



GREENPEACE



February 2009

Parliamentary Briefing

Marine and Coastal Access Bill Amendment

Duties of public authorities towards MCZs (Clauses 121, 122 & 143)

The organisations listed above are all members of Wildlife and Countryside Link's Marine Task Force¹, which has been campaigning for several years for improvements in marine conservation and better management of the marine area. We have been closely engaged in the Marine & Coastal Access Bill process from the outset.

Background

The general duties of public authorities, and their duties and procedures when granting consents to persons who wish to carry out activities or operations in or affecting Marine Conservation Zones (MCZs) are outlined in clauses 121 and 122. These clauses are of paramount importance for the protection of MCZs – it is imperative that the system created is transparent, consistent and offers certainty on how functions and activities affecting MCZs are to be assessed. It is considered very important to try to prevent any weakening of the current drafting.

The Annex to this briefing contains a number of suggested amendments – all designed to strengthen the protection afforded to MCZs. For example, throughout the two clauses we have suggested the removal of the word “significant” wherever it is used to qualify risk or hindrance to site conservation objectives. We have also suggested adding a definition of “hinder” to clause 143, which includes the concept of in combination effects. Both of these amendments are designed to make it clear that even seemingly insignificant negative effects on a site or its conservation objectives can have cumulative or more serious repercussions, especially when considered in combination with other factors, and we should not risk these situations going unnoticed. We have also included amendments to the effect that the public authorities should be required to “take account” of any advice from the statutory nature conservation authorities rather than merely “have regard” to it.

¹ Wildlife and Countryside Link is a coalition of the UK's major environmental organisations working together for the conservation and protection of wildlife, the countryside and the marine environment.

1. General duties of public authorities

The primary amendments proposed for clause 121 seek to ensure that activities outside an MCZ that will affect the MCZ are included within the scope of the duty.

We are also seeking the deletion of subclause 121 (2)(b) – which contemplates the level of duty that allows an authority to hinder the achievement of the conservation objectives of an MCZ, on the basis of its own assessment of what causes least hindrance.

The other amendments proposed for clause 121 should be read in light of the (very appropriate) duty created by subclauses 121 (3) and (4) to involve the statutory nature conservation body if an authority feels that it might be acting other than in the best interests of an MCZ. It follows from this that the nature conservation body will be able to offer its advice on the matter in hand. In order to ensure that this advice has force when in the hands of another public authority, amendments are proposed that require that authority to act in a way that, on objective advice, is in the best interests of the MCZ.

The suggested change from “inform” to “notify” (and the addition of a definition of “notify” at clause 143), and the insertion of additional subclauses similar to 122(3) and (4) are designed to ensure that the procedure of seeking expert nature conservation advice has necessary formality and is consistent with the analogous provisions in the Wildlife and Conservation Act 1981 in relation to SSSIs.

2. Specific duty of public authorities when granting consents

The specific duty of public authorities – clause 122 – will apply when third parties apply for consents to carry out potentially harmful activities or operations in or affecting MCZs. As a result of the Bill’s marine licensing provisions, plus the existing marine consenting regime, this provision will be very important. In some cases it will be the primary mechanism for protecting MCZs.

The mechanism that the Bill proposes has its conceptual background in Articles 6.3 and 6.4 of the Habitats Directive. Suggested amendments to this clause, set out in the Annex to this briefing seek to tighten up and clarify the process of decision-making in relation to activities affecting or potentially affecting MCZs. It is important to ensure that this decision-making process enshrines a sound approach to safeguarding natural assets, ensuring any damage to them is fully justified in the context of sustainable development, and that any such damage is made good, so that there is no net loss of the natural resource.

Specific amendments to 122(6) and (7) suggested here are designed to specify that the public authority has to make a decision on how the test (of whether there is risk posed to an MCZ’s conservation objectives) has been met – and what that test is.

We have also included a suggested amendment to 122(7)(b), altering the wording so that public interest must “override” rather than “outweigh” any risk of damage to the environment. This will mean that the authority has to be satisfied that a priority must be given to the damaging act over the need to conserve the MCZ. It should also give the benefit of the doubt in favour of the MCZ in finely balanced cases.

3. A new offence

As discussed above, clauses 121 and 122 create statutory duties, including very precise duties to notify the appropriate conservation body and in one case a duty to wait for 28 days before giving consent to activities that might harm MCZs.

These procedures have a direct analogue in relation to the granting of consent to carry out operations within SSSIs (sections 28H and I of the Wildlife and Countryside Act 1981, inserted there by CRoW 2000).

The Natural Environment and Rural Communities Act 2006 inserted into the 1981 Act a new offence of breach of these duties. It is suggested that if this is necessary in relation to SSSIs it will also be necessary in relation to MCZs, and this suggestion is included in the Annex to this briefing.

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Annex – Amendments

Marine & Coastal Access Bill House of Lords Committee Stage, February 2009

1. General duties of public authorities

| Clause | Clause 121 General duties of public authorities in relation to MCZs |
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| Amendment | <p>Page 73, line 4: Leave out '(other than insignificantly)'</p> <p>Page 73, line 7: Insert at the end 'This section applies even if the function is exercised in relation to areas not within an MCZ.'</p> <p>Page 73, line 10: Leave out 'the authority considers'</p> <p>Page 73, line 12: leave out subclause 121(2)(b)</p> <p>Page 73, line 15: Leave out 'If a public authority considers that the exercise of any of its functions' and insert 'If the exercise of any of the functions of a public authority'.</p> <p>Page 73, line 16: Leave out 'significantly'.</p> <p>Page 73, line 17: Leave out 'it must inform' and insert 'the public authority must notify'</p> <p>Page 73, line 18: At end, insert new subclauses analogous to 122(3) and 122(4).</p> <p>Page 73, line 19: Leave out 'If a public authority considers that a relevant event has occurred, it must inform' and insert 'If a relevant event has occurred, the relevant public authority must notify'</p> <p>Page 73, line 26: Leave out 'the authority believes to' and insert 'might'.</p> <p>Page 73, line 27: Leave out 'the authority considers'.</p> <p>Page 73, line 27: Leave out 'significantly'.</p> <p>Page 73, line 34: Leave out 'have regard to' and insert 'take account of'.</p> |

| Clause | Clause 143 Interpretation of this Chapter |
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| Amendment | <p>Page 87, line 8: Insert “hinders” includes hindrance either alone or in combination with other factors’.</p> <p>Page 87, line 12: Insert “notify” means to give notice in writing’.</p> |

2. Specific duty of public authorities when granting consents

| Clause | Clause 122 Duties of public authorities in relation to certain decisions |
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| Amendment | <p>Page 73, line 43: Leave out ‘(other than insignificantly)’</p> <p>Page 74, line 4: Insert at the end ‘This section applies even if the function is exercised in relation to areas not within an MCZ’.</p> <p>Page 74, line 5: Leave out ‘the authority believes that’.</p> <p>Page 74, line 5: Leave out ‘significant’.</p> <p>Page 74, line 17: Leave out ‘the authority thinks that’.</p> <p>Page 74, line 22: Leave out ‘satisfies the authority that there is no significant risk’ and insert ‘provides the authority with information allowing the authority to ascertain that there is no risk’.</p> <p>Page 74, line 25: Leave out ‘the person seeking the authorisation is not able to satisfy the authority that there is no significant risk’ and insert ‘the authority is unable to ascertain that there is no risk’.</p> <p>Page 74, line 31: Leave out ‘outweighs’ and insert ‘overrides’.</p> <p>Page 74, line 41: Insert at end ‘(c) by another person’.</p> <p>Page 74, line 46: Leave out ‘have regard to’ and insert ‘take account of’.</p> |

3. A new offence

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| Clause | New clause - Offence of breach of duty by a public authority |
| Amendment | Insert a provision analogous to <u>section 28P(5A) of the Wildlife and Countryside Act 1981</u> applicable in cases where a public authority is in breach of the notification and waiting duties set out at clauses 121, 122 and 124. |