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SR618_Appraisal of Marine Environmental Regulatory Developments

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Appraisal of Marine Environmental Regulatory Developments

Purpose

This paper concerns the current position of marine environmental legislation in the UK. There is, of course, a large amount of legislation in the marine area, but much of this is irrelevant to the scope of this paper. The concern here is the marine environment so legislation relating to transport, fishing etc will not be covered. Also when talking about the environment there is a large amount of legislation in the marine area about pollution. This is not covered in any depth either because this is not a concern to the industry. The focus here then is the rapidly increasing amount of legislation which does impact and has the potential to impact on the industry. This includes protection of wildlife, habitats and biodiversity, the proposals for marine spatial planning, coastal zone management and environmental liability and assessments.

The contents below will attempt to explain where the legislation comes from, how and why it is developing and its integration. It will begin with a brief explanation of the various influences which act upon the UK when it legislates and how these influence and complicate the process. This will be done by looking at the relationship amongst international law, European law, UK law, and even the devolved governments. Then the paper will move on to consider the specifics of marine environmental law and how it has developed because this allows the current position to be more easily understood. There then follows a section which provides a summary of the laws which exist or are proposed to exist in the UK marine environment and where they can have an effect. Finally in the conclusion it is suggested where areas of influence on the process may be found.

Introduction

This is a relatively new area of law and is developing rapidly due to strengthening concern for the environment and continuing globalisation.

Clearly, particularly with marine law there is a strong element of international co-operation necessary. The marine environment is not completely sessile and many issues are trans-boundary. In order to make sense of the developing law in this area then it is necessary to understand a little background of the integration amongst national, UK, European Union and international law.

International Law

International law is a strange beast. It does not exist in the way that we as citizens are accustomed to thinking of law. It creates no obligations on individuals, only on states themselves. This coupled with the fact that there is no parliament at international level with powers to legislate makes international law

a difficult concept to define. However, it is generally accepted that international law does exist, and that there are two main sources of it.

a) Customary International Law – this is really the only form of truly international law, because it has the power to apply to all states, unless a state has persistently objected to it. It is developed over time by way of custom and practise and consequently is a re-active and slow way of making law.
b) Treaties or Conventions – this is a much quicker and often proactive way of making international law and it is becoming more significant. It fails however to be truly international because it cannot bind states who refused to ratify it. Thus to apply to all states it must wait for enough time to pass for it to be accepted via the custom and practice route.

The treaty route is the most efficient way of introducing and developing international law, and much of the marine environmental law can trace its roots back to treaties.

European Union Law

Here lies the first complication. The European Union is, of course, is relative new-comer to the legal framework. Individual states have their own legal systems usually developed over centuries, and even international law can be traced back to the 16th century. So where does EU law fit in to the framework? If there were ever to be an international parliament the only current contender would be the United Nations General Assembly, and the EU is not a member. The members of the United Nations are the individual nations. Therefore, although international law can be binding on countries it has no jurisdiction over the EU itself.

The EU however does have the power to make laws binding on its member states, by virtue of the agreement of those member states to the EU's written constitution and constitutive treaties. The EU also, in addition to its direct legislative powers has an additional source of law, decisions of the European Court of Justice (ECJ).

The real power of EU law however comes from its supremacy over national law. This is where it differs significantly from international law. This principle was laid out originally by the ECJ in 1964 when the court held that EU law could not be overridden by domestic legal provisions, regardless of whether those provisions pre or post dated the EU law.

UK law

One of the most fundamental changes to UK law has been brought about by the recognition of the supremacy of EU law. Traditionally, although the UK had no written constitution it was an embedded principle that there was sovereignty of

parliament. This meant that there were no legally enforceable limits to the legislative authority of the Westminster parliament. Probably the most significant part of this was that any government had the power to make constitutional changes by the ordinary process of legislation. This makes the UK legal system fundamentally different from most others. For example in the United States where the Bill of Rights is entrenched in the constitution. In the US the legislature may not contravene the Bill of Rights by normal legislative procedure, and indeed citizens there may rely on the Bill to legally challenge new legislation.

The UK had no such provisions and parliament was free to legislate as it saw fit, with no possible constraints to its power. This position is slowly changing. It could be argued that international law has no ability to affect the sovereignty of parliament, as it is parliament who ratifies (or not) the treaties or who has the ability to object to international customary law. The EU influence however is different, because of the direct effect of much EU legislation; it does not require ratification, or even agreement. It can be relied on in court as law without this. Nor can Westminster opt out of the process.

Although the EU only has competence (or authority) in some areas of law, in those areas where it has it can certainly be argued that Westminster no longer has sovereignty. Sometimes people will state that this is irrelevant as the UK can always leave the EU, but even if this were desirable would it be practically possible?

UK Devolution

Quite recently Westminster has devolved various powers to Scotland, Wales and Northern Ireland, but not England. These countries now have their own legislative bodies. The current trend seems to be to gradually increase these powers which mean that in affected areas of law the UK now has four different legislative bodies enacting four sets of different laws.

Why is this significant?

The question I am asked most frequently is “how does it (marine environmental law) all fit together logically? The answer is what this paper is trying to provide. Firstly it is important to appreciate that logic, and fairness, are not concepts given particular significance by law. Law is an evolutionary process influenced most by politics and thus, in democracies at least, by public opinion and compromise.

In order to understand the “logic” of emerging marine environmental law it is necessary to have a general appreciation of how it is created, by whom, and why.

If it was as simple as Westminster passing laws without any reference to outside influences I suspect the resulting framework would be more logical and straightforward. It is not however and I hope that the brief points above go some way to explaining the complexities.

Marine Environmental Legislation

Background and History

As early as 1926 it was recognised that the marine environment needed protection[1]. The first treaty to address oil pollution of the sea was the 1954 International Convention for the Prevention of Pollution of the Sea by Oil. This was followed by the first treaty to recognise the dangers of over fishing, the 1958 High Seas Fishing and Conservation Convention, and there were several other initiatives, mostly targeting oil pollution and waste dumping at sea.

At the 1972 Stockholm Conference marine pollution was an important issue and Principle 8 called on all states to "take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea". It is clear that around this time the emphasis was beginning to shift from concentrating merely on the impact that pollution would have on humans, to having the protection of the marine environment as a goal in itself.

The next important development was in 1976 when the United Nations Environment Programme (UNEP) established its Regional Seas Programme, which has led to over 30 regional treaties. The important area from the UK's point of view is the North East Atlantic and North Sea region, which will be discussed in more detail below. Following this though the international community finally adopted the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 which addressed pollution of the marine environment comprehensively with a view to establishing rules and standards of global application.

International Law

International marine environmental protection fits into two very broad categories, global and regional rules. The second category covers the UNEP Regional Seas Programme and EU initiatives, and is probably more significant to the UK. It is important firstly however to look at the global treaties in order to give context to the more localised ones.

[1] Preliminary Conference on Oil Pollution of Navigable Waters, Washington June 8 -16

United Nations Convention on Law of the Sea (UNCLOS)

The 1982 UNCLOS aims to establish “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of resources, the conservation of living resources, and the study, protection and preservation of the marine environment.” (Preamble).

Although UNCLOS was developed in 1982 it only entered into force in 1994. Despite this it has been able to have significant influence on the development of rules both internationally and regionally. Its provisions on the protection and preservation of the marine environment are considered to reflect generally applicable principles of customary international law, thus making them carry even more weight. This is evidenced in the text of subsequent treaties which are considered below. All of this signifies that UNCLOS has become part of general international law and can be enforced and relied upon as such.

UNCLOS requires states to pursue two main environmental objectives: to prevent, reduce and control marine pollution and more significantly from the point of view of the seafood industry to conserve and manage marine living resources. It establishes rules and liabilities for enforcement of its aims. Part XII specifically addresses the “protection and preservation of the marine environment” and comprises 46 articles. It draws extensively on the language of the Stockholm declaration and declares that “states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment”.

Much of the treaty still concentrates on the traditional area of pollution, but for the first time it separates the terms pollution and damage thus paving the way for a whole new area of marine environmental law. In addition Article 194 requires states to give special protection to rare or fragile ecosystems, as well as habitats of depleted, threatened or endangered species and other forms of marine life. There are further duties on states to limit the use of new technologies, or the introduction of alien or new species which may cause significant and harmful changes to the marine environment.

The importance of UNCLOS to the development of marine environmental law is difficult to overstate. It restricted the freedom of states to pollute and placed obligations on them to develop their own laws specifically to give effect to the treaties general obligations. It established a framework for much of the more specific legislation to follow. Principles such as the duty not to damage the environment, to conserve rare and endangered species and to restrict industry from doing these things can all trace their origins back here.

United Nations Environment Programme (UNEP) Regional Seas

Although this ambitious programme preceded UNCLOS its development was greatly influenced by it. The Regional Seas Programme followed the 1972 Stockholm Conference and the aim was to develop treaties regionally so that they could be more specific to the needs of different areas. The Mediterranean area led the way and became a model for the other areas. It developed an action plan which had five basic components: environmental assessment, environmental management, institutional arrangements, financial arrangements and regional legal structure. From the UK perspective though it is most important to consider the progress made in the North East Atlantic and North Sea Region.

The principle instruments which regulate this area are the Convention for the Protection of the Marine Environment of the NE Atlantic (1992 OSPAR Convention) and the 1982 Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances. Clearly it is the OSPAR Convention which concerns our industry more.

The OSPAR Convention seeks to bring together all aspects of marine environmental protection into a single instrument. Its provisions draw directly on UNCLOS and it solidifies many of the recommendations found there into treaty obligations. The most significant legal obligations it adopts include the following;

- It commits to the principle of sustainable management, which is a change from the previous obligations of sustainable development
- It incorporates both the polluter pays and the precautionary principle, both of which have had significant influence in shaping subsequent laws.
- It promotes the concept of best available techniques, best practice and clean technology.
- It stresses the importance of increased public participation, with rights of access to information and the participation of Non Governmental Organisations, again this has greatly affected current legislation.
- It established a new commission with the power to take legally binding decisions.

At the beginning of the Convention it emphasises environmental protection as a goal which has value in itself, this follows the growing international trend of moving away from simply considering the importance of the effect on humans as had been the case for much of the twentieth century. It obligates states to consider the preservation of marine life as intrinsically valuable.

It recognises “sustainability” as an emerging legal concept, one of the first to do so, and it provides a definition of sustainable management;
“The management of human activities in such a manner that the marine eco-system will continue to sustain the legitimate uses of the sea and will continue to meet the needs of present and future generations”. (Preamble) (Fishing is previously defined in UNCLOS as a legitimate use of the sea).

The convention uses the concept of the eco-system in relation to pollution. Prior to this pollution had to be “prevented, reduced and controlled” but OSPAR changed this to now read “eliminated”. It goes still further, under Article 2 (1)(a) parties must “when practicable, restore marine areas which have been adversely affected”. Here can be seen the origins of still more legislation on water quality as well as environmental liability.

Further, one of the 5 Annexes specifically deals with “the protection and conservation of the ecosystems and biological diversity of the marine area” (Article 7).

United Nations Conference on Environment and Development (UNCED)

Agenda 21, which was adopted at the above conference in Rio in 1992, is the other major international legal development which needs to be considered. Although it is not specifically about oceans and seas it nevertheless has far reaching implications for this area.

The United Nations Website (www.un.org/esa/sustdev/documents/agenda21/index.htm) describes Agenda 21 as

“A comprehensive plan of action which needs to be taken globally, nationally and locally by organisations of the UN, Governments and major groups in every area in which human’s impact on the environment”.

It created the Commission on Sustainable Development (CSD) which is to ensure effective follow up, and report on its implementation. The aims of Agenda 21 and its full implementation have since been re-affirmed at subsequent world summits.

It is Chapter 17 of Agenda 21 which concerns the marine environment. Here it recognises that international law, as reflected in the provisions of UNCLOS “provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources”.

It establishes seven programme areas of which the most important to our industry are;

- sustainable use and conservation of marine living resources of the high seas
- sustainable use and conservation of marine living resources under national jurisdiction, and
- the programme on marine environmental protection

This is the first attempt to conserve the seas outside national jurisdiction, and clearly requires high level international co-operation to achieve this.

It also outlines proposals to guide future legislation including coastal zone management, environmental impact assessment, improvement in effluent treatment and conservation and restoration of critical habitats. These are, of course, still more themes which can be traced in into EU and national law.

Agenda 21 fully supports taking the precautionary approach rather than the more traditional reactive one and covers an extremely broad range of subject matter, addressing all activities which impact on the marine environment.

Effect on the Marine Environment

There is no doubt that at an international level there is a considerable amount of legislation and many initiatives to protect the marine environment, but how effective has it been? In truth most of the legislation deals with pollution, and this is not the focus if this paper as it is not a primary concern to the industry, but there have been attempts to asses the effect on the environment of all the legislation. In 1990 the Joint Group of Experts on the Scientific Aspects of the Marine Environment (GESAMP) reported that coastal pollution was increasing and was more widespread globally than in 1982. It also reported that whilst the open seas were relatively clean the coastal zones were adversely affected by pollution from land based sources and insensitive human settlement. They concluded that without further action these coastal areas would continue to deteriorate. Major concerns which they identified were coastal development, destruction of habitats, eutrophication from nutrient and sewage, overfishing and changes in sediment flow due to hydrological changes. Overall it estimated that nearly 30 per cent of land in the world's coastal ecosystems had been extensively altered or destroyed.

Subsequently GESAMP has confirmed the situation is not improving (2001) and it against this background that legislation is continuing to become more restrictive in the marine environment. As governments most potent solution to a problem is legislation it is difficult to see how this trend would be reversed against this backdrop.

So, it can be seen that against a background of deterioration of the environment there is considerable international will to change this. International political will translates into international treaties and conventions which place legal obligations on signatory states (and sometimes non-signatories through customary law). Whilst this has no direct impact on industry its significance is nevertheless considerable. States place themselves under legal obligations in the global community, and in order to fulfil these they do what Governments can, and legislate, and this is how industry is impacted. The EU is not directly affected by all of this international change, as it is not a sovereign state and thus cannot

be subject to customary international law. Increasingly though the EU is being invited to sign treaties, perhaps this is recognition of its increasing global influence. It is clear though that international trends impact on the EU and influence its course, but perhaps also the reverse is true and the progress and development of the EU has bearing on what happens at international level.

It is unfortunately true that none of these processes develop according to a linear timescale. There are ideas and developments in International Law which run in parallel to those being discussed at the EU parliament and even in the national arenas. It is not a top down process where progress would perhaps be more logical, if probably a lot slower. It is a number of processes by different authorities all of whom have the power to make distinct legislation which impacts on particular groups. It is also sometimes the case that national law, which can generally be made much faster than EU or International law, is brought out prior to either of them, whilst their process is ongoing. This is perhaps so that the national government can try to influence the wider process by having developed a workable system already. It does however lead to more complication when the subsequent supra-national legislation emerges and has to be interpreted in line with the existing national ones.

European Union

It is now necessary to look at the development of marine environmental law from the EU perspective in order to complete the picture of influence over the UK position.

Prior to the 1986 Single European Act (SEA) the Community had no express treaty provisions on environmental protection. This did not prevent it however from adopting legislation on environmental matters. It began the process in 1967 with the adoption of a Directive on dangerous substances. The then nine member states adopted a declaration on the environment in October 1972, following the Stockholm Conference, and its first EC Action Programme on the Environment the following year. Also prior to 1987 the EU legislated on the protection of flora, fauna and the countryside as well as introducing the first example of international legislation on environmental impact assessment. It had also produced a recommendation on the polluter pays principle.

During this period though the environmental protections were introduced into Community law on the basis that they harmonised national law and thus removed barriers to trade. Environmental protection was not recognised as an end in itself at this point. This was changed however in 1985 when the European Court of Justice (ECJ), which is responsible for many legal developments within the Community, ruled in the Procureur de la Republique case[2]. This stated that even without express provision in an EC Treaty environmental protection was one of

[2] Procureur de la Republique v Association Defense de Bruleurs d@Huiles Usagees 1985 Case 240/43 ECR 531 at 549

the Communities essential objectives. It was then formalised in the 1986 SEA as an EC objective.

Single European Act (SEA)

The changes introduced by the SEA had a profound effect on the Community. Whilst a considerable amount of environmental law existed already it was quite disparate and not part of an overall policy or objective. This changed and the whole process gathered momentum and gained prominence as all areas of the Community law now had to be considered in conjunction with the Communities new environmental objectives. Article 130r (1) stated the following objectives;

- To preserve, protect and improve the quality of the environment
- To contribute towards protecting human health, and
- To ensure prudent and rational utilisation of natural resources.

It also added that action was to be preventative, that damage should be rectified at source, and the polluter pays principle. It stated that member states could maintain or introduce “more stringent protective measures compatible with this Treaty”. (Article 176).

As new environmental protection legislation became more ambitious the process began to slow down as unanimous agreement from member states was required, and certain states sought to limit or prevent the introduction of new rules. A new provision however (Article 100) provided a way to circumvent this problem and introduce environmental legislation via qualified majority voting. This became the subject of extensive legal battles in the ECJ until 1992 when the Maastricht Treaty on the European Union introduced qualified majority voting in the area of environmental protection anyway.

Maastricht Treaty on the European Union 1992

Environmental protection became one of the fundamental objectives of the Community (Article 2). The precautionary principle was added to the list of guiding principles and environmental protection was required to be integrated into all EU policies rather that just are a component of them as the SEA had required.

Amsterdam Treaty 1997

In its preamble the Amsterdam Treaty enshrines the principle of sustainable development and has a declaration on environmental impact assessments. Thus following its various amendments Article 174 of the EC Treaty now provides that;

“Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principle

that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay".

UK Legislation

Already then it is becoming clear where many of the legislative initiatives which we see are coming from, and the principles on which they are based. The polluter pays, the precautionary principle the environmental assessments are embedded in much of the legislation which is already in place or emerging. More deeply embedded still is the protection of the environment as an end in itself and the sustainability concept. Although the varied legislation which is current and proposed in the UK may seem piecemeal and it is difficult to see a logical framework, it is slightly easier when seen in the context of wider developments. The UK is bound by its international and EU obligations to create national laws and sometimes the timetable for their implementation is quite tight. This inevitably leads to the results being more fragmented than would otherwise be that case if the UK were only considering its own legislation needs, when we might expect a more logical result.

It is usually the case though that as legislation "beds in" over time it is revised to bring greater coherence and an attempt is currently being made to do this in the marine environment with the proposed Marine Bill. At this point it is necessary to examine the legislation as it currently affects, and is proposed to affect the industry.

The next section is a list of current and proposed legislation in alphabetical order with a brief explanation of its purpose and significance to industry. Following that the table provides a list of the legislation, which is responsible for it, where it is applicable and its origin.

Aquatic Animal Health Directive

Directive 2006/88 is currently being transposed into national law. There is an English and Welsh version, with Wales having slightly different regulations, a Scottish version, and a Northern Irish version. The Directive itself is concerned with preventing the spread of disease amongst aquatic animals, particularly in aquaculture, but also in the wild, and during transport. It introduces measures for traceability and movement restrictions under certain circumstances. It also creates a need for businesses to have in place bio-security action plans. The regulations are scheduled to come into force during the third quarter of 2008. Currently the consultation stage has just finished and the full implications for industry are unclear at this stage. It is hoped that much of the traceability system required can be aligned with the one already in use under Regulation EC no.178/2002, thus not increasing the administrative burden on businesses. Also it should be possible for other requirements under this Directive to be covered by existing legislation, leaving one additional requirement, that of keeping mortality

records. However, this Directive does have the potential to increase requirements on businesses and certainly will introduce a new system for registration of transporters.

The next stage will be the production of the final regulations which are expected in July 2008.

Responsible bodies

England and Wales – DEFRA, Aquatic Animal Health Team
Scotland – Scottish Government Marine Directorate Food and Fish Division

Biodiversity Action Plans

It may seem strange to include these here as they actually have no legal status at the moment. However, indications are that they may at some point in the future be incorporated into law. For example the recent consultation on the Environmental Liability Directive stated that it had considered whether to include them within its scope, but decided against it as they were not yet sufficiently developed. Thus it seems important to include them here and monitor their development.

They are a UK initiative and there are many different ones. They are the creation and maintenance of localised plans for the assessment and improvement of biodiversity. Currently they are run by local voluntary groups and these groups vary in their membership.

It is anticipated that these will become more significant in the future, with legislation starting to include protection for their species and habitats.

Responsible Bodies – Numerous committees, but ultimately JNCC, marine ones controlled by Natural England

Birds Directive

The EU Directive on the conservation of wild birds (EC/79/409). This Directive identified a list of species which required conservation measures. Since that time, the Joint Nature Conservation Committee (JNCC), working on behalf of the devolved nature conservation agencies has drawn up guidelines for identifying protected sites and gained subsequent protection for these sites. These sites, known as Special Protection Areas (SPA's) are a contribution to Europe's Natura 2000 network, and there are currently 243 in the UK offering protection for 103 species.

This legislation is well established, and although considered by some to be outdated, it has a limited effect on our industry. Although the majority of these SPAs are coastal they do not currently extend beyond high water and so have limited impact on the marine environment. Indications are though that under the new Offshore Regulations there may be plans to include some SPAs in offshore areas in the future. It is also possible that the Marine Bill will establish some protected areas in inshore waters.

Responsible body – DG Environment

Environmental Liability Directive

Directive 2004/35/CE implements the polluter pays principle. There is an English and Welsh version, with slightly different Welsh regulations, a Scottish one and a Northern Irish one. It is concerned with significant damage to species or habitats of European significance. However, we are now in the second consultation stage for the English and Welsh version and the proposal is to extend the protection to species and habitats of national significance also. This means that there are many more potential sites to which this legislation could be applied.

Whilst the Directive contains provision for strict liability for damage in some industries this does not apply to the fishing industry where liability would have to be established. The current second consultation also asks whether the fishing industry should be exempted from the legislation, both because of the difficulties in competence with regard to the Common Fisheries Policy and also with the practical difficulties associated with proving that an individual vessel damaged a particular habitat.

The Scottish and Northern Ireland version are a little behind, but this legislation should be resolved by late 2008.

Responsible Bodies -
Europe - DG Environment
England, Wales Northern Ireland and Offshore Scotland – DEFRA Climate Change Branch
Scotland Inshore – Scottish Government Environmental Quality Directorate International Environment Issues Team

Fisheries 2027

This is a policy document which sets out a vision for planning the fisheries sector for the next twenty years. It is for England, and there is also a Welsh version. Currently Scotland and Northern Ireland are considering producing theirs.

It has a number of goals, such as increasing the size of fish stocks, reducing administrative burden and ensuring the sustainable development of the shellfish

sector. There are also roles and responsibilities outlined for the various stakeholders.

The effect on industry is not clearly defined because this is policy and not legislation, but it is likely that these principles will remain at the heart of legislation for the immediate future and will be used to shape upcoming initiatives.

Responsible Bodies

England – DEFRA Strategic Policy Team
Wales – WAG Fisheries Branch, Environment, Conservation and Management Division

Heritage Protection

Originally in 2007 when this initiative was first launched the proposed legislation was UK wide. This situation has now altered and Scotland has separated and is currently consulting on its own legislation.

Essentially the legislation is about bringing the systems on land and in the sea in line with each other. Clearly there is a concentration on the land based systems, with that in the sea being something of an add on. When the legislation is brought into force the Protection of Wrecks Act 1973 will be repealed. In its place will be a system for protecting any man made structure of historical or archaeological significance, which will of course include some wrecks. It will not include war graves as these remain under separate legislation. The risk to industry lies mostly in the fact that the legislation proposes interim protection, so that a nominated site could be afforded protection whilst its merit is being assessed. Potentially this could be used mendaciously to disrupt the industry. It remains to be seen what the process would be for applying interim protection.
Responsible Bodies

England and Wales – DCMS, Architecture and Historic Environment Division
Scotland – Scottish Government Directorate for the Built Environment

Invasive Non-Native Species

This is a framework strategy being developed UK wide. One of the main threats to biodiversity is the introduction of new species and this strategy is aimed at tackling their routes of entry. It suggests that the strategy should seek to prevent the introduction of species through climate change, and this seems nonsensical, particularly in relation to non-sessile species in the sea, where of course there are no physical barriers.

The main concern to industry with this one is that as the marine environment alters through climate change some of the traditional species will become unavailable. It would be logical to suppose that these would be replaced by other species which would then be available to the industry. The framework strategy suggests that this should be resisted, so if this strategy were successful there could be nothing left to fish.

Responsible Body – The Non-Native Species Secretariat

Marine Bill

Currently published in draft form for comment and committee scrutiny. The Marine Bill is essentially an English document which will be amended for Wales and apply to the offshore areas of the whole UK. It is an attempt to draw together a framework of legislation which brings many of the activities in the marine environment under one umbrella of control. It covers the following main areas;

- Marine Planning
- Marine Licensing
- Marine Management Organisation
- Marine Nature Conservation
- Marine Fisheries
- Coastal Access
- Migratory and Freshwater Fisheries
- Marine Enforcement

At this stage the Bill contains much intent and little detail, so it is difficult to draw conclusions as to what its introduction will mean to the industry. There are almost certainly going to be advantages as well as drawbacks, but the balance of these is still very much unknown.

It is most important at this stage to keep engaged with the process and endeavour to influence the outcome in favour of the industry as much as possible.

Responsible Body – DEFRA Marine Bill Team, Marine Enforcement Division

European Marine Strategy

A Europe wide strategy for the next five years which seeks to bring maritime matters under the control of one area. Prior to this there were a number of directorates dealing with fragmented aspects of the seas. Includes various policies aimed at sustainable development and environmental objectives which are all thought to be achievable over one term, i.e. five years. Various legislation is likely to ensue, such as the IUU fishing legislation.

Responsible Body – Europe - DG Mare and DG Development
DEFRA – Marine Strategy and Evidence Division

Marine Strategy Directive

The Thematic Strategy on the Protection and Conservation of the Marine Environment aims to achieve good environmental status of the EU's marine waters by 2021 and to protect the resource base upon which marine-related economic and social activities depend. The Marine Strategy will constitute the environmental pillar of the future maritime policy the European Commission is working on, designed to achieve the full economic potential of oceans and seas in harmony with the marine environment.

It will split the marine areas in Europe into regions and require full environmental assessments in order that good environmental status can be achieved. It ties in with the Water Framework Directive which addresses inland and coastal waters.

The possible effect on industry centers on the fishing industry being able to adversely affect good environmental status. In some circumstances it could be judged that fishing is the barrier to an area achieving the status, and thus fishing could be curtailed.

Responsible Body – Europe - DG Mare UK – DEFRA Marine Strategy and Evidence Division

Natura 2000 (Habitats Directive)

Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna. Member states are required to introduce protection for a range of species listed in the Annexes and keep, or return them to, favourable conservation status. It is necessary to have a network of protected areas (Special Areas of Conservation, SAC) and these areas combine with the SPA's of the Birds Directive to produce a network of sites known as Nature 2000 sites.

Socio-economic considerations can be taken into account when designating these areas, and plans or projects which may compromise them can still be given permission if they are deemed essential. It introduces for the first time in EU nature conservation law the precautionary principle.

The threat to industry from this one is obvious, these Natura 2000 sites can be designated anywhere making the process of obtaining licenses to conduct aquaculture activities much more difficult. These SAC's are now being designated in offshore waters by virtue of the Offshore Regulations 2007.

Responsible Bodies

Europe – DG Environment
UK - DEFRA

Natural Environment and Rural Communities Act 2006

This English legislation is designed to achieve a rich and productive natural environment as well as thriving rural communities. It implements key elements of the government's rural strategy. It created Natural England and modernised and reviewed many of the designated powers.

Responsible Body
England and Wales - DEFRA

Offshore Regulations

These regulations were necessitated by the Birds and Habitats Directives. Without these regulations is was not possible for the UK to designate SAC's and SPA's outwith the 12 nautical mile limit. These regulations affect the UK as a whole as responsibility for environmental concerns outside 12nm is a reserved power.

The Offshore regulations allow designation of protected areas, but have provided a statutory defense for fishing within the Common Fisheries Policy. This means that to affect fishing in the protected areas there has to be provision made under the Common Fisheries Policy.

Responsible Bodies
Europe – DG Environment
UK – DEFRA Marine Biodiversity Team, Wildlife and Habitats Division

Shellfish Waters Directive

The Shellfish Waters Directive 2006/113 was originally introduced in 1979, but updated in 2006. It aims to protect and improve shellfish water in order to promote shellfish life and growth, therefore contributing to the high quality of shellfish products which are directly edible by man. It sets physical, chemical and microbiological water quality standards that designated shellfish waters must either comply with (mandatory standards) or endeavor to meet (guideline standards).

The Directive will be repealed in 2013 by the Water Framework Directive, but according to DEFRA the standards contained within it must be upheld and not reduced. Until this statement is contained within the legislation the industry feels threatened by the repeal.

Responsible Bodies
Europe – DG Mare
UK - DEFRA

Strategic Environmental Assessment Directive

European Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Article 1 of this Directive states that its objective is “to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development”.

It requires environmental assessment where plans or programmes affect, or potentially affect, the environment. Fishing has been held to constitute a plan or programme.

Increasingly these Environmental Assessments are being required of new enterprises, and the cost of conducting them is a significant burden on the industry.

Responsible Bodies
Europe – DG Environment
UK - DEFRA

Water Framework Directive

The Water Framework Directive (WFD) will revolutionise the way that the water environment is managed and protected. It replaces today’s piecemeal legislation with integrated management of water quality, quantity, physical habitat and ecology.

The Directive has been implemented into UK legislation differently for Scotland than the rest of the UK. The main difference is in the extent of its application. In Scotland it applies out to 3nm and in the rest of the UK only to 1nm. It will however become a largely irrelevant difference as the Marine Strategy Directive comes into force as this will apply to water quality in the wider marine environment.

The WFD has far-reaching implications for fisheries managers and the industry. Its main effect will be an improvement in environmental quality – but it may also result in new controls on fishing and new duties for regulators.

Responsible Bodies
Europe – DG Environment
UK – Originally DEFRA, now EA, SEPA, CCW

Wildlife and Countryside Act

The Wildlife and Countryside Act 1981 consolidated existing national legislation and implemented the Bern Convention and the Birds Directive. It originally pre-dated UK devolution so applied UK wide but now has been amended in Scotland by the Nature Conservation Act 2004.

It addresses wildlife and makes it an offence to kill, injure or take wild animals, birds and plants (there are obviously some exceptions). It also creates the mechanism for designating Sites of Special Scientific Interest (SSSI's), and clarifies the law with regard to public rights of way.

Whilst this is a land based piece of legislation the SSSI's affect those activities which are located on the coast and require access via the coast to function.

Responsible Bodies
England, Wales and Northern Ireland – DEFRA
Scotland – Scottish Government

Legislation	Origin	Status	Jurisdiction	Summary
Aquatic Animal Health	Europe	Proposed	Versions for England and Wales, Scotland and Northern Ireland	Modernise legislation in relation to disease in aquaculture animals. Bring in an authorisation scheme for businesses
Biodiversity Action Plans	Europe	Soft Law / Policy	UK	Creation and maintenance of localised plans for assessment and improvement of biodiversity
Birds Directive	Europe	In force	Europe wide	To regulate, protect and conserve wild birds, establishes areas of protection (SPA's)
Diffuse water pollution	UK	Proposed	England and Wales	Proposals to identify and limit diffuse water pollution – originates from the Water Framework Directive
Environmental Liability Directive	Europe	Proposed	Versions for England and Wales, Scotland and Northern Ireland	Implements the polluter pays principle, but only concerns significant levels of damage at a European level to European protected species and / or habitats
Fisheries 2027	UK	Policy	Versions currently for England and for Wales	A plan for how to plan the fisheries sector for the next 20 years
Heritage Protection	UK	Proposed	Versions for England, Wales and Northern Ireland, and one for Scotland	Intends to harmonise planning on land and at sea. A precursor to coastal zone management and covers historical sites at sea (including wrecks)
Invasive non-native species	UK	Proposed	UK	Intends to limit the introduction and spread of invasive non-native species
Marine Bill	UK	Proposed	Version for England,	Intends to draw together and modernise

			others to follow	current marine legislation whilst adding marine planning, nature conservation zones etc. Will create a new marine management organisation
Maritime Strategy	Europe	Policy	Europe wide	A strategy for the next five years to bring marine matters under one umbrella, rather than spread over many directorates. Includes various policies from which specific legislation may ensue
Marine Strategy Directive	Europe	Proposed	Europe wide	Legislation to protect the quality of water in seas and oceans outside the limit of the Water Framework Directive
Natura 2000 (Habitats Directive)	Europe	In force	Europe wide	To protect biodiversity by establishing a network of protected areas (SAC's)
Natural Environment and Rural Communities Act	UK	In force	England	Contains powers and duties of statutory nature conservation bodies, protection of wildlife, SSSI's, national parks etc
Offshore Regulations	Europe	In force	UK	Legislation to enable the designation and protection of Special Areas of Conservation outwith 12nm requires under the Habitats and Birds Directives
Shellfish Waters Directive	Europe	In force until 2013	UK	To classify and ensure the quality of waters which are deemed as shellfish harvesting areas
Strategic Environmental Assessment Directive	Europe	In force	UK	Legislation to make environmental assessment a necessary part of any significant developments where an environmental effect is anticipated
Water Framework	Europe	In force	England and Wales,	Legislation to bring inland and coastal

Directive			Scotland, Northern Ireland	waters up to achieve “good ecological status”
Wildlife and Countryside Act	UK	In force	UK	Protect certain birds and wildlife and their habitats

What is obvious from the table above is that most of the legislation is proposed. It is emerging very quickly at this point and has the potential to alter the ways in which the industry can operate in the future.

Discussion

Whilst it is clear that the industry is already beginning to feel the effects of this increasingly complex area of law, it is also clear that there is no sign of the pace of change slowing down. What is also becoming more apparent to me is that the UK government departments have no desire to adversely affect the industry. Effect on the industry may happen as a consequence of these new environmental protections but it is not the aim, it is merely a casualty. So, where might we and industry exert the greatest influence the developments?

Firstly, it is important to accept that environmental protection is not going to go away. There is a consensus that the marine environment is deteriorating globally despite the not inconsiderable efforts made so far. This means that in the global community the will to introduce increasingly stringent policies is strong. As we have seen this filters down to the UK via its ratification of treaties, its obligations to implement EU law etc, as well as its own desires to introduce new policy. It is also possible that the UK likes to be seen as a world leader, traditionally the UK is proud of its well developed and stable legal system, and there may well be an element of it wanting to show others the way in developing policy and legislation. None of this is in any way something we can influence, and indeed why would we want to? Cleans seas and a health marine environment with flourishing fish stocks has to be a good thing for the industry as well.

The point is of course that the way this aim is achieved can vary greatly thus the effect on industry can too. It is also important to remember that legislators are not experts in all fields and rely on the advice and information they are provided with as they make the law.

One point of influence then is to make sure that the legislators fully understand the potential effects on industry of what they propose. Even better than that perhaps would be to develop the relationship to the point that it was possible to have input prior to consultation, when there is more flexibility in any proposal. In order to do this it would probably be necessary to be seen as supportive of the goals of legislation in terms of environmental protection, but desiring to help the industry achieve them in the most efficient manner.

It has long been recognised by the UK government that their traditional paper based consultations are not particularly effective, and they conducted an exercise in better regulation last year. We are yet to see significant changes, but at least it is apparent that other methods are being considered and thus any methods we can demonstrate to work more effectively should have a strong chance of being adopted.

Whilst this point applies to the UK and its devolved administrations, it also of course applies to the EU. It is probably too ambitious to expect any influence at a global level, but as most of the environmental protection legislation emanates from the EU it seems important to attempt to influence here. The same strategy could be employed as has been suggested for the UK governments, but now that the voting on environmental issues is via qualified majority it would no doubt be more effective to try and gain co-operation from industry in other EU countries. It is not suggested that this be lobbying in any way but it would be helpful to the industry to have a voice at an early stage to help inform the process.

This is one way of perhaps being able to influence change; another is for industry to be pro-active in its approach to legislation. There is little doubt that if government were contemplating new legislation and there were a working voluntary system already in place which dealt effectively with the issue, it would be much more likely to adopt the system. In fact, if new legislation was contemplated and a working system was already in place to address the issue the likelihood of the existing system being adopted would be high. This would mean that in effect industry would be able to dictate much of the detail of the legislation provided that it was working towards achieving the policy goals. There is also the possibility under these circumstances that the need to legislate in this area would be removed altogether.

Probably the key goal for Seafish to achieve then would be to have a policy determining group where the industry as a whole could determine its own policy and seek to negotiate with legislators. Whilst we already have a group for this in the UK, the Seafish Marine Environmental Legislation Expert Group it is clear that the influence needs to be not just in the UK but broader as well. It seems a logical step to have a group which could gain influence at a European level.

There are two main places where it would be necessary to negotiate. The Commission is one of those and here it would be important to engage not just with DG Mare but also with DG Environment as they have an increasingly strong voice in what happens elsewhere. However access to the Commission is difficult because of expansion of the EU and they have made it clear that the most legitimate routes are through the Member States governments and the Regional Advisory Councils.

The other place where they may be opportunity is through the European Parliament. Under the Lisbon Treaty co-decision would become a feature of most fisheries decisions (excluding Total Allowable Catch and quota decisions). Thus, if the proposed policies are implemented most fisheries decisions will need the approval of both the Council and the Parliament. This means that the European Parliament will pass judgement on the detailed proposals from the Commission during their formulation. As this process and level of detail is new to the Member

of European Parliaments it would seem an opportune time to begin discussions with them about the issues.

It would appear then that to be able to talk to and try to influence at a European level we need to have a legislation policy group which represents more than just one member state. It is the breadth of representation and agreement which is much more attractive to the Commission as they need to develop legislation which is going to receive support from the majority of Member States.

At Seafish we already have a model which works well in the Legislation Expert Groups, so it seems logical to try to extend this concept to become European on the marine environment side. Ideally the European group would need to include fisheries representatives from the Member States, Europeche and the Regional Advisory Councils. Once we have that it is hoped that officials from the Commission would be persuaded to attend and engage with the group in the way that our own government officials do now.

I have explained this concept to both DEFRA and the Scottish Government and have been told they would have no objection to it. This then would seem to be one key long term goal for Seafish to explore.

It is important not to forget the domestic front though, and this is where the other key recommendation lies. Although much of the marine environmental legislation does emanate from Europe, there is still some of considerable significance which does not, such as the Marine Bill for example. In addition of course there is still considerable work to be dome on the interpretation and detail of European legislation when this is transposed into national law. We have the Marine Environmental Legislation Expert Group set up now and working effectively to deal with these issues. The group perhaps needs to expand slightly to include a more broad industry representation, but other than that it is fairly well settled. It works with the devolved governments and thus is able to call itself a truly UK group. This aspect is becoming increasingly complex and time consuming as the devolved governments continue to diverge and issue separate consultations on most issues. This however is a problem of scale and resources not one of concept which needs to be overcome.

The real issue is that of other influences on the government. There are the statutory nature conservation agencies which are afforded considerable weight by the government. It is vitally important for industry bodies to engage in a positive manner with these conservation agencies to enable their proposals to government to be as informed and balanced as possible. It is clear that the nature conservation agencies are involved in the process of government well before any consultation process, indeed this follows simply from them being part of government. Thus having involvement with them throughout discussions will enable the industry to have a more prominent role in the process.

During their own processes they seek advice from various sources and it would seem important to become one of these sources and talk to the rest. This process would need to rely initially on networking and after a period of time a clearer strategy should emerge. It is an important area though to explore and one which exerts great influence on shaping legislation thus should not be ignored.

Conclusions

From the background and discussion above it is possible to reach some conclusions and suggest some actions which Seafish / industry should be taking in order to try to gain a strategic influence on what is happening in the marine environment both in the UK and at European level.

Seafish should;

- Gain a better understanding of the processes and drivers involved when new legislation is being contemplated in order to identify possible points and times of influence. Both at European and UK level. The most effective way to achieve this would be through developing relationships with the key points of contact.
- Identify and develop key points of contact. We are effective already here at UK level, but this needs to be achieved with the EC in both DG Mare and DG Environment. This will be difficult until Seafish operates on a more European level, and can be seen as representing more than one Member State.
- As discussed earlier it will probably only be possible to gain an effective influence at European level if we can be seen as representing more than one Member State. With the legislation expert groups we have an effective model which works well at UK level. We should investigate setting up a marine environmental legislation group on a European level, involving industry representation from other Member States.
- If the co-decision process proceeds as per the Lisbon Treaty, identify key MEP's who may be sympathetic to the industry's needs.
- Start an awareness of issues campaign generally with MEP's, as they will certainly be receiving input from NGO's.
- Be aware that the UK devolution process is already causing differences in legislation within the UK. It is increasingly necessary to deal with each administration separately as they issue separate consultations and legislation. It may become necessary in the future to form sub-groups of the marine environmental legislation expert group to deal with the differing issues.

Industry should;

- Recognise the potential significance of this field of legislation on business.

- Support Seafish in its efforts to influence the process by being seen to back the progress made.
- Be prepared to participate in the process when industry expertise is essential.

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