



Management of activities in the Marine Area – the Marine and Coastal Access Act 2009

BRIEFING

Purpose of the Marine and Coastal Access Act

Legislation to improve planning and management of activities in the marine area has been a Government commitment since 2005. A White Paper¹ was published in 2007 and, in April 2008, the Department for Environment, Food and Rural Affairs (“DEFRA”) published a pre-legislative draft Bill which also included provisions covering public coastal access and migratory and freshwater fisheries. A draft Marine and Coastal Access Bill was introduced to Parliament in December 2008 and received Royal Assent on 12 November 2009.

According to DEFRA’s website, the Act:

“will ensure clean, healthy, safe, productive and biologically diverse oceans and seas, by putting in place better systems for delivering sustainable development of marine and coastal environment.”

The Marine and Coastal Access Act contains a framework of powers (set out in 320 sections and 22 schedules) that will enable Government policies in this area to be implemented over a period of time by means of secondary legislation and guidance. Its impact is wide-ranging and has

the potential to affect anyone participating in commercial or recreational activities on the coast or involving UK territorial waters.

This briefing includes a summary of the Act’s content with particular regard to those aspects likely to be of interest to local authorities, harbour and port authorities and developers involved in activities off-shore or at the interface of the marine and terrestrial areas. Although a number of the Act’s provisions will be devolved to the administrations of Scotland, Wales and Northern Ireland, this note deals only with its impact in England.

Content

There are eleven parts to the Act, covering the following topics:

Part 1 The Marine Management Organisation

This provides for the creation of a non-departmental public body under DEFRA called the Marine Management Organisation (“MMO”), tasked to deliver marine functions for the Government.

¹ “A Sea Change – a Marine Bill White Paper” – 15 March 2007



Part 2 Exclusive Economic Zone, UK Marine Area and Welsh Zone

This part defines the “UK marine area”, a term used to describe where activities take place, and provides for designation of an “Exclusive Economic Zone”, the boundaries of which will be set by the Secretary of State.

Part 3 Marine Planning

There will be a new marine planning system based on a “Marine Policy Statement” setting out strategic objectives for the whole of the UK waters and a series of marine plans to contain detailed local policy.

Part 4 Marine Licensing

This part contains the framework for a revised marine licensing regime by which various licensing and order making functions of the Secretary of State currently governed by different statutory functions may be delegated to the MMO.

Part 5 Nature Conservation

Designation of Marine Conservation Zones (MCZs) will replace the existing process for establishing Marine Nature Reserves under the Wildlife and

Countryside Act 1981. MCZs will have varying levels of protection, depending upon individual circumstances and will contribute to an ecologically coherent network of marine protected areas. The Act establishes criteria for designating sites and provides for protection by byelaw for both established and potential sites.

Part 6 Management of Inshore Fisheries

New inshore fisheries and conservation districts may be established by order of the Secretary of State, controlled by Inshore Fisheries and Conservation Authorities (IFC authorities), replacing existing Sea Fisheries Committees.

The IFC authorities will have powers to stock fisheries and make byelaws. It is worth noting in passing that IFC authorities will be fully funded² by local authorities, and their boards will include significant numbers of local authority members. The relevant order establishing each IFC will specify the number of constituent local authority members and where there is more than one local authority represented, how the costs will be divided between them.

² Section 175



Part 7 Fisheries

Powers relating to sea fisheries conservation and shellfish management are strengthened, and law relating to Government charges for commercial fishing licences amended. The Environment Agency receives new powers to conserve and manage migratory and freshwater fish and a new scheme will manage the movement of live fish.

Part 8 Enforcement

This part introduces wide-ranging enforcement measures relating to licensing, nature conservation and fishing in the marine area. It creates Marine Enforcement Officers, employed by the MMO, with powers of entry, search and seizure to implement them.

Part 9 Coastal Access

Coastal access did not appear in the original White Paper, but was the subject of Government consultation in 2007.

The Act imposes a duty on the Secretary of State and Natural England to establish (subject to certain exceptions) a long distance route

around the entire coast for recreational purposes, together with access to a strip of coastal land.

Part 10 Miscellaneous

This part amends other legislation as required by the Act's provisions. In particular, it modifies the licencing regime in the Harbours Act 1964 and introduces navigational controls into the Energy Act 2008.

Part 11 Supplementary provisions

The final part of the Marine and Coastal Access Act contains powers relating to the making of regulations and orders. It also contains provisions making company officers personally liable in some instances for offences under the Act committed by their organisation.

Marine Management Organisation

Key to the Act is the creation of the MMO. It is the general duty of the MMO, set out in section 2, to secure that its functions are exercised so that the carrying on of activities in its area is managed, regulated or controlled with the objective of making a contribution to the achievement of sustainable development, taking account of all relevant factors, in a consistent and co-ordinated manner.



Funding for the MMO will be provided in part by way of grant from the Secretary of State but it may also charge for its services and has significant borrowing powers. Although the Act tells us what the MMO will do, it contains few details as to how the MMO will operate. (DEFRA's policy document³ provides more information on these practicalities.) The Secretary of State will have powers⁴ to give general or specific directions and guidance to the MMO and to require the MMO to comply with any direction and take notice of any such guidance.

Chapter 2 provides for transfers of existing functions under specific legislation from the Secretary of State to the MMO and Chapter 3 establishes a flexible mechanism whereby the MMO can acquire powers to perform marine functions by entering into agreements with the Secretary of State and with designated bodies, including Harbour Authorities. Local authorities (who are not also harbour authorities) are not in the list of designated bodies in section 16 that can enter into agreements with the MMO although it may be possible for them to be added to the list by order in due course. Section 20 permits local authorities who are also harbour authorities to collaborate in the discharge of functions given to them by the MMO under such an agreement.

Schedule 1 sets out the constitution of the MMO's board which will consist of a chairperson and

between 5 (the statutory minimum) and 8 members appointed by the Secretary of State. Amendments to the Act require the appointment of a Chief Science Adviser to assist the Board on marine science matters.

General responsibilities of the MMO

- Planning in the Marine Area
- Marine licensing
- Contributing to the designation of Marine Conservation Zones
- Enforcing the Marine and Coastal Access Act 2009 regime
- Delivering DEFRA's marine fisheries management functions, including appointing members to local Inshore Fisheries and Conservation Authorities
- Providing advice on sustainable development of the marine areas
- Reviewing all matters relating to its objective of contributing to sustainability
- Establishing and controlling systems for the collection and management of marine data.

³ "Marine and Coastal Access Bill Policy Document", last updated 29 June 2009

⁴ Sections 37 and 38



Planning in the Marine Area

The Act⁵ defines the UK Marine Area, of which the outer limits are the edge of the UK Continental Shelf or the Renewable Energy Zone⁶ whichever extends the furthest and the inner limit is the Mean High Water Springs.

A two-stage approach to marine planning will provide the framework for individual decisions regarding marine developments and other activities:

- The creation by the MMO of a Marine Policy Statement for UK waters agreed by all Government departments and devolved administrative bodies, and setting out both long term and short term objectives for the sustainable development of the environment in the UK marine area;
- The creation of a series of marine plans for eight marine planning regions covering the whole of UK waters from the Mean High Water Springs to the UK continental shelf and fisheries limits.

The Marine Policy Statement

The Marine Policy Statement (“MPS”) will prioritise objectives for a variety of policy areas - economic, social, cultural and environmental. All decisions by public bodies with implications for the marine area

⁵ Section 42

⁶ as claimed under section 84 of the Energy Act 2004

must be made in accordance with the MPS and any relevant marine plan unless there are “clear and convincing” reasons for adopting another course. The Act makes it clear that all policies in the MPS should contribute to the achievement of sustainable development of the UK marine area.

The policy authorities (defined as the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Department of the Environment in Northern Ireland) may prepare an MPS by acting jointly⁷ but, in order that an MPS can be adopted come what may, the Secretary of State (alone or with only one of the other policy authorities) can adopt the statement provided that he has first invited each of the other policy authorities to participate in its preparation.

Like National Policy Statements under the Planning Act 2008, the consultation draft of the Marine Policy Statement must be laid before parliament prior to adoption, but is not subject to parliamentary approval. If Parliament makes a resolution or recommendations with regard to the draft, the policy authority must lay before Parliament a statement setting out its response to the resolution or recommendations⁸.

Marine Plans

Marine Plans will be akin to terrestrial development plans. They will be subject to strategic environmental assessment and

⁷ Section 45(1)

⁸ Section 45 & Schedule 5



information gathered at this stage will inform future Environmental Impact Assessments for new licence applications. A Marine Plan will come into effect when it has been published by the marine plan authority that prepared and adopted it in accordance with Schedule 6⁹, which includes an obligation to consult the local planning authority. The marine plan authority for the English inshore and offshore regions is the Secretary of State. It is unclear exactly how the MMO will be involved in planning at a local level and how the interface between marine development and its terrestrial counterpart will operate where there is an overlap between the two planning regimes.

Interface with the Planning Act concerning Major Infrastructure Projects

The Planning Act 2008 established an Infrastructure Planning Commission (“IPC”) to take planning decisions on Nationally Significant Infrastructure Projects, including responsibility for issuing development consents for large offshore renewable energy projects and the biggest harbours. Section 23 amends the Planning Act 2008 to make the MMO a statutory consultee if a proposed development may affect an area where both the MMO and Infrastructure Planning Commission operate, and to ensure that the MMO is notified of accepted applications. Marine Enforcement Officers will enforce IPC development consents in the marine area¹⁰.

⁹ Section 51(11)

¹⁰ Defra “Managing our marine resources – licensing under the Marine Bill”

Development of renewable energy

The new marine planning policy and simplified licensing provisions are expected to facilitate development of offshore renewable energy. In due course, the Secretary of State may provide by order for the marine licence application (see below) to be considered by the MMO under the Electricity Act procedure, providing a single consent process for wind, wave and tidal projects of 100 MW or less output.

Impact upon developers generally

As with terrestrial planning policy under the new Planning Act, the Government believes that the new marine planning system will bring increased certainty for developers and increased transparency in the decision-making process. It will certainly be in the interests of developers to become involved in the planning consultation process from an early stage because decisions made as a result of these consultations and incorporated into the MPS and marine plans will have significant long term impacts on future schemes.

Licensing

The Act describes the activities (similar to those currently requiring licences under Part 2 of FEPA¹¹) that require a marine licence from the “appropriate licensing authority”.¹² In England, the

¹¹ Food and Environment Protection Act 1985

¹² Section 66



appropriate licensing authority is the Secretary of State (who will delegate these functions to the MMO). The list may be amended by order. It includes deposits and incineration at sea as well as activities to construct, alter or improve any works in or over the sea or on or under the seabed¹³. Unlike FEPA, it covers all forms of dredging (although there is an exemption in respect of dredging authorised by a Harbour Order¹⁴).

Another difference to the FEPA regime (but similar to that in the Coast Protection Act 1949) is that the licensing authority can impose conditions on the licence that extend to operations after the completion of the works authorised by the licence and to persons other than those to whom the licence is given¹⁵ (who own, occupy or enjoy the use of the works).

The licensing authority may make detailed regulations concerning the application for, and grant of, marine licences but when considering an application for a marine licence the licensing authority is obliged to have regard to¹⁶:

- The need to protect the environment
- The need to protect human health

- The need to prevent interference with legitimate uses of the sea¹⁷; and
- Such other matters as the authority thinks relevant.

The licensing authority has power to hold a public inquiry but is not obliged to do so¹⁸.

It will be required to maintain a register of information relating to the marine licences and there will be a presumption that the material it contains will be made available to the public.

Harbours and ports

Ultimately, by the Secretary of State's exercise of order making powers under the Act, the MMO will be able to decide applications and issue licences for, and set and monitor conditions on most marine development, including aggregate extraction and dredging. By amendments to the Harbours Act 1964, set out in Schedule 21, it will take over the administration of Harbour Orders from the Ports Division of the Department for Transport.

The Secretary of State may also, by order amending Harbour Act procedures, provide that where an activity requires both a marine licence and a Harbour Revision or Harbour Empowerment Order (and the applicant consents), the application

¹³ Section 66(1) 7

¹⁴ Section 75

¹⁵ Section 71(2) & (5)

¹⁶ Section 69(1)

¹⁷ The reference to legitimate uses of the sea includes considerations of navigational safety.

¹⁸ Section 70(1)



will be considered entirely under the Harbour Act procedures¹⁹. Thus the Act makes it possible for the authorisation of harbour works through Harbour Orders to be delegated to the same body (namely the MMO) responsible for issuing marine licences with the result that there should be a single consenting process via the MMO for port and harbour developments and that the MMO will ultimately administer the regulation of all but the largest harbour developments and administer all harbour revision orders, harbour empowerment orders and local and private harbour Acts.

The Act also provides a framework for the Secretary of State to review and modernise out of date harbours powers by means of secondary legislation.

Finally on this point, the Harbours Act is amended so that in future, public inquiries into proposed Harbour Orders will only be held when serious or substantial issues are raised or when the Secretary of State decides that one should be held.²⁰

¹⁹ Section 78

²⁰ This is what the policy statement says and appears to be the intention behind paragraphs 5 and 6 of Schedule 20. It is not so clear from the text, however, which might arguably be interpreted to mean that the Secretary of State has only two options – to hold an inquiry or to give the person who made the objection an opportunity to be heard.

Exceptions to marine licensing regime

The main exceptions to the marine licensing regime are oil and gas installations (which will be regulated by the Department of Energy and Climate Change), nationally significant infrastructure (which will be decided by the IPC), shipping (regulated by the Maritime and Coastguard Agency) and land based or associated activities regulated by the Environment Agency and local authorities.

Activities licensed under the Petroleum Act 1998 for the purposes of construction, protection, maintenance or removal of a controlled pipeline within the meaning of that Act will not also require consent under marine consent regime²¹ whilst licensing of submarine cable laying operations will be licensable under the Marine and Coastal Access Act regime rather than the Telecommunications Act 1984²²

It was envisaged by the White Paper that activities will be exempt from licensing where they pose no significant risk to the marine environment, heritage or other users. As indicated above, dredging operations will fall within the MMO licensing process and each type will be considered according to its risks and impacts. The policy statement indicates that the Government's intention is to exempt the majority of regular "channel clearing" dredging from the ambit of marine licensing. DEFRA's consultation on

²¹ Section 77

²² Section 81



secondary legislation in respect of Part 4 of the Act ended on 22 September 2009 and the results are to be published on the DEFRA website in due course.

Flood risk and marine licensing

Coastal engineering projects may have implications for flood risk and land drainage. The MMO, with the consent of the Environment Agency, may incorporate flood risk management and land drainage conditions as part of a marine licence.

Benefits of new regime

An overhaul of the licensing system ought to result in reduced complexity and cost of obtaining the requisite consents for marine projects. Potential benefits for developers include:

- Dealing with a single body;
- Clearer procedures and timetables
- Fast track system for urgent licences
- Longer lasting consents for routine maintenance such as dredging.

Marine Conservation Zones

Part 5 of the Act provides the framework whereby the UK coast will be protected by an “ecologically coherent” network of Marine Conservation Zones

(“MCZs”) instead of the existing (and limited) Marine Nature Reserves. The new MCZs will exist alongside European special sites. Save where there is an urgent need to protect the area, the Act requires certain bodies including local authorities, local planning authorities, IFC’s and harbour authorities to be consulted before designations are made and includes provisions for public consultation.²³ As with Marine Plans, it will be hugely important for harbour authorities and developers to participate in the public consultation process before MCZ’s are designated and to be heard on the extent of protection necessary.

Protection in each zone will vary from restricting only certain kinds of development and activities to “Highly Protected Marine Reserves” where all damaging activities will be prohibited. It will be an offence to damage or destroy and species or habitat for which a Marine Conservation Zone has been designated. All public bodies will have a duty to exercise their functions in a manner which will further the conservation objectives set for the MCZs. The MMO will consider the existence of MCZs in the planning process and when considering other functions such as licensing. The MMO will have powers to make byelaws for the purpose of furthering the conservation objectives for an MCZ in England²⁴. These may regulate previously unregulated activities where deemed necessary to further the conservation objectives for a MCZ or a potential MCZ.

²³ Section 119(4)

²⁴ Section 129



Such controlled activities may include, inter alia:

- Collecting bait
- Fishing from the beach
- Snchoring of boats
- Jet skiing
- Snorkelling and scuba diving

Marine Data – principle of “collect once, use many times”

The Government intends the MMO to become a centre of expertise for the collection, storage and accessibility of up to date scientific, environmental and socio-economic data and information relating to the marine area.

Enforcement

The Act confers significant powers on Marine Enforcement Officers, appointed by the MMO, who will be able to enforce and, if necessary prosecute, sea fisheries, nature conservation and licensing legislation in the marine area. The MMO will also have powers to impose various “administrative penalties” (fines) as an alternative to prosecution, such as in the case of a breach of a licensing condition.

Coastal Access Duty

Section 291 in Part 9 of the Act imposes the “coastal access duty” on the Secretary of State and Natural England. Its two objectives are to secure public access to (i) the “English Coastal Route” and (ii) to a margin of land surrounding it. The English Coastal Route will comprise a trail around the entire English coast (consisting of one or more long distance routes) available to the public for recreational purposes. Islands are excluded unless they meet the definition of “accessible island” (eg: can be reached by walking at low tide, or by bridge, tunnel or causeway). The coastal margin will exist in association with the coastal route. Section 298 amends the Countryside and Rights of Way Act 2000 (“CROW Act”) by inserting a new section 3A. This allows the Secretary of State to make an order under section 2(1) of CROW Act so that approval of a coastal access route means the public get a right of access to the land within a specified distance either side of the line of the trail, and to any classic coastal land (such as dunes or cliffs) to the landward side or up to a natural boundary²⁵.

Natural England will operate under a scheme approved by the Secretary of State which will set out how it must go about determining the route in different local situations. A draft scheme was published in December 2008 and a final version is to be published after Royal Assent. See

²⁵ New section 55D to the National Parks and Access to the Countryside Act 1949



www.naturalengland.org.uk/ourwork/enjoying/places/coastalaccess/default.aspx.

When discharging the coastal access duty, the Secretary of State and Natural England must take into account the safety and convenience of those using the route, the desirability of the route adhering to the periphery of the coast and providing views of the sea and the desirability of ensuring, so far as reasonably practicable, that interruptions to the English Coastal Route are kept to a minimum²⁶. They must also strike a fair balance between the interests of the public in having access and the interests of the landowner and must undertake fairly widespread local consultation, including with local authorities.

In order to ensure continuity of the route, where the coast is interrupted by a river Natural England has discretion to treat the relevant upstream waters as if they were the sea. Section 296(3) defines “relevant upstream waters” as the waters from the seaward limit of the estuarial waters upstream to either (a) the first bridge or tunnel or (b) to some point Natural England specifies downstream of that first public foot crossing.

Section 301 removes an occupier’s statutory liability in respect of any physical feature so as to place the public exercising their right to access in the same position as a trespasser is now. It includes, for example, a river or pond, whether or not it is a natural feature and includes man made features such as wartime defences. This is subject

to the occupier not having acted intentionally to create that risk or recklessly about a known danger.

Excluded land and access over operational port and harbour land

The coastal access route will always remain open (although it may be subject to seasonal diversions) and it can pass through land which would otherwise not be subject to a right of access. With regard to the coastal margin, however, operational port and harbour land is excepted under paragraph 8 of Schedule 1 of CROW Act (land covered by works used for the purposes of a statutory undertaking or the curtilage of such land). Unsuccessful attempts were made in the House of Lords to extend the CROW Act exceptions to include land which may be required for future port development and land used for the purposes of recreational boating facilities.²⁷

However, some comfort is provided by the DEFRA policy document which states:

“The route itself will be established so that it can always remain open e.g. it will not be put through areas where there would be an unacceptable impact on nature conservation or, for instance, through ports where security and safety are issues.”

Thus, developers and harbour or port authorities can expect diversions around commercial

²⁶ Section 292

²⁷ Hansard 30 March 2009, column 902 et seq.)

developments and operational land where heavy plant is used or where high value materials and equipment are kept but it is doubtful that the mere fact that a route would run through land owned by a harbour authority will prevent it forming part of a scheme without more. It will be in the interests of any landowner to actively engage in the consultation process before Natural England determines the relevant stretch of route.

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