



SUSTAINABLE SEAS FOR ALL

RSPB Scotland's response to the consultation on Scotland's first marine bill

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RSPB Scotland

The RSPB in Scotland has around 77,900 members and employs 296 people (250 FTE) to promote the conservation of biodiversity, especially birds. We manage 75 nature reserves in Scotland covering over 67,000 hectares of land and from these we have gained practical experience of managing coastal land for conservation, farming, and other enterprises. We work with fishing organisations and fisheries managers with the aim to develop sustainable fisheries, and we undertake biological and economic research to underpin our policy analysis and advocacy. RSPB Scotland is the BirdLife International partner in Scotland.

Overview

RSPB Scotland is delighted that the Government is consulting on a Marine Bill. We were pleased to participate in the Scottish Cabinet Secretary's Sustainable Seas Task Force, and its predecessor the Advisory Group on Marine and Coastal Strategy, which recommended many of the proposals laid out in the consultation. RSPB Scotland believes that these proposals will improve the management of devolved marine matters, and provides an excellent framework for Scotland to protect its internationally important marine species and habitats.

Seabirds are a key indicator of the health of our seas. Reports from RSPB Scotland's coastal reserves this summer indicate continuing problems for Scotland's famed seabird colonies; evidence suggests that these repeated annual breeding failures are now substantially reducing populations of certain species, with some experiencing massive population declines. These worrying trends make it even more crucial that the Scottish Marine Bill represents a true policy shift to put environmental protection at the heart of decision-making.

RSPB Scotland strongly supports the Scottish Government's commitment to a Marine Bill based on the principles of the ecosystem approach and sustainable development (in line with the Scottish Government's own Sustainable Development Strategy¹), and adopting the precautionary principle to protect the marine environment and its resources. These approaches must be the basis of the proposals outlined in the consultation, including the key proposals welcomed by RSPB Scotland:

- **A statutory system of Marine Spatial Planning based on the three tier approach of local, national and regional seas plans;**
- **Improved Marine Nature Conservation, including a comprehensive network of marine protected areas to support the protection of species, habitats and ecosystems of international and Scottish importance;**
- **A Marine Management Organisation ('Marine Scotland') to act as lead decision making body on maritime issues; and**
- **A set of Marine Ecosystem Objectives (MEOs) to direct plans and measure progress.**

¹ *Choosing the Future – Scotland's Sustainable Development Strategy*, Scottish Executive 2005.

However, we do have concerns about the limitations of the consultation. RSPB Scotland believes that comprehensive marine legislation requires a Scottish Marine Bill which is closely integrated with a UK Marine Bill for reserved matters. RSPB Scotland urges both administrations to work together constructively to ensure that these separate Marine Bills are compatible, and that their implementation delivers comprehensive and coherent protection and management throughout UK seas. To achieve this, the Scottish and UK Governments should agree, and the two bills should provide for, the following:

- **The devolution of nature conservation duties and powers beyond 12nm around Scotland;**
- **A system of joint authority over marine spatial planning at the UK and the higher ‘regional seas’ levels of implementation; and**
- **A structure for either two separate Marine Management Organisations (MMOs) or a single UK MMO with accountability for different functions to the relevant Ministers/Parliaments.**

These issues must be addressed as a matter of urgency by both governments working together to ensure that legislation for all UK jurisdictions takes a ‘regional seas’ ecosystem approach as envisaged by the new EU Marine Strategy Framework Directive. To meet the spirit and requirements of the European legislation, a duty of coordination in developing a UK Marine Policy Statement and to jointly plan across boundaries on the regional seas scale should be placed on both Marine Scotland and the UK MMO. RSPB Scotland, the Scottish Fishermen’s Federation and WWF Scotland have joined together to call for formal arrangements to be put in place in both Bills (see Annex 1).

In detail

CHAPTER 1 - SETTING THE SCENE

Q1 Do you agree that change is needed to the management and legislative framework for managing Scotland’s seas?

Yes. RSPB Scotland has campaigned for strong and effective marine conservation legislation for over a decade. We were pleased to participate in the Cabinet Secretary’s Sustainable Seas Task Force, and its predecessor the Advisory Group on Marine and Coastal Strategy, and this cross sectoral group, including representatives of marine industry and science, recommended many of the proposals laid out in the consultation. Our recommendations were further endorsed by the Environment and Rural Development Committee inquiry into the Marine Environment in 2007²

As well as this strong, non-partisan and cross-sectoral support for robust new legislation, such change is essential for the Scottish and UK governments to deliver international commitments including those under the OSPAR Convention³, the

² <http://www.scottish.parliament.uk/business/committees/environment/reports-07/rar07-04-00.htm>

³ OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic

World Summit on Sustainable Development, and the EU Marine Strategy Framework Directive

The Scottish Marine Bill will be the vehicle for transposition of the Marine Strategy Framework Directive (MSFD) in Scotland. We particularly support the clauses of the MSFD which demand a strategic, regional seas approach to the conservation of marine ecosystems, including a network of Marine Protected Areas (MPAs) and the use of closed areas, and addressing all human activities that have an impact on the marine environment. We note in particular the emphasis on the precautionary principle and 'polluter pays' principle.

The World Summit on Sustainable Development (WSSD) commits all contracting states to significantly reducing biodiversity loss by 2010, and to establishing marine protected areas based on scientific information, including representative networks, by 2012.

Under OSPAR, our commitments include the establishment of a network of MPAs by 2010 to complete, along with Natura sites, an ecologically coherent network of well-managed MPAs to '*ensure the sustainable use, protection and conservation of marine biological diversity and ecosystems*'. This must include MPAs for '*mobile species, such as certain birds, mammals and fish, to safeguard the critical stages and areas of their life cycle*'.

It is clear that for Scotland and the UK to meet these commitments, there must be a fundamental shift towards integrated, sustainable management of reserved and devolved activities in the waters around Scotland, and ensure that ecosystem protection and recovery is at the heart of management decisions.

Q2 For each of the following areas, do you agree that Scottish Ministers/Scottish Parliament should put in place a new legislative and management framework to deliver:

a) a new system of marine planning for the sustainable use of Scotland's seas

Yes. In contrast to the well-developed terrestrial planning system, no overall framework exists for planning the use of the sea and protecting our marine environment. Instead, there is an *ad hoc* sectoral approach to consenting of marine activities, involving different pieces of legislation and all managed by different authorities. It is vital that Holyrood works with Westminster to produce a coherent regional seas approach, and that all administrations sign off a UK-wide High Level Policy Statement, and joint marine spatial plans for regional seas. The new marine planning system must be statutory, including a statutory local tier delivered by a body recognised as a legal entity. The new system of marine planning must also consider the requirements of the Water Framework Directive, which in Scotland extend out to 3nm.

b) improvements to marine nature conservation to safeguard and protect Scotland's marine assets;

Yes. Protecting important habitats and species is key to improving the health of the marine environment. We are pleased to note that 'ecosystems' will be at the heart of

Scotland's marine management (paragraph 35) and would like to see this reiterated throughout the document. Improvements to marine nature conservation must include a duty on Scottish Ministers to use the powers proposed to establish an ecologically coherent network of MPAs. Without the relevant duties, new powers would not be effective as they would lack the statutory impetus to ensure that such a network is delivered. We note that the UK and Welsh Assembly Governments have accepted the cross-party recommendations of the Joint Committee that the Secretary of State and Welsh Ministers should have such a duty in respect of Marine Conservation Zones. Robust environmental protection is key to delivering Scotland's commitments to sustainable development.

c) a streamlined and modernised marine licensing and consents system;

Yes. However, we seek assurances that the current arrangements for cooperative working (ie delivering enforcement responsibilities on behalf of other Administrations as outlined in paragraph 30) will be retained, and updated to reflect the new systems in Scotland and the rest of the UK. The new licensing and consents system must be plan led. That is, there must be a clear requirement on decision makers to make decisions on licences and consents in accordance with the relevant approved marine plans.

d) better stewardship backed up by robust science and data;

Yes. However, lack of data must not be used as an excuse not to meet deadlines we have committed to in international fora. Adequate scientific data exists, particularly for the inshore, to begin work immediately to identify sites which could contribute to a coherent network of marine protected areas. Data pertaining to the offshore is often less available and there is an urgent need to gather more information about the distribution of marine species and habitats in this zone. We therefore urge a precautionary approach when licensing new activities until such time as surveys for SEA and EIA identify the suitability or otherwise of new sites for new activities, and Marine Spatial Plans at the various levels are developed and implemented.

e) a new structure, Marine Scotland, to deliver sustainable seas for all?

Yes. A Marine Management Organisation must be set up with integrated responsibility for the stewardship of Scotland's seas including planning, licensing, monitoring, enforcement, science and data collection. This must also be the competent authority for the implementation of the MSFD.

However, a clear decision and proposal is required on the legal nature of Marine Scotland: while we have no preference, in principle it is important that, if Marine Scotland is to carry out the scientific and planning functions outlined in the consultation, it must be independent and subject to an appropriate appeals system. Under the current Government (and Court) system, it seems to us that neither of these conditions can be met if Marine Scotland remains part of Government and that – unless the Government intends to establish an independent appeals structure such as an Environmental Court - Marine Scotland must be an Non-Departmental Public Body. Our response to this consultation makes this assumption in making recommendations for Marine Scotland.

Q3 What difference would these changes make to your area of interest?

These changes could improve delivery of nature conservation measures, and effectiveness in achieving nature conservation objectives – but only if they are properly resourced, implemented and enforced. A healthy marine ecosystem underpins the marine goods and services provided by and attainable from Scottish waters and therefore the conservation and recovery of our marine ecosystem must be at the very heart of the Scottish Marine Bill. Nature conservation must not be seen as simply another activity to be traded off against economic and social activities, but the very foundation and building blocks for those activities. The changes proposed to improve marine nature conservation should therefore not be viewed in isolation as a sectoral benefit alone, but as being essential for Scotland and the UK in meeting national and international commitments highlighted above. The establishment of Scottish Marine Region Boards, if properly resourced and chaired, could improve the engagement of communities and nature conservation organisations in managing Scotland's seas.

Q4 Scottish Ministers believe there are strong practical reasons for further discussion with the UK Government on the allocation of responsibilities around the seas of Scotland. Do you agree with this approach?

RSPB Scotland believes there is a conservation case for the devolution of marine nature conservation duties/powers beyond 12 nm around Scotland. This would ensure that conservation delivery is fully integrated with accountability for action e.g. designation and enforcement of marine protected areas should be linked, particularly as the Scottish Fisheries Protection Agency is responsible for fisheries enforcement in the Scottish Fisheries Zone. However, in order to implement an ecosystem approach there must be a joint approach to marine planning and management for UK seas. This will require full integration of plans and the ability to establish joint planning arrangements at the regional seas scale (as defined by JNCC) as well as a commitment from all UK Administrations to work together across political boundaries, even where different legislation is used to deliver planning. There should also be a duty to consult and take into full account cross border issues including devolved/reserved issues. Only this will deliver 'a joined up system of marine planning in the UK' as stated in paragraph 29. We urge all UK Administrations to agree these mechanisms as quickly as possible.

CHAPTER 2 - CREATING STABILITY: MARINE PLANNING AND INTEGRATED COASTAL ZONE MANAGEMENT

Q5 Do you agree with the overall 3-tier approach to marine planning in Scotland?

RSPB Scotland strongly supports the 3-tier approach to marine planning. However, in order to implement an ecosystem approach, as signed up to by all four UK administrations⁴ and required by the MSFD, marine management for UK seas must be based on biogeographical rather than political boundaries. We believe that marine management on a regional seas scale, as defined by JNCC, is the most coherent

⁴ Safeguarding Our Seas: A Strategy for the Conservation and Sustainable Development of our Marine Environment (2002); Review of Marine Nature Conservation (2004)

approach. As such, a duty of coordination in developing a UK-wide Marine Policy Statement, and the ability to jointly plan across boundaries on the regional seas scale, should be placed on both Marine Scotland and the UK MMO. Furthermore, EU Member States will have to cooperate to ensure that their marine strategies for the marine regions set out in the MSFD deliver good environmental status (GES) for that region.

We are concerned that the new planning system is proposed to “ensure sustainable economic growth in the seas around Scotland” and to “maximise and balance the various uses made of marine resources”. Rather, the ecosystem approach should be the basis for marine planning and any new planning system should be firmly underpinned by the five principles of sustainable development, rather than economic growth per se. (We note that the Government’s use of the term sustainable economic growth remains undefined, but used variously to mean “economic growth” and “sustainable development”. This confusion is unsatisfactory and should be resolved.) The RTPI principles of spatial planning focus on land-use (development) planning, rather than natural resource management. We believe that marine spatial planning must also have a primary focus on natural resource management. The marine planning system should not just be a development plan but must ensure space for wildlife too.

We are also concerned about the statement in paragraph 47 that marine planning will provide confidence because industry will know that the marine assets upon which they depend will be made available. This statement fails to acknowledge the licensing and EIA and SEA processes which are vital in ensuring that development does not have a negative impact on the marine environment. In this regard, it is disappointing that the Scottish territorial waters have not been included in the SEA for offshore wind currently being carried out for other UK waters.

Q6 Do you have any comments on the proposals for a National Marine Plan and the role of Marine Scotland in relation to planning at the Scotland level?

We believe that it is appropriate for Marine Scotland to be responsible for the creation of the National Marine Plan. It will be important for the National Marine Plan to integrate with the National Planning Framework for Scotland to ensure joined-up consideration of issues in the terrestrial and marine environments. We are pleased that such plans will have statutory force and that all Scottish public bodies will have to act in accordance with them. We seek clarification as to whether UK bodies would also be required to act in accordance with these plans but note that, were there a jointly agreed regional seas plan, joint approval by the UK Government would bind such bodies.

It is appropriate that such plans are reviewed and revised on a 5-yearly basis. However, as illustrated in Figure 1.3, oil and gas, telecoms shipping and defence are reserved to Westminster from 0-200nm. This mix of responsibilities illustrates the importance of a coherent system of joint planning between the Scottish Government, UK Government and the devolved administrations in Northern Ireland and Wales.

Therefore, we note that the proposal is for UK marine plans to be reviewed every 6 years.

We assume that 'ecosystem management' (paragraph 55) refers to ecosystem-based management as per the EU Marine Strategy Framework Directive. If so, we welcome proposals to give Marine Scotland a duty to deliver ecosystem-based management, but we ask for clarification of the extent of its 'fall back' powers. Marine Scotland should be provided with full emergency powers to stop damaging activities.

Q7 Do you have any comments on the approach to setting out national objectives for marine planning?

We are encouraged that all marine objectives will be founded on the five guiding principles of sustainable development (Box 2.2). However, this is inconsistent with the statement that "Objectives ... will be developed within the context of sustainable economic growth" (Paragraph 53). The five guiding principles of sustainable development are not hierarchical but mutually supporting and "achieving a sustainable economy" is not the same as economic growth per se (please refer to our response to Q5). Scotland must at all times be mindful of its existing commitments to the UK-wide vision and strategic goals and objectives for the marine environment, for example Safeguarding Our Seas: A Strategy for the Conservation and Sustainable Development of our Marine Environment (2002). Sustainable development should be a statutory objective of the National Marine Plan

It is right that Marine Scotland should ensure that local/regional objectives are consistent with national marine objectives. Similarly, national objectives should be compatible with UK and EU agreed marine objectives. To ensure compatibility, Scottish Ministers should participate fully in the joint UK-wide Marine Policy Statement and High Level Marine Objectives. We would therefore agree with the findings of the Joint Committee on the draft UK Marine Bill: *"The [UK] Marine Policy Statement... must be subject to a high level of Parliamentary scrutiny, and should not be adopted before every effort has been made to reach agreement with the devolved administrations on it."*⁵

We are extremely concerned that marine ecosystem objectives appear to be "balanced" by social and economic objectives. This would allow the marine environment to be traded off where necessary to allow economic activities to take place. This Bill must deliver a healthy marine environment and therefore marine ecosystem objectives should be overarching and SMART (specific, measurable, achievable, realistic and timely) to ensure that we can measure progress towards the conservation and recovery of our marine environment, including biodiversity. The link between the planning process and objective setting must be made clear in the Bill.

⁵House of Lords, House of Commons (2008) Joint Committee on the Draft Marine Bill, Volume 1, Report and formal minutes.

Q8 Do you agree with the overall approach to planning at the international level beyond Scotland? Do you have any further suggestions or comments to add to the proposed approach, in particular on the UK high-level objectives?

Whilst it is encouraging that Scottish Ministers intend to consult with partners across national or international boundaries, we were very disappointed that Scottish Ministers will not participate in the development and agreement of the UK Marine Policy Statement. As stated in Paragraph 53, "Ministers propose that Marine Scotland examine and where possible develop joint objectives for the regional seas around Scotland". We believe that the most effective way to achieve this aim would be to participate and influence the UK Marine Policy Statement and contribute to and sign-up to the UK High Level Marine Objectives (HLMOs). We would stress the importance of UK-wide agreement on these HLMOs, which in turn will inform the UK Marine Policy Statement, which we believe must also have UK-wide sign-up. RSPB's response to the UK consultation on HLMOs, 'Our Seas – a Shared Resource', is included as an annex to this response.

Q9 Should Scottish Ministers use the Marine Planning system to deliver Scotland's obligations under the Marine Strategy Framework Directive?

In so far as it is able, yes. However, the MSFD requirement for the UK to produce Marine Strategies and programmes of measures that, when combined with those from other Member States, will result in the Good Environmental Status of the Marine Regions, supports UK Administrations working together on a coherent approach to marine management. In particular, it provides a rationale for promoting a UK-wide Marine Policy Statement and joint planning, involving all UK Administrations. It also supports the regional seas approach to achieve an ecosystem-based approach to planning. Administrations would plan jointly in areas where there is shared responsibility to produce one plan at the regional sea scale.

The MSFD also makes specific reference to the programme of measures including "spatial protection measures, contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems" to achieve good environmental status. The marine planning system would therefore not be sufficient alone to meet Scotland's obligations under the MSFD. Transposition of the MSFD by Member States is required by 15 July 2010 at the latest. To ensure a comprehensive system of marine planning and a coherent approach to developing MSFD marine strategies, we believe that transposition should occur in parallel to the Scottish Marine Bill. It is clear that if good environmental status is to be meaningful, it must lead to conservation and recovery of the marine environment.

Q10 Do you agree with the overall approach and functions for Scottish Marine Regions? Do you have any further comments on the proposed approach to planning at a regional level?

Scottish Marine Regions

It is not clear from the consultation document whether the Scottish Government propose that marine planning at the level of the Scottish Marine Regions (SMR) would be statutory. We maintain that marine planning at this level must have statutory force. We agree that a partnership approach is appropriate at this tier and

are pleased to see that Marine Scotland will designate a lead partner for each SMR, particularly as, in a statutory planning system, the 'delivery agent' must exist as an agent in law, and must be invested with clear roles, responsibilities, powers and duties. It is unlikely that a loose partnership between existing bodies (such as a Local Coastal Partnership or the Scottish Coastal Forum) could exist in law as required. The emphasis in the consultation paper appears to be on plan making, and it is not clear how inevitable conflicts over plan implementation will be dealt with. We would seek clarification as to whether the lead body will have decision-making powers in this area. Scottish Ministers must sign-off all marine plans. In addition to the details in Paragraph 66, it must be clear that legal requirements and international obligations (e.g. Habitats and Birds Directives) will need to be met at the local level where appropriate.

Inshore Fisheries Groups

RSPB Scotland fully supports the formation of Inshore Fisheries Groups (IFGs) to manage local fisheries issues. Box 2.7 states that each SMR board will have representation from the relevant IFG and will take into account the fisheries management framework developed by IFGs when drawing up regional plans. However, this integration must be two-way, with the SMR board having a place on the relevant IFG's advisory group. It is clear that the SMR Board, with its statutory basis, and the agreed SMR plan, will take priority in cases where the two plans are inconsistent. We seek clarification of the timing of the development of management plans and encourage the Scottish Government to ensure that these plans are developed in parallel rather than independently. There is a need for SMR plans to take into account other plans and objectives, not only IFG plans. We are concerned that there does not appear to be a requirement for other planners/plans (where they are not a public body) to take the SMR/Scottish plan into account in their plan; this will need to be addressed in full Bill.

Presumption of Use

Box 2.8 states that 'The basic principle is the presumption of use, i.e. it is presumed that an activity can take place in a specific location unless it is specifically excluded'. As we also highlight in our answer to Q 38 below, we are extremely concerned that the term 'presumption of use' is open to misinterpretation due to how it has traditionally been interpreted under the terrestrial planning system. We assume here that presumption of use would only apply to marine activities licensed and permitted under existing rights and not for new, unlicensed activities. Otherwise such an approach would bypass EIA and Habitats and Birds Directives requirements for assessment and we could not support it. However, a planning system is about integrating and balancing what activities should take place where and when and therefore various public interests must be balanced. In the light of this, we believe that there should be no presumption of use within the planning system - including any new marine planning system - as all industries should have an equal say in the planning of marine activities (via the SMR board). Ultimately it is for the planning authority and Scottish Ministers to make these decisions, with licensing decisions made by the appropriate licensing authority. We believe it is essential to work towards more sustainable activities and therefore there should be a sustainability test

for new activities to allow a more even playing field between new and existing activities.

Appeals

We believe that there should be a clear mechanism to review the competence of the plan itself, as well as an appeal mechanism for decisions made on the basis of the plan. There is no mention of a Public Inquiry process for marine plans; we believe that such a process should be mandatory in certain circumstances, such as where there are outstanding objections to a plan, as for development plans on land. There is also no mention of the SEA process.

Q11 Do you agree that Scottish Marine Regions should be responsible for integrated coastal zone management?

All relevant Scottish public bodies, including Scottish Marine Regions, should have a duty to deliver ICZM.

Q12 Do you agree that Scottish Ministers should place a duty on Scottish Marine Regions to adopt the eight principles defining integrated coastal zone management?

Whoever is responsible for delivering ICZM should be bound by these principles.

Q13 Do you have any other comments on the delivery of integrated coastal zone management alongside marine planning?

It is essential that land sea interactions – and the expected SEPA/Marine Scotland overlap - are managed appropriately and based on the five principles of sustainable development, via ICZM. It is clear that the voluntary principle in resolving resource conflicts and supporting sustainability is not adequate, and so a statutory basis to local marine planning is essential.

We seek clarification on how the requirements of the WFD in coastal and marine areas will be dealt with under these proposals. In particular, this includes the requirement to safeguard good ecological status of these areas and prevent deterioration in status. Whoever is responsible for delivering ICZM should also be bound by the requirements of the Water Framework Directive.

CHAPTER 3 - REDUCING THE BURDEN: LICENSING AND ENFORCEMENT

Q14 Does licensing remain an effective method of delivering both certainty for investment purposes, and protection for the marine environment?

Yes. It is important to note that although licensing has an important role in helping to protect the marine environment, it is also important in ensuring that common resources are available to others rather than just licensees. There are societal benefits (e.g. human health, well-being and amenity benefits), recreation benefits and other economic benefits (e.g. reducing conflicts and preserving the rights of other legitimate users of the sea). Whilst we welcome the statements in paragraph 75 and 76 we also believe that there is room for improvement in the current system. In particular we would refer to our concerns with regard to presumption in favour of development (See answer to Question 10 above). Activities where the adverse

impact on the marine environment is considered significant should not be licensed or permitted.

Q15 The existing licensing system covers most of the impacts on the seas from existing activities. One area of activity that has potentially large impacts and is not licensed is dredging. Scottish Ministers propose to license all new forms of dredging (i.e. those forms that agitate the sea bed). Do you agree? Are there other activities that should be licensed?

We believe that the following activities should be considered for licensing:

- Novel dredging techniques, such as water injection, plough and other forms of agitation dredging
- Subsea disposal of nuclear waste
- Fishing with mobile gear that contacts the seabed
- Bioprospecting (in the search for new medicines, antibiotics and biodegradable plastics)
- Supra-marine structures such as offshore wind turbines (as opposed to the 'socket' in which they sit)
- Human-induced noise
- Aggregate extraction
- Cable installation
- Moorings
- Marine research (current mismatch between SNH and Home Office License under the Animals (Scientific Procedures) Act 1986.
- Wildlife watching
- Leisure craft (depending on engine size/power/purpose)
- Launching of vessels (depending on vessel size)
- Winkle picking and bait digging (perhaps only beyond a certain level of extraction)
- Seaweed harvesting (perhaps only beyond a certain level of extraction)

Licensing should not only "seek, where possible, to protect [marine features], and if it is not possible ... seek to minimise the adverse impact" (Paragraph 78). There is also a clear third option, as alluded to above, not to licence activities where the adverse impact to the marine environment or to the potential benefits of another use is considered significant. We would like to see this third option in the final Scottish Marine Bill. We seek clarification on how the licensing system will ensure compatibility with the requirements of the Water Framework Directive.

Q16 Scottish Ministers intend to create powers to set out a list of licensable activities in regulations. Do you have any views on this approach?

This would appear to be a sensible approach, allowing Scottish Ministers to amend the list as new activities arise. Such a system would need to be flexible enough to deal with all forms of new activity, and subject to Environment Impact Assessment as mentioned in Box 3.1. The Marine Bill should create a power for the Scottish ministers to add to or amend the list by Order.

Q17 The proposed Marine Scotland should have general responsibility for the delivery of the marine licensing system. Do you agree?

It would appear to make sense to bring planning and licensing under Marine Scotland along with being the competent authority for Environmental Impact Assessment. We would like to reserve further comments until it is clear what “general responsibility” for the delivery of marine licensing means. We need greater clarity regarding what roles Marine Scotland will have and which licensing regimes it would be responsible for, as well as what appeals regime will be proposed.

Q18 Scottish Ministers intend to reduce the numbers of marine licences that developers require to get before an activity can take place. There are two ways to reduce the numbers of licences either by creating a single licence for all marine impacts or by creating a single licence for each activity. Which system do you prefer?

RSPB Scotland believes that, whichever approach is taken, licensing decisions must be made in accordance with the marine spatial plan, and must contribute to good environmental status. Therefore, whichever option is chosen, any reduction of regulatory burden must not be at the expense of environmental and human health safeguards.

Q19 Marine Scotland could undertake the licence work itself or operate as a front door coordinating the work of others. Do you have any views on these options?

It is not possible for Marine Scotland to be wholly responsible for regulation of marine consents as there are both reserved and devolved activities which require licenses. Whilst it would be possible for Marine Scotland to deal with all devolved licenses, therefore reducing the number of agencies responsible for consents, this would not be the same as a ‘one-stop shop’ for operators in the marine environment. However, working as a ‘front door’, Marine Scotland could coordinate both reserved and devolved licensing processes. Again, our main concern is that decisions are taken in accordance with the plan and good environmental status is not compromised. Any new streamlined licensing system should not be seen as an excuse for deregulating or relaxing environmental standards.

Q20 Do you agree with the proposed approach to consultation involving local stakeholders?

We support the principle of improved local involvement in licensing decisions and new mechanisms to increase local accountability. We would therefore support the principle of a list of consultees being drawn up and a proposed consultee list being consulted on. For many consultees, consultation will only be relevant in some circumstances, so criteria would need to be agreed that would trigger a consultation.

In addition to active consultation, it will be important to ensure adequate publicity is given to licensing applications to ensure that any interested parties not actively consulted have a reasonable chance of becoming aware of a proposal. This could be done through media such as local or sectoral press, or a national publication such as the Edinburgh Gazette. However, advertising on the website of Marine Scotland and the relevant SMR may be more effective.

In order to make sure that consultation responses are given due weight in decision making, it should be made clear that the marine decision making body must make decisions in accordance with the agreed plan, unless other material considerations indicate otherwise.

Q21 Do you agree that the revised licensing system should incorporate the simplified CAR model throughout, to focus scrutiny on higher risk activities/ impacts and reduce the regulatory burden?

We seek assurance that cumulative or in-combination impacts can be understood, considered, and taken into account. All activities must be registered to allow cumulative impacts to be assessed. We are very concerned that there is no mention of the precautionary approach here; 'minor' engineering works for example could still have a major impact if they occurred in the wrong place at the wrong time. There must be a clear commitment to monitor and review the process to ensure it is adequate to prevent environmental harm.

Q22 Scottish Ministers intend to provide Marine Scotland with powers to insert conditions into licences. Do you agree with this approach?

Yes. The ability to insert conditions will be essential. Many developments or activities may result in unacceptable environmental impacts if licences are granted without restrictive conditions. In the terrestrial planning system, the use of planning conditions allows consent to be granted for many developments where, for example, the risk of environmental harm means that consent could not be granted were the consent to be unconstrained by restrictive conditions. It is difficult to imagine how a marine consenting process could function without the ability to similarly restrict consents. Impact monitoring should be a requirement and Marine Scotland should be able to set standards such as minimum standards and good-practice standards.

Q23 Scottish Ministers believe an appeals procedure for those directly involved in the licence application would be a beneficial development. Do you agree?

Yes. RSPB Scotland supports an appeals process but any such process should also allow appeals by interested/affected parties. With regard to paragraph 103, while we agree that timetables for licensing decisions are good in principle, the system must have flexibility to respond when there are legitimate delays. Such delays could occur where there is a need for additional environmental information from the applicant to inform the EIA and ensure that there is adequate information on which to base a decision. For example, it can become apparent during an application process that additional ornithological data needs to be collected to assess the likely impacts of, for example, wind farms on birds. This can require a full years worth of data collection and can result in subsequent delays to the process. (This situation can often be avoided by good pre-application discussions, but inevitably happens on occasion.) Issuing a consent in the absence of adequate data on which to make an assessment could result in significant unforeseen adverse environmental impacts and could be difficult to reconcile with, for example, the EIA, Habitats and Birds Directives. It is more important that the right decision is reached, perhaps over a longer period of time, than the wrong decision made quickly. Any timetables set must not lead to a weakening of environmental criteria and safeguards.

Q24 To provide an easy and transparent system, do you agree that a scale of charges related to cost recovery is the most appropriate way to recover the costs of assessing, issuing, monitoring and enforcing licences?

RSPB Scotland welcomes the polluter-pays criteria and notes that the EU MSFD states that programmes of measures *should be devised on the basis of the precautionary principle and the principles that preventative action should be taken, that environmental damage should, as a priority, be rectified at source, and that the polluter should pay.* Therefore, full cost recovery must form a statutory part of the new licensing system.

Q25 The Scottish Government proposes a review of existing licence monitoring and enforcement provisions relating to the marine environment and wishes to consolidate them into a single set of coherent powers and remedies. Marine Scotland should be tasked with ensuring compliance monitoring and enforcement activity is carried out consistently and efficiently. Do you agree?

Yes. Monitoring and enforcement must also be strong and visible, for example using public registers or 'league tables' to show compliance. Licences must be reviewed on a regular basis, and there must be penalties for non-compliance, set at a level which is sufficient to act as a deterrent. The enforcement system must link with the proposed UK system of enforcement and enforcement officers.

Q26 Please provide any further comments you have on the licensing provisions in the consultation paper.

The licensing provisions in the consultation paper are very high level and we look forward to further detail in the future. We would like clarification on how the Scottish and UK systems of reformed licensing will link together, especially in cross-border areas such as the Solway and Northern North Sea, and between licenses for devolved activities and reserved activities. We would also seek assurances that the two licensing systems will be consistent and compatible.

CHAPTER 4 - SECURING THE FUTURE: NATURE CONSERVATION

Q27 Do you agree that our system of marine nature conservation should be based on the three pillar approach?

Yes. During the AGMACS and SSTF processes that there was widespread support for such an approach from industry, science and environmental groups. We are disappointed that there is no specific mention of the ecosystem-based approach, particularly within wider seas measures and we believe that this is a major omission, particularly in the light of our international commitments in transposing the MSFD (See Q1). In keeping with the Biodiversity Duty under the Nature Conservation (Scotland) Act, protection for marine biodiversity must be enshrined in the management and planning of all marine activities, as is also required in an ecosystem conservation approach.

Q28 Please provide your views or comments on the application of Marine Ecosystem Objectives for marine nature conservation.

Marine Ecosystem Objectives are key to the success of the Scottish Marine Bill. High level marine ecosystem objectives should underpin the Scottish Government's policy on the marine environment and there should be a duty for Scottish Ministers to

implement such MEOs. In addition, SMART (specific, measurable, achievable, realistic and timely) MEOs should be used as a tool to monitor the health of Scotland's seas and ensure that high level objectives are delivered. We would like to see a clear timescale and pathway for the development of Scottish MEOs.

The suggested list of areas where MEOs might be developed is rather basic and limited. MEOs should attempt to expand information to measure key ecosystem features and processes for function and health, rather than being limited to those datasets currently available. Some thought also needs to be given as to how to measure the health of ecosystem function e.g. in terms of nutrient cycling, trophic indices etc. As stated above, we strongly believe that MEOs should underpin the entire bill and not be applied only to marine nature conservation.

As stated in our answer to Q8, We would stress the importance of UK –wide agreement on the UK Government's High Level Marine Objectives. RSPB's response to the UK consultation on HLMOs, 'Our Seas – a Shared Resource', is included as an annex to this response (see Annex 2).

Q29 Do you agree it would be worthwhile to have a biodiversity duty in the offshore area around Scotland?

Yes, we strongly agree. However, it is not clear whether such a biodiversity duty would also apply to UK bodies operating in the offshore area adjacent to Scotland.

Q30 Do you have any other suggestions for making improvements to Pillar I - wider seas measures?

The marine planning system could make a significant contribution for marine nature conservation, but only if there is clear sustainability purpose for the planning system. Any new planning system must be underpinned by the five principles of sustainable development, rather than economic growth alone.

Q31 Do you agree with the proposals for a science-based review of whether new marine species need to be added to the existing list of protected species?

Yes.

Q32 Do you have any further comments or suggestions for making improvements to Pillar II - species conservation?

In addition to the science-based review mentioned above, we believe that if powers for marine nature conservation were extended to 200nm, the Wildlife and Countryside Act 1981, the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004 and any associated legislation should also be extended and enforced to 200nm.

Q33 Do you agree with the overall principle of the introduction of a power to select new types of site?

We are very supportive of this principle and have produced two reports on nationally important sites; one with Scottish Environmental LINK entitled 'Finding NIMAs – The case for nationally important marine areas', and an RSPB report

'Safeguarding our seabirds: Marine Protected Areas for the UK's Seabirds' which identifies possible sites to protect colonies of seabirds of importance to Scotland.⁶ EU sites cover a very narrow range of species and habitats and therefore we believe that new nationally important sites will play a crucial role in meeting our international commitments under MSFD, OSPAR and WSSD. It is clear therefore that the Scottish Bill must deliver networks of sites rather than individual sites. In order for the power to be used, we would like to see a duty on Scottish Ministers to deliver a comprehensive network of MPAs, and for all public bodies to exercise their functions to secure the maintenance and enhancement of this network.

Q34 Do you agree with the assessment of the three main types of requirements for site protection? Do you have any further comments on this?

We support all three requirements for site protection, but in addition we believe that sites for ecosystem recovery should form part of the selection criteria for tiers 1 and 2 of site protection (sites for international and European commitments, and sites for national priorities). This is where it is important to establish within the network MPAs for representative species and habitats that are not rare, threatened or declining and may not be biologically diverse, in order to support the functioning and recovery of the wider marine ecosystem. There must be a clear purpose for the MPA network - the underlying objective for designating a marine protected area, and establishing a network of MPAs, is marine nature conservation and helping ensure, as one pillar of the three-pillared approach, wider marine ecosystem functioning and recovery, not the encouragement of socio-economic use. Selecting sites for ecosystem recovery is consistent with the approach demanded under the Water Framework Directive (which applies within 3nm of the coast) whereby there is a responsibility to ensure the restoration of good ecological status in water bodies.

The third tier shown in Box 4.4 describes a different type of MPA, more akin to the terrestrial Local Nature Reserves, for which different criteria could be used. We support such a community-driven approach provided the underlying purpose for proposed local areas is marine conservation.

Q35 Do you have any views on whether or not a "single approach" should be taken for marine historic and natural environment site protection?

Any 'single approach' would have to be scrutinised to check for compatibility between the various needs of different natural and cultural assets.

Q36 Do you agree with the proposals on how a new flexible site protection power will be used? Do you have any other comments?

There should be a duty to identify and designate new types of sites, and a duty to create an ecologically coherent network of MPAs. We seek clarification of the term 'flexible', as we believe that any flexibility in site selection should only reflect ecological needs and priorities and not changing economic imperatives.

⁶RSPB's report *Safeguarding our Seabirds: MPAs for the UK's seabirds* can be viewed at http://www.rspb.org.uk/Images/Safeguardourseabirds_tcm9-185543.pdf

We are concerned by the use of the term ‘proportionately’ (Paragraph 139) with regard to how new site protection powers will be used. This does not appear to be consistent with selecting sites according to a set of science-based ecological criteria (Paragraph 140). Sites should be designated wherever science-based ecological criteria are met, and whilst engagement with stakeholders should take place in deciding the management of such sites, designation should be by scientific criteria alone.

We are also concerned about the proposal to allow ministers to deselect a site or amend its boundary. We accept that such flexibility may be appropriate if, for example, the geographical location of a species or habitat is altered due to climate change (i.e. reflecting ecological needs and priorities). However, the de-selection of a site due to changing economic priorities (such as increases in shipping or the development of new industries) is not appropriate, and inconsistent with designation of sites by science-based ecological criteria. Such a socio-economically driven approach to de-selection would undermine the integrity and function of the MPA network, which should be established to help promote marine ecosystem health and recovery (along with the other two pillars of marine nature conservation). Of course, we accept that the power to deselect sites must exist for cases when socio-economic concerns do legitimately over-ride a site, but in such cases the duty to maintain the network would mean a replacement site is designated if possible.

Finally, there should be an emphasis on the precautionary principle. The EU Treaty incorporates the precautionary principle as a legal obligation, and the MSFD requires measures to be devised on the basis of that principle (See answer to Question 1 above). We note the recent report of the Joint Committee on the draft UK Marine Bill⁷: “We recommend that where there is limited knowledge some locations may need to be designated on a precautionary basis, for example to avoid the potential for environmental damage or to support an effective MPA network under a scenario of climate change.”

Q37 Do you have any views or comments on whether a single integrated power should be used to deliver these proposals?

We are unsure of the distinction between this question and Q33. We wish to see a duty in the Bill for Scottish Ministers to deliver a comprehensive network of MPAs.

Q38 Do you agree with the proposals for how sites will be managed, including the site by site approach and overall context of sustainable development?

We believe that nationally important marine features should be protected from potentially damaging activities according to their ecological need. The designation of some sites will not require any changes to human activities taking place in them, while other sites might require a higher degree of protection from damage. Although this does not mean that such sites should be ‘no-go areas’, social and economic uses must be compatible with the feature for which the site is designated. Consented activities should continue until such time as consents are reviewed before renewal, or

⁷ House of Lords, House of Commons (2008) Joint Committee on the Draft Marine Bill, Volume 1, Report and formal minutes.

the site management plan determines that such activities are likely to damage the species or feature designated. Such management decisions (including review processes) must take into account the precautionary principle as required by the MSFD and signed up to by all four UK administrations⁸. It is vital that cumulative effects are considered when determining restrictions of activities within sites.

Q39 Please provide us with your views on the role that a wider planning system should have in the identification of Marine Protected Areas?

We do not envisage a role for the marine planning process in identifying and designating sites, which should be an exclusively science-driven process. However, site management objectives will need to be met partly through the marine planning process. In short, marine planning has a key role in the management of sites but not their identification. We are therefore pleased to see that Scottish Ministers believe that there is a distinct need for a separate power to create MPAs (Paragraph 147). Given our international commitments to deliver an ecologically coherent network of well-managed marine protected areas by 2010 and the establishment of representative networks for marine protected areas by 2012 under OSPAR and WSSD respectively, and the time-frame required to set up a system of marine spatial planning, it is clear that such a separate power would need to be used for the majority of sites. There should be a clear statutory purpose for an ecologically coherent, representative network of MPAs and a clear duty to designate MPAs in line with this purpose.

Q40 Do you have any other comments or suggestions for making improvements to Pillar III - site protection?

We believe that one of the failings of Natura sites is the lack of a requirement to produce a management plan. Management of Natura sites is primarily based on voluntary agreement but where this fails, control of damaging activities (that are not “plans of projects”) relies on the coordinated action of agencies and government departments, which is not always present. Where there is no plan, the sites effectively have no protection. There is also currently a requirement to demonstrate that damage has taken place before protective measures can be put in place meaning that the precautionary principle cannot be applied. We note that the MSFD states that: (Clause 27) ‘Member states should establish and implement programmes of measures which are designed to achieve or maintain good environmental status...’ and ‘Those measures should be devised on the basis of the precautionary principle and the principles that preventative action should be taken, that environmental damage should, as a priority, be rectified at source, and that the polluter should pay. We believe there should be a requirement to produce a management plan for all sites.

Q41 Would you agree with the principle that the offence against damage to Natura sites should apply to marine sites? What are your views on whether a similar offence should be introduced for damage to other Marine Protected Areas?

⁸ Safeguarding Our Seas: A Strategy for the Conservation and Sustainable Development of our Marine Environment. (2004).

Yes. Activities should have to demonstrate that a significant impact will not occur, either singly or cumulatively, to be allowed to operate within Natura designated sites. This is in line with the precautionary principle and would be entirely appropriate for other MPAs. There should be a 'general offence' of damage or disturbance to a site/feature, including any new sites introduced through a Scottish Marine Bill.

Q42 How can we enhance the contribution which the wild marine environment makes to Scotland's economy?

The value of Scotland's marine environment is beyond economic calculation. However, Scotland seas do support many important industries, and most people involved in these agree that goods and services provided by the marine environment are entirely dependent on a healthy marine ecosystem. The best way to enhance the marine environment's economic contribution is to ensure that it, and its biodiversity, are adequately protected and, where there is degradation, allowed to recover. These economic benefits apply equally to tourism, other industries such as fishing and aquaculture, and important ecosystem services.

APPENDIX TO CHAPTER 4 - SEALS FORUM REVIEW OF THE CONSERVATION OF SEALS ACT 1970

Q43 Do you have any views or comments on the options for improving conservation measures for seals?

RSPB Scotland supopr's Scottish Environment LINK's position on improving conservation measures for seals which calls for:

- The Conservation of Seals Act (1970) to be repealed
- Seals to be listed as protected species under Part 1 of the Wildlife and Countryside Act, thus extending the current closed season to provide year-round protection
- Only under exceptional circumstances of over-riding wider concern, where all non-lethal means have been tried and failed, should any licences for lethal control be issued by Scottish Ministers (following advice from SNH) under the WCA, consistent with the Habitats Directive.

CHAPTER 5 - UNDERSTANDING OUR SEAS: SCIENCE AND DATA

Q44 Do you agree that Scottish Ministers should develop a marine science strategy to focus marine scientific effort, integrate socio-economic considerations, and to create a framework for wider stakeholder input?

We support the creation of a marine science strategy, but are again disappointed by the emphasis on socio-economics. There is no reference to the role of science in the delivery of the ecosystem approach or sustainable management of the marine environment. Science must be directed by broadly-agreed sustainability objectives, not by political or economic priorities. There is a role for science to identify synergies between environmental and socio-economic objectives but this must be kept separate from developing purely ecological criteria for identifying and designating marine protected areas.

Q45 Do you have views on how to integrate scientific evidence with stakeholder and local knowledge?

While such knowledge can be valuable, it must be quality assured and weighted before it is used to supplement scientific evidence. SMR boards must be provided with appropriate and adequate scientific advice and support to ground-truth stakeholder and local knowledge.

Q46 What do you think are the potential priorities for further work?

Some priorities will be determined by meeting the requirements of the EU MSFD. We consider priorities to be:

- Establishing the criteria for MPAs.
- Establishing HLMOs
- Developing MEOs
- Assessing impacts of new technologies.
- Filling known data gaps.

Q47 Scottish Ministers propose that the strategic role for the monitoring and assessment of Scotland's seas lies with Marine Scotland, do you agree?

Yes. In order to deliver an ecosystem approach to the management of UK seas, there should be a duty for Marine Scotland to co-ordinate its functions, including monitoring and assessment, with the UK MMO, and vice versa.

Q48 Scottish Ministers propose to instruct Marine Scotland to take forward the development of GIS as a matter of priority. Do you agree?

Yes, but it should be noted that a number of organisations already use GIS for Scottish waters (e.g. Crown Estate, SEPA, SNH). It is vital to ensure that any new system is compatible and integrated with these existing systems to ensure that there is no duplication of effort.

CHAPTER 6 - MANAGING OUR SEAS: MARINE SCOTLAND

Q49 Scottish Ministers propose to develop Marine Scotland to champion the seas and their use and provide better integrated and streamlined delivery in the marine area. Do you agree?

We strongly support the creation of Marine Scotland with integrated responsibility for the stewardship of Scotland's seas, including planning, licensing, compliance monitoring, enforcement, science and data and as the competent authority for implementation of the Marine Strategy Framework Directive. A key role for Marine Scotland is suggested to be the delivery of 'increased economic growth for the marine area' (Paragraph 197). However, given that Marine Scotland will also take responsibility for marine nature conservation, this would appear to be a clear conflict of interest. We strongly believe that economic development should occur according to the five principles of sustainable development. Simple 'increased economic growth' is not consistent with these principles and therefore should not be a key duty of Marine Scotland.

We believe that Option B (partial or total integration) is the best option as we do not believe that 'virtual' coordination will be effective. We agree that SNH's and relevant

parts of the Scottish Government's regulatory responsibilities should be transferred to Marine Scotland. We however also strongly believe that SNH must remain independent in providing its statutory advisory and wider natural heritage 'promotional' roles. Marine Scotland should have a duty to have regard to this advice from SNH. An objection from SNH to a proposal should also be able to trigger a referral to Scottish Ministers, should Marine Scotland wish to grant a consent or issue a licence.

Q50 Scottish Ministers propose that Marine Scotland deliver marine planning proposals as set out in Chapter 2. What are your views on this proposal?

RSPB Scotland believe that it is appropriate that Marine Scotland to be responsible for delivering marine planning proposals and we are pleased to see a duty on Marine Scotland to deliver ecosystem management. However, there should be a stronger emphasis on this duty and role.

Q51 Do you agree with the approach set out for fisheries and aquaculture management?

It is vital that responsibilities for aquaculture and fisheries are integrated within Marine Scotland and that these industries are included in the marine spatial planning system.

Q52 What are your views on the arguments relating to where control for aquaculture should lie?

As with other sectoral activities, control for aquaculture should lie with Marine Scotland as we believe that this is the most appropriate solution for consistency, integration and simplification of marine management. The other responsibilities need to be integrated with marine management through integrated coastal zone management.

Q53 Do you have any views on the role that FRS should take?

We believe that there is a case to be made for moving only the regulatory and planning functions of FRS into Marine Scotland and retaining the remaining research function of FRS as an independent advice body. This would allow Marine Scotland to take independent nature conservation advice from SNH and further scientific advice from FRS. Presumably, since FRS has both marine and freshwater functions, some form of reorganisation of FRS would have to occur in any event.

Q54 What are your views on the creation of Marine Scotland and the proposed range of functions it should deliver?

- We are happy to see that a Scottish MMO will be established
- The role of safeguarding the sea should be the central role of Marine Scotland as many of the key industries (such as fishing and aquaculture) rely on a healthy, productive marine environment. Marine Scotland should not have responsibility for securing marine based economic growth – rather the responsibility should be for ensuring sustainable development, founded on the five guiding principles of sustainable development (Box 2.2).
- We support Marine Scotland in having lead responsibility for marine planning, coordination, management and monitoring of underpinning science and data, and

- as competent authority for the implementation of the MSFD in Scotland. We note that the later responsibility will require close coordination with the UK MMO.
- We support the integration and management of fisheries and aquaculture with the other responsibilities of Marine Scotland but emphasise that sustainable development rather than simple economic growth should be the priority.
 - We support SNH retaining its statutory advisory responsibilities, but there should also be a duty on Marine Scotland to take full account of such advice.
 - We strongly welcome and support Marine Scotland's ecosystem duty.

Q55 Do you have any views on the development of Marine Scotland's role and functions over time?

It is vital that Marine Scotland is given sufficient resources and ministerial support to carry out its tasks successfully. Under the assumption that work towards implementing an ecologically coherent network of MPAs would be taken up by existing bodies prior to Marine Scotland being set up (due to the timeframe required in meeting our international commitments), we would suggest that marine planning and the coordination of the licensing system would be the first priority of Marine Scotland. If powers are to be accrued over time, a clear schedule would have to be laid out in the Marine Bill.

Q56 Ministers believe Marine Scotland should form part of Scottish Government with appropriate safeguards for science and the appeals process. Do you have any views?

Having received independent legal advice on this matter, Scottish Environment LINK, of which RSPB Scotland is a member, strongly favours the status of Marine Scotland as a Non-Departmental Public Body. This approach increases the independence of Marine Scotland from Government and, given that the UK MMO will be a NDPB and the importance of effective coordination between the UK MMO and Marine Scotland, practical (and legal) issues may arise which will make it desirable that both bodies operate in the same way. There is also an issue as to how, if Marine Scotland is to be part of the Scottish Government, this new organisation will operate transparently, and whether its advice to ministers will be published. Finally - and crucially - with Marine Scotland as a part of Scottish Government we can see no means of devising an effective, separate appeals process, without the creation of an Environmental Court. Therefore, unless or until the Scottish Government considers an Environmental Court is the appropriate body for appeals, Marine Scotland will need to be a Non-Departmental Public Body.

With regard to the options for managing marine consents, we favour either integration of responsibility for environmental regulation of inshore waters within SEPA, with other marine regulatory functions resting largely within Marine Scotland, or integrating responsibility for marine environmental regulation in Marine Scotland. If the former option is followed, it is vital that there is effective coordination between SEPA and Marine Scotland within 3nm.

Annex 1: Joint letter from SFF, RSPB and WWF



SCOTTISH FISHERMEN'S FEDERATION

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Our Ref: BA/FL0/L08-088

1st October 2008

Mr Richard Lochhead MSP
Cabinet Secretary for Rural Affairs and Environment
Scottish Executive
Pentland House
47 Robb's Loan
Edinburgh
EH14 1TY

Dear Richard,

Scottish Marine Bill Consultation – Marine Planning

All the undersigned will be responding to the Scottish Marine Bill consultation. However, we each felt that one topic - marine planning - was important enough to warrant an additional, joint submission sent directly to you.

Your Sustainable Seas Task Force, in which we all participated, had, along with its predecessor AGMACS, recommended that devolution of Marine Nature Conservation responsibilities beyond 12nm be requested. Some groups and political parties, are also calling for the devolution of "planning" (variously defined). Irrespective of the outcome of these discussions, however, the grouping of the SFF, RSPB and WWF supports the principles and rationale for marine planning but strongly contends that arrangements must be put in place in both the Scottish and UK Marine Bills for the local, cross border and international cooperation that will be essential to achieve coherent marine planning.

Both Marine Bills are necessarily constrained by political boundaries and the complicated realities of the devolution/reserved mix. Our argument for clear overarching arrangements turns on the fact that ecosystems and the resources within them know no such constraints. Achievement of a regional and layered solution, embedded in the enabling legislation of both Bills seems perfectly possible, drawing on the Regional Seas model pioneered in the 2005 Irish Sea Pilot. To meet the spirit and requirements of the European legislation, a duty of coordination should be placed on both Marine Scotland and the UK MMO.

The relationship between the Marine Policy Statement and the National Marine Plan must be made plain, if there is to be proper input from stakeholders whose vital interests will be affected by the plans. Neither Bill makes it sufficiently clear how this will happen.

V.A.T. Reg. No. 605 096 748
Members: Anglo Scottish Fishermen's Association · Clyde Fishermen's Association · Fishsalesmen's Association (Scotland) Limited · Mallag & North-West Fishermen's Association
Orkney Fisheries Association · Scallop Association · Scottish Pelagic Fishermen's Association Limited · The Scottish White Fish Producers Association Limited · Shetland Fishermen's Association

For this reason, we are urging, in our individual responses, both the UK and Scottish Governments to base their marine planning on a regional seas approach. We hope that this joint submission from a cross-section of key non-statutory stakeholders will be viewed as giving these responses additional weight. Such an approach is not hard to achieve – although it does represent a modest policy shift, it would require only minor drafting changes to the proposed legislation (Scottish and UK). This approach is also infinitely flexible – being appropriate, in our view, for any possible constitutional settlement, from the status quo to independence. Indeed, that feature highlights the apolitical nature of the process that is based entirely on the resource/ecosystem for the benefit of the marine environment and its users.

We hope that in moving forward with the Scottish legislation you will consider very carefully this strong, but non-partisan and cross-sectoral submission. As we are all pressing the UK Government to adopt a similar approach, we are copying this letter to Jonathan Shaw.

Yours sincerely,



BERTIE ARMSTRONG
CHIEF EXECUTIVE
SCOTTISH FISHERMEN'S FEDERATION



LLOYD AUSTIN
HEAD OF CONSERVATION POLICY
RSPB SCOTLAND



DAN BARLOW
HEAD OF POLICY
WWF SCOTLAND

cc: Jonathan Shaw MP, Parliamentary Under-Secretary of State (Marine, Landscape and Rural Affairs)

Annex 2: RSPB's response to the UK consultation on HLMOs

Our Seas – A Shared Resource: High Level Marine Objectives

A response from The Royal Society for the Protection of Birds

26 September 2008

1. Overview

The Royal Society for the Protection of Birds (the RSPB) is the UK charity working to secure a healthy environment for birds and wildlife. We campaign for better protection and management for marine biodiversity and ecosystems. Seabirds are a key component of the marine environment and depend on healthy, functioning marine ecosystems to survive. A priority area that our campaign currently focuses on is calling for Marine Bills to deliver new legislation to properly protect the marine environment.

The RSPB is a UK-wide organisation encompassing RSPB Scotland, RSPB Cymru and RSPB Northern Ireland, and we campaign for better protection and management of the marine environment and its wildlife throughout UK waters. The RSPB response to this consultation is a joint response and covers all four UK Administrations – UK/England, Wales, Northern Ireland and Scotland.

We therefore welcome this consultation from the UK Government, Welsh Assembly Government and Northern Ireland Executive on high level marine objectives (HLMOs) which are a fundamental component of the Marine Policy Statement (MPS) set out in the recent consultation on the draft Marine Bill. However, it is notable that the Scottish Government is not included in this consultation process and has not signed up to these HLMOs. Instead, the Scottish Government through its consultation on a Scottish Marine Bill '*Sustainable Seas for All*'⁹ has asked for stakeholders' views on these HLMOs. We would stress the importance of UK-wide agreement on the HLMOs, which in turn inform the Marine Policy Statement (MPS) which we believe also must have UK-wide sign up. To this end, we would urge the Scottish Government to be involved in this process. Furthermore, we understand that WAG intends to add Welsh-specific objectives to the HLMOs and look forward to the opportunity to comment on these in the future.

2. The RSPB's views on '*Our seas – a shared resource*'

The RSPB supports the UK Government and Devolved Administrations' jointly agreed marine vision of "*clean, healthy, safe, productive and biologically diverse oceans and seas*". We therefore also support the development of high level marine objectives (HLMOs) to deliver this vision, particularly where jointly agreed.

Overall, we welcome the principles set out in '*Our seas - a shared resource*' and their aspirational nature. Furthermore, we believe that the process of developing the

⁹ *Sustainable Seas for All: a consultation on Scotland's first Marine Bill* (14 July 2008) The Scottish Government. <http://www.scotland.gov.uk/Resource/Doc/231463/0063135.pdf>

HLMOs which involved stakeholders at an early stage and canvassed our views has resulted in positive progress in developing this set of objectives. We are pleased that many of our comments made during and after the stakeholder event in January have been included in the objectives published for consultation. However, we do have some on-going concerns regarding the proposals in this consultation document which we have set out below.

2.1 Rationale – ‘Why we need marine objectives’ section

Column 1, para1 – We welcome the statement that the HLMOs don’t replace the existing policies or goals. However, the link to the ‘UK Marine Policy’ page on the Defra website¹⁰ only provides further links (though currently not all links appear to be functioning) to the documents that the objectives originate in, while we would like clarity about how all the various Government objectives fit together. In particular, we would like clarity regarding the relationship between the HLMOs and the UK’s strategic goals for the marine environment¹¹ and strategic goals for marine nature conservation¹², both sets of goals which are jointly agreed by all four UK Administrations and therefore, UK-wide in scope. Furthermore, it would be useful to include the ‘vision for natural resources’ from the UK Sustainable Development Strategy (UK SDS)¹³. Presenting all the UK’s goals and objectives, etc, diagrammatically could facilitate understanding.

Column 1, para2 – we welcome the acknowledgement that a holistic cross-sectoral approach and policy integration are required to deliver sustainable development in the marine area.

Column 1, para3 – we welcome and support the development of HLMOs as a first step in developing the Marine Policy Statement (MPS). It is laudable that this process is progressing in parallel with the legislative process for MPSs. However, it was our understanding that there would only be one MPS at a time, not multiple MPSs, and we are therefore confused about references to “these policy statements”.

Column 1, para3 – This paragraph states that the MPS will “prioritise different policies and objectives where required”. However, we would question whether that is the intention with the MPS as this was not what was inferred in the draft Marine Bill. While the draft Bill provides a process for policy priority where there is a conflict, it does not (nor does the accompanying policy paper) provide for certain policies to be prioritised over others. We would appreciate clarity on this point.

Column 2, Box – we welcome the intentions for the HLMOs set out in this box. However, there appears to be some contradiction with the text. For example,

¹⁰ <http://www.defra.gov.uk/environment/water/marine/uk/policy/index.htm>

¹¹ Defra 2004. *The Government’s response to its Seas of Change consultation to help deliver our vision for the marine environment*.

¹² Defra 2005. *Safeguarding Sea Life: The Joint UK Response to the Review of Marine Nature Conservation*.

¹³ HM Government 2005. *Securing the Future. The UK Government and Devolved Administrations’ Sustainable Development Strategy*. pg.99 – ‘Developing our vision for natural resources’. http://www.sustainable-development.gov.uk/publications/pdf/strategy/SecFut_complete.pdf

the MPS and the HLMOs must do more than just act as a framework for achieving sustainable development (see column 1, last para and column 2), rather they should provide a steer, as stated in the box.

Column 2, penultimate para – We welcome the statement that “*truly sustainable development will require difficult choices*”. We believe that the ‘difficult choice’ is often the one to protect the marine environment when that decision is likely to bring some form of burden to those who make their living at sea. We would welcome therefore, a renewed commitment from all the Administrations developing these HLMOs to making those hard decisions in order to ensure the achievement of ‘truly’ sustainable development at sea.

Column 2, final para – We support these HLMOs being developed within the framework of the UK SDS, which is jointly agreed by all four UK Administrations.

2.2 Outcomes – ‘What success will look like...’ section

Column 1, para1 – We welcome the aspirational view of what the future of the marine environment will look like.

Column 1, para3 – states that the “*environmental impacts of using the marine environment will be managed in [the] context*” of the climate change driven changes to both the environment and the way the area is used, citing renewables and CCS as examples. To this it should be added that healthy, functioning marine ecosystems will be better able to adapt to climate change impacts and therefore, continue to deliver the goods and services that we depend upon, including natural climate mitigation measures. To this end, the part that site protection, i.e. Marine Protected Areas (MPAs), will play in ensuring ecosystem health must not be overlooked or underestimated.

Column 1, para3 – We welcome the statement that Government’s action will ensure that “*the integrity of marine ecosystems and underwater cultural heritage is conserved*”. However, we would note that such an outcome will not be achieved if the Government and Devolved Administrations fail to properly protect and allow recovery of the full range of marine biodiversity found in UK waters.

Column 1, para4 – We support a strategic approach and delivery through marine planning.

Column 2, para3 – Overall, we welcome the aspirational ‘success’ outcomes envisaged for the marine environment, its ecosystems and biodiversity. In particular, we welcome acknowledgement of the role an ecologically coherent network of well managed MPAs will have in achieving the marine vision, especially as in the UK Marine Bill, they are the primary mechanism for ensuring that biodiversity is protected and conserved. However, there are sections where we would expect a more ambitious view of what the marine environment should look like in 20 years. For example while we welcome the reiteration of the EU Gothenburg Agreement “*to halt the loss of biodiversity by 2010*” (phrased as “*no net loss of biodiversity*” in the consultation document), that deadline is less than 2 years away and therefore we would expect a more ambitious successful outcome envisaged for the state of biodiversity in 2028, 18 years later. For example, we know that much of the marine environment is

degraded and consider the current state of marine biodiversity as only the starting point for conservation. Therefore, rather than maintaining the *status quo* we would expect the UK to be looking at a successful future that has ensured that biodiversity is both protected and has been able to recover. To this end, we would like the unnecessary caveat “*in some cases*” removed in reference to recovery in this paragraph.

2.3 The Marine Objectives

We welcome the marine objectives set out within the context of the five UK Sustainable Development Strategy (UK SDS) principles. We believe it would be helpful to clarify that for a policy to be sustainable, it must respect all five of these principles. Hence, it would be useful to reiterate that the UK SDS “*sustainable development principles place living within environmental limits at the heart of the new strategy*” with the UK Government and the Devolved Administrations stating that “*we want to achieve our goals of living within environmental limits and a just society, and we will do it by means of a sustainable economy, good governance, and sound science.*”

Overall, we support the HLMOs and where that is the case, we have not made any additional comments. However, where we believe improvements could be made or have issues or concerns, we have highlighted them below.

2.3.1 Achieving a sustainable economy

Bullet 2 – This bullet would be improved by the addition of the underlined text, as it is not clear what the term responsible means – “*Long-term wealth is generated by the sustainable and responsible use of the marine ...*”

Bullet 4 – This bullet would be improved by the addition of the underlined text to ensure that the capacity of the marine environment to continue to deliver necessary goods and services is not compromised and that the environment is not taken to the tipping point, i.e. to its limits – “*Marine businesses are acting within the capacity of the marine environment and in a way which respects environmental limits and are socially responsible.*”

2.3.2 Ensuring a strong, healthy and just society

Bullet 1 – This bullet would be improved by the addition of the underlined text, as it is through enjoyment of the marine environment that people most appreciate its value, including intrinsic value – “*People appreciate the value of and enjoy the marine environment, ...*”

Bullet 2 – This bullet would be improved by the adding the following text to the end – “*... and delivering health and well-being benefits*”, as outdoor activities deliver health benefits which are linked with inspiring landscapes and environments and the therapeutic value of wildlife and nature.

Bullet 3 - This bullet would be improved by adding “*clean*” as follows – “*... are clean and safe to use*”, to provide consistency with its use in the UK marine vision statement.

Bullet 4 – This bullet would be improved by the addition of the underlined text, as it clarifies the link between environmental protection and societal benefits –

"The marine environment plays an important role in mitigating climate change through healthy and resilient ecosystems".

2.3.3 Living within environmental limits

Bullet 1 – While we welcome the inclusion of the term recovery in this bullet, we strongly believe that *"where appropriate"* should be removed. Should it be considered entirely necessary that this caveat is retained, then the sentence must be punctuated properly to ensure that it only refers to recovery, which is the case in the objective of the EU Marine Strategy Framework Directive (MSFD) [Art1(2)(a)].

Bullet 3 – This bullet should be reworded to include reference to the need to ensure that representative populations of species and habitats are also valued and protected, not just those that are already under threat (as *per* pg.3 - 'What success will look like...'). This statement would also benefit from an explanation of what is meant by the term 'viable'.

Last Bullet – This bullet would benefit from the addition of the deadline for halting the loss of biodiversity, to indicate that this is to be achieved by 2010 rather than later on within the 20 year vision period. In addition, a reference to *"put[ting] biodiversity on course to recovery"*, the commitment made by EU Member States reiterated in the EU Biodiversity Communication¹⁴, would be valuable here.

2.3.4 Promoting good governance

Bullet 3 – While acknowledging that marine management should indeed take account of different systems and the various administrative and political boundaries, they must not act as a barrier to delivering an ecosystem based approach to management (as *per* bullet 5), particularly through marine planning, on a regional seas scale. It is for this reason that the RSPB has been advocating a joint marine planning approach at the regional seas scale, requiring the four UK Administrations to work together to produce joint marine plans across boundaries/borders. In addition, there will be international transboundary issues to consider. Therefore, this bullet should be amended to include the following underlined text – *"... because of administrative or political boundaries, but is not restricted by such boundaries, and takes account of transboundary and international issues"*.

Bullet 4 – This bullet would be improved by the addition of the underlined text – *"... associated decision-making, which is itself based on sound science"*.

Last bullet – We welcome the reference to planning and management based on the ecosystem approach. However, we believe that this bullet would benefit from the inclusion of 'natural assets' at the end so that it reads – *"... and recognises the protection needs of individual natural and historic assets"*.

2.3.5 Using sound science responsibly

¹⁴ Communication from the Commission (22 May 2006) *Halting the loss of biodiversity by 2010 – and beyond. Sustaining ecosystem services for human well-being*. COM(2006)216. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0216:FIN:EN:PDF>

Bullet 3 – We welcome the inclusion of the precautionary principle as one of the objectives. However, we believe that the objectives should also include references to the preventative and polluter-pays principles, in accordance with the UK SDS – the former is referred to in the Prime Minister’s foreword¹⁵, and the latter comes under the ‘Achieving a sustainable economy’ principle¹⁶. All three of these principles are enshrined in the Treaty on the European Union¹⁷ and reiterated in the MSFD. These additional principles might sit better under the ‘Promoting good governance’ objective.

2.4 Delivery & reporting on progress

We welcome the statement that further guidance will be provided, through the MPS, on how the delivery body/ies will deliver sustainable development and in doing so, make the “*difficult choices*”.

We welcome the inclusion of the HLMOs in the Scottish Government consultation on a Scottish Marine Bill ‘*Sustainable Seas for All*’ (Box 2.4 pg.35 and Annex B), asking for stakeholders’ views. Ideally, we believe that there should be one set of shared UK-wide HLMOs, in the same way as we advocate a single UK-wide MPS agreed and adopted by all four UK administrations. Therefore, we would urge the Scottish Government to adopt the same HLMOs for Scottish waters, not least to ensure that UK-wide HLMOs provide the framework for the development of Scotland’s marine ecosystem objectives (MEOs), which we also welcome and support.

We strongly welcome and support the commitment to monitor and report on progress to achieving the HLMOs and the UK’s vision for the marine area. However, it is highlighted under the ‘monitoring and reporting’ section that there are ongoing processes to develop indicators and contributory objectives, therefore as with the existing policy objectives, it would aid transparency, if these objectives were set out, e.g. in a table or diagram so that stakeholders were aware of how the ‘whole’ is coming together. At the moment, the process is scattered amongst different disciplines and different organisations and many stakeholders are only aware of what is happening in their sector or area of expertise.

2.5 Definitions & Language

pg.2, 3 & 6 – We believe that the phrase “*achieving sustainable marine development*” should be replaced by the more commonly used, and understood, phrase “*achieving sustainable development in the marine area*”, as these two statements have potentially very different meanings and the former could be misinterpreted. Re-wording will ensure that the role of the HLMOs in

¹⁵ “*Most of all, it means focussing on long-term solutions, not short-term fixes. Targeting prevention now, rather than putting right later.*” UK SDS, Prime Minister’s foreword

¹⁶ “*Building a strong, stable and sustainable economy... in which environmental and social costs fall on those who impose them (polluter pays), and efficient resource use is incentivised.*” UK SDS, ‘Achieving a sustainable economy’ principle,

¹⁷ European Commission (1992) Treaty on European Union. Official Journal C 191, 29/7/1992, pg:1.

achieving sustainable development in the marine area will be understood within the context of the UK SDS description of sustainable development. It also ensures that the HLMOs are consistent with the UK SDS and other government policy that refers to sustainable development.

pg.3, column 2, para2 – The use of terms such as ‘appropriate’ and ‘acceptable’ throughout the document are unhelpful and ambiguous. For example, using the text from the MSFD Annex I(11) we would suggest re-wording the following sentence using the underlined text – *“Underwater noise will be restricted to levels that do not adversely affect marine biodiversity; and litter will be disposed of in ways which do not harm the marine environment”*.

pg.7, Ecosystems approach definition – This definition only covers two of the three elements of the ecosystem approach definition that are covered in the Convention on Biological Diversity (CBD) definition, i.e. ‘sustainable use’ and ‘equitable sharing of benefits’. Therefore, the ‘conservation’ element of the ecosystem approach needs to be included in this definition. We suggest adding the following underlined text which is based on the MSFD text [Art1(1)(a)] – *“... the core of the approach lies in integrating and managing the range of demands placed on the natural environment in such a way that the environment (including biodiversity) is protected and preserved, and deterioration is prevented and recovery is enabled, so that it can indefinitely support essential ecosystem services and provide benefits for all”*.

pg.7, Ecosystem goods and services definition – This definition only makes reference to the ‘goods’ that the marine ecosystem supplies, it would be useful to add examples of ‘services’, such as CO₂ absorption from the atmosphere (mitigating climate change impacts) and regulating global weather, etc, that healthy marine ecosystems deliver for free.

pg.7, Precautionary principle definition – This definition focuses on the potential costs of precautionary measures. We believe that terms such as ‘proportionate’ and ‘cost-effective’ have the potential to be used as loopholes to avoid carrying out environmental protection measures and in effect continue the *status quo*. Referring again to the UK SDS, we would reiterate that in that document Governments are alive to the precautionary concept that action to prevent environmental damage and degradation can be a more ‘cost-effective’ policy than either trying to repair damage or dealing with the consequences of irreversible damage. This is the same concept that the Stern Review on climate change advocates.

pg.7, Role in mitigating climate change – there should be more emphasis on the role of ecologically functioning seas in the mitigation of climate change, acting as a carbon sink. It should be noted that these ‘services’ delivered by healthy and resilient marine ecosystems are both free and potentially priceless. The role of the marine area in providing space and resource for marine renewables is a secondary function. One way to deal with this would be to switch these two bullets around. There are likely to be conflicts with biodiversity interest as time goes on and, as presently worded, the definition seems to indicate priority to renewables in such cases.

We believe that if our suggested improvements are taken on board, then the HLMOs will provide a positive steer to achieving sustainable development at sea. However, until the HLMOs have been operationalised, it will not be possible to determine whether they have successfully achieved the marine vision. We therefore eagerly await the next stage in the development of the HLMOs and their delivery.
