

Summary: Intervention & Options

Department /Agency: Defra	Title: Impact Assessment for the implementation of the Habitats Directive in relation to “marine works”	
Stage: Final	Version: Final	Date: November 2008
Related Publications:		

Available to view or download at:

<http://www.defra.gov.uk/corporate/consult/marine-works/index.htm>

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What is the problem under consideration? Why is government intervention necessary?

The problem under consideration is whether to implement the Habitats Directive more specifically in relation to “marine works”.

The UK has a legal obligation to adequately transpose the Habitats Directive and failure to do so puts the UK at risk of legal action by the European Commission with a consequent risk, if the failure is not addressed, of incurring infraction fines. This creates an unacceptable risk to the UK taxpayer.

What are the policy objectives and the intended effects?

The policy objective is to close the current gap in the transposition of the Habitats Directive for “marine works”. This can be achieved by amending the Habitats Regulations so that the provisions contained in the regulations more specifically apply to “marine works”.

The effect of this will be to ensure that when changes are made to the Marine Works (Environmental Impact Assessment) Regulations 2007 (MWRs), any works carried out which are covered by these regulations will also be specifically subject to the relevant provisions of the Habitats Directive.

What policy options have been considered? Please justify any preferred option.

Option 1: do nothing. This is not a realistic option as it would leave a gap in the transposition of the Habitats Directive. This would pose an unacceptable risk of legal action by the EC and potentially heavy fines.

Option 2: amend the Habitats Regulations to more specifically include “marine works”.

Option 2 is the preferred option as it will ensure that the gap in the transposition of the Habitats Directive is closed, avoiding the risk of legal action by the EC and potentially heavy fines.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be reviewed as part of the process to consolidate amendments to the Habitats Regulations. This is currently scheduled for 2010.

Has the assessment been signed off by the Chief Economist?
Yes

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option: Option 2

Description: Amend the Habitats Regulations to include “marine works”.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by ‘main affected groups’
	One-off (Transition)	Yrs	
	£ 0		No significant monetised costs anticipated.
	Average Annual Cost (excluding one-off)		
£ 0		Total Cost (PV)	£ 0
<p>Other key non-monetised costs by ‘main affected groups’</p> <p>There may be a small cost to industry of familiarisation with the new regulation, however, no significant non-monetised costs anticipated.</p>			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by ‘main affected groups’
	One-off	Yrs	
	£ 0		No direct monetised benefits. However, an indirect benefit will be to avoid potentially heavy infraction fines. Estimates for these are provided in the main text below.
	Average Annual Benefit (excluding one-off)		
£ 0		Total Benefit (PV)	£ 0
<p>Other key non-monetised benefits by ‘main affected groups’</p> <p>Industry will benefit from the removal of any uncertainty regarding the legal status of “marine works” in relation to the Habitats Regulations.</p>			

Key Assumptions/Sensitivities/Risks

A key assumption is that there will be very little actual change as a result of amending the Habitats Regulations to include “marine works”. This is because there is already a ‘general duty’ requirement to undertake appropriate assessments for “marine works” under the Regulations. The proposed amendment will merely remove any legal uncertainty with regards to the status of “marine works”. The reasons for doing this are set out in the text below, under section 2 (ii). The key risk is that the EC initiates fresh infractions proceedings against the UK for not having adequately transposed the Habitats Directive, i.e. for not having specifically referred to “marine works” in the Habitats Regulations.

Price Base Year 2008/9	Time Period Years N/A	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ N/A
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What is the geographic coverage of the policy/option?	England and Wales
On what date will the policy be implemented?	
Which organisation(s) will enforce the policy?	NE / harbour authority
What is the total annual cost of enforcement for these organisations?	£
Does enforcement comply with Hampton principles?	Yes

Will implementation go beyond minimum EU requirements?			No	
What is the value of the proposed offsetting measure per year?			£ n/a	
What is the value of changes in greenhouse gas emissions?			£ n/a	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)	
Increase of £ 0	Decrease of £	0	Net Impact	£ 0

Key: **Annual costs and benefits: Constant Prices** (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

1. Proposal: Impact assessment of the implementation of the Habitats Directive in relation to “marine works”.

In closing the regulatory gap for the Marine Works (EIA) Regulations 2007 (MWRs), it has become apparent that Articles 6(3) and 6(4) were not fully implemented in relation to “marine works” (including dredging in harbours). These include any activities requiring:

- a licence under part 2 of the Food and Environment Protection Act 1985,
- a consent under section 34 of the Coast Protection Act 1949
- a consent for certain harbour works, which includes harbour works for which consent is required pursuant to an order made under section 14 or section 16 of the Harbours Act 1964.

Accordingly, changes to domestic legislation (the Conservation (Natural Habitats, & c) Regulations 2004 - “Habitats Regulations”) are required to ensure that the UK adequately implements the Habitats Directive to more specifically cover “marine works”.

2. Purpose and intended effect

(i) Objective

The objective is to close the current gap in the transposition of the Habitats Directive for “marine works”. This can be achieved by amending the Habitats Regulations so that the provisions contained in the regulations more specifically apply to “marine works”.

The effect of this will be to ensure that when changes are made to the Marine Works (EIA) Regulations 2007, the Habitats Directive will be fully transposed for any works carried out which are covered by these Regulations..

(ii) Background

Directive 85/337EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive) has not been fully transposed in England, Wales and Scotland for the dredging of marine minerals in harbours.

The Scottish Government has decided to close this gap by amending the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Regulations 2007. England and Wales have decided to close this gap by amending the MWRs.

The Scottish Government approach will mean that the Habitats Directive (as well as the EIA Directive) will be specifically transposed in Scotland for the dredging of marine minerals in harbours.

However, the Habitats Directive is not specifically transposed in respect of such works within England and Wales. The UK has been planning to address gaps in the transposition of the Habitats Directive via an exercise to consolidate amendments to the Habitats Regulations. However, this is not expected to come into force until 2010.

Since Scotland have decided to take this approach, and Art 23(3) of the Habitats Directive requires Member States to inform the Commission of measures to implement the Directive, i.e. that the Scottish Marine Minerals Regulations will implement Art 6(3) and (4) in relation to minerals dredging in harbours, it is imperative that England and Wales take action to fill this regulatory gap within their jurisdictions. In doing so, the Habitats Directive will also be specifically transposed in relation to all other marine works covered by the MWR, as such works are not specifically transposed in England and Wales either.

This will avoid fresh infraction proceedings for failure to implement Art 6(3) and (4) in relation to “marine works” in the UK. Therefore England and Wales intend to make relevant amendments to their Habitats Regulations specifically in respect of “marine works”. Northern Ireland intends to make amendments to its equivalent of the Habitats Regulations. However, such amendments will not need to cover those marine works comprising the marine mineral dredging in Harbours as the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007 already does this transposition in relation to Northern Ireland.

It is notable that the Habitats Regulations already impose a general duty on Competent Authorities to comply with the Habitats Directive in marine areas. This is set out in Regulation 3(3).

Regulation 3(3) states:

In relation to marine areas any competent authority having functions relevant to marine conservation shall exercise those functions so as to secure compliance with the requirements of the Habitats Directive.

Therefore the UK already applies the provisions of the Habitats Directive to “marine works” through the Habitats Regulations, including requirements to undertake Appropriate Assessments.

However, the European Court of Justice (ECJ) in Case c-6-04 deemed that the general duty was not sufficient to transpose the Directive. In paragraph 27 of the ECJ Judgment, the Court stated (in relation to similar general duties under Regulations 3(2) and 3(4)) that the general duty “*is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty*”.

The ECJ judgement held that the general duty is insufficient to transpose the Habitats Directive. Therefore, amendments to the Habitats Regulations to specifically include “marine works” are required to remove the risk of infraction.

(iii) Risk assessment

Failure to fill the regulatory gap for “marine works” could result in:

- the UK appearing before the ECJ for failing to fully implement the requirements of the Habitats Directive;
- heavy infractions fines by the EC;
- reputational damage to the UK for not fully meeting its obligations under the Habitats Directive;
- doubt being cast on the UK’s stated intention to preserve and enhance biodiversity in line with the Biodiversity Convention signed at the Rio Earth Summit and to achieve Europe’s target of halting the loss of biodiversity by 2010.

(iv) Benefits of filling the regulatory gap:

Filling the regulatory gap to cover “marine works” in the Habitats Regulations will ensure that the Habitats Directive is adequately transposed in relation to “marine works”. In doing so, the UK will also demonstrate its commitment to protecting biodiversity, while avoiding infractions proceedings and potentially heavy fines.

3. Consultation

Defra will consult with all principal departments, agencies and stakeholders which have an interest.

4. Options

Two options have been identified:

Option 1: Do nothing – i.e. do not fill the regulatory gap in the transposition of the Habitats Directive for “marine works”. We do not regard this as a realistic or acceptable option as it would pose a risk of infractions proceedings for the failure to fully transpose Article 6(3) and (4) of the Habitats Directive. This could lead to an appearance before the European Court of Justice and potentially heavy infraction fines. Waiting until the consolidation exercise in 2010 would pose similar unacceptable risks.

Option 2: Fill the regulatory gap in the transposition of the Habitats Directive by amending the Habitats Regulations to specifically include “marine works”.

In our view option 2 is the preferred option as it meets the UK’s obligation to fully implement the Habitats Directive for “marine works”. It will also avoid the risk of EC infraction proceedings and potentially heavy fines.

5. Costs and Benefits

(a) Costs

Option 1 (the ‘do nothing’ option):

To Government / regulators (where they are appropriate authorities):

There are no direct or immediate financial costs involved in this option.

There is a risk that in due course, however, administrative and legal costs may be incurred on mounting a defence to infraction proceedings and paying any EU penalty for non-compliance with the Habitats Directive. Although instances of fines being imposed are relatively rare (presumably because Member States take action before infractions proceedings get that far), the European Court of Justice can impose very heavy fines (a Member State was recently fined a lump sum of Euro 20 million, plus Euro 58 million for every six months it failed to comply with a judgment of the ECJ). However, it is not possible to anticipate the lump sum penalty or monthly penalty rate, as this is set by the EC according to the seriousness of the infringement and the situation.

Non-financial costs could include damage to reputation, linked to failure to fully implement the Habitats Directive and possibly loss of influence in the environmental / conservation community generally both within the UK and at a EU level (including amongst NGOs with significant influence).

To industry:

No quantified costs are identified for this option. However there may be a cost associated with legal uncertainty surrounding the issue of whether some “marine works” could take place without appropriate assessments.

Option 2 (filling the regulatory gap in the transposition of the Habitats Directive):

To Government / agencies:

There are no significant financial costs to Defra and the Welsh Assembly Government (WAG), other than minimal administrative and legal costs arising from amendments to the Habitats Regulations. Such costs are expected to be absorbed within the course of normal work.

There are unlikely to be additional administrative costs for Natural England (NE) and the Countryside Council for Wales (CCW), since they already provide advice to Competent Authorities undertaking Appropriate Assessments in England and Wales under the general duty under section 3(3) of the Habitats Regulations.

To Competent Authorities:

Implementation of the Habitats Regulations in respect of “marine works” introduces a specific requirement to ensure that the environmental impact of any proposed activity on a protected site (plan or project) is subject to an Appropriate Assessment. This requirement is unlikely to involve additional work by Competent Authorities as they are already required to undertake such assessments pursuant to the general duty under Regulation 3(3).

To industry:

There may be a small cost to industry of familiarisation with the new legislation. However, there is unlikely to be additional costs for industry as Appropriate Assessments are already required for marine works under the general duty in the Habitats Regulations – under Regulation 3(3).

(b) Benefits

Option 1 (the ‘do nothing’ option):

No benefits are identified from the ‘do nothing’ option.

Option 2 (filling the regulatory gap in the transposition of the Habitats Directive):

To Government / regulators (where they are the appropriate authorities):

The benefit of this option is that it will fill the regulatory gap to cover “marine works” in the Habitats Regulations and ensure that the Habitats Directive is adequately transposed in relation to “marine works”. In doing so, the UK will demonstrate its commitment to protecting biodiversity, while avoiding the risk of infractions proceedings and potentially heavy fines.

To industry:

The benefit of this option is that the requirements for industry are clearly laid out, reducing uncertainty and potentially reducing legal costs over time. As a result licences and consents for “marine works” are unlikely to be challenged through the courts for not being issued in compliance with the Habitats Directive.

6. Sectors and groups affected

The main sectors and groups affected will be:

- Competent Authorities providing licences and consents for “marine works”;
- the marine minerals extraction industry;
- statutory conservation agencies; and
- Defra and the Welsh Assembly Government.

Conservation NGOs will be supportive of action to fill the regulatory gap in the transposition of the Habitats Directive and help ensure the coherence of the Natura 2000 network.

7. Small Firms’ Impact test

The impact on small firms is expected to be low. The change will be equitable and will not place undue burdens on small firms.

8. Competition Assessment

Implementing the Habitats Regulations more fully in respect of “marine works” is not likely to change the investment behaviour into England and Wales, compared with other Member States.

The implementation will not affect competition within sectors carrying out “marine works”. Impact on consumers, where it occurs, is likely to be minimal.

9. Post-implementation review

It is expected that a review of the implementation will be undertaken when further amendments to the Habitats Regulations are consolidated, anticipated to be in 2010.

11. Summary and recommendation

The recommendation is that Option 2 is preferred. The regulatory gap in the transposition of the Habitats Directive should be filled by amending the Habitats Regulations to more specifically include “marine works”.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annex A

SPECIFIC IMPACT TESTS: CHECKLIST

	Specific Impact Test	Specific considerations	Outcome
Economic	Competition Assessment	<ul style="list-style-type: none"> • Will the proposal have a significant impact on competition? 	No significant impact
	Small Firms Impact Test	<ul style="list-style-type: none"> • Will the proposal impact on small businesses? 	No significant impact
	Legal Aid Impact Test	<ul style="list-style-type: none"> • Will the proposal introduce new criminal sanctions or civil penalties? 	Yes, under the Habitats Regulations
	<i>Other Economic Issues:</i>	<ul style="list-style-type: none"> • Will the proposal bring receipts or savings to Government? • Will it impact on costs, quality or availability of goods and services? • Will it impact on the public sector, the third sector, consumers? • Will the proposal result in new technologies? • Will the proposal result in a change in the investment behaviour both into the UK and UK firms overseas and into particular industries? 	No No Yes No No
Environmental	Carbon and Greenhouse Gas Assessment	<ul style="list-style-type: none"> • Will the proposal lead to change in the emission of Greenhouse Gases? 	No
	<i>Other Environmental Issues:</i>	<ul style="list-style-type: none"> • Will the proposal be vulnerable to the predicted effects of climate change? • Will it lead to a change in the financial costs or environmental and health impacts of waste management? • Will it impact significantly on air quality? • Will it involve any material change to the appearance of the landscape or townscape? • Will it change the degree of water pollution; levels of abstraction of water; exposure to flood risk? • Will it disturb or enhance habitat or wildlife? • Will it affect the number of people exposed to noise or the levels of exposure? 	No No No No No Not applicable. No
Social	Health Impact Assessment	<ul style="list-style-type: none"> • Will the proposal have an impact on health, well-being or health inequalities? 	Not applicable.
	Race Equality	<ul style="list-style-type: none"> • Have you considered how to assess the proposal's impact of on race equality? This is a statutory obligation. 	Not applicable.
	Gender Equality	<ul style="list-style-type: none"> • Have you assessed the proposal's impact on men and women? This is a statutory obligation. 	Not applicable.
	Disability equality	<ul style="list-style-type: none"> • Have you assessed the proposal's impact on disability equality? This is a statutory obligation. 	Not applicable.
	Human Rights	<ul style="list-style-type: none"> • Will the policy have an impact on human rights? 	Not applicable.

	Rural Proofing	<ul style="list-style-type: none"> • Will the policy have a different impact in rural areas? 	Not applicable
		<ul style="list-style-type: none"> • Could the proposal have a differential impact on: <ul style="list-style-type: none"> • Children and young people? • Older people? • Could the proposal have a differential impact on: <ul style="list-style-type: none"> ○ Income groups? ○ Devolved countries? ○ Particular regions of the UK? 	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>
Sustainable development	SD Principles	<ul style="list-style-type: none"> • Have you considered all of the above issues and does the proposal comply with Sustainable Development Principles? 	Yes. The proposal will ensure greater legal certainty with regards to the protection of Natura 2000 sites in the UK.