



UKELA's response to the Government's 'Pre-consultation on the Draft UK Marine Policy Statement', March 2010

Introduction

1. The UK Environmental Law Association ("UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares its responses to consultations with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Water Working Party.
3. UKELA welcomes the opportunity, through this pre-consultation, to comment at an early stage in the development of the draft UK Marine Policy Statement.

General comments

Relationship between marine planning and other plans and policies

4. The document recognises the important role the MPS and marine plans should play in providing a coherent policy framework (see for example page v and para 3.1). A key means of facilitating this will be to explain in the MPS how marine planning will relate to other plans and regimes that impact on the marine area. We recognise that some guidance is provided in this regard – for example in relation to territorial planning (at paragraph 1.12) – and that other plans and regulatory regimes are mentioned throughout the document. We consider, however, that more detailed, focussed guidance and elaboration is needed: in particular about exactly how the inter-relationships will work between the Marine Management Organisation (MMO) and the Infrastructure Planning Commission (IPC); between the MPS and the National Policy Statements; between Marine Plans and other plans (e.g. Water Framework Directive (WFD) River Basin Management Plans; and between the MPS and the objectives (and requirements) of the EU Marine Strategy Framework Directive (MSFD). Ensuring effective integration will be especially important in coastal areas which are covered by a wide variety of statutory and non-statutory initiatives including LDFs (typically to low water);

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River Basin Management Plans; Shoreline Management Plans; estuary management plans; potentially ICZM, etc.

5. By way of an overview, we would suggest that it would be helpful to regulators and to those regulated for the MPS to provide a summary of the plans, policies and regulatory regimes that affect different parts of the marine environment, and relevant regulators – perhaps in the form of a summary table and illustrative map? This would be a useful means of clarifying the areas where various regimes overlap.
6. As to how the different plans and regimes should inter-relate, we are particularly interested in how marine planning (the MPS, Marine Plans and decisions) should relate to river basin management planning under the Water Framework Directive and marine strategies to be prepared under the Marine Strategy Framework Directive.
7. On 22nd December 2009, the WFD river basin management plans were published. These set ecological and chemical objectives and highlight associated actions not only for fresh water bodies but also in the area from the tidal limit out to one nautical mile beyond the baseline from which territorial waters are drawn (see map in Annex 1).
8. The MSFD, meanwhile, will require Member States to prepare Marine Strategies. There is an extensive area of overlap between the MSFD and the WFD in WFD 'coastal water bodies'. Marine Strategies will therefore overlap with RBMPs. The Directive is clear that MSFD objectives apply in this area only insofar as equivalent WFD objectives do not already exist. Of the 11 'descriptors' for the MSFD, the WFD does not set objectives in respect of litter, energy (noise), or marine mammals; food chains and alien species are less clear. However, in practice, it does not seem that proper attention is yet being paid at EU level to this area of overlap.
9. In the UK, it seems that Marine Plans under the Marine Act will cover not only the same WFD coastal water bodies that overlap with the MSFD but also (some or all or parts of?) WFD transitional water bodies. There is thus scope for further duplication and confusion. WFD transitional water bodies extend, for example, up to Teddington in west London and almost as far inland as Norwich in Norfolk.
10. We would suggest adding paragraphs to explain the relationship between marine planning and river basin management planning and marine strategies in Chapter 1 of the MPS; this could be elaborated further as necessary in Chapter 2 (context). Such discussion should clearly recognise the potential

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issues that could arise in this extensive area of overlap. More than this, however, there are also real opportunities here for the MPS to provide the clarity needed on how these inter-relationships will work in practical terms; to reduce the potential burden on both operators and regulators; and hence to make an important contribution to the to the better regulation agenda.

11. We would also suggest further consideration should be given to how to manage the relationship between marine planning and terrestrial/infrastructure planning. This issue poses huge challenges for policy and regulatory integration, given the proliferation of the local planning authorities whose areas impact on the marine environment in each plan area, and the fact that priorities of local planning authorities frequently conflict, as for example in relation to Dibden Bay. In the circumstances we consider the guidance on the subject - that integration of marine and terrestrial planning will be achieved through policy consistency, liaison between authorities and sharing evidence base (at para 1.15) seems rather cursory and unrealistic.

Setting priorities

12. Marine Plans will need to set priorities. In terms of legal priorities, we consider that the MPS should set out clearly **how** Marine Plans will be coordinated with other plans in order to deliver effective contributions to international, EU, national and local or non-statutory policy achievement – recognising the legal hierarchy of obligations and policies. We regard it as imperative that the MPS does set the framework for reconciliation and integration of plans and projects across their boundaries, overlapping or otherwise: as we have pointed out previously, the MPS has to emulate the function of PPS in high level guidance.
13. Insofar as the Plans will need to deal with different pressures and impacts, however, priorities will be different between plans. The MPS should not therefore attempt to set priorities in this respect. Rather, consistency in **how** priorities are set between different geographic areas will be important, and it is clearly desirable that there shall be a consistency of objectives across the boundaries of plan areas. The NPS does not currently offer any guidance on the process for identifying such priorities. If this guidance is not provided in the MPS, it is not clear how the necessary consistency in the priority-setting process will be achieved.

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Specific comments on draft MPS

Chapter 2

14. We have set out below some matters that might usefully be clarified, elaborated or mentioned in the summary of current policy and legislation given in chapter 2.
15. Paragraph 2.6 should perhaps also include reference to the obligations under Article 10 of the Habitats Directive, and likewise the obligations in relation to European Protected Species under Article 12.
16. In relation to European sites, the obligation to “take account” in paragraph 2.7 is insufficient: actions taken should be calculated to ensure the achievement of the conservation objectives of each site. It is viewed as equivalent to “have regard to” (the term used in 3.53 as a synonym of 3.52), which has been subject to much criticism in relation to specific binding obligations. The same point also applies to paragraph 3.26.
17. Paragraph 2.27 – in particular the statement “the need for further port development should be taken in to consideration...” – appears to reflect the policy in the draft National Policy Statement for ports, in that it seems to presume a need, regardless of location and existing consented provision. Similarly, paragraph 4.37 refers to the national policy on need in the NPS. As the NPS has not yet been formally adopted we query whether the guidance on need (in the draft MPS and draft NPS) reflects settled government policy. In our comments on DfT’s consultation UKELA provided critical comments on that aspect of the draft NPS (see: <http://www.ukela.org/content/page/1621/Ports%20consultation%20response%20Feb%202010.pdf>).
18. Paragraph 2.28 could usefully refer to the implications of new or continuing dredging operations in relation to European sites e.g. the judgement in the *Papenburg* case (C226/08, 14th January 2010). This is particularly critical where there is a potential for extensive pollution from the deposit of dredged material. This point could usefully be emphasised in guidance in the light of recent experience with attempts to cap contaminated dredged wastes. The detailed discussion at 4.48-4.50 on this issue is questionably Habitats Directive compliant.
19. We would also suggest that paragraph 2.29 mentions the need to have regard to the implications of increased shipping activity on European sites as

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illustrated by the recent judgment in the *Wightlink* case: R (Akester and Melanaphy) v Defra & Wightlink Ltd, 16th February 2010.

20. Reference could be made at 2.36 to the policy objectives adopted in the Commission's Communication on Sustainable Aquaculture which became UK government policy, and the need to identify sites particularly in England where bivalve molluscan aquaculture can be pursued within the constraints of the Habitats Directive in order to achieve the UK's potential for sustainable shellfish production (and incidentally contribute to achieving other environmental objectives).
21. Paragraph 2.39 guides marine planners to 'generally seek to support national priorities for growth ... *balanced against* any consequential impacts on the marine environment.' 'Balanced against' seems rather misleading/confusing in that certain adverse impacts could cause a breach of mandatory legal obligations, such as those under the Water Framework Directive.

Chapter 3

22. Paragraph 3.14 states that assessments "must" be done in accordance with certain guidance. As guidance is advisory, not imperative we would suggest saying instead 'should' (see *Froglife*). The English circular guidance is already out of date and DCLG is consulting on a revised circular. We note that the English equivalent to TAN5 (PPS9) is not mentioned, nor DCLG's consultation on a replacement. We would suggest emphasising that authorities are responsible for making their own decisions on appropriate assessments in the light of the best scientific information available and must record their decisions including screening decisions appropriately, and that authorities must have regard to the latest caselaw of the European Court of Justice and the UK courts in the application of the principles of appropriate assessment.
23. We would suggest that paragraph 3.22 also refers to the potential for cumulative effects. Setting policies only with regard to significant harm also allows for cumulative harm which in combination can become significant.
24. Paragraph 3.23 could also refer to the potential for enhancement through appropriate location or co-location of aquaculture development e.g. mussel culture on fixed structures.
25. Paragraph 3.26 - For the reasons given in our general comments above we would suggest that more elaboration is provided on the relationship with

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marine strategies, river basin management plans and obligations under the MSD and WFD.

26. Paragraph 3.27 omits to refer to the fact that where an pSPA ought to be designated then even stricter obligations apply to the site under *Basses Corbieres*, and all state bodies are obliged to fulfil those obligations. This particular obligation has been drawn to the attention of a state body by CCW in a particular instance, and was required by the European Commission to be applies to Carmarthen Bay in infraction proceedings against the UK which have been referred to by WAG in consultation.
27. Paragraph 3.29 should refer to the fact that the SSSI protections are intended to underpin and to deliver the outcomes required in relation to European sites, and that the protection of these has been enhanced by the Marine Act.
28. Paragraph 3.31 could usefully explain the legal meaning of “deliberate” as interpreted by the European Court of Justice in *Commission v Greece* in relation to *Caretta caretta* (Case C-103/00) to include the use of lighting small boats and pedalos: this is equally capable of applying to air pollution (see 3.48).
29. Paragraph 3.32 could usefully refer to similar considerations to PPS23, given that noise nuisance from vessels, for example, can fall under Part III of the Environmental Protection Act 1990. However reference also needs to be made to the limitation on taking potential socio-economic benefits into account where either Article 6.3 or Article 16 of the Habitats Directive come into operation, and therefore vessel routing becomes a specific issue in relation to noise sensitive European sites and European Protected Species wherever they are situated.
30. We welcome paragraph 3.47 as an example of the kind of firm advice that the MPS can usefully provide. However we would suggest clarifying what is meant by ‘areas of high risk and probability of coastal change’.
31. Particular reference is made to the WFD in Sections 3.54-3.56 (Water Quality and Resources). The breadth of the WFD is, however, not properly reflected in Chapter 3. For example, not only do many of the WFD’s objectives relate to ecology (i.e. are relevant to Sections 3.18 onwards) but physical modifications are also covered (i.e. Sections 3.44 onwards). Therefore, as indicated earlier, the relationship with the WFD and RBMPs is more of an over-arching issue insofar as coastal waters are concerned. We would suggest that the WFD and the need for public bodies and decision

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makers to have regard to the associated RBMPs should be introduced early in Section 3, possibly in the paragraphs headed 'High level approach to marine planning'.

Chapter 4

32. Building on our introductory comments, we would suggest that fuller guidance is given in chapter 4 on how to ensure compliance with the WFD when taking decisions on particular developments. References to compliance with the WFD in the draft MPS are rather disparate and cursory - eg paragraph 3.56 in chapter 3 (in this particular respect, chapter 4 seems a more suitable home for the reference to WFD Article 4(7) which is specifically related to new developments) and paragraph 4.50.
33. A particular issue which we regard as important to address in chapter 4 is how regulators should approach applications for consents that may fall within Article 4(7) of the WFD (new modifications to water bodies, alteration of groundwater level and new sustainable development activities that cause a failure to meet certain environmental objectives). Consenting such activities could cause a breach of the requirement under Article 4(1) WFD for member states to prevent deterioration and aim to achieve good status (where this is set as the objective), unless they can be justified as meeting the conditions under Article 4(7). There will need to be guidance on how to apply the detailed criteria in Article 4(7) to ensure a fair and consistent approach to all activities/developments that may fall within Article 4(7). It may be that Defra is planning to produce a separate guidance document on application of Article 4(7) that will apply to all such activities/developments. This would help ensure consistency across all types of decision making (whether by planning authorities, the IPC or other regulators). If that is the case, then we would suggest that chapter 4 of the MPS refers to that guidance. The general issue of how to apply Article 4(7) could be introduced in paragraph 4.4 – given that Article 4(7) is the equivalent of Articles 6(3) and 6(4) of the Habitats Directive – and then throughout Chapter 4 as appropriate.
34. Paragraph 4.26 could usefully refer to the fact that denial of access to areas of seed mussel through laying of cables can significantly affect sustainability of aquaculture e.g. in the Wash which are dependent on gathering from transient mussel beds in deeper water, and that failure to bury cables can therefore lead to displaced fishing pressure on more sensitive sites.
35. Paragraph 4.36 does not seem to acknowledge that an increase in shipping *per se* is not likely to be the subject of an application – indeed, UNCLOS (1982) provides for a 'right' of innocent passage for vessels. Rather it is
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more likely that a decision maker would be considering an application for a port or harbour or marina which would increase vessel movements locally. However, in the *Wightlink* case (above), it was accepted that the use of larger ferries on a route was capable of being a plan or project for the purposes of Article 6.3 of the Habitats Directive even though the applicants had withdrawn their application for related shore facilities. The guidance therefore needs to address the responsibility of the plan-making authority and other state bodies with particular reference to vessels using ports and harbours and other facilities in or close to protected areas, together with such margin of discretion as is available to states in relation to the right of innocent passage vis-a-vis such areas.

36. As written, paragraph 4.42 relates to waste disposal rather than to dredged material (i.e. it is making the point that disposal at sea is now limited to natural materials rather than the historically wide range of waste products).
37. As mentioned above (in relation to paragraph 2.28), paragraph 4.50 is doubtfully compliant with the Habitats Directive. Where wastes are proposed to be deposited in any site where there is conceivable effect on a European site, under the *Waddenzee* principles no consent can be given unless the possibility of adverse effect on the conservation objectives of the site can be objectively excluded on the basis of the best scientific information available. The proposition that protocols help to meet statutory obligations in relation to European sites is possibly a mis-nomer. The paragraph 4.50 could also usefully refer to the joint Environment Agency and ports industry framework developed to help ensure that dredging and disposal are WFD-compliant.
38. It is also worth noting in relation to paragraph 4.50, that many of the other activities and developments discussed in Chapter 4 will also need to demonstrate that they are WFD-compliant.
39. Paragraph 4.50 could also refer to the need to consider the potential for marine aggregate extraction to accelerate coastal erosion and contribute to the loss of communities and protected habitats.
40. With regard to paragraph 4.58 site availability is critical in relation to aquaculture. It may well be necessary for the marine planning authority to plan to achieve habitat creation and enhancement within and adjacent to existing European sites in England and Wales in order to achieve the objectives. Currently in many estuaries no expansion is possible as a result of difficulties in relation to establishing sites. Even though under the Marine Act something of a one-stop shop is to be established, positive development

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planning for molluscan aquaculture is required as was achieved in New Zealand more than a decade ago.

Resource implications

41. We think the resource implications of the MPS have been underestimated. We would anticipate that stakeholders will spend considerable time and effort responding to this pre-consultation and the formal consultation, and reviewing the final version of the MPS – at significant expense (cf non-monetised cost at page 45; and paragraph 5.7). Policy integration could engender considerable costs, too: for example liaison between authorities responsible for different plans and policies to ensure policy coherence (and possible consequential revisions to existing plans).

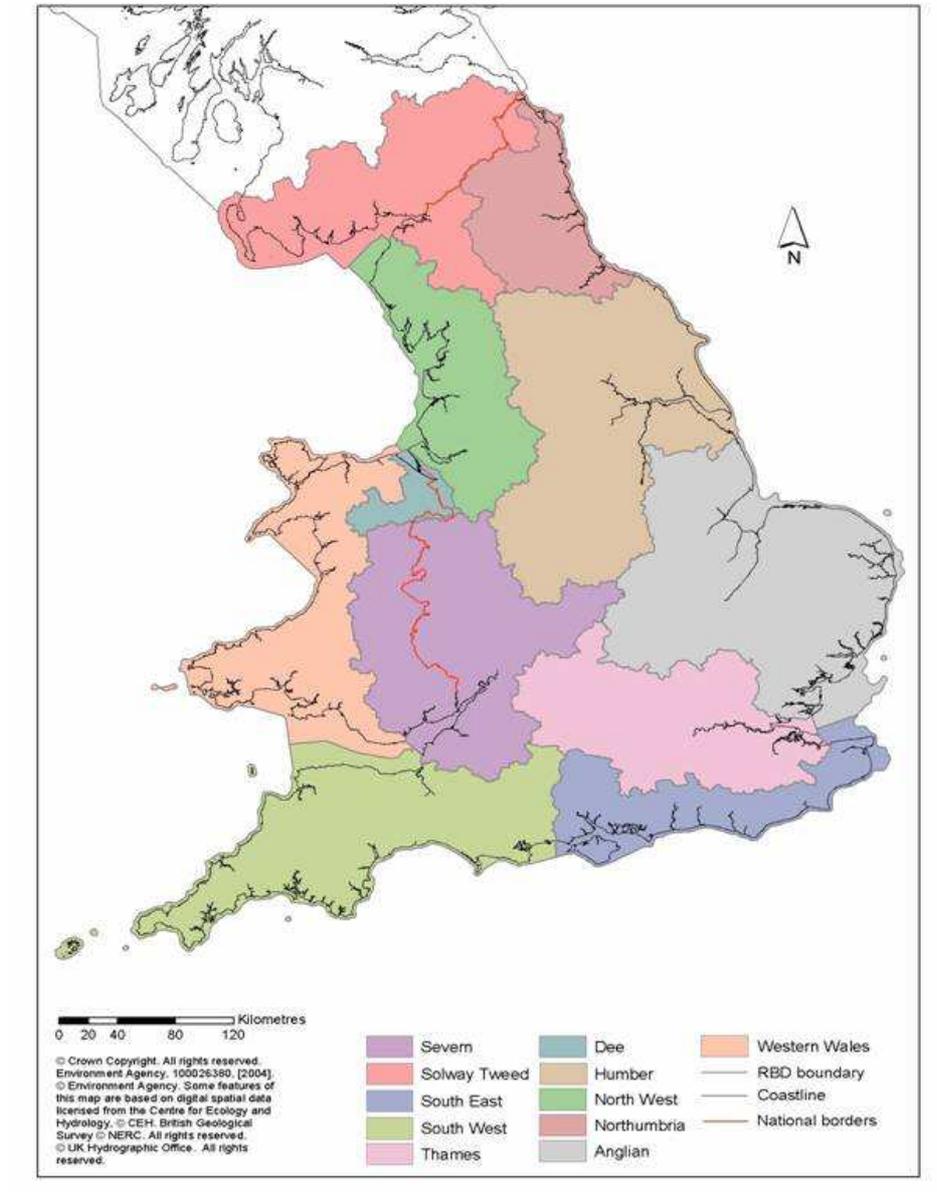
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Annex 1: Map of River Basin Districts indicating extent of marine areas covered by WFD



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