January 2009

Parliamentary Briefing

Marine and Coastal Access Bill Amendment

Environmental Safeguards on Marine Licences (Clause 66 etc)

The organisations listed above are all members of Wildlife and Countryside Link's Marine Task Force[1], which has been campaigning for several years for improvements in marine conservation. We have been closely engaged in the Marine & Coastal Access Bill process from the outset.

Environmental Safeguards

We are concerned that in attempting to streamline licensing and reduce the burden on applicants, the Government has weakened environmental safeguards on licensing applications. Licensing is one of the main mechanisms for managing human impacts on the marine environment and as currently drafted, licensing is the main tool for ensuring the protection of Marine Conservation Zones (MCZs) (though there will be other mechanisms for IFCAs to manage fisheries impacts). Therefore, if the UK is to achieve sustainable development in the marine area and deliver the Government's assurance in the accompanying document "*Managing our marine resources – licensing under the Marine Bill*" that the "*the process will be no less rigorous*", environmental safeguards are an important element of the licensing process.

We believe that the following amendments to Part 4 of the Marine & Coastal Access Bill will strengthen the environmental safeguards and the rights of legitimate users of the marine area.

(i) Strengthening the duty to protect marine biodiversity when issuing a licence

While we welcome the inclusion of a duty to have regard to the need to protect the environment when determining applications (clause 66(1)), we are concerned that the term "*environment*" is described so broadly in Explanatory Notes 199-200. At the same time as being inclusive, we fear this broad definition will result in every project trading off site-specific biodiversity loss or damage against some indeterminate global environmental gain. We would note that that there are global benefits to protecting biodiversity and that the UK waters are home to and support nationally and internationally important marine biodiversity.

[1] Wildlife and Countryside Link is a coalition of the UK's major environmental organisations working together for the conservation and protection of wildlife, the countryside and the marine environment.

We believe that greater prominence should be given to the protection of biodiversity when considering the need to protect the environment, as the building blocks of our marine communities and ecosystems. Therefore, we believe that the general duty in the Natural Environment and Rural Communities (NERC) Act 2006 on all public authorities to have regard to the purpose of conserving biodiversity (section 40 of the NERC Act) should be extended to the marine area. This would put a duty on all public authorities (as defined in clause 312(1)) who exercise "*marine functions*" (as defined in clause 14(2)) to "*have regard, so far as is consistent with the proper exercise of their functions, to the purpose of conserving biodiversity*", with Ministers having to have particular regard to the CBD (United Nations Environmental Programme Convention on Biological Diversity of 1992) (section 40(2) of the NERC Act). This would ensure consistent protection for biodiversity through the whole of the UK, whether marine or terrestrial.

In the absence of a definition for the term "*environment*" in the Marine & Coastal Access Bill, lawyers are likely to turn to other legislation for interpretation. For example, the Environmental Protection Act 1990 defines "*environment*" as "*the air, water and land …*" and the Food and Environment Protection Act (FEPA) 1985 s8(1) provides greater clarity by requiring the licensing authority "*to protect the environment* [and] *the living resources which it supports …*". We believe that to have some detail set out in the Explanatory Notes (EN199-200), while clause 112(2) formally provides that in Part 4 "*environment*" includes "*sites of historic or archaeological interest*", is neither sufficient or consistent.

(ii) Ensuring an adequate enforcement response to non-compliance and damage

As we stated in our response to the Joint Committee on the Draft Marine Bill's call for evidence, we believe that a lack of a definition for the terms "*serious harm*" and "*serious interference*" in relation to the use of compliance notices (clause 87(4)), remediation notices (clause 88(5)) and stop notices (clause 99(5)) creates ambiguity likely to result in a lack of subsequent enforcement action in response to the non-compliance or damage or in a legal challenge whenever these enforcement tools are used. These situations will arise as they are used by enforcement authorities, because a compliance notice, a remediation notice or a stop notice is dependent on whether or not the "*serious*" test has been met – i.e. if an activity has caused/is causing/is likely to cause "*serious harm*" to the environment or human health, or has caused/is causing/is likely to cause "*serious interference*" with legitimate uses of the sea. We believe that these enforcement tools should be available where an activity has caused/is causing/is likely to cause any harm or interference. The enforcement authority can then choose the most appropriate tool or combination of tools to use to deal with the offence. Guidance could be provided on their use.

In its response "*Taking forward the Marine Bill*", to the Joint Committee's report on the Draft Marine Bill, the Government accepted the above rationale with respect to remediation notices (Government's response to Recommendation 77). The Government stated that they "*believe*[d] *that harm caused by the commission of an offence should not have to be 'serious' before the person who caused the harm should have to make amends. This is consistent with the polluter pays principle*." We support this rationale for removal of the term "*serious*" from this clause (88(5)) and believe it should be applied to the other clauses too (87(4) and 99(5)). However, as currently drafted, the Marine & Coastal Access Bill still includes the term "*serious*" in clause 88(5) on remediation notices, while instead it has been removed from clause 87(5) on compliance notices. We therefore believe that such confusion of thinking by Government on this point adds weight to our call for the removal of the term "*serious*" from all three clauses. Thereby clarifying that enforcement action, whether it is

compliance (clause 87(4)), remediation (clause 88(5)) or stop notices (clause 99(5)), is to be used where there is any harm to the environment or human health or interference with legitimate uses of the sea. The severity of the enforcement action can then be in proportion to the offence.

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Annex – Amendments

Marine & Coastal Access Bill
House of Lords Committee Stage, January 2009

(i) Strengthening the duty to protect marine biodiversity when issuing a licence

Clause	**Clause 66 Determination of applications**
Amendment	Page 37, line 33: at end insert a new sub-clause— "(1A) Every public authority must, in exercising its marine functions as defined in section 14(2), have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity under section 40 of the Natural Environment and Rural Communities (NERC) Act 2006."

(ii) Ensuring an adequate enforcement response to non-compliance and damage

Clause	**Clause 88 Remediation notice**
Amendment	Page 51, line 40: leave out "serious" Page 51, line 41: leave out "serious" Page 51, line 42: leave out "serious"
Clause	**Clause 99 Notice to stop activity causing serious harm etc**
Amendment	Page 59, line 18: leave out "serious" Page 59, line 31: leave out "serious" Page 59, line 32: leave out "serious" Page 59, line 33: leave out "serious"