

Advice on the impacts of MCZs on information provision and decisions in relation to marine licensing proposals

Advice from Natural England and the Joint Nature Conservation Committee to the Regional MCZ Projects

In fulfilling our obligations under the Marine and Coastal Access Act 2009 to support the Regional Marine Conservation Zone Projects, Natural England and the Joint Nature Conservation Committee have produced this advice to inform the development of the IA for proposed Marine Conservation Zones (MCZs).

The advice sets out the process for the environmental assessment of licensing proposals and details potential differences in the information provision for licensing proposals, the advice that may be offered by the Statutory Nature Conservation Bodies and the outcome of licensing decisions were an MCZ in place compared with no designated site for similar features.

Whilst we have endeavoured to make this advice as fit for purpose as possible, including seeking external input, it should be recognised that licensing proposals differ and therefore the advice of the Statutory Nature Conservation Bodies (SNCBs) and the outcomes of a specific licensing application will vary on a case by case basis. For individual MCZs the advice should be used alongside site specific information, local knowledge and with the support of the relevant regulator and statutory conservation adviser. This advice does not pre-judge decisions of, nor bind the SNCBs or regulatory authorities in any way.

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A. Background

1. Introduction

1.1 This advice has been compiled with input from the Marine Management Organisation (MMO) and the Department of Energy and Climate Change (DECC) and has been produced solely to inform the development of a robust Impact Assessment (IA) for marine conservation zones (MCZs). The advice sets out the existing arrangements for the environmental assessment of licensing proposals and addresses the following questions:

- Will the information required to consider a licence application differ for licence applications for activities where there is no MCZ compared with if an MCZ was in place?
 - How will the information operators need to provide to inform JNCC and Natural England statutory advice on licence applications differ for licence proposals that may affect an MCZ compared with those that will not affect an MCZ?
 - Whether, and if so how will, the statutory advice that JNCC and Natural England provide differ in relation to licence proposals where there is an MCZ compared with if there is no MCZ?
- Whether, and if so how, will the outcome of licensing decisions made by regulators differ for licence applications for activities where there is no MCZ compared with if an MCZ was in place?

1.2 Public authorities and regulators licence marine projects under a range of legislation including the new marine licensing system which will be introduced in spring 2011 to implement Part 4 of the Marine and Coastal Access Act 2009 (MCAA 2009)¹. The new marine licensing system will largely replace existing regulatory regimes under Part 2 of the *Coast Protection Act 1949*, Part 2 of the *Food and Environment Protection Act 1985* and *The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007*.

1.3 Offshore oil and gas, gas storage and unloading and carbon dioxide storage activities are covered by a comprehensive environmental regime that requires consent under the Petroleum Act 1998² and Energy Act 2010³. It is envisaged that, for these activities, this process will be applied for the assessment of potential impacts on MCZs.

¹ See: http://www.legislation.gov.uk/ukpga/2009/23/pdfs/ukpga_20090023_en.pdf for the full text of the Act.

² <http://www.legislation.gov.uk/ukpga/1998/17/contents>

³ <http://www.legislation.gov.uk/ukpga/2010/27/contents>

- 1.4 Before giving consent to a project, public authorities and regulators must ensure that applications are processed in line with relevant requirements under the EIA⁴ and Habitats Directives⁵. Whether or not a project triggers these requirements will depend on its potential impact on the environment and protected habitats. Applications must also take account of relevant marine plans (where available), and the Marine Policy Statement.
- 1.5 Public authorities also have specific duties in relation to MCZs when they are exercising any functions, or when considering authorising activities, that may affect the conservation objectives of an MCZ.
- 1.6 The statutory nature conservation bodies (SNCBs) (Natural England and JNCC) can provide advice to operators on the information to be provided in environmental impact assessments and to regulators to inform their decisions on licence applications. The SNCBs are statutory consultees in the EIA process and are consulted on all licence, consent or permit applications requiring an EIA that are administered by DECC and by the MMO.
- 1.7 Advice from the SNCBs includes advising on the determination of significant effect as part of the screening process for EIAs, advising on the possible impacts of proposals on designated sites (including Sites of Special Scientific Interest (SSSIs) and European marine sites⁶) and on the wider marine environment. Advice on the impacts on designated sites includes advice on the potential impacts of the proposal on delivery of the conservation objectives for the features for which the site has been designated.
- 1.8 The impact assessment (IA) for the MCZ recommendations being produced by the regional MCZ projects will consider the costs and benefits of MCZs. Assessment of the costs will involve considering the way in which the outcome of licensing decisions, and the information and advice required to inform the decisions, might change where a proposal might impact on an MCZ compared with if there was no MCZ. This should also include any potential requirement for monitoring the impacts of the marine activity on the MCZ. The IA will also assess the potential costs and benefits to regulators and operators of any changes.

⁴ Directive 85/337/EEC

⁵ Directive 92/43/EEC

⁶ European marine sites comprise marine Special Areas of Conservation designated under the Habitats Directive and Special Protection Areas classified under the Wild Birds Directive

2. Duties on public authorities in the Marine and Coastal Access Act in relation to MCZs

2.1 The MCAA 2009 contains a number of provisions for the conservation and protection of those features⁷ for which MCZs are designated.

2.2 Section 125 of the Act requires public authorities which exercise any function that is capable of affecting the protected features of an MCZ or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent to exercise those functions in a manner which the authority considers:

- best furthers the conservation objectives for the MCZ or, where this is not possible;
- least hinders the achievement of the conservation objectives.

2.3 Section 126 of the Act requires public authorities with responsibility for determining an application that is capable of affecting (other than insignificantly) the protected features of an MCZ or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent to, if the authority believes that there is or may be a significant risk of the act hindering the achievement of the conservation objectives stated for the MCZ, to notify the statutory conservation body. The appropriate statutory conservation body in respect of England is Natural England and, in respect of an area outside the seaward limits of the territorial sea, the Joint Nature Conservation Committee⁸. The authority must then wait 28 days before granting the authorisation and have regard to any advice received from the statutory conservation body⁹.

2.4 In addition, the statutory conservation bodies can provide advice and guidance under their general functions. The scope of the advice and guidance they may provide in relation to MCZs is set out in Section 127 of the Act. Advice can be provided on:

- The matters which are capable of damaging or otherwise affecting any protected feature or features;
- The matters which are capable of affecting any ecological or geomorphological process on which the conservation of any protected feature or features is (wholly or in part) dependent;
- How any conservation objectives stated for an MCZ may be furthered, or how the achievement of any such objectives may be hindered;
- How the effect of any activity or activities on an MCZ or MCZs may be mitigated;

⁷A feature can be a marine habitat, marine flora or fauna, geological or geomorphological entity for which an MPA is identified and managed. See s.117(1) (a) to (c) of the Marine and Coastal Access Act 2009.

⁸ See s.147(1) of the Marine and Coastal Access Act 2009.

⁹ See s. 126(10) of the Marine and Coastal Access Act 2009.

- Which activities are, or are not, of equivalent environmental benefit (for the purposes of section 126(7)(c)) to any particular damage to the environment (within the meaning of that provision).

3. Environmental impact assessment (EIA)

- 3.1 The EIA Directive has been transposed into UK law through *The Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended)*¹⁰ and, for activities consented under the Petroleum and Energy Acts, through the *Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (as amended)*¹¹. Amendments proposed by Defra to *The Marine Works (Environmental Impact Assessment) Regulations*, due to be introduced in spring 2011, will apply existing EIA processes to the new marine licensing regimes in England.
- 3.2 Projects listed on Annex I of the Environmental Impact Assessment (EIA) Directive require an EIA. Annex I projects include extraction of minerals and construction of marinas. Projects on Annex II must be assessed to see whether they require an EIA. The assessment determines whether, because of its size, nature or location, a project is likely to have significant effects on the environment.
- 3.3 The screening process for projects on Annex II of the Directive means that an EIA will not be required for every project. For example the MMO has determined that maintenance dredging for navigational purposes is not covered in Annex II¹². Maintenance dredging is addressed, in relation to European sites¹³, by the Maintenance Dredging Protocol¹⁴ whilst navigational dredging is covered by the Regulations only where it is associated with an infrastructure project. For developments to be located in or close to SSSIs, especially those which are also international conservation sites such as Ramsar sites or Special Protection Areas for birds, the likely environmental effects will often be such as to require an EIA.
- 3.4 Where a project needs to undergo an EIA the operator must provide details of a project, including its potential impacts and the management or mitigation of adverse impacts, to the regulator.
- 3.5 Schedule 3 of the Marine Works Regulations require a description of the environment likely to be significantly affected by the project to be provided, including:
- human beings, fauna and flora;

¹⁰ <http://www.legislation.gov.uk/uksi/2007/1518/regulation/2/made>

¹¹ <http://www.legislation.gov.uk/uksi/1999/360/contents/made>

¹² http://marinemanagement.org.uk/works/licensing/documents/marine_works_practice.pdf

¹³ Special Areas of Conservation and Special Protection Areas are designated/classified in accordance with the Wild Birds or Habitats Directives for their habitat and/or species interest

¹⁴ <http://www.defra.gov.uk/wildlife-pets/wildlife/protect/bird-habitat/mdpe.htm>

- soil, water, air and the landscape;
- material assets and the cultural heritage;
- the interaction between any two or more of the things mentioned above.¹⁵

3.6 The impacts on flora, fauna and geology, including for all relevant designations, should be considered within the EIA for the proposal. Once MCZs have been designated, this will include the impact of the proposals on MCZ features and will entail consideration of the effects of the project on flora, fauna and geology, including¹⁶:

- Loss of, and damage¹⁷ to, habitats and plant and animal species;
- Loss of, and damage to, geological, palaeontological and physiographic features;
- Other ecological considerations, which would include the impact on achievement of the conservation objectives for the features that the site has been designated to protect.

4. Other regimes

4.1 There is already a comprehensive environmental regime for offshore oil and gas, gas storage and unloading and carbon dioxide storage. All activities that require consent under the Petroleum and Energy Acts are underpinned by environmental approval. The legislation can be accessed from the DECC website¹⁸.

B. Implications of a marine conservation zone

5. Implications for an operator

5.1 For projects that require an EIA, or which may affect an MCZ and where the regulator advises it is necessary, the operator will need to consider the effects, and any associated impacts, of the proposed activity on the features for which the MCZ is designated as set out in 3.6 above. This may take additional time since the operator will need to obtain information on the MCZ (its boundary, the features it protects and their conservation objectives) and will need to consider the impacts of the proposed project on the MCZ as set out in EIA guidelines^{19,20}. Any additional costs of

¹⁵ See Schedule 3.2 of the Marine Works Regulations.

¹⁶ See Appendix 5 section 3 <http://www.communities.gov.uk/documents/planningandbuilding/pdf/157989.pdf>

¹⁷ Damage could include consideration of disturbance

¹⁸ https://www.og.decc.gov.uk/environment/environ_leg_index.htm

¹⁹ <http://www.communities.gov.uk/documents/planningandbuilding/pdf/157989.pdf>

²⁰ http://marinemanagement.org.uk/works/licensing/documents/marine_works_practice.pdf

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assessing impacts are likely to be of a similar scale to those accrued when a proposal is likely to impact any type of designated site, though the assessment may be more complex and collecting and presenting evidence could be more time consuming and costly.

- 5.2 Currently EIAs do not assess the impact of proposals on the MPA network²¹, which Government is aiming to have substantially complete by the end of 2012. Once an ecologically coherent network of MPAs is in place it is possible that EIAs will need to consider the impact of proposals on the coherence of the MPA network²² and consider network design principles such as connectivity, replication, viability and adequacy²³, though at present MCZ conservation objectives do not incorporate a network component (see Section 5.6). A requirement to take account of network considerations would result in additional costs to the operator in time and effort.
- 5.3 For projects that do not require an EIA (see sections 3.2 and 3.3) and which may significantly affect the protected features of an MCZ or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent, public authorities will be required to assess proposals according to the provisions of Section 126 of the MCAA 2009. For these proposals, operators may accrue additional costs because they may be advised by the regulator to produce an Environmental Statement (or information to a similar level of detail) to enable public authorities to fulfil their duty under Section 126. Although for these proposals an Environmental Statement would not be mandatory, operators generally accept the advice of the regulator. This would result in the licensing application requiring additional time to progress. DECC administers a process that allows the operator to request a Direction that a project need not be accompanied by an Environmental Statement where the proposed activity for which a Direction is sought is not likely to have a significant effect on the environment. Such a request is accompanied by a reduced but robust EIA to demonstrate there will not be a significant effect. This process is subject to a 28 day review process by the SNCBs.
- 5.4 Section 126 (7) of the MCAA 2009 sets out the conditions that have to be met when an applicant seeking authorisation is not able to satisfy the authority that there is no significant risk of an act hindering the achievement of the conservation objectives stated for an MCZ. These conditions include requiring the operator to undertake, or make arrangements for the undertaking of, measures of equivalent environmental benefit to the damage which the proposal will or is likely to have in or on the MCZ²⁴. Meeting this condition will result in additional cost to the operator.

²¹ The Marine Protected Area network will comprise Sites of Special Scientific Interest, European marine sites, Marine Conservation Zones and Ramsar Sites.

²² Currently MCZ conservation objectives do not incorporate a network component (see Section 5.6)

²³ More information on the network design principles can be found in the Ecological Network Guidance (http://www.naturalengland.org.uk/Images/100608_ENG_v10_tcm6-17607.pdf)

²⁴ See s. 126(7)(c) of the Marine and Coastal Access Act 2009.

- 5.5 Where a proposal would constitute an extractive, depositional and/or disturbing and damaging activity in relation to an MCZ that was, in whole or in part, a reference area, then the operator would need to be aware that delivering the conservation objective for the reference area will require exclusion of that activity²⁵. This would entail a cost to the operator who would be required either to find a new location for the activity or, if the conditions set out in 5.4 (above) were met, deliver measures of equivalent environmental benefit.
- 5.6 The provisions of Section 126 (7) of the Act require public authorities to take impacts into account in relation to the conservation objectives of an MCZ. Conservation objectives²⁶ for MCZs do not currently include network considerations so public authorities are not required to take account of network effects under this section of the Act. However, in response to advice from the SNCBs, public authorities may request information on network impacts from operators. This would involve additional costs to the operator, regulator and SNCB.

6. Implications for regulators and SNCBs

- 6.1 Additional time will be required by the SNCBs and regulators to consider and assess the impacts set out in paragraph 3.6 above and to provide advice, particularly on mitigation of impacts and, in relation to Section 127(1)(e) of the MCAA 2009, on those measures that are, or are not, of equivalent environmental benefit (for the purposes of section 126(7)(c)) to any particular damage an activity may have in, or on, an MCZ. The amount of additional time, data and interpretation that will be required will depend upon the extent and/or type of development, though it is anticipated that for typical proposals the additional time required in relation to each proposal is unlikely to be significant, since the information normally required through the EIA process for a designated site is likely to suffice. However, for novel or contentious proposals inputs of significant additional time to consider impacts on the conservation objective (and, in time, on the MPA network) could be required for the operator, regulator and SNCB and, in addition, the designation of MCZs will increase the number of applications requiring the higher level of information and assessment.
- 6.2 Regulators may also need additional time to consider the impacts set out in paragraphs 3.6 in relation to MCZs and to consider the SNCB's advice, particularly if the advice is in relation to effects of a proposal on the MPA network. Public authorities have a legal obligation to have regard to any advice and guidance provided by the SNCBs under Section 127(10) of the MCAA 2009 in relation to an MCZ.

C. Information provisions from operators to inform SNCB advice

7. Information from operators

²⁵ http://www.naturalengland.org.uk/Images/MCZ-regional-guidance_tcm6-23451.pdf

²⁶ http://www.naturalengland.org.uk/Images/conservation-objective-guidance_tcm6-24853.pdf

- 7.1 Operators with proposals that impact a European site are generally expected to provide more detailed analysis in relation to the potential effects on the integrity of the site and its designated features given the legal tests involved in relation to these sites. It can be expected that a similar level of information and analysis would be required from operators in relation to MCZs to inform the assessment of impacts on the conservation objectives. For example, an EIA would need to consider the impact of an activity in the context of the distribution and abundance of the designated features of an MCZ within the MCZ, rather than assess the impact of an activity over, for example, a specified distance from the activity which would be the preferred approach for features occurring outside a designated site.
- 7.2 Information that operators are required to provide (even in the absence of a protected area) includes general benthic survey for characterisation of seabed habitats associated with the footprint of a licensed activity (at pre-application) to determine or confirm the seabed environment. This allows identification of any sensitive receptors (e.g. natural habitats, fishery critical spawning habitat, palaeo-landscapes, wrecks). The characterisation is not biased to identification of any particular features and simply provides a snap shot of what is where. These data must be appropriate to address assessment of environmental impacts.
- 7.3 Once licensed, but before the activity starts, the operator may be required to carry out a time-zero baseline survey if sufficient time has elapsed from characterisation to start-up, though this is not normally required as activities are usually commenced within a short time period from receipt of relevant permits but is a possible requirement whether or not a protected area is involved. The project baseline is to allow environmental condition and thresholds to be determined to act as a benchmark against which environmental monitoring will report.
- 7.4 Data collected through these processes will address seabed features, and should be fit-for-purpose to satisfy tests against MCZ conservation assessments including for broadscale habitats, habitats features of conservation interest (FOCI), non-mobile and mobile species FOCI and localised features (e.g. biogenic reefs) .
- 7.5 In terms of data analysis, the analyses currently provided by the aggregate extraction and renewables sectors in EIAs are likely to be sufficient. For EIAs produced by the oil and gas sector, it is possible that, in relation to MCZs, more detailed survey data processing and interpretation may sometimes be required compared to that provided at present (for example, faunal interpretation of grab survey data and sediment data). Any such requirement would need to be assessed on a case by case basis and, where further data processing and interpretation was required, there would be additional costs for the operator in terms of extra time required for data analysis.

D. Advice from the SNCBs in relation to licensing proposals

8. Advice from JNCC and Natural England

- 8.1 It is anticipated that a site-specific assessment of the impact of proposed activities on features will be undertaken by the operator, in discussion with the SNCBs, that

includes consideration of the impact on the feature's conservation objectives (in a similar approach to that adopted for European marine sites). The onus will be on the operator to demonstrate no significant impacts and the SNCBs will screen for effects against the conservation objectives based on the assessments provided by the operator. It is expected that this will follow standard protocols such as those which have been established through the EIA and Habitats Directives.

- 8.2 Where advice relates to an MCZ with conservation objectives of **maintain**, the advice provided by the SNCB is unlikely to differ from advice provided for a similar set of circumstances outside a designated site.
- 8.3 Where advice relates to an MCZ that contains features with a conservation objective of **recover**, the advice from the SNCB may differ from advice provided for a similar set of circumstances outside a designated site to reflect the need to allow one or more features of the site to recover.
- 8.4 The advice that is provided by the SNCBs will depend on factors including the feature, location and pressures as well as the type of impact and the level of understanding of the impact on features and will differ on a case by case basis.
- 8.5 Advice on the management of activities in reference areas²⁷ has been published by the SNCBs and sets out in more detail the management of activities required for reference areas.

E. Decision-making by regulators

9. Decisions by regulators

- 9.1 Regulators set conditions on a license that are proportionate to the scale and nature of the impact and which would identify any mitigation measures required. They would also have regard to the advice of the SNCBs and, since the advice from the SNCB may differ for MCZs containing features with a conservation objective of **recover**, it is possible that conditions on a license may also differ in these cases. For MCZs with conservation objectives of **maintain**, any license conditions, including mitigation requirements are likely to be similar to those in the same circumstances outside a designated site.
- 9.2 A public authority would also require an operator, under section 126(7)(c) of the MCAA 2009, to undertake, or make arrangements for the undertaking of, measures of equivalent environmental benefit to the damage which an act will or is likely to have in or on an MCZ in circumstances in which that operator is unable to satisfy the authority that there is no significant risk of the act hindering the achievement of the conservation objectives stated for an MCZ but can meet the conditions set out under section 126(7)(a)-(b). If an operator is not able to satisfy the public authority that the conditions set out under section 126(7)(a)-(b) have been met and is unwilling to

²⁷ http://www.naturalengland.org.uk/Images/MCZ-regional-guidance_tcm6-23451.pdf

undertake, or arrange to undertake, measures of equivalent environmental benefit to the damage likely to occur the public authority must not grant authorisation for the doing of that act under section 126(5) of the MCAA 2009.

F. Conclusions

10. Summary

- 10.1 In general, the designation of MCZs are likely to increase the regulatory burden on applications, regulators and consultees.
- 10.2 For licences which would already require an EIA (for reasons other than the location of MCZs), additional information requirements to support assessments on MCZs may be small.

Annex 1: Quality assurance and sign off

Date	Task	Lead	Contributors
11 February 2011	Meeting to agree key questions and broad content of advice	Rebecca Clark	Victoria Copley, James Bussell, Jamie Davies (Natural England); Finlay Bennet, Simone Pfeifer, Cristina Herbon (JNCC)
13-18 February 2011	Internal peer review of v1	Rebecca Clark	James Bussell, Victoria Copley, Jamie Davies Natural England; Finlay Bennet, Cristina Herbon, Simone Pfeifer (JNCC)
14 February	Request for information from MMO	Rebecca Clark	Brian Hawkins (MMO)
19-22 February	Incorporate comments	Rebecca Clark	
22 February	Request for information from DECC	Rebecca Clark	Derek Saward (DECC)
22 February- 1 March 2011	Internal Peer review of v2	Rebecca Clark	Steve Benn, James Bussell, Victoria Copley, Jamie Davies, Ian Reach, Ginny Swaile (Natural England); Finlay Bennet, Cristina Herbon, Simone Pfeifer (JNCC),
1-17 March 2011	Incorporate comments	Angela Moffat	
17-23 March 2011	Internal peer review of v3	Angela Moffat	Jen Ashworth, Steve Benn, Richard Broadbent, Victoria Copley, Jamie Davies, Finlay Bennet, Cristina Herbon, Simone Pfeifer, Ian Reach, James Bussell, Ginny Swaile, Sarah Wiggins.
17 March- 6 April 2011	External review of v3	Angela Moffat	Brian Hawkins (MMO), Evelyn Pizzolla (DECC)
6 April-27 April 2011	Incorporate comments	Angela Moffat	
26 April	Sense check of amendments	Angela Moffat	Brian Hawkins (MMO) Evelyn Pizolla (DECC)
27 April 2011	Paper to MCZ Project Board seeking sign off and clearance for release	Angela Moffat	MCZ Project Board
2 June 2011	Incorporate comments	Angela Moffat	
13 June 2011	Completion of final version (v5)	Angela Moffat	