

## **QUESTIONS & ISSUES RAISED BY MEMBERS AT SECOND STAGE DEBATE MARINE BILL – 5 MARCH 2012**

\* Raised by non-Committee Member – Mr Agnew

\*\* Raised by non-Committee Member – Mr Allister

\*\*\* Raised by non-Committee Member – Mr McMullan

### **1. Cost & Resources required for full implementation of the Marine Bill**

There are no additional costs associated with the Bill's introduction *per se*, as the Department has found the resources necessary from within its existing allocations to take forward the legislative process.

There are, of course, indicative costs associated with the Bill's implementation, which are identified in the Regulatory Impact Assessment that accompanies the Bill. These relate largely to the Northern Ireland Marine Plan (NIMP) and proposed marine conservation zones (MCZs); and there are also indicative, but less significant, costs associated with the reformed marine licensing regime as provided for by the Bill.

#### **Northern Ireland Marine Plan (NIMP)**

It is estimated that the preparation, adoption and publication of the NIMP could cost approximately **£1.87 million** (see table 1) spread over three to four years.

This indicative cost includes the staff required to prepare the plan, initial data collection and management, stakeholder engagement, public consultation, impact appraisals, and the "buy in" of other specialist services such as legal, economics and science on a needs basis. It also includes provision for independent investigation of the plan, should this be necessary.

**Table 1**

<b>Cost Category</b>	<b>Indicative Cost of NIMP*</b> <b>(£m)</b>
Plan preparation	1.42
Independent investigation of plan (examination in public)	0.25
Impact appraisals (eg Strategic Environmental Assessment, Regulatory Impact Assessment)	0.2
<b>Total indicative cost</b>	<b>1.87</b>

\*Figures estimated based on terrestrial planning experience.

## **Marine Nature Conservation**

It is estimated that the implementation and management of a network of MCZs could cost approximately **£195k - £221k** per site in initial, one-off costs; and approximately **£163k** per site in annual costs, starting in 2013/14, and possibly taking upwards of 5 years in which to complete the designation process (see table 2).

However, it is important to exercise a high degree of caution with these indicative costs as the number, size and complexity of the network will only become clear once the public consultation process has been completed. In addition, many of the costs will be site specific.

The initial, one-off costs include the identification, selection and designation of sites, establishment of the enforcement regime and the introduction of byelaws; and the annual, ongoing costs include site management and reviews of the protection measures to ensure that the conservation objectives are being met.

**Table 2**

<b>Activities</b>	<b>Cost per Site*</b>
Survey costs	£100k - £120k
Site selection	£20k - £25k
Consultation	£50k
Management Schemes	£23k
Designation orders	£2k - £3k
<b>Total one-off costs</b>	<b>£195k - £221k</b>
Implementation – review of consents	£1k
Monitoring of conservation status	£150k
Enforcement	£12k
<b>Total annual costs</b>	<b>£163k</b>

\*Figures estimated using information in ABPmer study 2007, commissioned by the Scottish Government.

## **Marine Licensing**

The majority of costs associated with the reform of the marine licensing regime relate to the Marine and Coastal Access Act 2009. Accordingly, the additional

costs associated with the licensing provisions in the Bill are not expected to be significant. These will relate to the publication of procedural guidance for regulators and applicants for licences, estimated at approximately £1.5k - £4k.

## **2. Timeline for full implementation of the Marine Bill**

The growing scientific knowledge of the seabed through ongoing research work for marine European designations will help to identify potential national sites for designation when the Marine Bill comes into operation.

Strangford Lough, Northern Ireland's only Marine Nature Reserve (MNR), designated under the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985, will become the first MCZ. It is envisaged that Strangford Lough will be fully designated within 12 months of the Marine Bill coming into operation.

Consideration will also be given to using the flexibility of the MCZ mechanisms, contained in the Marine Bill, to protect habitats and species which occur in existing marine Natura 2000 sites. These designations, including any new MCZ sites identified, will play an important role in achieving Good Environmental Status (GES) in the marine environment by 2020.

The Department, as Marine Plan Authority, is already taking forward certain preparatory work in advance of the Marine Bill being enacted, including work on a Statement of Public Participation. This Statement, work on which is well advanced, will include a timeline setting out the key steps in the marine plan-making process from initiation and early stakeholder engagement to publication of draft plan and adoption.

## **3. How integration will be achieved/how conflict will be resolved**

It is worth emphasising that the Executive has already signed up to the introduction of the Marine Bill itself, and to the Marine Policy Statement which was adopted in March 2011. This is a key document in the marine planning process, as it sets out a framework of high-level objectives for the marine environment and how it should be sustainably managed. It brings together, in one document, departments' existing marine policies and articulates how they relate to each other.

In turn, the importance of this document is reflected in the Bill, which requires that the marine plan must be in conformity with the Marine Policy Statement, unless relevant considerations indicate otherwise.

Furthermore, the Bill provides for extensive consultation arrangements between the Department, as the Marine Plan Authority, and those other departments that have marine responsibilities. This requires consultation to take place during preparation of the consultation draft of the marine plan and during the settling of its text for adoption and publication.

In effect, the marine planning process will progressively bind departments, so that agreement is reached. This “binding” will also extend into the decision-making process, whereby “public authorities”, which includes Ministers and departments, will have a duty placed on each to take any authorisation or enforcement decision in accordance with the marine plan, unless relevant considerations indicate otherwise.

The Bill further places a duty on a “public authority”, which includes a department, to state its reasons for not taking an authorisation or enforcement decision in accordance with the (appropriate) marine plan.

Finally, and insofar as MCZs are concerned, the Bill will place a duty on the Department to consult with “interested persons” before making a designation order – this will, of course, include other departments.

#### **4. Consultation/participation – need to include all those impacted, and for it to be meaningful**

An important element of MCZ designation will be stakeholder involvement. In contrast to the designation process for the European marine sites, the MCZ process will take account of socio-economic impacts. It is intended that the creation of an ecologically coherent network can be achieved whilst minimising the economic and social impacts, thereby maximising the wider benefits to society.

The development of MCZs will be undertaken in collaboration with marine stakeholders. As well as marine interests and organisations, stakeholders will include local authorities, communities nearby to proposed sites and users from a wider geographic area, such as recreational interests.

Engagement will be undertaken throughout the process, from discussions on boundaries, setting conservation objectives (which will determine the level of protection) to management measures. However, the nature, timing and those involved may vary as the process progresses. In the early stages, work will focus on data collection, and identification of conservation features and locations. This will be achieved mainly through discussions with representatives of organisations which may hold relevant data. As the process continues, engagement will increasingly involve stakeholders at a local level.

Awareness raising and provision of updates will be important throughout the process. Existing forums, sectoral meetings and various media, for example newspapers, Afbi and DARD communications with stakeholders, will be used to reach a wide range of organisations and people and to encourage feedback. All proposed MCZs will be subject to a 12-week public consultation.

Consultation and participation is an integral component of the Marine Plan process. It is strengthened in the Bill by the provision for consultation with other Government departments with marine responsibilities. Also included is the production of a Statement of Public Participation, which will set out arrangements for engaging effectively with as wide a range of interests as possible. Work on

this Statement is well advanced. Initial views on the Statement are currently being sought, and it was discussed at an event for sectoral stakeholders held on 16 March.

## **5. Marine governance structure/arrangements**

The foundations for the marine governance arrangements are to be found both in the Marine and Coastal Access Act 2009, which makes the Department the policy authority for the purpose of the Marine Policy Statement and the marine plan authority for the Northern Ireland offshore region; and the Marine Bill, as introduced to the Assembly, which similarly makes the Department the marine plan authority for the Northern Ireland inshore region.

As the marine environment is very much a cross-cutting issue, the Department will consult with all other departments that have marine functions during preparation of a consultation draft of Northern Ireland's marine plan; and during the settling of its text for adoption and publication.

Likewise, the Department will be the appropriate authority for the purpose of designating MCZs, and, again, will consult with departments that have marine functions before it makes a designation.

Members will, of course, be aware that the Minister's preferred structure of marine governance involves the establishment of a marine management organisation; and he is convinced that this remains the best vehicle by which to manage and reconcile the many interests and needs of marine management.

This requires the Executive's agreement, which has, thus far, noted the intention to explore options for the achievement of improved co-ordination of marine management and to bring recommendations to it in due course. The Minister intends to continue his conversations with the Executive on this matter.

## **6. Data collection and information sharing**

The Department has been engaged in systematic surveys of many parts of the Northern Ireland inshore region since 2006 for the identification and assessment of European designated sites, and in order to monitor marine priority species.

There is a wealth of information available in Northern Ireland's recently published 'State of the Seas' report. Furthermore, Northern Ireland is part of the UK Marine Science Strategy, which will ensure that an integrated approach is sustained.

The Department will continue to follow developments on the regional MCZ pilot projects being undertaken across the UK, including the Irish Sea Conservation Zones project.

The assessment of results and analysis of data collected through these various sources will be key to informing our marine nature conservation process.

The Department is considering how best to gather and analyse its own data and then extend this collection to other departments before exploring other external sources. Quality assuring the data will be a challenge for the Department, however the Marine Plan team will not be limited to Government sources as communities, groups and industry have good local knowledge which will be an important element of the marine plan process. The issue of data collection and information sharing was discussed at the Department's sectoral stakeholder event held on 16 March.

## **7. Independent Advisory Body – to provide expert advice to DOE**

It has been suggested that an independent advisory committee might be established. It is worth noting that the Bill (at Schedule 1, paragraph 8) already provides for the Department, in connection with the preparation of a marine plan, or of any proposals for a marine plan, to “seek (the) advice or assistance from any body or person in relation to any matter in which that body or person has particular expertise.”

Creating an independent advisory committee is not as straightforward a proposal as it might first appear – for instance, it is clear that any such committee would need to perform a role that was sufficiently distinct from that of existing advisory committees. It is a matter to which some further thought will be given, as part of the exploration of options for improved co-ordination of marine management.

## **8. Supremacy of Bill in relation to rights and powers under other legislation – salmon net licences\*\***

A question was asked about the supremacy of the Bill in relation to the exercise of existing rights and powers, and the application of the term ‘relevant considerations’ in clauses 2 and 6 in respect of the duties imposed on ‘public authorities’ by the Bill.

All ‘public authorities’, which includes Ministers, departments and their agencies (including the Loughs Agency), will have a duty placed on each to take any authorisation or enforcement decision in accordance with the marine plan, unless relevant considerations indicate otherwise. This duty is already in place in relation to compliance with the Marine Policy Statement under the terms of the Marine and Coastal Access Act 2009.

This duty includes decisions relating to authorisation or enforcement decisions in respect of salmon netting.

Although both the Marine and Coastal Access Act 2009 and the Bill will enable decision-makers to depart from the policies set out in the MPS (or plan), the intention is that this flexibility should not be used as a matter of course, and that the ‘relevant considerations’ should be fully justifiable.

In fact, needing to depart from the MPS or plan could indicate that they are not working effectively, and should be amended. Alternatively, needing to depart

from the MPS or plan could indicate that other legislation may need to be updated to reflect current obligations.

## **9. Boundaries & Extent of Marine Bill – inclusion of Lough Foyle and Carlingford Lough and Loughs Agency (clauses 1, 46 and 11(4) 13(3)&(4))\***

A number of questions were raised regarding the extent of the Marine Bill and the boundaries of the area covered.

The Marine Bill applies to the '**Northern Ireland inshore region**'. This area is defined in clause 1 of the Bill. The inshore region comprises all our marine waters, including tidal rivers and all our sea loughs (including Lough Foyle and Carlingford Lough), out to the 12 nautical mile limit. Rathlin Island is within this area.

The Marine Bill applies to both Carlingford Lough and Lough Foyle, and existing arrangements put in place under the Belfast Agreement for joint management of the two cross-border loughs, Carlingford Lough and Lough Foyle (the Foyle, Carlingford and Irish Lights Commission's Loughs Agency) will be employed to assist with the implementation of the Bill in these areas.

## **Marine Conservation Zones**

### **10. Size and nature of restrictions for MCZ – impact on other users**

MCZs will be designed to safeguard vulnerable or unique species and habitats of national importance in the Northern Ireland inshore region. They will have flexible boundaries, with the level of protection being dependent on the feature to be protected and the activities deemed to be detrimental to it. MCZs will be agreed on a site-by-site basis.

The development of new MCZs will be carried out in collaboration with key stakeholders, and potential MCZs will be subject to full consultation.

Fishing and other organisations' responsibilities will be taken into account in the process of identifying and designating MCZs. Equally as important, they will take account of socio-economic interests.

The Bill provides for a designation regime which is flexible depending on the particular habitat or species requiring protection. The level of protection will be determined on a site-by-site basis, and could range from very minimal, right through to a high level of protection.

### **11. Evidence base for MCZ designation**

The Department's approach to identifying new MCZs in the Northern Ireland inshore region will be based upon the use of best available science.

While some existing data, for example, the Northern Ireland Sublittoral Survey and the Northern Ireland Littoral Survey can be used to identify where potential MCZs may be, new surveys will be required to fill in the gaps, in order to provide a full picture of the number, size or complexity of possible MCZs in our waters.

## **12. Relationship between the Bill and EU Directives – for eg, MSFD and WBD**

It is a requirement under the Wild Birds Directive to classify Special Protection Areas (SPAs) for birds, listed in Annex 1 of the Directive, that occur in the marine area. Northern Ireland has fulfilled this obligation through the creation of 9 SPAs with a marine component for such species of birds.

It is, however, a further requirement of the Directive to create protected areas for other species of birds occurring in the marine area that are not listed in Annex 1. The ability to create MCZs will allow Northern Ireland to meet this obligation.

It is also a requirement to maintain and manage habitats inside and outside of protected areas, to re-establish destroyed habitats and to create habitat. The power to establish MCZs is the structural mechanism by which Northern Ireland can meet these obligations.

The Marine Strategy Framework Directive, which has been transposed into national legislation, establishes a framework within which Member States are required to take measures to achieve or maintain ‘Good Environmental Status’ in the marine environment by 2020. The designation of MCZs as part of an ecologically coherent and well-managed network of marine protected areas (MPAs) will play an important role in helping to meet the obligations under this Directive.

## **13. Balance of interests – if no agreement will matter be referred to Executive (clause 12)**

Clause 12 sets out the circumstances in which the Department may designate an MCZ. Before designating a site the Department will take account of any economic or social consequences of designation and the views of all key stakeholders. The Department is required through clause 14 to consult widely with stakeholders. MCZs will be designated by the Department with the agreement of the Secretary of State.

It is not envisaged that each MCZ will be subject to Executive approval. However, in specific cases where issues, for example, cut across the responsibilities of two or more Ministers, then the Minister would bring it to the attention of the Executive Committee as outlined in the Ministerial Code before the designation order is made.

## **14. Delineation and policing of MCZs (clause 13)**

The approach to setting boundaries for MCZs will broadly follow the approach which has developed through the experience of setting boundaries for European marine sites. Management of activities within an MCZ will only be effective if the boundary is accurately drawn and represented on a map - for example, by a series of co-ordinates (degrees of longitude/latitude). Copies of these maps will be available on the NIEA website. The boundary of a new MCZ should reflect current knowledge on the distribution of a feature so that it is relevant to planning, management and use of a specific area. Boundaries should be as simple as possible to ease compliance and to facilitate the enforcement of management measures.

The use of best available scientific knowledge and information should be used to delineate boundaries. In addition, boundaries may need to be revised in future years should features move beyond existing boundaries.

It is proposed that NIEA will be the primary enforcement body in relation to marine nature conservation in the inshore region.

## **15. Timescales for designation of MCZs – does process start again if order not made (clause 14)**

The provisions in clause 14 include a time limit for designating individual MCZs. This provision ensures that the Department must make a MCZ designation order within 12 months of publishing notice of the proposal under clause 11(1).

These provisions will ensure that all interested parties have a clear understanding of the timescale involved in the MCZ designation process and provide more certainty for developers and sea users. Designating authorities will be aware of the importance of keeping the momentum up in the designation process. Imposing a timetable for individual MCZs will help to speed up the creation of an ecologically coherent network of sites in the medium to long term.

If the Department fails to designate a site within 12 months of publishing notice of the proposal then the process will need to begin again before an area can be designated as an MCZ. However, a new notice could be issued and be identical in terms of the original notice.

## **16. ‘Least hinder conservation objectives’ – what does this mean (clause 20)**

Clause 20 places a general duty on public authorities to inform the Department when they think that the exercise of their functions might significantly hinder the achievement of conservation objectives for an MCZ. There may be situations when a public authority needs to grant a licence for an activity to be carried out despite knowing that the activity could have a detrimental impact on the site. In these circumstances, it is right that a public authority should assess the likely impact of its functions on MCZs. Therefore, they must be aware of the designated site and minimise any potential damage, as furthering the conservation objectives of the MCZ should be their goal.

**17. Fines – concern about the levels and also amounts being included in the Bill, clarification of how case might be prosecuted in order to secure higher penalty\***

Clause 30 provides that anyone who contravenes a byelaw would be committing an offence and if convicted, fines of up to £5,000 may be imposed. This is based on the current amount of a Level 5 fine and is the same as the UK provisions.

Clause 31 provides a general offence for acts of deliberate or reckless damage to protected features of an MCZ. Intentional or reckless acts of damage are likely to have longer term and more permanent effects.

Clause 31(4) details the related fines. Anyone found guilty of committing the general offence could be fined up to £50,000 on summary conviction or an unlimited amount on indictment. There are provisions in this clause for a court determining the level of the fine to have regard to any financial benefit the person obtained by committing the offence: the greater the gain, the higher the penalty is likely to be. In addition, it is worth noting that £50,000 is consistent with section 140(4) of the Marine and Coastal Access Act 2009 and section 95(4) of the Marine (Scotland) Act 2010.

If the damage to the feature of the MCZ occurred in the course of a licensable activity, then enforcement, including the use of civil sanctions and prosecution, would be undertaken in line with the procedures for the appropriate licensing/authorisation regime.

**18. Fixed monetary penalties – ‘substantially change’ what does this mean schedule 2, paragraph 4(2)**

Fixed monetary penalties are fines for relatively low fixed amounts that are intended to be used in respect of minor instances of regulatory non-compliance.

The procedure for fixed monetary penalties is provided for on the face of the Bill and requires the Department to consult (schedule 2, paragraph 4(2)) relevant organisations when it proposes to make an order allowing the use of fixed monetary penalties.

Following consultation, if it appears necessary to substantially change the proposals for the order, the Department will be required to undertake further consultation as it considers appropriate in regard to the changes. A substantial change could be, for example, doubling the amount of the fixed monetary penalty.

**19. Potential for conflict because of different approach to MCZs in inshore and offshore regions\*\***

The procedures for the designation and enforcement of MCZs in the inshore region are provided for in the Bill.

MCZs will be identified using best available science. Potential sites for MCZs will be selected for formal designation following discussions and consultations with stakeholders. All MCZ designations will be subject to public consultation. MCZs will be designated by the Department, by Order, with the agreement of the Secretary of State. These procedures mirror those which apply in the offshore region.

MCZs in the offshore region will be designated by the procedures contained in Part 5 of the Marine & Coastal Access Act 2009. The UK Government asked Natural England and Joint Nature Conservation Committee (JNCC) to work in partnership with stakeholders to identify and recommend potential MCZs through four regional projects. Defra has recently commissioned significant additional work to improve the evidence base underpinning the designation of MCZs. Following recommendations from Defra, the Secretary of State will designate MCZs by Order.

Enforcement officers in the inshore region, who will be appointed by the Department, have access to the same suite of enforcement powers as officers for the offshore region, who will be appointed by the MMO. Therefore, the Department does not envisage any potential for conflict between the inshore and offshore regions.

**20. Burden of proof for offences – apparent differences in standard to be applied (clauses 31 and 32)\*\***

Clause 31 makes it an offence for any person to intentionally or recklessly damage the protected features of an MCZ in such a way that the conservation objectives have, or may have, been significantly hindered. There are provisions in this clause for a court determining the fine to have regard to any financial benefit the person obtained by committing the offence: the greater the gain, the higher the penalty is likely to be. Enforcement will be proportionate and in line with the nature of the offence.

Clause 32 contains details of activities which are exempt from the general offence, which includes acts in the interest of national security or for the prevention or detection of a crime. The Department considers that there is no reason to depart from the general position regarding the onus and standard of proof as reflected in clause 32(4).

In addition, a defence is provided for actions undertaken in pursuit of sea fishing where the accused person can prove that the damage could not reasonably have been avoided.

In regard to establishing the defence in relation to offences in Part 3 of the Bill, the Department is content that clauses 31 and 32 do not depart from the general position that the standard of proof is on the balance of probabilities.

As a regulator, it is the responsibility of the Department to investigate breaches of the legislation for which it is responsible by gathering evidence and presenting this to the prosecutor. The decision to prosecute and to conduct the case on

behalf of the Department is ultimately made by the Public Prosecution Service for Northern Ireland, (PPS). The PPS is wholly independent from both the investigating agency and government. Its decisions will be based on impartial and professional assessment of the available evidence and the public interest.

**21. Sea fishing defence – concern about standard of proof to be applied and ability to amend this exception (clause 32(4) & (5))\*\***

The Bill includes provisions for a ‘general defence’ of damaging the protected features of an MCZ.

There is a statutory defence at clause 32 (4) which specifies that a person cannot be guilty of the general offence if the act involved was done whilst sea fishing and the effect of that act on the protected feature could not necessarily be avoided.

We cannot at present remove the sea fishing defence because to do so would leave us in breach of our European obligations under the common fisheries policy.

This clause mirrors section 141 of the Marine and Coastal Access Act 2009 which was included as an amendment to ensure that the rules apply equally to fishermen from the UK and from elsewhere. It needs to be considered in the context of the CFP reform.

Clause 32(5) ensures that the defence only applies where it is relevant. It provides the necessary flexibility to deal with potential changes to the CFP. This clause enables the Department to restrict or remove the sea fishing defence as necessary following the reform of CFP.

As any order to be made under clause 32(5) must be laid in draft and approved by the Assembly before making, the Assembly shall have an opportunity to scrutinise the draft order.

**Marine Plan**

**22. Reporting system – operation of 3 & 6 year reporting system**

The reporting mechanism provided for in the Bill directs the Department to keep under review certain matters and prepare reports every 3 years on the effectiveness of an adopted Marine Plan. A report is also required 6 years from the enactment of the MCA Act identifying any marine plans, the intention to amend any marine plan and the intention to prepare and adopt any further marine plans. These reports will be laid before the Assembly.

**23. Challenge to validity of documents – no closing timescale (clause 8)**

Clause 8 of the Bill allows a person to apply to the High Court should he/she feel aggrieved, on specified grounds, about the validity of a marine plan or any

amendment of a marine plan, within 6 six weeks of the plan's publication. It has been pointed out that the Bill does not specify an "end date" for proceedings, should such a challenge be made.

Should a person make an application challenging the validity of a marine plan, it would be for the High Court, in accordance with clause 9, to further proceedings until they are finally determined.

#### **24. Validity of documents – concern regarding grounds for challenge in respect of HR (clauses 8 &9)\*\***

Clauses 8 and 9 of the Bill provide for a form of statutory judicial review of the marine plan. The specific ground for the review of administrative acts (as developed by the common law) are reflected in clauses 8 and 9.

The Department has taken legal advice on this matter and is content that a marine plan is not determinative of any civil rights or obligations. Hence Article 6 of the European Convention on Human Rights is not engaged.

### **Marine Licensing**

#### **25. Licensing – clarification of 'parallel' applications**

Concern was raised about the provision allowing for applications for electricity generating stations to be considered in parallel and consequently the possibility of one developer 'blocking' an application by another developer.

Clause 40 applies to the situation where a single operator requires both a marine licence from DOE, under Part 4 of the Marine and Coastal Access Act 2009, and also a generating station consent from DETI, under Article 39 of the Electricity (Northern Ireland) Order, for the construction and operation of a renewable energy installation. It is these two applications for the same project which would be considered in parallel.

This process is separate to the Crown Estate Leasing Round during which it is possible that two potential operators may apply for a lease for the same site. Crown Estate provides exclusivity agreements for sites with developers, however, these lease agreements are issued subject to the securing of statutory consents from the Northern Ireland departments with marine functions – primarily DOE, DETI and DARD.