

Consultation on an amendment to the Marine Works (Environmental Impact Assessment) Regulations 2007

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Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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1. Introduction

1.1 This consultation seeks views on:

- a proposed amendment to the Marine Works (Environmental Impact Assessment) Regulations 2007 (“Marine Works Regulations”) so that they apply to the dredging for marine minerals in harbour areas in England and Wales;
- whether the Port of London Authority (PLA) should be an “appropriate authority” for the purpose of the Marine Works Regulations;
- the transposition of the European Council Habitats Directive (94/43/EEC) more specifically in relation to England and Wales for ‘marine works’ and marine mineral dredging in harbours.

1.2. The UK Government and Welsh Assembly Government are committed to wider improvements to the management of activities in the marine area, and this will be taken forward through the Marine Bill. The Bill will provide the framework for co-ordinated strategic management of activities in the marine area based on principles of good regulation, and will enable the Governments to implement their strategies for sustainable development. The joined-up approach being taken under the Marine Bill is complemented by the Marine Works Regulations, which ensure compliance with EU Directives.

2. Proposed amendment to the Marine Works (Environmental Impact Assessment) Regulations 2007

Reason for amendments to Marine Works Regulations

2.1. The Marine Works Regulations transpose the European Council Directive Environmental Impact Assessment Directive on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)”) in relation to the following “Marine Works” activities:

- activities regulated under Part 2 of the Food and Environment Protection Act 1985 i.e. for the deposit of substances into the sea;
- activities regulated under section 34 of the Coast Protection Act 1949 (which does not apply to Northern Ireland) i.e. affecting navigation;
- harbour works requiring approval or consent in accordance with a local Act; a local Act read together with a notice given and published under section 9 of the Harbours Transfer Act 1862; or an order made under sections 14 or 16 of the Harbours Act 1964. This does not apply in Northern Ireland.

2.2. Since the Marine Works Regulations were implemented in June 2007, a regulatory gap has become apparent in the transposition of the Environmental Impact Assessment Directive to the dredging of marine minerals in harbours in England, Wales and Scotland.

2.3. This is because existing Regulations do not apply the Environmental Impact Assessment Directive to this activity. In particular:

- the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations, (“Marine Minerals Regulations”) , which transpose the Environmental Impact Assessment Directive and the Habitats Directive in relation to marine mineral dredging do not cover marine mineral dredging in harbours in England. The equivalent Regulations for Wales and Scotland also do not cover such dredging.
- the Marine Works Regulations do not apply to marine mineral dredging in harbours in England, Wales and Scotland because the definition of “harbour works” in such Regulations does not cover the dredging of marine minerals. “Harbour works” are defined in these Regulations as “works involved in the construction of a harbour or in the making of modifications to an existing harbour”.

2.4. Due to this regulatory gap, a harbour authority in England, Wales and Scotland wishing to authorise marine minerals extraction within its jurisdiction is not required to comply with the Environmental Impact Assessment Directive, either specifically under national legislation or as part of any wider duty on regulators. This leaves the UK vulnerable to infraction proceedings by the European Commission.

Options for closing the regulatory gap

2.5 Defra, the Welsh Assembly Government and the Marine and Fisheries Agency (MFA) have identified a number of options for closing this regulatory gap in England and Wales (the Scottish Executive intends to close this regulatory gap by making amendments to its own Regulations). These options are:

- a) do nothing for the time being and wait for the Marine Bill to come into force before making secondary legislation;
- b) amend the Marine Works Regulations to include minerals extraction in harbours;
- c) amend the scope of the Marine Minerals Regulations to cover minerals dredging in harbours.

Assessment of the options

2.6. Our assessment of the options is as follows:

a) do nothing and await the Marine Bill

Secondary legislation under the Marine Bill would close this regulatory gap, but it would not be in place before the target date of April 2010. This will leave the UK at a significant and unacceptable risk of being subject to infraction proceedings by the European Commission for not sufficiently complying with its obligations under the Environmental Impact Assessment Directive.

b) amend the Marine Works Regulations to cover marine mineral dredging

This will result in all harbour works in England and Wales being regulated for the purposes of the Environmental Impact Assessment Directive under a single regime, regardless of whether they consist of dredging or not. If this option is implemented, then the Welsh Ministers would be the appropriate authority for marine mineral dredging in harbours in Wales for the purpose of the Regulations.

c) amend the scope of the Marine Minerals Regulations to cover minerals dredging in harbours

The Welsh Assembly Government has its own equivalent to the Marine Minerals Regulations, so both the English and the Welsh Regulations would have to be amended to implement this option, resulting in additional work and consultations. Also, this option would be inconsistent with the policy of enabling all harbour works in England and Wales to be regulated under a single consenting regime for the purpose of the Environmental Impact Assessment Directive.

2.7. We believe the best option is b) amending the Marine Works Regulations to cover marine mineral dredging. This would amend the Marine Works Regulations to ensure that the activities to which the Regulations apply include - for England and Wales – the dredging of minerals in harbours. This option would also mean that the Welsh Ministers would be the Appropriate Authority for marine mineral dredging in harbours in Wales for the purpose of the Regulations.

Consultation questions

2.8. We are seeking views on the policy content of the proposed amendment to the Marine Works Regulations rather than comments on the legal drafting. For this reason, this consultation does not include the draft changes to the Marine Works Regulations.

2.9. We welcome comments on any aspect of this consultation, although as a guide, we would be particularly interested in answers to the following questions:

Q1) Are you happy that the option we have identified is the most appropriate way to rectify the regulatory gap?

Q2) Is there any reason why we should not close this regulatory gap?

Q3) Do you have any comments on the impact that the proposed amendment might have on small businesses, and on how they might affect competition in the industry?

Q4) Do you have any comments on the environmental impact of the proposed amendment?

Q5) Do you have any comments on the social impact of the proposed amendment?

Q6) Do you have any comments on the economic costs and benefits of the proposed amendments?

3. Port of London Authority

3.1. In addition to the above changes we intend to make, we are requesting comments on whether the Port of London Authority (PLA) should be an appropriate authority under the Marine Works Regulations for marine works within its jurisdiction. This would enable it to make environmental impact assessment consent decisions for proposals within its jurisdiction, in accordance with those Regulations.

3.2 The PLA was established as a Public Trust under the Port of London Act 1908. Its functions and powers are primarily set out in the Port of London Act 1968. Its purpose includes the administering, preserving and improving the Port of London and the conservancy of the tidal Thames.

3.3 A licence is required from the PLA, under the relevant section(s) of the Port of London Act, before any river works or dredging are carried out on the tidal Thames.

3.4 Currently under the Marine Works Regulations the body that makes the environmental impact decision (the appropriate authority) for works within the jurisdiction of the PLA is the Secretary of State for Environment, Food and Rural Affairs, with the Marine and Fisheries Agency being the main contact point for an applicant to whom the Marine Works Regulations apply.

3.5. The PLA has requested that it be considered as an 'appropriate authority' for the purposes of the Marine Works Regulations given its specific circumstances and powers under the Port of London Act. This would require an amendment to the Marine Works Regulations to give the PLA the function of

deciding on environmental impact assessment consent for regulated activities within its jurisdiction. It would mean that it would act as both “regulator” and “appropriate authority” under those Regulations.

Consultation questions

Q7) Is there any reason why the PLA should not be considered as an appropriate authority?

Q8) Do you see there being an issue with the PLA being both a regulator and appropriate authority?

Q9) Do you have any further comments on the PLA becoming an appropriate authority?

4. The Habitats Directive

4.1. The Habitats Directive is the means by which the European Union meets its obligations as a signatory of the Convention on the Conservation of European Wildlife and Natural Habitats 1979 (Bern Convention).

4.2. The provisions of the Directive require Member States to introduce a range of measures, including measures for the protection of species listed in the Annexes to the Directive; to undertake surveillance of habitats and species; and to produce a report every six years on the implementation of the Directive.

4.3. Each Member State is also required to prepare and propose a national list of sites for evaluation by the European Commission. This is to enable the Commission to create a European network of Sites of Community Importance (SCIs). Once adopted by the Commission, these sites are designated by Member States as Special Areas of Conservation (SACs), and, along with Special Protection Areas (SPAs) classified under the EC Birds Directive, form a network of protected areas known as Natura 2000.

4.4. Article 6(3) of the Directive requires an appropriate assessment to be undertaken on a plan or project if it is likely to have a significant effect on a Natura 2000 site and it is not connected with the management of that site. Subject to Article 6(4) of the Directive, if, following an appropriate assessment, it is determined that the plan or project may have an adverse effect on the integrity of the site, the plan or project cannot proceed.

4.5. Under Article 6(4), such plans or projects may be permitted despite a negative appropriate assessment, if there are no alternatives and there are imperative reasons of overriding public interest. In such cases compensation measures will be necessary to ensure the overall integrity of network of sites.

4.6. The main pieces of legislation which transpose the Habitats Directive into national law are:

- the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended, with separate amendments made by Scotland) (known as the “Habitats Regulations”);
- the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995 (as amended); and
- the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007.

4.7. Regulation 3(3) of the Habitats Regulations imposes a general obligation on competent authorities having functions relevant to marine conservation to exercise those functions to secure compliance with the requirements of the Habitats Directive. Under this duty, the MFA complies with the obligations under Articles 6(3) and 6(4) before giving any approval, on behalf of the Secretary of State or the Welsh Ministers, for marine works for which it has the power to grant regulatory approval.

4.8. The Habitats Regulations also transpose the requirements of Articles 6(3) and 6(4) for a number of specific projects or plans which require approval. This includes planning permission and certain consents under the Electricity Act 1989.

4.9. Despite the general duty under Regulation 3(3), it is considered prudent for the Habitats Regulations to be amended in relation to England and Wales so that, as for planning permission and certain consents under the Electricity Act 1989, they more specifically transpose the requirements of Articles 6(3) and 6(4) of the Habitats Directive in relation to dredging in harbours and other marine works. Failure to do this may leave the UK vulnerable to infraction proceedings by the European Commission, and create (in Defra and the Welsh Assembly Government’s opinion) an unacceptable risk to the UK taxpayer.

4.10. As a result, it is intended that when the change to the Marine Works Regulations is made, the Habitats Directive will be more specifically transposed for marine mineral dredging in harbours and other marine works in England and Wales. This will mean, in particular, amending the Habitats Regulations in relation to England and Wales so that Articles 6(3) and 6(4) of the Habitats Directive more specifically apply to such works. The Department of the Environment (DoE) in Northern Ireland intends to make similar amendments to its Habitats Regulations for which there will be a separate consultation. This change is not needed for Scotland because of the specific amendments to the Habitats Regulations which apply in Scotland.

Consultation questions

Q10) Do you agree that we are correct to ensure articles 6(3) and 6(4) of the Habitats Regulations are implemented in relation to “marine works”.

5. Responding to this consultation

Please send comments by **19 February 2009** to:
Sustainable Marine Resources and Climate Impacts Team,
Defra Marine Programme,
Area 2E, Nobel House,
17 Smith Square,
London SW1P 3JR.

Email: marine.resources@defra.gsi.gov.uk
Telephone: 020 7238 4427
Fax 020 7238 4699

In line with Defra's policy of openness, at the end of the consultation period copies of responses we receive may be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London SW1P 3JR. The information they contain may also be published in a summary of responses.

If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your email system will not be treated as such a request. You should be aware that there are circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

The Information Resource Centre will supply copies of consultation responses to personal callers or in response to telephone or email requests (tel: 020 7238 6575, email: defra.library@defra.gsi.gov.uk). Wherever possible, personal callers should give the library at least 24 hours notice of their requirements. An administrative charge will be made to cover photocopying and postage costs.

This consultation has been prepared in line with the Government code of practice which is available from the Department for Business, Enterprise and Regulatory Reform at <http://bre.berr.gov.uk/regulation/consultation/>.

Comments or complaints about the consultation process (as opposed to comments about the issue which is the subject of consultation) should be addressed to:

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Impact Assessments

Impact Assessments accompany this Consultation Paper for both the Marine Works Regulations and the Habitats Regulations, and can be found at <http://www.defra.gov.uk/corporate/consult/marine-works/index.htm>.

Previous consultation with Devolved Administrations and Government Departments

The proposals in this consultation have been informally consulted on in whole or in part with the relevant colleagues in Defra, as well as colleagues in other bodies, including:

Devolved Administrations:

Department of the Environment in Northern Ireland
Scottish Executive Environment and Rural Affairs Department
Welsh Assembly Government

Other Government Departments:

Business, Enterprise and Regulatory Reform
Department for Transport

This consultation exercise has been approved by the appropriate Minister.