Marine Bill: Committee stage

Submission of evidence to the Environment Committee on behalf of the Green Party
Prepared by Steve Agnew MLA, Mark Simpson and Gareth Ross Brown
If further information is required, please contact steven.agnew@mla.niassembly.gov.uk

Introduction

The Green Party welcomes the introduction of a Marine Bill. The bill's major goals of joined-up management of the marine environment and of enhanced marine nature conservation are to be commended. However, there is considerable scope to improve the bill as introduced. The main focus of this submission will be on ways in which the bill might be amended to better achieve its goals.

We first highlight a number of issues not addressed by the bill, whose inclusion would result in a more comprehensive piece of legislation for the marine environment or assist with the achievement of the objectives of joined-up marine management. We then examine the clauses of the bill as tabled and suggest a number of amendments.

Omissions

General duties

The overriding goal of marine management in Northern Ireland should be the sustainable development of our seas. However, the reference to sustainable development in Part 2 of the bill appears almost as an afterthought in clause 5(3)(b). In contrast, the Marine (Scotland) Act states at its outset that public authorities have a duty to further the sustainable development of the marine environment and climate change mitigation and adaptation. Similarly, the Marine and Coastal Access Act requires the Marine Management Organisation to carry out its functions in such a way as to contribute to sustainable development. Duties in respect of both sustainable development and climate change should be included in the Northern Ireland legislation, the latter due to the fact that the effects of climate change are widely predicted to be first felt in the marine and coastal environment (Fletcher, 2008; MC3, 2011). The wording of the sustainable development duty to include the protection and enhancement of the health of the marine area would also help ensure Northern Ireland complies with the duty in Article 1 of the Marine Strategy Framework Directive, to achieve good environmental status of all marine waters by 2020.

The Green Party requests that the Committee consider the following amendments to the Marine Bill:

After clause 1, insert new Part 2:

> *Part 2 – general duties*
>
> *2. Sustainable development and protection and enhancement of the health of the Northern Ireland marine area. In exercising any function that affects the Northern Ireland marine area under this Act—*

(a) the Department, and

(b) public authorities

must act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, enhancement of the health of that area, so far as is consistent with the proper exercise of that function.

3. Mitigation of and adaptation to climate change. In exercising any function that affects the Northern Ireland marine area —

(a) the Department, and .

(b) public authorities, .

must act in the way best calculated to mitigate, and adapt to, climate change so far as is consistent with the purpose of the function concerned.

In Schedule 1 paragraph 9, insert new paragraphs:

(c) The duty imposed by section 2 to in the way best calculated to further the achievement of sustainable development of the marine plan area.

(d) The duty imposed by section 3 to act in the way best calculated to mitigate, and adapt to, climate change.

Marine management authority

A central goal of the Marine Bill must be to balance all the sometimes competing uses of Northern Ireland's marine waters to achieve the maximum social, economic and environmental benefits. This will be most easily achieved if management of the marine environment is vested in a single authority. The Green Party concurs with NIMTF (2008) that this should take the form of a non-departmental marine management organisation (MMO). Such an approach would be most likely to deliver an holistic, consistent approach, reduced bureaucracy and relative political independence, while retaining accountability to the Assembly. Similar proposals for England and Wales in the Marine and Coastal Access Bill were regarded as uncontroversial and "a familiar regulatory pattern" (Lowther and Payne, 2009), with Appleby (2009) greeting the new MMO as an organisation with potential to "refocus marine management away from the previous isolated sectoral management."

Many of the arguments in favour of a non-departmental public body for environmental protection by the Review of Environmental Governance (2007) may be equally applicable to an independent marine regulator. Retention of regulatory functions within DOE would lead to concerns that past failures on the part of the Department to fulfil its regulatory remit in respect of the terrestrial environment (see Turner, 2006; Macrory, 2004) would be repeated in the marine environment. An MMO could also fulfil the function of providing independent advice on the management of marine conservation zones, a role assigned to Scottish Natural Heritage for Scotland (Marine (Scotland) Act s80), Natural England for England and the Countryside Council for Wales (Marine and Coastal Access Act s127) but absent from the Northern Ireland bill.

If the Executive maintains its opposition to an independent MMO, the creation of a single management authority within government, similar to Marine Scotland (a directorate of the Scottish Government), would at least have the advantage of consolidating the broad range of functions relevant to the management of the marine environment in a single body, although lacking the independence of an NDPB. Although the creation of Marine Scotland was achieved in the absence of specific provision in the Marine (Scotland) Act, this may have been facilitated by the non-departmental structure of the Scottish Government. In Northern Ireland, where the authority would potentially take on functions currently held by various departments, it may be necessary to legislate.

The Green Party requests that the Committee advise the Department to consider drafting the necessary amendments to the Marine Bill to facilitate the creation of a unified marine management authority, including the functions to be transferred.

Fisheries management

Parts 6 and 7 of the Marine and Coastal Access Act and part 8 of the Marine (Scotland) Act concern management of fisheries; at present, the Marine Bill makes no such provision. Failure to bring management of coastal fisheries within the scope of the Marine Bill would mean legislation with the goal of establishing a system for joined-up management of the seas would omit a key use. The green paper on reform of the common fisheries policy calls for greater integration of fisheries policy and wider marine policy. The UK-MSP Working Group includes ecosystem-based management among the objectives of marine spatial planning in the UK (Tyldesley, 2004); ecosystem-based management also forms a central pillar of the EU's marine strategy (de Santo, 2011). CoastNet (Conference 2003, reported by Tyldesley, 2004) states that ecosystem-based management requires sustainable management of *all* activities within a defined area.

The Green Party requests that the Committee advise the Department to discuss with the Department of Agriculture and Rural Development the necessary amendments to the Marine Bill to facilitate the inclusion of fisheries management in the Northern Ireland coastal zone.

Commentary on bill as tabled

Part 1

The Green Party has no objection to Part 1 as tabled.

Part 2

Clause 2(1) and (2) state that the department "may" prepare a marine plan for the Northern Ireland inshore region or any part thereof and "must seek to ensure" that any area covered by a marine policy statement is also covered by a marine plan. At the Environment Committee meeting of 19 April 2012, a departmental official stated that the bill would compel the Department to create a marine plan for the whole of the area covered by a Marine Policy Statement, ie the whole of the Northern Ireland inshore region. However, the wording at present does not represent an absolute compulsion. If it is the intention that the bill should require the creation of a marine plan for the whole of the area covered by the MPS, which the Green Party argues should be the case, the wording should be amended so as to remove any ambiguity.

Clause 2(5) states that the marine plan must be in conformity with the MPS "unless relevant considerations indicate otherwise." However, there is no indication of what a relevant consideration might be. So as to limit the frequency and duration of future litigation, guidance on what constitutes a "relevant consideration" should be provided in the bill or in explanatory materials issued by the Department.

Clause 5: The relatively low priority afforded to sustainable development in the matters to be kept under review is discussed above and would be addressed by the inclusion of a new Part 2 as suggested.

Clause 6(2) states that a public authority that takes an enforcement or authorisation decision other than in accordance with the marine plan need only state its reasons for doing so. This is rather weak – the Green Party argues that the authority or the person being authorised to carry out (or avoiding enforcement action in respect of) an action not in conformity with the marine plan should be required to put in place measures to mitigate or compensate for any negative impact on another user group or the marine environment resulting from the action.

Clause 6(3) makes no requirement of a public authority that takes a decision other than an enforcement or authorisation decision that is not in conformity of the marine plan. At the very least, an explanation should be required.

Clause 7: The Green Party welcomes the requirement to report regularly on matters kept under review and on future plans in relation to marine planning, but questions why the requirement in clause 7(6) should cease to apply in 2030.

Clause 8(4) states that *locus standi* for judicial review of a marine plan or amendment thereof extends to "person[s] aggrieved" by the document. At the Environment Committee meeting of 19 April 2012, a departmental official stated that "only somebody who has been substantially prejudiced can take an action on procedural grounds," but that "anybody" can challenge the plan in terms of its *vires*. The wording of the clause makes no such distinction. Even if the Department's interpretation is accepted, this subsection would constitute a breach of the Aarhus Convention, Article 9(2) of which requires that environmental NGOs are allowed standing "to challenge the substantive and procedural legality of any decision, act or omission" in respect of the environment. The subsection should be amended accordingly.

Clause 8(4) further limits the grounds for judicial review of a marine plan to *ultra vires* or failure to comply with a procedural requirement. In the public law of the United Kingdom, there are four grounds for judicial review:

- illegality (usually because the authority acted *ultra vires*)
- impropriety (usually failure to comply with a procedural requirement)
- irrationality / *Wednesbury* unreasonableness (the decision was so unreasonable that it could have been reached by no reasonable decision maker in the circumstances)
- incompatibility with the European Convention on Human Rights

Clause 8(5) stipulates that leave for judicial review of a marine plan must be sought within six weeks of the publication of the document. This is less than half the normal period allowed at common law, which is three months.

Article 9(5) of the Aarhus Convention requires parties to "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice" in environmental matters. In their current form, clause 8(4) and (5) erect additional barriers to access to justice and are therefore in manifest breach of the UK's Aarhus Convention commitments.

The Green Party requests that the Committee consider the following amendments to the Marine Bill:

In clause 2(2), after "*the Department must*," delete the words "*seek to.*" (This may also require amendment of clause 4 to require that, in the event of the withdrawal of a marine plan, a new plan is brought forward within a specified period of time).

Amend clause 6(2) to require mitigating or compensatory measures in respect of any damage caused to another user group or the marine environment as a result of authorisation of or lack of enforcement in respect of an action contrary to the marine plan.

After clause 6(3), insert:

> *(4) If a public authority takes a decision other than an authorisation or enforcement decision otherwise than in accordance with any appropriate marine plan, the authority must state its reasons.*

Delete clause 7(8)

Amend clause 8(4) as follows:

> *(4) A person aggrieved by a relevant document may make an application to the High Court on any of the following grounds—*
>
> *(a) that the document is not within the appropriate powers;*
>
> *(b) that a procedural requirement has not been complied with;*
>
> *(c) that the document, or part of the document, is irrational*
>
> *(d) that the document, or part of the document, is incompatible with a Convention righ.t*

After clause 8(4), insert:

> *(5) The reference in subsection (4) to a person aggrieved by a relevant document includes –*
>
> *(a) natural or legal persons affected or likely to be affected by, or having an interest in, the relevant document;*
>
> *(b) non-governmental organisations promoting environmental protection.*

Amend clause 8(5) as follows:

(5) Any such application must be made not later than 3 months after the publication of the relevant document.

Schedule 1

The Green Party broadly welcomes the provisions in Schedule 1, particularly those relating to public participation and the requirement in paragraph 10 for a sustainability appraisal. The only proposed amendment is that to paragraph 9 indicated above.

Part 3

Clause 12(1) lists reasons for designation of Marine Conservation Zones. The grounds for designation are more limited to those for Marine Protected Areas under the Marine (Scotland) Act. There may be a case for considering whether it should be possible to designate an MCZ on the basis of its historic or research interest, although it may not be necessary to specify distinct types of MCZ to do so. Appleby (2009) compares the Scottish provisions favourably to those for England and Wales in the Marine and Coastal Access Act, which the Northern Ireland bill more closely mirrors.

Clause 12(7) requires the Department to consider the economic and social consequences of designation of an MCZ when taking a decision on whether to do so. A decision to designate should be based solely on ecological criteria (or, if the proposed amendment to clause 12 (1) is accepted, historic, archaeological, cultural or scientific interest). This would not lead to environmental considerations being privileged above social and economic considerations as clauses 20 and 21 allow account to be taken of social and economic factors when a decision is taken on whether to carry out or authorise an action damaging to the protected features of the MCZ. Such an approach would be in keeping with that to the management of special areas of conservation designated under the habitats directive. The removal of subsection (7) would necessitate the removal of subsection (8), but this would be compensated for by the adoption of the suggested amendment to subsection (1)

The Green Party is content with the proposed designation procedure in clauses 14 to 17.

Clause 18: While it is desirable that a UK-wide network of protected sites should be created, there is a risk that the current wording of subsection (3) may lead to certain features not being protected in Northern Ireland waters because they are present elsewhere in the UK. The clause should ideally be amended to prevent this.

Clauses 20 and 21 repeatedly refer to “hindering the achievement of the conservation objectives stated for the MCZ.” While in line with the language in the Marine and Coastal Access Act and the Marine (Scotland) Act, this is relatively new legal language that will have to be clarified by the courts. The Department should provide strong guidance on its interpretation of the phrase so as to limit the extent of litigation as far as possible. Guidance should also make clear that an action capable of significantly hindering the achievement of the conservation objectives of an MCZ need not take place in or immediately adjacent to the MCZ, but that the clauses refer to actions anywhere in the marine or terrestrial environment as long as it is reasonably foreseeable that they could hinder the achievement of the conservation objectives.

Clause 20 places a less stringent burden upon a public authority whose actions significantly hinder the conservation objectives of an MCZ than does clause 21 upon a private individual. It would appear to be more equitable as well as providing stronger protection to the MCZ if similar criteria to

those listed in clause 21 (5), (6) and (7) were also applied to public authorities acting under clause 20. Although this would increase the cost to the public purse of carrying out such operations, the alternative – being allowed to carry out actions damaging to the MCZ without mitigating or compensatory measures – might be more costly if it resulted in failure to meet the duty in Article 1 of the Marine Strategy Framework Directive, namely that member states' seas should be of good environmental status by 2020. If this amendment is accepted, it is suggested that clause 23 should also be mended to make provision for retrospective mitigating or compensatory measures.

The Green Party welcomes the provisions for the making of byelaws in clauses 24 to 29, in particular those concerning the making of emergency and interim byelaws, and the level of maximum fine for the breach of byelaws in clause 30.

Clause 31: The Green Party welcomes the offences set out and the level of fines available, in particular the provision in subsection (5) requiring the court to have regard to any financial benefit resulting from the offence. In addition to any criminal penalty imposed, it is suggested that civil measures should be employed to ensure that any environmental damage is remedied to the maximum extent possible (enforceable undertakings) and that no financial gain results (variable monetary administrative penalty) (see Macrory, 2006). It may be the case that no amendment to the bill is necessary to achieve this, as Part 4 of the Proceeds of Crime Act and Part 3 of the Environmental Liability Regulations may already provide the necessary powers. However, the Department should ensure it is satisfied that this is the case – in particular, "surface water" for the purposes of the Environmental Liability Regulations is defined by reference to Annex 2 of the Water Framework Directive and it is by no means clear that this covers all marine waters.

Clause 32(4) provides a near-blanket defence against prosecution for Article 31 offences if damage to the MCZ was caused by sea fishing. There appears to be no objective reason to afford one user group a higher level of protection from prosecution than any other. It is arguably in the interests of the fishing community for MCZs to benefit from the intended level of protection, as this may provide opportunities for the improvement of scientific knowledge of fish populations and contribute to the recovery of depleted stocks in the area around the MCZ (see Bradshaw et al, 2001). If DARD (or a future marine authority with responsibility for fisheries management) considered that the benefit to the public of fishing in a manner likely to hinder the achievement of the conservation objectives of an MCZ would outweigh the harm likely to be caused, it could issue permits for such fishing in accordance with clause 21. Appleby (2009) sees "no accountable reason" for the equivalent defence in the Marine and Coastal Access Act.

The Green Party welcomes the assignment of enforcement powers to the Department by clause 36 and calls for the provision of sufficient resources for this purpose to the Environmental Crime Unit.

The Green Party is content with the repeals contained in clause 38.

The Green Party requests that the Committee consider the following amendments to the Marine Bill:

After clause 12(1)(c) insert:

(d) features of historic or archaeological interest

(e) features of regional or national cultural significance

(f) features of special scientific interest

After clause 18(3)(b) insert:

(c) that the features which are protected by the sites in the Northern Ireland inshore region represent the range of features present in that region

After clause 20(8) insert:

(9) Where the authority has given notice under subsection (5), it should only proceed with the act if it is satisfied that –

(a) there is no other means of proceeding with the act which would create a substantially lower risk of hindering the achievement of conservation objectives stated for the MCZ,

(b) the benefit to the public of proceeding with the act clearly outweighs the risk of damage to the environment that will be created by proceeding with it, and

(c) where possible, the authority will undertake, or make arrangements for the undertaking of, measures of equivalent environmental benefit to the damage which the act will or is likely to have in or on the MCZ.

(10) The reference in subsection (9)(a) to other means of proceeding with an act includes a reference to proceeding with it–

(a) in another manner, or

(b) at another location.

After clause 23(2) insert:

(3) Where this section applies –

(a) the Department may recommend of equivalent environmental benefit to the damage which the act will or is likely to have in or on the MCZ, and

(b) the authority must provide an explanation in writing if it does not undertake, or make arrangements for the undertaking of, such measures.

Delete clause 32(4) and (5)

Part 4

The Green Party is content with clause 40.

Part 5

Clause 47(1) stipulates that Part 3 of the bill shall take effect on a date appointed by order. It would be desirable to enact this part of the bill at royal assent or as soon as possible afterwards. Any marine plan made in advance of the designation of MCZs may have to be revised once MCZs have been designated – it therefore makes practical sense to start this process as soon as possible. At the

latest, Part 3 should be enacted by the end of 2015, due to the MCZs' potential contribution to the achievement of good environmental status for marine waters and the requirement in Article 5 of the Marine Strategy Framework Directive that a programme of measures for doing so should be in place by the end of that year and operational by the end of 2016.

The Green Party requests that the Committee consider the following amendment to the Marine Bill:

Amend clause 47(1) as follows:

> *(1) Part 3 comes into operation on such day or days as the Department may by order appoint, being no later than 31 December 2015.*

Concluding remarks

The Green Party thanks the Committee for its consideration of this submission. The overall objective of the Marine Bill is to be welcomed, as are many of its provisions. We believe that adoption of the amendments proposed will result in a better piece of legislation that will ensure Northern Ireland's seas continue to provide economic, environmental and social goods for generations to come.

If clarification is sought on any point, please do not hesitate to contact steven.agnew@mla.niassembly.gov.uk.

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