

Biodiversity Protection and Conservation in the Marine Environment

This paper is a working document and the proposals it contains may evolve as our thinking progresses.

Introduction

Wildlife and Countryside Link (Link) has considered in detail the current species protection regime for the marine environment, the main relevant piece of national legislation being the Wildlife and Countryside Act 1981 (WCA), as amended by the Countryside and Rights of Way Act 2000 (CRoW). The WCA has a number of shortcomings in relation to the marine environment. Link submitted detailed thoughts on necessary improvements to the species protection regime, focusing chiefly on proposed amendments to the WCA, to the Review of Marine Nature Conservation (RMNC) sub-group on legislative mechanisms. In its final report, the RMNC Working Group recognised the need for an overhaul of the current system and suggested that bespoke or new legislation might be preferable to attempting to patch up the existing statutory measures:

“The shortcomings of existing domestic species protection legislation suggest that it may be appropriate to consider an overhaul of the current system. This was a conclusion of the Sub-group on Legislative Mechanisms. One option would be to replace the marine elements Wildlife and Countryside Act 1981 with new, bespoke legislation and other mechanisms for marine species and habitat protection. This would provide the benefit of allowing the development of a coherent ecosystem approach for the protection of important features” [paragraph 7.31].

“Government should consider replacing the marine elements of the Wildlife and Countryside Act 1981 with bespoke legislation aimed at providing protection for priority marine species and habitats” [supporting recommendation 9.1].

Link supports this view, and looks to the marine bill to introduce wide-ranging measures to support the protection, conservation and recovery of biodiversity, throughout the marine jurisdiction (i.e. to 200nm). However, the species protection measures contained in the WCA are considered important for those marine species particularly threatened by human activities. Link is anxious that introducing a new approach does not mean dismissing the measures which are already available (but need tightening up) through the WCA. Therefore, Link supports either of the following two alternatives:

1. Replace relevant sections of the WCA with clauses more specific to marine species in the marine bill, along with additional, new measures for protection, conservation and recovery of marine biodiversity (species and habitats) in the wider sea (all applicable to 200nm);
2. Amend identified elements of the WCA to address loopholes and ensure applicability to the marine environment; extend application of WCA to 200nm; AND introduce additional, new measures for protection, conservation and recovery of marine biodiversity (species and habitats) in the wider sea.

Link is aware of work currently being undertaken by Defra to develop thinking on Marine Ecosystem Objectives (MEOs), which could set targets and limits for ecosystem components, and be relevant at various spatial scales. Link is in principle supportive of this approach, but firmly believes that improved measures to protect biodiversity in the wider sea, as described in this paper (as well as spatial tools such as marine protected areas), will make an essential contribution to biodiversity protection and recovery, and are therefore likely to be key to meeting MEOs.

This paper considers a number of necessary elements of the marine biodiversity protection regime:

1. Geographical Application
2. Enforcement
3. General Duties
4. Nationally Important Marine Features (NIMFs) – measures needed for conservation and recovery in the wider sea
5. Amendments to the Wildlife and Countryside Act

1. Geographical Application

Nationally important marine biodiversity should be protected by UK law throughout waters where the UK has jurisdiction and responsibility.

This should be:-

- (a) *Extreme high water mark to 200nm (including the sea bed, subsoil to a depth of 30m, and superjacent waters including the surface of the sea); and,*
- (b) *UK Continental Shelf from beyond 200nm (including the sea bed and subsoil to a depth of 30m.).*

Biodiversity is not limited to the inshore zone – indeed some species regularly move between inshore and offshore areas – and human activities which may impact upon biodiversity are increasingly moving offshore. Any developing or existing piece of legislation with relevance to nature conservation and the marine environment should be made to apply over this area, to include the Marine Bill, NERC, WCA and CRoW.

2. Enforcement

The appropriate duties, powers and functions to enforce nature conservation legislation should be given to the appropriate competent marine authorities (e.g. Royal Navy, Maritime and Coastguard Agency) to ensure that complete coverage is obtained and nature conservation measures are enforced throughout UK waters. With several agencies enforcing legislation in the marine environment the need to co-ordinate becomes very important – they should be required to work together, develop best practice and an effective framework for joint enforcement of marine wildlife protection measures.

A national system for recording wildlife crime incidents and numbers of successful and unsuccessful prosecutions is also needed, for both terrestrial and marine environments. Without it, it is impossible to accurately identify trends or particular problem areas, and only speculation is possible about the effectiveness of any protective measures in place. Establishing a centrally co-ordinated system for recording wildlife crime incidents would result in a more effective use of resources as they could be directed towards conservation priorities and allow 'hotspots' to be identified.

3. General Duties

A duty to further conservation

A general duty should be placed on all public bodies and office-holders to further the conservation of marine biodiversity. We believe a robust duty would encourage action and not just fine words from public authorities, and would help to ensure that biodiversity is considered in all aspects of marine management. We believe that a requirement for public bodies to further, rather than simply have regard to, biodiversity conservation would demand greater attention to the needs of biodiversity in the exercise of public bodies' functions. It is also consistent with the biodiversity duty contained within the Nature Conservation (Scotland) Act (2004).

It is possible that this duty may be delivered through the Natural Environment and Rural Communities (NERC) Bill currently before parliament. If a duty to further conservation is included in the NERC Bill, it will be necessary to clarify whether this duty applies throughout the marine environment.

4. Nationally important marine features (NIMFs)

A RMNC sub-group identified criteria for the identification of nationally important marine sites and nationally important marine features (the latter including marine landscapes, habitats and species). The sub-group has recently been reconvened to take forward the review of UK BAP Priority species and habitats for the marine environment, as part of the work to identify a list of UK NIMFs (habitats and species only; work on marine landscapes is being taken forward through the UK Seamap project¹).

Link considers that a number of measures will be needed to provide for the conservation and/or recovery of NIMFs, both through the designation and protection of important areas, and in the wider sea. This paper focuses on measures needed for conservation in the wider sea.

Listing

The NIMFs list should be given a legal status to ensure that NIMFs are taken into consideration in planning and decision making processes. Incorporation of the full list of NIMFs into the 'Section 74' list (CRoW Act 2000) could achieve this, but it will be necessary to clarify whether the related duties are applicable throughout the marine environment. The list should be reviewed on a regular basis.

A duty to further the conservation of NIMFs

A general duty to further the conservation of (marine) biodiversity would be preferred. As noted in section 2, this may be delivered by the NERC Bill, but the application of this Bill would need to be clarified. If no such general duty was put in place (through the NERC Bill or the Marine Bill), then a duty should be placed on all public bodies and office-holders to further the conservation of NIMFs.

A duty to monitor NIMFs

A duty should be placed on the appropriate competent authorities to undertake the monitoring of priority marine species and habitats. Article 11 of the Habitats Directive, for example, requires Member States to undertake surveillance of the conservation status of the natural habitats and species with particular regard to priority natural habitat types and priority species (this requirement has not yet been transposed into UK law – a fact which the Irish Sea Pilot recommended should be rectified). Link believes that monitoring is of such importance to conservation efforts, and that marine monitoring lags so far behind that in the terrestrial environment, that a monitoring duty should be broader than focussing on species of community importance; it should also be applied to NIMFs (species and habitats).

Targets and measures

In relation to the potential benefits of establishing recovery programmes for priority habitats and species, the RMNC final report concluded that '*The introduction of measures requiring public bodies to work towards the agreed targets and status of the features concerned, ... would also be a useful mechanism*' (para 7.32) and Link would agree with this.

Biodiversity stop orders (BSOs)

The appropriate authority should be given powers to call an urgent halt to activities likely to damage NIMFs. These powers would be relevant where, for example, ongoing operations were discovered to be having an unacceptable impact upon a species or habitat, or where a population of a mobile marine species unexpectedly occurred in an area where an operation could impact upon it. The potential benefits of providing such emergency powers was recognised in the RMNC final report (para 7.32). Link believes BSOs are a vital tool, given the fragility of some marine communities and the long-term damage that can be caused by a single activity during a short timescale.

¹ Multi-partner project 'UKSeamap'. This project is due to conclude at the end of 2005. For more information on UKSeamap see JNCC website: <http://www.jncc.gov.uk/page-2117>

Powers for competent authorities

Link believes that powers should be given to competent authorities to create zones where, for example, speed restrictions can be put in place or vessels are restricted from entering, for reasons of wildlife protection. Such powers could be used flexibly, to protect specific areas at certain times of the year, for example, when they are important for raising young and animals are more sensitive to intrusion by people and vessels, e.g. seal haul outs during pupping season, whilst not restricting activities outside these areas or at other times of the year. Use of byelaws, for example by local authorities, might be a useful means of achieving this in the coastal zone and to the limit of local authorities' jurisdiction. However, byelaws alone may be insufficient and further powers may be required for competent authorities, e.g. operating in the context of marine spatial planning.

Measures to address noise pollution

There is considerable evidence that human activities have significantly increased the overall level of sound in the oceans during the last few decades. Accordingly, there is growing concern that this trend is having a significant negative impact on marine life.

Statutory acoustic guidelines should be developed for all activities which introduce potentially harmful noise into the marine environment, with subsequent monitoring and reporting requirements and enforcement. Regulatory standards for the construction, design and use of technology in the marine environment should consider noise production levels along with other environmental concerns. Link also believes the extension of the criteria for the identification of MEHRAs should be considered, to take account of noise pollution from shipping.

5. Amendments to the Wildlife and Countryside Act

Reckless Killing

Birds, Schedule 5 animals and Schedule 8 plants are currently protected against intentional, but not reckless, killing. There is now a major inconsistency in the legislation whereby the term 'reckless' is added to the lesser offence of disturbance but not to the potentially more important offences of killing, taking or destruction of birds and other animals. The main purpose of adding 'reckless' would be to deal with activities which do not have the intention of killing or injuring a protected species but such harm is likely, predictable or occurs regularly.

The Council Framework Decision on Environmental Crime (2003/80/JHA) requires that unlawful killing of protected fauna and flora is established as a criminal offence when committed with negligence. Extending existing provisions to include reckless as well as intentional killing would implement the requirements of the Framework Decision in this regard.

Link supports the addition of reckless to legislation relating to marine animals and plants, while highlighting that there is a need to carefully caveat the use of reckless in relation to wild animals. We ask that adequate legal consideration is given to ensuring that the law does not undermine positive survey and management work for the endangered species and their habitats. The challenge with drafting legislation in this area is to criminalise offences which could have a negative impact on the conservation status of the species without wishing to criminalise or penalise activities which are actually necessary to further nature conservation.

Defences

The WCA includes the defence that allows damage to protected species as 'the incidental result of an otherwise lawful operation'. Link argues that this is a significant loophole in the protection of species and that while damage may be an incidental result of an operation it is often not an unpredictable one.

A recent Advocate General's opinion² found that the 'incidental result' defence contained in the Habitats Regulations was incompatible with the Habitats Directive. Link urges Defra to address this concern in the context of UK legislation also, and suggests that this could be done by including in the legislation steps that should be taken to manage and lessen impacts. Link proposes the following:

- Assessment of potential effects of operations on protected species;
- Development of best practice guidelines with the appropriate statutory nature conservation organisation (SNCO), detailing mitigation and technical measures to be employed as a requirement of consent for the operation. Current and future opportunities for statutory backing of these guidelines should be seriously considered;
- Ongoing monitoring of impacts of the operations and the effectiveness of any guidelines and mitigation measures employed;
- Feedback from the monitoring programme will determine if further measures are needed, as determined by the SNCO.

Marine Wildlife Watching Code

In 2000 CRoW amended the Wildlife and Countryside Act (1981) to make it an offence to recklessly disturb birds and Schedule 5 animals. This was largely in response to difficulties in proving 'intent' in disturbance incidences, and also concern about the disturbance of large marine fauna. In the following 4 years, it has still not been possible to obtain a prosecution for the disturbance of marine wildlife and this is not because the problem has gone away. Link believes that a further step is needed to ensure that disturbance provisions are enforceable and can provide real benefit to the wildlife they seek to protect.

A national, consolidated code of conduct for marine wildlife watching is needed and legislation could achieve this. A generic code, with statutory backing, that could be developed by additional clauses for local situations and different species would set the standard and provide guidance to both leisure and commercial pleasure craft that come into contact with marine wildlife, as to how to behave to minimise disturbance to marine wildlife. It would additionally aid enforcers, as non-compliance with the code could be used as supportive evidence for the offence of disturbance.

The Nature Conservation (Scotland) Act has recently introduced such a provision and provides a useful example of how such codes may be underpinned by statute.

Protection for areas of important habitat for protected species

The Wildlife and Countryside Act, 1981 offers statutory protection to certain areas important to the survival of species protected under each piece of legislation.

Under Section 9(4) of WCA, an offence has been committed if a person damages or destroys 'any structure or place' which a Schedule 5 species 'uses for shelter or protection'; or, 'disturbs any such animal while it is occupying a structure or place which it uses for that purpose'.

This relies on interpretation of the nature and extent of these spatial objects which becomes much harder to define in relation to marine species and their environment.

With relation to marine species, wording needs to be developed that allows for the difficulty in defining these important places. 'Structure, shelter or habitat important for stages of such an animal's life cycle' could be a more useful and applicable phrase. As this definition is necessarily broad, the legislation must also establish a means by which a Court could be advised on the definition of the term.

²Opinion of Advocate General Kokott delivered on 9 June 2005. Case C-6/04. Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Conservation of natural habitats – wild fauna and flora).

ANNEX I

Examples of the need for improved species protection mechanisms

1. Zoning powers and Code of Conduct

Recent disturbance of haul-out seals in Cardigan Bay SAC. This site was primarily selected for the protection of the bottlenose dolphins, and seals are listed as a qualifying feature³. However, certain members of the public have caused encroachment and disturbance of these animals during the 2004 breeding season⁴, at times making breeding males and females leave the beach. Powers to restrict or exclude damaging activities during the breeding season could help to address this.

Conservation of bottlenose dolphins in Cardigan Bay. A long term study on the New Quay Bay bottlenose dolphins has shown a worrying decline in dolphin group size and sightings of small calves. This indicates the possibility that some environmental factors could be amiss. Researchers have speculated that increasing recreational boating, which has led to an increasing number of recorded disturbance incidents, and the licensed dumping of thousands of tonnes of shell waste into this small SAC could have contributed to what appears to be a long term decline in bottlenose dolphin activity in New Quay Bay⁵. Ensuring that users of leisure vessels are aware of how to behave to minimize disturbance to bottlenose dolphins – through a statutory code of conduct – could help to lessen the potential impact of recreation on the dolphin population in the area. Better enforcement of the law relating to disturbance of protected species may also be important in this case.

Satellite tracking of basking sharks has revealed that they spend about 80% of their yearly activity outside the UK 12nm coastal limit (David Sims, pers. Comm.). This tracking shows that only by extending biodiversity protection provisions to the limit of the UK's marine jurisdiction, will we adequately be able to protect the full range, within UK waters, of this species. The basking shark is known to occur in shallow inshore waters in the UK in the spring and summer, and to be impacted by some human activities – for example, a basking shark was recently found off Newlyn, Cornwall, entangled and nearly drowned in a gillnet; another was found beached on Perran Sands near Newquay, Cornwall with its caudal (tail fin) removed. Seasonal closures of areas to activities known to disturb basking sharks should be considered given the wealth of information on the species's seasonal shallow water movements⁶. Better education of sea users through a code of conduct could also help to avoid disturbance to these animals.

2. Measures to address predictable impacts resulting from otherwise lawful operations

The extensive pink seafan beds in the south coast of Britain are often subject to disturbance, primarily through scallop dredge gear trawled over rocky reefs – e.g. the East Tennants reef pink seafans were damaged by scallop dredgers (and recorded by Marine Bio-images) in 2002. Sessile species like the pink seafan can be mapped relatively easily. Measures should be taken, as outlined in section 4 above, to address this predictable damage. Where severe damage to such species, resulting from ongoing operations, is discovered, Biodiversity Stop Orders could be used as a temporary measure.

³ - Go to JNCC website - www.jncc.gov.uk/ProtectedSites/SACselection/

⁴ - Personal communication with Pauline Bett of Cwmttydu Bay Wildlife

⁵ Bristow, T. (2004). Changes in coastal site usage by bottlenose dolphins in Cardigan Bay, Wales. *Aquatic Mammals* 30(3), 398-404.

⁶ - Doyle *et al.* (2005). The Basking Shark Watch Report 1987 – 2004. *The Marine Conservation Society*.

Supported by the following organisations:

- Buglife – The Invertebrate Conservation Trust
- Marine Connection
- Marine Conservation Society
- Royal Society for Protection of Birds (RSPB)
- Shark Trust
- Whale & Dolphin Conservation Society
- Wildfowl & Wetlands Trust
- The Wildlife Trusts
- WWF-UK
- Zoological Society of London