

**REPORT INTO THE ESTABLISHMENT OF MARINE PROTECTED AREAS  
IN UK WATERS UNDER EXISTING LEGISLATION**



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Disclaimer: The material provided in this report is of a general nature and should not be regarded as an attempt to cover every aspect of the particular issues being addressed. It is for academic and discussion purposes and should not be relied upon or treated as a substitute for legal advice in relation to individual situations.

## INTRODUCTION

The purpose of this report is to put into plain English the legal issues, which underlie the establishment of marine protected areas (MPAs). Though there are numerous legal vehicles for regulating marine activities, the creation of closures for purely wildlife conservation purposes is a relatively novel concept. This novelty means that established regulatory bodies have to operate and take into consideration concepts concerning marine conservation, which were not in the past central to their brief. This raises the questions over a regulatory body's ability to act and how it should react to the plethora of new legislation in this area. This report delineates the most appropriate bodies to develop MPAs and assesses whether have the powers to do so. It cannot claim to present an exhaustive list because of the numbers of regulatory bodies with marine powers. This report has attempted to identify those bodies with the most appropriate powers over marine activities.

This report has four sections:

- 1 - Key legal concepts
- 2 - An overview of existing international legislation
- 3 - An overview of existing UK legislation
- 4 - Summary
- 5 - Conclusion

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# 1 KEY LEGAL CONCEPTS AND DEFINITIONS

## DEFINITION

### *Marine Protected Area*

An area land and/or sea dedicated to the protection and maintenance of biodiversity, and of natural and associated cultural resources and managed through legal or other effective means.<sup>1</sup>

### *Regulatory body*

Any public body, which has the power to regulate human activity in the sea.

### *Ultra vires.*

With a few notable exceptions (such as Crown prerogative, which enables HM Government to go to war without consultation)<sup>2</sup> any regulatory body must have been specifically granted its powers to regulate by Parliament. It cannot operate outside those powers. If it attempts to do so, it will be acting *ultra vires*, or beyond its powers. Any regulation, by that regulatory body, could then be struck down by the court at judicial review. The ambit of any individual regulatory body's powers is therefore extremely important. In practice this can be made difficult by poor drafting of a regulatory body's constitution or related legislation. This is true of a surprising number of pieces of marine legislation, as can be seen through the course of the report. It is particularly important in this context because many regulatory bodies are now being requested to consider conservation objectives, which they were not originally established to achieve.

### *Jurisdiction.*

There are two key elements to jurisdiction. Firstly there is the question of what powers are delegated to the regulatory body (which is dealt with under *ultra vires*). Secondly there is the question of spatial extent of different regulatory bodies' powers. This can create the problem of multiple and confusing tiers of regulation.

So for instance the Government of Wales Acts 1998 and 2006 both define 'Wales' to include 'the sea adjacent to Wales out as far as the seaward boundary of the territorial sea'. It would not however be safe to conclude that the administration of Trust Ports in Welsh waters fell within the National Assembly of Wales' jurisdiction, since the administration of non-fishing trust ports still remains with Department for Transport in Whitehall.

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<sup>1</sup> Definition adopted by the World Conservation Union IUCN 1994

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[www.parliament.uk/parliamentary\\_committees/public\\_administration\\_select\\_committee/pasc\\_19.cfm](http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc_19.cfm)

Devolution and EU membership make the questions surrounding jurisdiction particularly pertinent. The relatively recent acquisition, in legal terms, of substantial offshore interests and poor drafting mean many of these issues are not settled law.

### *Jurisdiction and International Law*

The ability of the nation state to govern its adjacent seas can probably be best understood using a rule of thumb that the further away from land one travels, the less control that a coastal state can influence. There are numerous conventions and international treaties concerning the sea, but the most relevant is the United Nations Law of the Sea Convention (LOSC). This is a framework, which enable states to claim jurisdiction and various powers over those adjacent tracts of water. There are a number of key concepts:

#### *The Baseline.*

This is a line proximate to the coast, from which the various jurisdictional boundary measurements are taken.

#### *Territorial Waters.*

This is an area, usually 12 miles from the baseline, (unless it overlaps with another coastal state's waters) which is wholly within the state's jurisdiction. The UK's Territorial Waters are established by the Territorial Seas Act 1987. It is important to note that, within this zone, the seabed and its attached natural life are owned by the Crown Estate. Oil, natural gas and coal are excluded from the Crown Estate's ownership. Ownership of oil and gas is vested in the Crown and managed by the Department for Business Enterprise and Regulatory Reform (BERR), while coal is vested in the Coal Authority.

Beyond territorial waters there is no owner of the seabed, but the state still has various rights.

#### *Exclusive Economic Zone.*

This is an area usually between 12 to 200 miles from the baseline (unless it overlaps with another coastal state's waters). The coastal state has certain powers within the EEZ:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;*
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:*

- (i) *the establishment and use of artificial islands, installations and structures;*
  - (ii) *marine scientific research;*
  - (iii) *the protection and preservation of the marine environment;*
- (c) *other rights and duties provided for in this Convention.*<sup>3</sup>

It is important to note that the 'preservation and protection of the marine environment' is the responsibility of the coastal state. The modus operandi is set out at Article 194 LOSC:

'4 *In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.*

5 *The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'*

It would seem therefore that within the EEZ the coastal state is permitted to justifiably interfere with other states' rights for the protection of marine life. While it is clear that a state can take action to protect an endangered species or its habitat it is not so clear that a state can take action to establish general protection for species which are not so threatened.

Article 194 LOSC must also be read separately to the duties to 'conserve marine resources' set out at Article 61, which purely concern fisheries management.

#### *Implications of an Exclusive Fishing Zone*

Coastal states may claim the full extent of the jurisdiction contained in LOSC. It is customary for that state to declare its powers. Some states (such as the UK and Canada) have not declared EEZs and therefore only partially implemented the Convention. The UK has declared a 200 nautical mile fishing zone,<sup>4</sup> known as an Exclusive Fishing Zone. The UK has also taken some steps in respect of pollution control to 200 nautical miles, under s 129 of the Merchant Shipping Act 1995, Ministers can extend control to pollution of the sea by matter from ships

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<sup>3</sup> A 56 Laws of the Sea Convention 1982

<sup>4</sup> Fishery Limits Act 1976

under the LOSC. However, the position would be clarified if the UK Government declared an EEZ. The custom of such declarations may be under threat, in the *Greenpeace case*<sup>5</sup> the High Court found that the UK Government did have jurisdiction outside the 12 mile limit for matters beyond fisheries and should designate Special Areas of Conservation under the Habitats Directive beyond it.<sup>6</sup>

### *Continental Shelf*

Under the Article 76 LOSC, the adjacent coastal state has 'sovereign rights for the purposes of exploring and exploiting the resource' over its adjacent continental shelf.<sup>7</sup> The seaward limit of the continental shelf is a matter which can be contentious,<sup>8</sup> however it can be seaward of the EEZ. Under LOSC the coastal state does not have the same jurisdiction to take marine conservation measures on the continental shelf as it does with the EEZ. So continental shelf seaward of the EEZ does not have the same protection under international law. However under the Offshore Habitats Regulations 2007<sup>9</sup> the UK Government is assessing sites for protection under the Habitats Directive out to the edge of the continental shelf.

### *Proprietary rights and regulatory rights.*

The state has two methods of controlling use of the sea.

Firstly, as a regulator, it can set limits on how users may carry out their activity, through the passage of byelaws, regulations and consents under the auspices of various regulatory bodies.

Secondly, as an owner, it can choose whether to lease that land or resource at all, and if so on what terms. The state, in its various guises, owns the seabed to 12 miles, 55% of the UK foreshore, and mineral resources to the 200 mile limit and edge of the continental shelf.

It is essential that this dichotomy is properly understood. Language does not assist here since the use of the word 'licence' can either mean authority from a regulatory body or a right granted by an owner. For this reason throughout this report the term 'consent' has been used with reference to regulatory

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<sup>5</sup> *R v The Secretary of State for Trade and Industry ex parte Greenpeace Ltd* CO/1336/1999

<sup>6</sup> Wegelein F H T *Marine Protected Areas in the Exclusive Economic Zone: the*

*European Union between a Rock and Hard Place?* Georgian Law Review 5 2002 321-371

<sup>7</sup> A 2 UN Continental Shelf Convention

<sup>8</sup> As has been seen recently with the claim over the Lomonosov Ridge by Russia. [www.nationalgeographic.com/news/2007/09/070921-arctic-russia.html](http://www.nationalgeographic.com/news/2007/09/070921-arctic-russia.html)

<sup>9</sup> The Offshore Marine Conservation (Natural Habitats &c.) Regulations 2007

bodies and 'lease' or 'licence', when referring to a grant of a right by an owner.

### *Byelaws (or by-laws)*

These are regulations created by a regulatory body within their jurisdiction with statutory authority to do so.

Byelaw making powers in general have three particular set backs:

Firstly, because there is a danger of an unelected body creating new legislation, the authority granted by parliament to a regulatory body to create byelaws tends to be interpreted as narrowly as possible by the courts. So there is always a danger of an ultra vires challenge.

Secondly, the byelaw itself needs to be ratified by the relevant Minister, which can take months, if not years.<sup>10</sup>

Thirdly, breaches of byelaws generally do not carry with them significant fines, and enforcement will depend on the ability of the regulatory body to gather evidence and run a prosecution.

### *Devolved Government*

This report has concentrated on the effectiveness of legislation in England and Wales only. In some cases Scottish law is referred to. The effect of devolution is being felt in many areas where the devolved governments use different and diverging methods to regulate marine activities.

### *Officers' powers*

Although in this report we attempt to explain the maximum limits of any potential penalties, we are not able to comment on the effectiveness of enforcement powers.

## 1.9 *General*

These themes will recur throughout this report. It is very important when assessing a proposed MPA to understand the legal context in which the regulatory body is operating.

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<sup>10</sup> Bradley A Ewing *K Constitutional and Administrative Law* 2007 Person Longman 690

Abbreviations:

BERR	Department for Business Enterprise and Regulatory Reform
CAP	Common Agricultural Policy
CCW	Countryside Council for Wales
CFP	Common Fisheries Policy
CPA	Coastal Protection Act 1949
EA	Environment Agency
EEZ	Exclusive Economic Zone
LOSC	United Nations Convention on the Law of the Sea
MPA	Marine protected area
MNR	Marine nature reserve
NERC Act	Natural Environment and Rural Communities Act 2006
RCEP	Royal Commission on Environmental Pollution
SAC	Special Area of Conservation under the Habitats Directive
SFC	Sea Fisheries Committee
SNH	Scottish Natural Heritage
WFD	Water Framework Directive

## 2 AN OVERVIEW OF EXISTING INTERNATIONAL LEGISLATION

It would be too lengthy a task to list every piece of legislation and organisation with an interest in MPAs. This report will therefore examine those, which are most likely to be effective.

### THE OSPAR CONVENTION

Under the Annex V of the OSPAR Convention, the OSPAR Commission has a duty to develop a biodiversity strategy. As part of that strategy the UK Government has a duty to identify, implement and establish management plans for an ecologically coherent network of marine protected areas by the year 2010.

Identification of locations for that network is an ongoing process. It is likely (as acknowledged by the OSPAR Convention itself)<sup>11</sup> that there will be some elements of the Natura 2000 sites put in place by the Birds and Habitats Directives contained within the final network. Work establishing the obligations under the OSPAR Convention is still ongoing, but following announcements by DEFRA at the conference on MPAs in the UK hosted by Natural England in Scarborough in October 2007, it is likely that the UK will merely designate those areas already protected as Natura 2000 sites. Whether a double badging exercise meets the OSPAR obligations is open to question. The Natura 2000 sites are chosen because of the criteria established in the Habitats and Birds Directives (see post). According to the European Union remains a questionmark over the Natura 2000 sites 'ecological coherence'.<sup>12</sup>

*'Protected sites that make up the Natura 2000 network, however, are often not adjoining, and in many areas of the network little attention has been paid to ecological and spatial coherence'*

If that is indeed the case with the UK Natura 2000 sites then designating the Natura 2000 sites as OSPAR sites will not meet the OSPAR criteria.

It is important to note that although both the UK and the European Union have ratified the OSPAR Treaty, it is not and will not be binding on individuals unless it is brought into force by other legislation.

According to the OSPAR strategy<sup>13</sup> by 2003 the contracting parties should have notified OSPAR concerning the areas for which they were seeking protection and the process should now be evaluation whether those areas could form an ecologically coherent network. At this stage the OSPAR Convention must be treated as a future policy aspiration and although the

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<sup>11</sup> Article 3.1 2003 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic

<sup>12</sup> *Natura 2000* European Commission DG Environment Newsletter June 2007 22 12

<sup>13</sup> Article 4.1

goal will be MPAs, as it stands OSPAR does not of itself currently create MPAs.

Furthermore there is an important exception contained at Article 4 of Annex V of the OSPAR Convention

*'no programme or measure concerning a question relating to the management of fisheries shall be adopted under this Annex'*

This wording needs some further explanation. Fishing is one of the most significant and destructive activities, which takes place in the sea. Nature does not discriminate between commercial species and the ecosystem. It is therefore difficult to envisage a position where the obligations contained in OSPAR would not have some effect on fisheries management. The question clearly taxed the original signatories as the matter was the subject of an interpretive agreement to the original convention.<sup>14</sup> It was settled by reference to the Common Fisheries Policy. This reference has been made more confusing, as the Common Fisheries Policy now contains significant features of environmental policy.<sup>15</sup> indeed the 2002 reforms to the CFP added objectives of 'conservation, management and exploitation of living aquatic resources' and 'limitation of the environmental impact of fishing'.<sup>16</sup> It therefore remains a question in law whether closing an area to fisheries for marine conservation purposes would amount to a fisheries management measure or a marine conservation measure.

Notwithstanding any confusion over fisheries the OSPAR convention still remains a very important aspirational legal device for a coherent network of MPAs.

## THE COMMON FISHERIES POLICY (CFP)

Under what is known as the principle of conferral, Member States retain sovereignty and control over legislation unless they have passed responsibility for that legislation to the European Union. There is no specific definition of the CFP in any of the EU Treaties. The European Communities Treaties established the Common Agricultural Policy (CAP) of which the Common Fisheries Policy is part.

It is interesting to note the objectives of the CAP which are listed at Title II Article 33 of the consolidated European Treaties:

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<sup>14</sup> OSPAR Agreement on the Meaning of certain concepts in Annex V to the 1992 OSPAR Convention on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area (Reference number: 1998-15.2)

<sup>15</sup> See 3.2 of the Green Paper - The Common Fisheries Policy after 2002 Directorate General for Fisheries and Maritime Affairs and the 2002 reforms to the Common Fisheries Policy which introduced criteria of

<sup>16</sup> See Framework Regulation (EC) No 2371/2002 Article 1 2 (a) and (b)

*'The objectives of the common agricultural policy shall be:*

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;*
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;*
- (c) to stabilise markets;*
- (d) to assure the availability of supplies;*
- (e) to ensure that supplies reach the consumer at reasonable prices.'*

Environmental objectives for the CAP are not specifically mentioned. It remains to be seen whether the 2002 reforms of the CFP, which incorporated a broader suite of objectives,<sup>17</sup> including environmental ones, are beyond the scope of the original Treaty. If that were the case then there is a danger that the purely environmental objectives and mechanisms of the CFP would be *ultra vires*. It would be for the European Court of Justice to make that decision and no such case has yet been brought.<sup>18</sup>

Such arguments are to extent academic, but the point is worth considering if ultimately there is a conflict between OSPAR and the CFP, or domestic and European legislation. It is also worth considering when developing the network of MPAs. There is little mileage in the development of MPAs by the wrong regulatory body.

There are two principal regulations, which establish the Common Fisheries Policy: Regulation 2371/2002 and Regulation 850/98. Rather confusingly the powers conferred by the CFP overlap considerably between the two regulations. For fisheries measures the Member States have been granted specific authority to generate their own measures under Articles 8, 9 and 10 of Regulation 2371 / 2002 and Articles 45 and 47 or 850/98. Each of these authorities has its own strengths and weaknesses, and it is worth a brief description of the powers contained within each one.

*Article 8* - This gives the Member State powers to the 200 mile limit to take fisheries management measures in an emergency to protect biodiversity or aquatic resources. Such powers are limited to 3 months, and even then it

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<sup>17</sup> see A 2 (1) of Regulation 2371/2002

<sup>18</sup> for a fuller investigation of the subject see Owen D *Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directives* April 2004 Briefing IEEP

requires consultation with an advisory committee of fisheries experts, Regional Advisory Councils, and can be amended or cancelled by the European Commission.

*Article 9* – This gives the Member State powers within its 12 mile limit for conservation and management of fisheries resources and for conservation of the marine ecosystem. The measures may affect vessels from other Member States but if they do so then there are consultation requirements with those other Member States, the Regional Advisory Councils and the European Commission, and they can then be amended or cancelled by the European Commission.

*Article 10* – This gives Member States fisheries management and conservation control over their own fleets to the 200 mile limit. Such controls need to be no less stringent than CFP regulations. This does not extend to beyond the 200 mile limit which could be something of an oversight.

*Article 45* – This gives Member States powers in respect of ‘certain species or fishing grounds’ and where a delay would result in damage to a fishing ground. This operates within its ‘jurisdiction’ which is likely to be in the 200 mile limit. There is no time limit on the measure itself, nor is it confined to the Member State’s own vessels, but it does require notification to the European Commission who can amend or cancel the measure.

*Article 46* – This gives the Member State powers in respect of ‘strictly local stocks .... of interest solely to fishermen of that Member State’ and a more general power for the creation of technical measures to apply to fishermen from that Member State. Such measures require notification to the European Commission who can amend or cancel the measure.

Although some of Articles include different wording to similar effects all such measures must be compatible with the minimum requirements of the CFP, non-discriminatory against fishermen of other Member States and compatible with EU law.

These general powers conferred on Member States’ administration may be set out as follows:

*0 – 6 miles* In the UK there are no agreements, which allow the international exploitation of fisheries within this zone. Under Article 9 it is clear that UK regulatory bodies can make fisheries management decisions without the fear of subsequent amendment by the EU as long as the basic principles of EU law are understood.

*6 – 12 miles* There is still scope for jurisdictional confusion as the UK can only legislate for its own vessels in this area, while it would have to notify, and effectively seek consent from, the EU for any other measures. This area sits uncomfortably between being controlled by the EU and being controlled by the Member State and it is therefore difficult to see in which forum it would be the most appropriate to commence any statutory consultation process for

MPAs. An example of such confusion is where the UK Government sought to bring in a ban for bass pair trawling in the 6 to 12 mile limit because of the cetacean by-catch. While the ban was effective for the 2 UK vessels it was not effective against the 10 French vessels operating in the same waters. The European Commission did not accept the UK Government's argument that an immediate ban on pair trawling was necessary for cetacean protection.

<sup>19</sup>

There is a legal question which remains to be answered in this area whether an MPA, which was suggested for purely nature conservation rather than fisheries management reasons, would be outside ultra vires to the CFP and therefore within the title of the Member State, even in respect of other Members States' fishing vessels: whether the UK could control other Members States' fishing vessels within the UK EFZ under domestic conservation legislation.

*12 – 200 miles* With the exception of emergency measures fisheries management of this area is within the exclusive title of the European Union. Again there remains the question of whether MPAs for nature conservation purposes are outside the scope of the CFP, and therefore within the exclusive title of the UK. The example of the protection given to the Darwin Mounds<sup>20</sup> by the European Union in this zone shows that there is a facility within the EU to rapidly create MPAs under the Common Fisheries Policy if these are required.

### 2.3 EU ENVIRONMENTAL LEGISLATION

The basis for EU environmental legislation comes from Article 174 of the consolidated European Treaties:

*'(1) Community policy on the environment shall contribute to pursuit of the following objectives:*

*preserving, protecting and improving the quality of the environment;*

*protecting human health;*

*prudent and rational utilisation of natural resources;*

*promoting measures at international level to deal with regional or worldwide environmental problems.*

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<sup>19</sup> see Commission Decision 2005/322/EC implications of the Decision see Lowther J *Dolphin Bycatch : the Greenpeace Challenge* Journal of Water Law 2005 Vol 16 6 206

<sup>20</sup> De Santo EM and Jones PJS *Offshore marine conservation policies in the North East Atlantic: Emerging tensions and opportunities* Marine Policy 31 (2007) 342

- (2) *Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'*

Article 175 empowers the EU to make protective measures but importantly, under Article 176 the Treaty makes it clear that:

*'the protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.'*

Although it is arguable that MPAs have commercial fisheries benefits, particularly as a result of the ecosystem approach to fisheries management, it is equally tenable that MPAs are purely about environmental protection. In which case there are two potential sources of their establishment, either by the measures proposed by European legislation or through domestic legislation, as long as it is more stringent than EU legislation. In reality since the UK must adhere to its obligations to the EU it is likely that any domestic proposals for MPAs will be more stringent than EU legislation.

#### The Habitats and Birds Directives<sup>21</sup>

The key delivery mechanism under EU law for MPAs is the potential for 'Special Areas of Conservation' (SAC) under the Habitats Directive and Special Protected Area (SPA) under the Birds Directive. Both Directives lists habitat, species and selection criteria for protection and set a timetable by which Member States must notify the Commission of a list of sites.<sup>22</sup> These sites are then be confirmed by the Commission and are collectively known as Natura 2000 sites

Article 6 of the Habitats Directive sets out the protective measures which need to be taken to protected SACs and Natura 2000 sites:

- (1) the creation of administrative measures to protect the ecological requirements of the site;
- (2) the Member State must take steps to avoid the deterioration of natural and species' habitats and the disturbance of species;
- (3) Any 'plan or project' not directly concerned 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'

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<sup>21</sup> Directives 92/42/EEC and 79/409/EEC

<sup>22</sup> A 4 Habitats Directive

Even before a site has been confirmed the Member State must treat that site as if Article 6 (2) applies to it.<sup>23</sup>

The Habitats Directive sets out a scheme for marine protection. Since 1999 it has become clear that these obligations extend not just to the 12 mile limit of territorial waters but to the EEZ and potentially the edge of the continental shelf.<sup>24</sup>

Obligations for the creation of SACs are therefore important. Moreover, once a site has been chosen the protection afforded through the regime is significant.

Initially, it was supposed that commercial fishing was not a 'plan or a project' and so did not require appropriate assessment under the Habitats Directive to assess its impact. In 2004 the important *Waddenzee case*<sup>25</sup> settled that commercial mechanical cockle picking was a plan or a project and that the authority which licensed it should have carried out an appropriate assessment before doing so. In the United Kingdom, DEFRA have sought to distinguish the *Waddenzee* ruling by claiming that since fishing was authorised by the public right to fish there was no authorising body and as such the activity fell outside of Article 6 (3). This is an interesting claim as '*fishing by fishing boats*' does require a licence under s 4 of the Sea Fish (Conservation) Act 1967 and subsequent regulations. It would seem from the wording of the Act that it is the activity, which is being licensed rather than the vessel. Although the point has yet to be tested in court, it would not appear to have succeeded, recently after a complaint to DG Environment by the British Sub Aqua Club and a local ngo, the Scottish Executive was forced to close the Firth of Lorn SAC to scallop dredging,<sup>26</sup> or face infraction proceedings, regardless of the licensing position of scallop dredging. There is a similar ongoing dispute on the Fal and Helford SAC.<sup>27</sup>

Despite the undoubted power of the Habitats and Birds Directives as designation mechanism for MPAs there are significant drawbacks. The Habitats Directive of 1990 is an extrapolation of the Birds Directive of 1979. As such the scientific mechanisms which underpin it do not truly reflect the mechanisms for a modern MPA. The Habitats and Birds Directives protect target species and habitats. Recently, scientific research would suggest that MPAs would be useful for areas, which performed more complex functions and protected proportions of the entire ecosystem both for wildlife conservation and to allow the seeding of other areas of the sea by species

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<sup>23</sup> A 5 (4) Habitats Directive

<sup>24</sup> *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [1999] QBD CO/1336/1999

<sup>25</sup> *the Waddenzee case* [2004] ECJ C-127/02

<sup>26</sup> The Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No. 2) Order 2007 SSI 2007 / 240

<sup>27</sup> [www.mcsuk.org/newsevents/press\\_view/193](http://www.mcsuk.org/newsevents/press_view/193)

living in the MPAs.<sup>28</sup> The Royal Commission on Environmental Pollution suggested a closure of 30% of the UK's EFZ to fishing. The method for site selection and protection in the Habitats and Birds Directives would not be particularly useful for this sort of MPA.

Both Directives do have significant benefits as a designation tool. There are none of the jurisdictional problems associated with selection and enforcement under the CFP. Once a site has been designated under the Directives, all Member States must comply with the designation. This has inherent advantages for the designation of offshore SACs outside the 6 mile limit, where there would be a potential for jurisdictional confusion between domestic and European fisheries management bodies.

In addition the Habitats Directive also offers scope for the development of UK initiatives. Article 176<sup>29</sup> permits the UK regulatory bodies to take additional protective measures. Having established boundaries around SACs it is therefore possible for domestic regulators to improve on the habitat / species, which currently enjoy protection within the SAC to a broader ecosystemic protection. As noted above, this may bring such designation into conflict with the CFP.

The Water Framework Directive<sup>30</sup>

This is not the place for a full discussion of the terms of the Water Framework Directive, but the Directive does have a major influence on coastal regulation. Its aim is to prevent pollution to EU's waters. Its focus is on river basin management, this is particularly important in mainland Europe where many river basins cross national boundaries. However, there are features, which could potentially concern the marine environment, in particular the WFD aims to achieve 'good ecological status'. This covers all estuarine ('transitional waters') and coastal waters 1 nautical mile from the baseline (or 3 nautical miles in Scotland).<sup>31</sup>

The WFD sets time limits of 15 years for surface waters (which includes coastal and transitional waters) to achieve good status. There are opportunities for the Member State to evade full requirements in all waters. There are mechanisms for the regulation of artificial and heavily modified pieces of water,<sup>32</sup> facilities to extend the time limits,<sup>33</sup> and the ability to achieve less stringent targets for socio-economic reasons.<sup>34</sup>

The WFD's main aim is for pollution control. The definition of pollution is:

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<sup>28</sup> Royal Commission on Environmental Pollution *Turning the Tide* RCEP 2005  
<sup>29</sup> of the consolidated European Treaties

<sup>30</sup> Directive 2000/60/EC *Establishing a framework for Community action in the field of water policy* 23<sup>rd</sup> October 2000

<sup>31</sup> s 3 (9) Water Environment Water Services Act (Scotland) 2003

<sup>32</sup> Article 4 (1) (b) WFD

<sup>33</sup> Article 4 (4) WFD

<sup>34</sup> A 4 (5) WFD

*'the direct or indirect introduction, as a result of human activity, of substances or heat into the air water or land which may be harmful to human health, or the quality of aquatic ecosystems or terrestrial ecosystems directly or depending on aquatic ecosystems.'*

Without going into too much detail it is likely that marine activities, which directly involve the release of pollutants into the sea such as waste discharge and fish farming, will come into the scope of the WFD

Operations such as fishing or aggregates dredging may result in pollution by associated disturbance of silt but it is arguable that they are not pollution per se.<sup>35</sup>

Moreover while the:

*'ultimate aim of the Directive is to achieve the elimination of priority hazardous substances and contribute to achieving concentrations in the marine environment near background values for naturally occurring substances'*<sup>36</sup>

the stated purpose of the Directive is to:

*'establish a framework for the protection of ..... transitional and coastal waters ..... which [inter alia] prevents further deterioration and protects and enhances the status of aquatic ecosystems .....'*<sup>37</sup>

Status is assessed using a range of elements contained at Annex V WFD, which involves biological elements as well as the presence of pollutants and changes in 'hydromorphology', which includes structure of the substrate and seabed. Activities such as marine aggregates dredging and commercial fishing will not normally involve the release of pollutants but they may lead to changes in biology and substrate and so it is conceivable that they could lead to a deterioration in the status of aquatic ecosystems. In which case it is possible that the WFD will impact on these operations.

Article 4 sets out the environmental objectives of the WFD:

*'In making operational the programme of measures specified in the river basin management plans: ..... Members States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water'*

There are exceptions contained in the WFD<sup>38</sup> but these are unlikely to apply to activities such as aggregates dredging and commercial fishing. If that is

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<sup>35</sup> A 1 (e) and (i) Habitats Directive

<sup>36</sup> (27) WFD

<sup>37</sup> A1 (a) WFD

<sup>38</sup> A 4 (7) & (8) WFD

the case then it is possible that when the river basin management plans become operational in 2012,<sup>39</sup> The WFD may have the effect of establishing a de facto MPA around the entire coastline of the UK.

The WFD also sets a time limit of 15 years for compliance with standards and objectives created for 'protected areas'<sup>40</sup> these include SACs and SPAs designated under the Habitats and Birds Directives. Ultimately this is the restoration of the species and habitats designated to 'favourable conservation status'.<sup>41</sup> Favourable conservation status arises when the natural range of that habitat is stable and increasing, its structure and functions are likely to continue to exist for the foreseeable future and the species is maintaining itself on a long-term basis, its habitat is sufficiently large and the natural range of the species is not being reduced.

Under those circumstances it is possible to see that the WFD could be a driver for MPAs where there are SACs in transitional waters and inside coastal waters so that the UK achieves its targets. It will be left to individual Member States 'competent authorities' to implement the WFD. For river basins this will be the Environment Agency (EA). In coastal waters this could be a combination of 'competent authorities'. In respect of the new duties to achieve 'good ecological status', unless the EA take up the task, it will involve a shift in the focus of the other established marine regulatory bodies.

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<sup>39</sup> A 13 (6) WFD

<sup>40</sup> A 4 (1) (c) WFD and A 11 (7) WFD

<sup>41</sup> A 3 (1) Habitats Directive

### 3 AN OVERVIEW OF EXISTING UK LEGISLATION

It is important to emphasize that the environmental obligations mentioned at the international and EU level represent the minimum requirements. A Member State may introduce more stringent environmental measures, as long as it notifies the EU,<sup>42</sup> it is compatible with EU legislative measures and in particular does not have the effect of being an anti-competitive protectionist measure by the back door. There are a number of potentially useful UK legislative tools. For convenience these have been split into zonal and sectoral restrictions.

#### ZONAL RESTRICTIONS

Some regulatory bodies can create restrictions, which are effective against multiple sectors.

#### Designation as an SAC or SPA

Putting an area up for candidacy as an SAC or SPA is a potential way of creating an MPA. Such a designation can only take place to protect designated species and habitats and cannot be used for broader benefits.

The UK Government transposed the Habitats Directive through the use of the Habitats Regulations 1994.<sup>43</sup> As well as conferring the same targets and duties as the Directive they also conferred up on the UK's statutory conservation advisers (CCW, Natural England and SNH) byelaw making powers, under Regulation 36. However there are flaws in the byelaw making process.

Firstly, it is important to note that such byelaw would need to be ratified by the relevant Minister.<sup>44</sup> This may take several months if not years.

Secondly, Regulation 36 contains some very poor wording, transposed from the Wildlife and Countryside Act 1981 (as can be seen below). It is such cynical drafting that is worth repeating in full:

*'No byelaws made by virtue of this regulation shall interfere with the exercise of any functions of a relevant authority, any functions conferred by or under an enactment (whenever passed) or any right of any person (whenever vested)'*

This passage hamstring the use of any byelaw. Both fishing and access take place under public rights, which therefore cannot be restricted, and other rights such as marine aggregates extraction, windfarms can be created by

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<sup>42</sup> Article 176 consolidated European Treaties

<sup>43</sup> The Conservation (Natural Habitats, &c.) Regulations 1994

<sup>44</sup> Bradley A and Ewing K *Constitutional and Administrative Law* 2007  
Pearson Longman 690

licence or lease. The wording is such that even if the activity started after the byelaw was created, the byelaw would have to be withdrawn.

Byelaw limitation is therefore restricted to other bodies with powers in that area, rather than the conservation agencies. For example, early in 2007, the Firth of Lorn SAC was closed to scallop dredging, which was allegedly harming the rocky reef for which the SAC was designated. The Scottish Executive had to use a Ministerial Order under fisheries legislation, the Inshore Fisheries (Scotland) Act 1984, to stop the activity rather than an SNH byelaw.

### Marine Nature Reserves

The Wildlife and Countryside Act 1981 sets up a mechanism whereby 'marine nature reserves' can be created. There are only 3 MNRs in the UK, Stangford Lough and off Skomer and Lundy islands. These are not particularly effective in law.<sup>45</sup> It would seem reasonable to expect a key feature to be a management regime where nature conservation was particularly pre-eminent in the mixture of uses of the site. The legislation merely designates the site at section 36 as an MNR. It allows for the conservation agency to create a system of byelaws when the site is designated, but those byelaws are limited by the same wording as set out above.<sup>46</sup> It is left to other regulatory bodies or 'relevant authorities'<sup>47</sup> to create meaningful byelaws, which they could do anyway regardless of the designation of the site. MNRs are therefore only a paper designation and do not by themselves have a useful legal function.

### Water Framework Directive

As yet the Environment Agency does not have powers to make byelaws to pursue its objectives under the Water Framework Directive in coastal waters. Where it does exercise its powers in the marine or estuarine waters it tends to do so under Sea Fisheries Committee legislation. As implementation of the WFD is still at a relatively early stage whether the EA will acquire powers in coastal waters is open to debate or whether implementation of the Directive will be left to other regulatory bodies.

### Proprietary interests in the Seabed

There are a few private owners of seabed but 55% of the foreshore and the vast majority of the seabed to 12 miles is owned by the Crown Estate, some 50,000 square miles according to its website.<sup>48</sup> In addition the Crown Estate

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<sup>45</sup> For a discussion of the lack of effectiveness of MNRs see Jones P *Marine Nature Reserves in Britain: past lessons, current status and future issues* Marine Policy 1999 23 4-5 375-396

<sup>46</sup> s 36 (6) Wildlife and Countryside Act 1981

<sup>47</sup> a list of relevant authorities with marine byelaw powers is contained at s 36 (7)

<sup>48</sup> [www.thecrownestate.co.uk](http://www.thecrownestate.co.uk)

owns rights to explore and utilize natural resources the 200 mile limit and to the edge of the continental shelf (excluding gas, coal and oil).

Currently the Crown Estate leases and licences seabed and other rights for numerous reasons, such as: cabling; mooring; windfarms; aggregates dredging; and fish farming. The Crown Estate notes on its website that 570km of foreshore (21% of its holding) is leased for environmental purposes to various conservation bodies.<sup>49</sup> There is no record of any area of seabed being leased for conservation. Such a lease would give the tenant the power to take action against people who infringe the owners rights, as well as security that dredging, fish farming and potentially even some damaging fishing techniques could not take place on that patch of sea bed.<sup>50</sup> It would not, in itself, defeat the public rights to fish and navigate. It is, though, firmly arguable that a conservation organisation having a legal interest in the seabed, would be more likely to encourage marine protection than having the sole legal interest vested in the Crown, for a number of reasons.

Firstly, it stops the grant of any potentially damaging right over that piece of seabed. The proposed MPA at Lamlash Bay on the Isle of Arran is under threat from a proposed new fish farm located adjacent to the MPA.<sup>51</sup> If a conservation organisation owned or leased the seabed, it is unlikely they would allow a fish farm on their property.

Secondly, a conservation organisation is more likely to take action against more marginal interferences with its property rights than the Crown Estate is. Bait digging at Strangford Lough took place on foreshore belonging to both the Crown Estate and the National Trust. It was the National Trust who attempted to sue the bait diggers for trespass.<sup>52</sup>

Thirdly, under the pragmatic adage 'possession is nine tenths of the law' the very fact that a designated area of seabed was in the ownership of a conservation organisation would encourage more conservation interest in that area than simply having it belonging to a Crown body.

The desirability of mixed ownership of the seabed has echoes in the *Quirk Review*, which assessed the transfer to community ownership of publicly owned land and was sponsored by the Department of Communities and Local Government. One of the three main findings of the review stated:

*'The benefits of community management and ownership of public assets can outweigh the risks and opportunity costs in appropriate circumstances. If there is thorough consideration of these risks and opportunity costs, there are no substantive impediments to the transfer*

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<sup>49</sup> [www.thecrownestate.co.uk/our\\_portfolio/marine.htm](http://www.thecrownestate.co.uk/our_portfolio/marine.htm)

<sup>50</sup> Appleby T *Damage by fishing in the UK's Lyme Bay – a problem of regulation or ownership?* The Journal of Water Law 18 2 39 - 46

<sup>51</sup> [www.news.bbc.co.uk/1/hi/scotland/glasgow\\_and\\_west/6195283.stm](http://www.news.bbc.co.uk/1/hi/scotland/glasgow_and_west/6195283.stm)

<sup>52</sup> *Adair v National Trust for Places of Historic Interest or Natural Beauty and another* [1998] NI 33

*of public assets to communities. It has been done legitimately and successfully in very many places.*<sup>53</sup>

The government's response to the review was positive:

*'The government will implement the Quirk Review proposals in full.'*<sup>54</sup>

In addition, in the past the Crown Estate had only to manage its estate according to the principles of good estate management,<sup>55</sup> which is rather nebulous concept, and relates particularly to maximising profit. s40 of the Natural Environment and Rural Communities Act 2006 (NERC Act) has put additional environmental duties on the Crown Estate. It states:

*'Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity'*

The definition of conserving biodiversity is fairly broad and includes: 'restoring or enhancing a population or habitat'.<sup>56</sup>

In the light of the Quirk Review and the NERC Act it is an appropriate moment for the Crown Estate to consider a greater focus on conservation in its management practices and the potential for diversity of ownership.

It is clear that while both Natura 2000 designation and MNRs are potentially zonal instruments for creating MPAs, and while it may be able to control some activities through ownership, for the MPA to be effective it requires regulation from other bodies. The functions of such bodies are normally defined with reference to a sectoral activity. The designation of a Natura 2000 site or MNR or the grant of a lease gives these regulatory bodies additional impetus to regulate for wildlife conservation benefits. It is, therefore, worth looking at various sectoral regulators to assess their powers.

## SECTORAL REGULATORS

### Harbour Authorities

There are numerous Harbour Authorities in the UK.<sup>57</sup> Each one has its own constitution. Their principle functions have been for the maintenance of

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<sup>53</sup> Quirk B *Making Assets Work: The Quirk Review of community management and ownership of public assets* DCLG 2007 7

<sup>54</sup> *Opening the transfer window : The Government's response to the Quirk Review of community management and ownership of public assets* DCLG 2007 5

<sup>55</sup> s1(3) the Crown Estate Act 1961

<sup>56</sup> s 40 (3) NERC Act 2006

<sup>57</sup>

navigation and general management of their respective port. However, increasingly marine conservation has become part of that function through various pieces of legislation, including the Habitats Regulations and the NERC Act.

The NERC Act applies to all 'public authorities' which are likely to include harbour authorities. Harbour Authorities normally have byelaw making powers to control activities within their waters and it is possible that they could be approached for the creation of inshore MPAs.

In addition many Harbour Authorities are competent authorities<sup>58</sup> under the Habitats Directive, where they cover areas which are SACs and SPAs (or proposed SACs and SPAs). As competent authorities they have a duty to seek an appropriate assessment when granting a licence for a 'plan or project', which will have a significant effect on the site in their area.<sup>59</sup> The appropriate assessment can cause a refusal to a consent or trigger a requirement for environmental compensation for a plan or a project if it is carried out in the public interest. It is an important mechanism. This is a specific extension of the competent authority's powers. Since the *Waddenzee* ruling it has become apparent that operations such as aggregate dredging authorized by Harbour Authorities needs to comply with the Habitats Directive. It is for this reason that maerl dredging, which had been licensed by Falmouth Harbour Commissioners, was stopped, as the activity failed its appropriate assessment.<sup>60</sup>

As a result of their responsibilities as a competent authority many Harbour Authorities have become aware of their environmental responsibilities. Now that this has been followed by the NERC Act, which gives them a more general conservation role, it is possible Harbour Authorities will not be as reluctant to take a role in marine conservation as they have been in the past.

## Fishing

Under the public right to fish all UK waters (with the exception of some ancient private tidal fisheries and several shellfisheries) are subject to the public right to fish. There are however various mechanisms for that right to be restricted. The potential for restrictions applies equally to recreational as well as commercial fishermen in this section unless stated otherwise. Commercial fishing is part of the common fisheries policy and fisheries legislation requires the notification of the DG Fish.

### *The Environment Agency (England and Wales only)*

Historically, the Environment Agency has only made byelaws<sup>61</sup> in respect of salmon and migratory fish stocks (where it has competence) rather than the

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<sup>58</sup> Regulation 6 the Conservation (Natural Habitats, &c.) Regulations 1994

<sup>59</sup> Regulation 48 the Conservation (Natural Habitats, &c.) Regulations 1994

<sup>60</sup> [www.archive.falmouthpacket.co.uk/2005/1/19/7484.html](http://www.archive.falmouthpacket.co.uk/2005/1/19/7484.html)

<sup>61</sup> See s 210 and Schedule 25 6 (1) Water Resources Act 1991

sea in general. These can still be very effective and many inshore waters are de facto MPAs for sea fish because of the extent of the EA's byelaws.<sup>62</sup> The list of potential powers is fairly restrictive.<sup>63</sup> 6A (1) confirms that such byelaws may be bought in for marine environmental purposes and so broadens the EA's functions within its jurisdiction. That jurisdiction is however limited to *inland waters*. Such fines are limited to fines to level 4 (currently £2,500) and in some cases imprisonment.<sup>64</sup>

In certain, particularly estuarine, waters the EA has byelaw making powers in addition to regulate sea fishing as a sea fisheries committee.<sup>65</sup>

#### *Sea Fisheries Committees (SFCs) (England and Wales only)*

SFCs and in some small areas the EA control the Territorial Waters to 6 nautical miles. The jurisdiction of each SFC is set out by Ministerial Order.

Within its jurisdiction each SFC has the power to create byelaws under s 5 Sea Fish Regulation Act 1966. These byelaw making powers are very broad:

*'For restricting or prohibiting, either absolutely or subject to any exceptions and regulations, the fishing for or taking of all or any specified kinds of sea fish during any period specified in any byelaw'*<sup>66</sup>

Such powers may also be exercised for marine environmental purposes.<sup>67</sup> Breaches of byelaws carry with them a fine not exceeding level 5 on the standard scale (currently £5,000). The Lundy no take zone is an example of an MPA put in place Sea Fisheries Committee byelaw.

Like Harbour Authorities, SFCs are also competent authorities under the Habitats Directive and have a duty to implement the Habitats Regulations. SFCs are increasingly familiar with their marine conservation duties. SFC membership tends to be comprised largely of fishing interests, which makes them unlikely to be proactive in marine conservation.<sup>68</sup> They are at their most effective in the resolution of gear conflicts, which can then have marine

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<sup>62</sup> For a useful analysis of jurisdiction in an estuary see *fish stocks – your part in their future : Fishing in the Fal and Helford estuaries and coastal area : A guide to fisheries regulation* Environment Agency 2007

<sup>63</sup> see Sch 25 6 (2) Water Resources Act 1991,

<sup>64</sup> Sch 4 1 Salmon and Freshwater Fisheries Act 1975

<sup>65</sup> For instance see Article 2(3) of the North Western and North Wales Sea Fisheries District Order 1986 (SI 1986/1201)

<sup>66</sup> s 5 (1) (a) Sea Fish Regulation Act 1966

<sup>67</sup> s 5A Sea Fish Regulation Act 1966

<sup>68</sup> See Eagle J *Democracy and Natural Resources: British and American Approaches to Public Participation in Fishery Management* 2004 the British Council

conservation spin offs, as was the case in the south Devon inshore potting agreement.<sup>69</sup>

### *Ministerial Orders*

Under s 5 (1) Sea Fish (Conservation) Act 1967 the Minister may make an order:

*[prohibiting] in any area specified in the order and either for a period so specified or without limitation of time –*

*(a) all fishing for sea fish*

*(b) fishing for any description of sea fish specified in the Order*

*(c) fishing for sea fish, or for any description of sea fish specified in the Order, by any method so specified;'*

Ministerial orders may be used for environmental purposes.<sup>70</sup> Orders made under s 5 can carry a fine of up to £50,000, so are an effective deterrent. They may also cross the jurisdictions of SFC and the EA.<sup>71</sup>

UK Orders (either by DEFRA or SEERAD) do not generally apply to foreign fishing vessels permitted to operate in the 6 – 12 mile and 12 - 200 mile limits. However, there is potential for UK Government and its devolved administrations to argue that UK regulation should apply to foreign vessels in the 6 to 200 mile limit. If authority under the EU Consolidated Treaties does not extend the CFP to marine environmental management, s 5A Sea Fish (Conservation Act) does.<sup>72</sup> To what extent foreign fishing vessels operating inside UK waters can escape without complying with domestic environmental legislation remains to be tested in the courts.

### *Scotland*

Scotland has its own legislation based on the Inshore Fisheries (Scotland) Act 1984. There are no Sea Fisheries Committees and fisheries management is directly by the Scottish government. The Act covers fishing in the 0 - 12 mile limit and has similar powers to DEFRA Minister.

's 1 (1) *The Secretary of State may after consultation with such bodies as he considers appropriate, make orders under*

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<sup>69</sup> Blythe R et al. *An example of conservation and exploitation achieved through a voluntary fisheries management system* Putting Fishers' Knowledge to Work Conference Proceedings 409-422 Fisheries Centre University of British Columbia

<sup>71</sup> For instance see Bass (Specified Areas) Prohibition of Fishing Order 1992

<sup>72</sup> as does arguably the Sea Fisheries (Wildlife Conservation) Act 1992 and s40 NERC Act

*this section regulating fishing for sea fish in any specified area within Scottish inshore waters.*

s 1(2) *Orders under this Section may prohibit, within the specified sea area, all or any, or a combination of the following:*

- (a) all fishing for sea fish.....*
- (c) fishing by specific method.....'*

There would not appear to be any wording in the legislation limiting the Minister's discretion to acting for purely fisheries purposes. There is an argument under the rules of ultra vires that marine environmental purposes may be beyond the scope of the legislation. It is likely that such argument is defeated by the Sea Fisheries (Wildlife Conservation) Act 1992 which states:

*'In discharging any functions conferred or imposed on him or them by or under the Sea Fisheries Acts, the Minister or Ministers of any relevant body shall, so far as is consistent with the proper and efficient discharge of those functions -*

- (a) have regard to the conservation of marine flora and fauna; and*
- (b) endeavour to achieve a reasonable balance between that consideration and any other considerations to which he is or they are required to have regard'*

Indeed there is precedent in this assumption in that the then Scottish Executive closed the Firth of Lorn SAC to scallop dredging by an Order under the 1984 Act for purely marine conservation purposes.

### *Fishing Vessel licences*

Under s 4 Sea Fish (Conservation) Act 1967 all British fishing vessels, which catch fish for sale need a licence to permitting fishing. Initially the numbers of such licences were unlimited but with the aim of restricting effort, no further licences have been issued for some time, although existing licences can be combined and aggregated up. They are for two year periods and there is a tacit understanding that they will be renewed at the end of the two year term. They can contain terms and conditions for zonal, gear type, time and species limitation.<sup>73</sup> There would appear from the legislation to be no statutory limits to the Minister's discretion as to the content of such terms and conditions.

New terms and conditions can also be imposed during the currency of a licence under s 4 (9) Sea Fish (Conservation) Act, which states:

*'A licence under this section –*

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<sup>73</sup> s 4 (5) and (6) Sea Fish (Conservation) Act 1967

- (a) *may be varied from time to time; and*
- (b) *may be revoked or suspended, if this appears to the Minister, who granted the licence to be necessary or expedient for the regulation of sea fishing.'*

This authority does not have the same specific extension to revocation or suspension for marine environmental purposes but is still affected by the Sea Fisheries (Wildlife Conservation) Act 1992 and s40 NERC Act. Scotland controls its own vessel licences on similar terms.

There are already many zonal restrictions in place in fishing vessel licences. As yet there are no such licence restrictions in place for purely marine conservation reasons. Breach of a licence term carries with it the sanction of ultimately the vessel losing its licence. It is clear that the inclusion of restrictions in fishing vessel licences could be a powerful tool.

### *Shellfish Regulating Orders and Several Orders*

The establishment of a Regulating Order is for shellfish management.<sup>74</sup> This is a complex process and involves a body either owning or regulating zoned fishery for the benefit of shellfish, mollusc or crustacean fishery. The Order then gives the company an exclusive right to fish for the named species within the zone. Establishing a Regulating Order is a potentially expensive process, as a single objection can lead to a public enquiry.<sup>75</sup> Orders tend to run for 5 – 10 years (there is a statutory maximum of 60),<sup>76</sup> and they are limited to the 6 mile limit. Breaches of Orders carry a fine of level 5 on the summary scale (£5,000),<sup>77</sup> breaches of several orders (where ownership of the fishing right is transferred to the applicant) also carry with them potential rights to sue in tort for any damage caused by a known third party.<sup>78</sup>

Although Regulating Orders do create de facto MPAs, this is a very purposive piece of legislation and is tightly defined to shellfish management. The potential for an expensive public enquiry after only a single objection also makes this an unwieldy piece of legislation to manage for conservation purposes, particularly as conservation measures can be contentious.<sup>79</sup>

### *EU Regulations*

It is important to note even though the UK has powers to control fishing in the 0 – 6 miles, it would still be possible for the EU to bring in direct regulation establishing MPAs under the CFP.

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<sup>74</sup> See [www.defra.gov.uk/corporate/regulat/forms/fish/FIS3.pdf](http://www.defra.gov.uk/corporate/regulat/forms/fish/FIS3.pdf)

<sup>75</sup> Sch 1 Sea Fisheries Shellfish Act 1967

<sup>76</sup> s 1(3) Sea Fisheries (Shellfish) Act 1967

<sup>77</sup> s 3 (3) Sea Fisheries (Shellfish) Act 1967

<sup>78</sup> The legislation is different in Scotland

<sup>79</sup> See the recent failure of the proposed Highland Regulating Order in 2006

## Fish Farming

Once a fish farm has been established it is very difficult to have it removed. Fish farms tend to be leased from the sea bed owner, usually the Crown Estate. In closing a fish farm for marine conservation purposes the effect is that the state is buying that fish farm out, unless the lease to the fish farm contains a break clause allowing it to be terminated early.

If the state wishes to take away an individual's possessions, then it will need to pay compensation under the Article 1 of the First Protocol of the Human Rights Act 1996 and the rules of natural justice. 'Possessions' in this context will mean property rights such as the unexpired terms of leases or licences.

It would be sensible, if in any proposal to establish an MPA the Crown Estate was involved in negotiations as early as possible to make sure that the siting of proposed MPAs is known to any potential fish farmers seeking leases. At present this coordination does not appear to be taking place. Although the Community of Arran Seabed Trust have been proposing an MPA in Lamlash Bay on the Isle of Arran in Scotland for nearly 10 years the Crown Estate have still allowed Marine Harvest to put an application in for what is proposed to be Scotland's largest fish farm adjacent to the proposed MPA.<sup>80</sup>

In Scotland there is a planning process supervised by the local authority before a fish farm is approved, but it is in its infancy.<sup>81</sup> It would be sensible to take into consideration the effects of a fish farm on any MPAs before even embarking upon the planning process.

## Aggregates Dredging

The situation for marine aggregate dredging is similar to that of fish farms. The Crown Estate's rights here extended beyond the 12 mile limit. Once a licence to dredge has been granted it will be difficult to terminate it early without compensation, unless the lease contains a break clause allowing it to be terminated early.

In England Northern Ireland and offshore in Scotland and Wales<sup>82</sup> there are new Dredging Regulations, which create a consenting regime for dredging applications, however these rules are complex and as with fish farms it would be safer to involve the Crown Estate in the siting policy for aggregates dredging.<sup>83</sup>

## Activities subject to Part II of FEPA

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<sup>80</sup> [www.news.bbc.co.uk/1/hi/scotland/glasgow\\_and\\_west/6195283.stm](http://www.news.bbc.co.uk/1/hi/scotland/glasgow_and_west/6195283.stm)

<sup>81</sup> Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007

<sup>82</sup> SI1067/2007

<sup>83</sup> The Crown Estate does not own all the seabed – for instance the bed of the Severn Estuary is partly in private ownership

There are various categories of operation which can loosely be described as 'marine works and releasing substances into the sea'<sup>84</sup> and are regulated by the Food and Environmental Protection Act. Such activities need a licence (which can be granted on conditions) and usually require an environmental impact assessment. S 8 (1) FEPA confirms that the licensing authority must have regard to:

- (a) *'protecting the marine environment, the living resources which it supports and human health*
- (b) *prevent interference with legitimate uses of the sea (and may have regard to such other matters as the authority considers relevant)'*

It is therefore worthwhile in establishing an MPA to ensure that DEFRA, Welsh Assembly Government or Fisheries Research Services in Scotland, are aware of the MPA to ensure that future applications will take the MPA into consideration. Those activities, which are already licensed, will be already established and will be hard to alter unless there is a condition, which permits subsequent amendment, within the FEPA licence itself.

#### Works which affect navigation

Works which are likely to have an effect on navigation, and deposits, alterations or works on the foreshore or seabed are required to have a consent under the Coastal Protection Act 1949 (CPA).<sup>85</sup> It is unclear whether the relevant Minister can take into consideration marine environmental matters, but as a result of the NERC Act, there is a strong argument that it should. Many activities which require a CPA consent also require a FEPA consent, where marine environmental concerns are more relevant.

#### Windfarms

Offshore windfarms are considered under the Electricity Act 1989<sup>86</sup> and Part II of FEPA. s 36A of the Act permits the suspension of navigation rights and therefore fishing among windfarms. For this reason windfarmers have suggested that windfarms could benefit the environment by establishing de facto MPAs.

It is therefore important that both BERR (in English and Welsh water), and the Crown Estate<sup>87</sup> are involved in development of MPAs and decisions made early on whether wind farming is appropriate in an MPA. Under the Energy Act 2004 provision has been made for the establishment of offshore

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<sup>84</sup> see the list at [www.mceu.gov.uk/MCEU\\_LOCAL/FEPA/FEPA-licence-categories-main.htm](http://www.mceu.gov.uk/MCEU_LOCAL/FEPA/FEPA-licence-categories-main.htm)

<sup>85</sup> s 35 CPA

<sup>86</sup> There is an alternative application process under the Transport and Works Act 1992

<sup>87</sup> See s84 Energy Act 2004

'Renewable Energy Zones' by Ministers, how these zones interact with MPAs needs to be considered carefully.

### Oil and gas exploration

Oil and gas reserves in UK waters are not vested in the Crown Estate but the Queen and the right to licence is exercisable by BERR.<sup>88</sup> Over the years BERR or their predecessor, the Department of Trade and Industry, will have issued many different types of licence for the exploration, production and development of oil and gas. These licences will vary, as will the ability of BERR to alter the terms once they have been completed, but it is important to note some of the requirements contained in a specimen licence:

*'The Licensee shall not carry out any operations authorised by this licence in or about the Exploration Area in such a manner as to interfere unjustifiably with navigation or fishing in the waters of the Exploration Area or with the conservation of living resources of the sea'*

Licences require liaison with the DEFRA<sup>89</sup> as to the effect on fisheries and the MOD.<sup>90</sup> There would appear to be no similar requirement to liaise with DEFRA's Wildlife Team or any statutory conservation adviser over marine conservation.

The NERC Act will have placed additional conservation duties on BERR. It is likely these duties during the Licensing process, where BERR require an environmental impact assessment. If the oil and gas industry are likely to have an adverse impact on an MPA this should be included as part of the environmental impact assessment.<sup>91</sup>

Where MPAs are likely to have an impact on oil and gas exploration BERR will need to be informed at an early stage.

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<sup>88</sup> s 2 Petroleum Act 1998

<sup>89</sup> R 23

<sup>90</sup> R 22

<sup>91</sup> ie Pipe-line Works (Environmental Impact Assessment) Regulations 2000

## 4 SUMMARY

There are requirements under OSPAR for a network of MPAs by 2010. It is possible that such network will be a double-badging exercise, rebadging sites already designated as Natura 2000 sites under the Habitats and Birds Directives. To do so would be stretching the definition of the term 'coherence'.

There are also inbuilt weaknesses in OSPAR concerning fisheries management and control over the fishing industry. As a result OSPAR targets are aspirational rather than binding.

SAC and SPA site designations are the most powerful zonal designatory tools currently available. They have considerable advantages, they can be implemented across borders and across industries, they can also change established practices. The adoption by the EU of the *Greenpeace* ruling has also extended their geographic ambit potentially to the edge of the continental shelf, giving a far larger area of coverage than was originally implemented.

The weakness inherent in both measures is their dependence on individual species and habitat protection, which is out of line with current scientific thought. Recently, MPAs have been proposed less for the protection of charismatic and threatened species and more the protection of the ecosystem as a whole. This makes it difficult in law to marry the aspiration of ecosystemic coherence with the reality of individual species protection. A greater number of species and habitats need to be included in the annexures to the Habitats and Birds Directives to give broader protection.

There is considerable potential for legal development, if a broad interpretation is placed on the WFD. The requirement to prevent the deterioration of the status of coastal and transition waters will in time create an area of protected waters 1 mile from the baseline (3 miles in Scotland) around the whole of the UK coastline. In terms of marine conservation the WFD is worthy of further investigation. This comes at a crucial time while the UK Government is drafting its Marine Bill and the devolved administrations are considering theirs. The issue of which regulatory body will implement the WFD and what powers it will have in coastal and transitional waters is live and should be up for discussion. Issues as to whether activities such as dredging and fishing are controlled under the WFD will also need to be considered at an early stage.

One of the most significant human activities which takes place in the sea is commercial fishing. Fisheries and marine environmental management have an unusual tripartite relationship with DG Fish, DEFRA / devolved administrations and DG Environment. The key question remains as to which is the best body to take marine environmental management forward. It is firmly arguable that the UK Government could bring in legislation, which affected foreign fishing vessels inside the UK EFZ for purely conservation purposes. Whether it has the political will to do so and whether the realpolitik of the EU will allow the UK such administrative freedom needs to be tested.

In UK waters new MPAs can be brought in using the mosaic of existing legislation. At an early stage it is possible to establish a few general guidelines on using the existing system as simply as possible:

Controls of fisheries within the 6 mile limit are possible.

Controls of fisheries by UK vessels outside the 6 mile limit are also possible.

Controls of other Member States' fishing vessels outside the 6 mile limit but within the UK EFZ may be possible by the UK alone but the position needs clarification, otherwise such controls need the involvement of the EU.

Controls over other activities can be established through various regulatory or ownership based methods out to the edge of the continental shelf.

Before establishing an MPA it is important to assess which legal mechanisms are most likely to create the proposed MPA early on and involve the respective regulatory bodies.

As owners of marine resources the Crown Estate and BERR can control activity via licence or lease.

Once a licence or lease has been granted for an activity, it will be very difficult to stop it without paying compensation, unless there is a clause allowing early termination, or permitting subsequent alterations.

The regulatory bodies for FEPA, the CPA and the Electricity Act play an important role and need to be informed about any proposed MPA, so that it can be taken into consideration in any round of consents.

With the failure of MNRs there is currently no UK based single designation and control mechanism for MPAs. It is hoped that this will be rectified in the Marine Bill, in the meantime UK MPAs have been processed on an ad hoc basis (such as in Lundy) or as a side effect of another activity (such as exclusions around windfarms) or a mixture of the two (such as the south Devon inshore potting agreement).

## **5 CONCLUSION**

There are six concurrent processes ongoing for the establishment of MPAs. At the international level OSPAR, at the European level the Natura 2000 network, the WFD and the CFP and at the UK level, the proposed Marine Bill and ad hoc arrangements such as Lundy and potentially Lamlash Bay. All of these methods have created a degree of protection. Urgent clarification is needed as to whether the UK government can control other Member States' fishing vessels for purely conservation purposes in the UK EFZ. With the exception of that clarification there would appear to be legal mechanisms for the establishment of MPAs using existing legislation.

A draft Marine Bill is promised during this Parliament. A successful Marine Act will make those existing MPA creation measures simpler, and create a new designation mechanism for MPAs. The Marine Bill needs to be treated carefully, once the Bill is available in draft there is still potential for it to be emasculated in the Parliamentary process. The failings of the MNR regime in the Wildlife and Countryside Act 1981 need to be remembered.

In the meantime MPAs are not being established at any great pace and if the RCEP is to be believed the health of the marine environment will continue to spiral downward. The measures outlined in this report should be developed to ensure that MPAs are designated regardless of the Marine Act.