ALONG THE COAST AND UNDER THE SEA – THE OUTLOOK FOR MARINE PROTECTION

This is a consultation response to the Draft Marine Bill, April 2008. The comments on the Bill are restricted to Part 4 – Marine Conservation Zones. The response lays out the issues of why current marine protection is inadequate, using examples to illustrate this, and then measures the proposals in the Draft Marine Bill for their adequacy. The further guidance on how it is anticipated the nature conservation provisions contained in the draft Bill will be implemented is then critiqued.

The Inadequacy of Current Marine Protection

[This section is essentially the same as the article Along the coast and under the sea - the outlook for marine protection, 16 April 2008]

The Draft Marine Bill, April 2008

There was always going to be the temptation to compare the provisions for marine protection in the Draft Marine Bill, 2008, with the New Zealand (NZ) Marine Reserves Act 1971, the archetypal standard for marine conservation. That bill has an eloquence of language in explaining the purpose and intention behind marine reserves, such as (my emphasis):

"3. Marine reserves to be maintained in natural state, and public to have right of entry
(1) It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest"

In addition, the content of that Reserves Act in achieving its purpose provides a useful benchmark for the Draft Marine Bill, since there has been over 30 years of monitoring the effects of that marine reserve designation. Thus there is in the Act the description of conservation; the procedure for declaring a marine reserve; the procedure for making bylaws; the setting up of rangers and their powers of enforcement; the offences within a reserve and the penalty for offences; the marking of boundaries of the marine reserve; and the rights of access and navigation.

It has to be said that Part 4 of the Draft Marine Bill doesn't really convey the "spirit" of why marine conservation is worthwhile or even essential as does the NZ Act, which is far more convincing in its use of language. However, the Draft Marine Bill does cover the grounds for designation of MCZs (c106); requires identification of the boundaries of the area designated (c108); a statement of the protected feature or features; and statement of the conservation objectives for the MCZ (c108); the duties of public authorities in relation to MCZs (c109, 110, 112) conservation orders for protection of MCZs (c113, 118); Offences against orders (c123-126); penalties (c127, 128) and enforcement (c129-131); powers to make bylaws (c144-) and the appointment and powers of enforcement officers (c156) etc.

The Draft Marine Bill has no explicit reference or definition of a Highly Protected Marine Reserve (HPMR). Since many of the Conservation orders will reference this (see below) it should have contained this.

There is no clause in the Draft Marine Bill to require marking of the boundaries of an MCZ by buoys etc as there is for marine reserves in New Zealand.

Clause 113(3) – "Conservation orders for protection of MCZs in England" – lays out the provisions for what activities can be restricted in a MCZ, such as prohibiting or restricting entry; restricting speed; prohibiting or restricting anchoring; prohibiting or restricting the killing, taking, destruction, molestation or disturbance of animals or plants of any description in the MCZ; and prohibiting or restricting the doing of anything in the MCZ which will interfere with the seabed or damage or disturb any object in the MCZ. This clause is fundamental to the Bill, and gives scope for the Conservation orders for MCZs to have real meaning for marine protection. Thus in the round, I welcome the clauses on marine conservation in Part 4 of the Draft Marine Bill.

As I stated in my consultation response to Sea of Change, I would like to see the current SAC

off Pembrokeshire turned into an MCZ, with the Skomer MNR turned into an HPMR within the MCZ. As noted above, the range of exclusion provisions that can be included in the conservation order(s) for an MCZ are given in Clause 113(3) of the draft marine bill. (Clause 118 gives the situation for conservation orders in Wales, but uses the provisions of Clause 113). The differential exclusion or zoning is consistent with Clause 113(9) in the Draft Marine Bill that alludes to the use of zones in an MCZ, but does not actually use the word zone.

However, it is not clear to me from the bill whether SACs and MCZs are mutually exclusive (see later critique of Guidance given below), but the ability that would be conferred by the Bill to write detailed conservation orders for MCZs, designating habitats and species of natural importance, and specifying the regulatory regime that should be applied, seem at last to provide a mechanism for setting up a comprehensive network of marine protected areas.

The Draft Marine Bill is strong on stakeholder involvement. Three issues arise from this. The draft Notice of Intent to make a Byelaw for the proposed No Take Zone for Skomer MNR contained "grandfather rights" for "historical users" to continue for 10 years. This was considered to cover a period in which the three remaining users would be seen out to retirement. It is likely that this issue will re-occur often in stakeholder engagement, and it may present a serious setback to achieving the restrictions on activity required for the MCZ designation. This is a recurrent drawback of the Special Provisions of the Wilderness Act 1964 of America, often as a result of an acceptance of existing rights or permits ("grandfather rights") such as for mining or grazing. The compromise of Special Provisions in the original Wilderness Act has left a difficult legacy, and must be avoided where possible in designating MCZs.

In addition, the emphasis on taking into account the views of stakeholders is fraught when from the survey of opinion of fishing industry representatives in south-west England described earlier [in the article], it shows an industry to have entrenched views about marine protected areas, and to be in urgent need of impartial information on the ecology of maritime habitats and the effect the industry has on their integrity and functioning.

The Regulatory Impact Assessment that comes with the Bill puts an annual cost to business from a network of MCZs as being in the range from £20m to £61m. The wide range reflects the differences in network size and management/regulatory regime applied at individual sites. A "highly restrictive regime" such as a no take zone is estimated to impose three to ten times higher costs than a partially restrictive regime (eg mixed use). This is subjective and will be used to argue for less restrictive regulatory regimes in "areas of high economic and social importance" as is a requirement in the Draft Marine Bill. I fear this will be used in stakeholder engagement to argue against the designation of some MCZ, or to limit the restrictions involved. The industry must recognise that our seas are a commonweal where there is a public will to conserve that outweighs a presumed inalienable right to fish anywhere at whatever cost to the marine environment. The stakeholder engagement must not be allowed to become a breaking point in setting up a network of MPAs.

I foresee problems arising from Scotland and N Ireland not being covered by this legislation. Since Wales is covered (with minor differences) hopefully there will be some coherency in strategic and spatial planning. In the same way that I doubt a deer knows it is crossing into Scotland or Wales from England, I doubt that a seal knows it is crossing territorial waters.

The Further Guidance, May 2008

I welcome the additional guidance from Defra posted on 28 May 2008.

In "Draft guidance on selection and designation of Marine Conservation Zones (Note 1)" I welcome the explicit references to HPMR, and the situations in which they have use (Section 5.12 and others). This is given some reality in the "Example of Conservation Objectives integrated with management advice" where a zoning approach is taken in the Conservation Objectives, and Zone A is described as "- highly protected: no fishing or collection of sea life of any kind"

I welcome reference to zoning in this example, but I would ask that it be given an explanatory paragraph of its own in perhaps Section 5 of the Guidance - Principles for identification and selection of MCZs. Clause 113(9) in the Draft Marine Bill alludes to the use of zones in an MCZ, but does not actually use the word zone e.g. "An English conservation order may make

different provision for different cases, including (in particular)
(a) different parts of the MCZ;"

It is noted in Guidance 1 in the section on Achievement of Conservation Objectives (7.22) that "In the current absence of data on 'natural' states the best way of testing this is to compare sites to reference or control sites (HPMRs)". While I note that the "Welsh Assembly Government intends that primarily the MCZ designation should be used to establish highly protected sites (Highly Protected Marine Reserves - HPMRs)"(5.13) there seems no policy objective for England on HPMR. Surely if HPMRs are to be reference sites, then there should be a presumption for English MCZ that a representative system of HPMRs should be designated, if not the whole of the MCZ so designated, then a part (zone) of each MCZ designated HPMR.

I welcome the addressing of the use of MCZ in the situation of existing EU designations such as SAC, SPA (6.5). However, the guidance does tend to look both ways. It suggests that MCZ can overlay or overlap where it "offers a higher level of protection than the existing designation", especially where it is the case where a feature of national interest does not qualify under the Habitats or Birds Directive criteria. The guidance then expresses the wish to avoid 'double-badging', and implies that there are already sufficient mechanisms for protecting and managing European Marine Sites.

This is not the case for those features or species that do not qualify, and thus it is not a case of 'double-badging', but of ensuring adequate protection. See earlier for the situation at the Overfalls in the Solent; the fact that Defra consulted on a proposed fishing order for the Fal and Helford SAC; and that CCW consider that SAC provide inadequate protection for the features of national interest to Wales, and why they are identifying a series of HPMR to complete their MPA network (5.13).

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