature conservation body is best placed to do this, and should be placed under a duty in this respect.
20. We believe that the designation of Nature Conservation MPAs must be based on the best available scientific advice and on biodiversity needs alone. We are therefore reassured that Scottish Ministers may have regard to social or economic consequences of designation only where the desirability of designating 2 or more areas is equal (Section 59(5)).
21. We welcome the statement in Section 59(8) that conserving '*a thing*' includes reference to assisting in its conservation and enabling or facilitating its recovery. However, we feel that the reference to 'increase' is rather ambiguous as it would be unhelpful and even irresponsible to attempt to increase conservation of '*a thing*' beyond its natural recovered state.
22. We believe that there should be a duty on SNH to give advice on all Nature Conservation and Demonstration & Research MPAs (Section 69) and for all public authorities to act *in accordance with* that advice. Whilst Section 71(6) and 72(8) require public authorities *to have regard to* any advice given by SNH, Section 89(1) does not appear to do so.
23. Section 71, 72 and 83 make reference to '*other than insignificantly*'/ '*significantly*' with regard to affecting the protected features or stated purpose of an MPA or hindering the achievement of

the stated conservation objectives or stated purpose of an MPA. However, it is not clear that the public body would have the appropriate expertise to make such a judgement call. Reference to '*other than insignificantly*' '*significantly*' should therefore be removed and the advice of SNH should be followed.

24. It is not clear whether Section 82 also covers urgent marine conservation orders or urgent continuation orders.
25. Section 83(1)(a): *and* should be amended to *or*.
26. The specific defence for sea fishing (Section 85(2)) creates some concern. The use of *reasonably* in 85(2)(b) gives a low threshold for using this defence and we believe that better wording would be to use a test of *using all necessary precautions*.
27. Post-designation it is essential that the conservation objectives are used to develop a management scheme for each MPA. This will translate the conservation objective into clear management guidelines, making it easier for public bodies and other organisations and individuals to understand the management requirements and the implications with regard to their own functions and activities. Furthermore the management scheme will facilitate monitoring of the status of the site and reporting against the delivery of the conservation objectives. The level of detail required in the management scheme will be dependent on the level of protection needed, the features to be protected and the range of activities requiring management. We believe the Bill should include a duty on SNH to produce a management scheme for all sites as soon as reasonably practicable after designation
28. There is no requirement for sites to be monitored. In the absence of such monitoring, it would appear to be impossible for Scottish Ministers to report on the extent to which the stated conservation objectives have been achieved (91(3)). We believe that the Bill should include a monitoring requirement for all MPAs in order that progress towards achieving conservation objectives can be assessed. In addition, we believe that SNH are best placed to monitor sites in order that the report can be based on expert opinion.
29. It is vital that the provisions of the Inshore Fishing (Scotland) Act 1984 can be used effectively and quickly to ensure protection of MPAs designated under the Marine (Scotland) Act. A clear link should be made between the two pieces of legislation to reinforce this.
30. Section 87(3) allows a marine management scheme to impose requirements in relation to the exercise of any functions which are not exercisable within the area to which the scheme applies but the exercise of which may have an impact on the protection of that area. We strongly support this provision to ensure that activities occurring outside an MPA do not affect the protected features, the stated purpose of an MPA or hinder the achievement of the stated conservation objectives or stated purpose or the conservation objectives of the MPA. An equivalent provision must be included for the conservation objectives of an MPA or Section 87(1) must be amended to place a duty (rather than discretion as at present) on relevant authorities to produce a management scheme for all sites.

#### **Part 5 – Conservation of Seals**

31. We support the Bill's overhaul of seal conservation legislation, but we are concerned that loopholes or omissions may remain which allow for the unnecessary killing of seals. To fully implement the provisions of the EU Habitats Directive, the Bill must ensure that shooting can only occur as a last resort, by licensees, within strict guidelines, and that all killings are accurately reported to the Scottish Government.