



**PROCEEDINGS OF THE IEEP/CCW WORKSHOP ON THE MARINE
IMPLEMENTATION OF NATURA 2000 AND ITS IMPLICATIONS FOR
INSHORE FISHING**

Aberystwyth, 9 February 2005

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INTRODUCTION

The workshop provided a timely opportunity to discuss the implications of implementing the habitats and birds Directives for the inshore fishing sector, in particular in relation to provisions for appropriate assessment of plans and projects. The main purpose of the meeting was to raise awareness amongst stakeholders, particular Welsh fishermen and their representatives, and to exchange experience with others, including representatives from the Dutch inshore fishing sector who were able to describe first hand the developments that led to the September 2004 European Court of Justice ruling on the application of assessment provisions to fishing (Wadden Sea Case; C-127/02).

The workshop attracted a range of participants including representatives from the Sea Fisheries Committees (SFCs), Fishermen's Associations, Producers Organisations, the Sea Fish Industry Authority, non-governmental organisations (NGOs), the Countryside Council for Wales (CCW), the Environment Agency, Defra and the Welsh Assembly. CCW kindly co-hosted the meeting.

SUMMARY AND WAYS FORWARD

Statement from CCW



It is CCW's statutory duty to advise on the designation of Natura 2000 sites and we are committed to establishing a coherent network of Natura 2000 sites around our coasts. It is our aim to assist sea fisheries authorities in managing fisheries in ways compatible with the conservation of habitats and wildlife in marine protected areas, particularly marine SACs and SPAs. Furthermore it is our stated policy (CCW Sea Fisheries Policy 2003¹) that all new fisheries and changes to fisheries practice or increases in effort which are likely to have a significant effects on site features, are treated as plans or projects (within the meaning of Article 6(3) of the Habitats Directive) and are subject to appropriate assessment in accordance with the legislation. We therefore welcome the clarification provided by the Waddensea ruling and are willing to work with others to help facilitate the implementation of Article 6(3).

Background to the habitats Directive

The *EU habitats Directive (92/43/EEC)* requires Member States to designate Special Areas of Conservation (SACs) to protect some of the most threatened habitats and species across Europe, and to restore and maintain them at a 'favourable conservation status'. SACs are an integral part of the Directive's provisions. Likewise, the *EU birds Directive (79/409/EEC)* requires the protection of Special Protection Areas (SPAs), also an integral tool in achieving the protection of wild birds and their habitats, breeding and resting grounds. Together SACs and SPAs are to form a coherent network of protected areas, known as 'Natura 2000'.

The territorial application of the Directive has been controversial, but following a ruling of the UK High Court², the Directive was found to apply to the UK Continental Shelf, and the waters above the seabed, up to a limit of 200 nautical miles from the baseline. There is also political agreement at EU level that the Directive applies to the Exclusive Economic Zone (EEZ - 200nm) of those EU Member States that have declared EEZs. The European Commission has taken the view that 'if a Member State exerts its sovereign rights in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating license for a drilling platform), it thereby considers itself competent to enforce national laws in that area, and consequently the Commission considers in this case that the habitats Directive also applies, in that

¹ Available at www.ccw.gov.uk.

² case of *R v The Secretary of State for Trade and Industry, ex parte Greenpeace Ltd*; [2000] 2 CMLR 94

Community legislation is an integral part of national legislation.’³ The Council (of Ministers) has also encouraged the Member States ‘to continue their work towards the full implementation of [the birds and habitats Directives] in their exclusive economic zones’.⁴

In the UK, the *Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716)* (Habitats Regulations) transpose most of the requirements of the Directive into national law, and provide for the designation and conservation of SACs in Great Britain, out to 12 nautical miles. In order to provide the legal basis for offshore nominations (ie beyond 12 nm), new Offshore Marine Conservation (Natural Habitats, &c) Regulations have been prepared, but these are still awaiting adoption.

Management and protection of Natura 2000 sites in inshore areas (out to 12 nm) is to be delivered using the existing regulatory framework. The UK Regulations place new obligations on so-called ‘relevant’ authorities in the marine/coastal environment. In practice this means that such bodies (eg Sea Fisheries Committees and harbour authorities) are legally bound to exercise their existing powers to secure compliance with the requirements of the habitats Directive even if the authorities were not initially intended for nature conservation. This includes the provision of bylaws to regulate fishing activities with the potential to damage a site or impact on a species, using existing powers (eg under the Sea Fisheries Regulation Act 1966) or seeking new powers within the remit of established procedures (eg by applying for an extension to competencies by means of an order under the Harbours Act 1964).

The Regulations further confer bylaw-making powers to the nature conservation agencies, enabling eg the Countryside Council for Wales to act where no other relevant authority exists. On a site-by-site basis, all relevant authorities must cooperate in establishing a single comprehensive management scheme (including conservation objectives, strategy and monitoring) using voluntary or regulatory measures.

In cases where a site is being adversely affected by non-UK fishing activities or lies outside UK territorial waters, the UK normally has to refer to the Commission, asking for measures to be proposed under the Common Fisheries Policy. A request for emergency measures (6 months in duration) was submitted for the first time in 2003, requesting bottom trawling to be prohibited to prevent continuing damage to the Darwin Mounds. The ban was later made permanent by amending the CFP technical Regulation.

The Wadden Sea Case

In addition to general site management obligations, the habitats Directive requires Member States to take preventative measures to anticipate and forestall the deterioration and disturbance of protected habitats and species. There is a general, though broad, requirement to prevent the deterioration of sites. In addition, Article

³ Communication from the Commission to the Council and the European Parliament on Fisheries Management and Natura Conservation in the Marine Environment, Brussels, 14.07.1999, COM(1999)363 final.

⁴ 2344th Council Meeting, Fisheries, 25 April 2001, *Council Conclusions on the integration of environmental concerns and sustainable development into the Common Fisheries Policy*, 8077/01, Luxembourg

6(3) of the Directive specifies that any '*plan or project*' not directly connected with the conservation management of the site, but likely to have a significant effect thereon, has to be subject to '*appropriate assessment*'. In light of the results of this assessment, plans and projects are only to be authorised if they will not adversely affect the integrity of the site and, if appropriate, after a public consultation. That said, authorisation can be given if there are no alternatives to the plan or project and if it needs to be carried out for reasons of 'overriding public interest'.

In September 2004, the European Court of Justice (ECJ) provided important legal interpretation on the issue of 'plans and projects' and 'appropriate assessment' in relation to fishing activities (C-127/02). The Court ruled that an activity, such as mechanical cockle fishing, can fulfil the concept of a project. It also ruled that the fact that an activity has been carried out periodically for several years on a given site does not preclude it being considered as a distinct plan or project within the meaning of the Habitats Directive.

The Court's ruling referred to a Dutch fishery in the Wadden Sea 'where a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on'. While the wording of respective translations of the original ruling delivered in Dutch has caused some debate (see Presentation 5), the ruling's potential wider implications for the fishing sector have not been disputed and reach further than the Wadden Sea. ECJ rulings are binding, with consequences for all Member States.

Following the ruling, Defra has stated that any doubt that annual licensing of an established fishery could amount to a plan or project was removed by the recent ECJ ruling, and that 'it is the view of the Department that the term 'plan or project' in terms of Article 6(3) of the Directive generally covers any activity involving an intervention in the natural environment that is undertaken, authorised or permitted by a competent authority'. Moreover, Defra concludes that if such 'an authorisation [or activity] is not directly connected to, or necessary for the management of a European site, and is likely to have a significant effect thereon, an appropriate assessment is required' (see Presentation 7).

Summary

Discussions at the workshop confirmed that the Welsh fishing industry, particularly the inshore sector, has substantial concerns in relation to the application of the Habitats and Birds Directives in the marine environment. While it was acknowledged that various factors - including factors unrelated to the Directives - have caused a slowdown in economic development and widespread frustration, the provisions of the Habitats and Birds Directives are thought by the sector to represent a significant economic barrier. In particular, the sector blames unreasonable obligations, which lead to additional restrictions, creating uncertainties in the short to medium term.

In particular, the following shortcomings were highlighted:

- *ambiguity* as regards terminology, extent of provisions and possible thresholds/triggers for application, leading to a lack of answers, clarity and predictability, and at times preventing a more practical or solution-based approach;

- *inconsistencies* in relation to the Directives' application and interpretation, notably relating to the (perceived) creation of an uneven playing ground between geographical areas and also between different sectors;
- *the marine information gap*, preventing speedy mapping/selection of areas subject to restrictions and potentially increasing the burden of precautionary restrictions on the industry;
- *unclear division of responsibilities*, leading (potentially) to lengthened decision making processes, a lack of direction, uncertainty as to who can assess an activity, who would take the risk of licensing an activity in the absence of full information, who has the burden of proof as regards the significance of an impact, who has to invest the resources needed for an assessment, etc;
- *lack of understanding of the provisions and relating obligations*, leading to often unfounded concerns and potentially misguided reservations (eg economic cost/benefit analysis), as well as uncertainty with regards to the full scope of the Directives (eg species protection);
- *uncertainty as to the overall cost and practicalities* of implementation and enforcement; and
- *difficulty of assessing cumulative and long-term effects*, potentially putting different sectors and actors within the same sector into direct competition.

Overall, the meeting represented just one step in a process that will require further time and consideration, if Wales is to meet its nature conservation obligations without losing the trust and support of its coastal and fishing communities. Discussions during the meeting were constructive and seemed to promote a better understanding of the obligations on the sector on the one hand, and its needs and concerns on the other hand. However, further work is needed to build a common vision of protected coastal and marine environments that provide the basis for sustainable coastal fisheries.

Ways forward

There are ongoing discussions between CCW and stakeholders in Wales, as well as more broadly across the UK and the EU. Within Wales, further meetings such as the one organised by IEEP as well as site-based work in Natura 2000 sites should provide an opportunity to continue discussions and address the different concerns of the Welsh fishing sector. Additional **opportunities to discuss further** the implications of Natura 2000 for the Welsh fisheries sector are presented by the following:

- CCW/ Fisheries Association meetings – now these are regularised at senior management level;
- the creation of a Welsh Fisheries Federation; and
- the production of guidance on implementing the Directives in the marine environment.

It is clear that the wider obligations of the birds and habitats Directives apply to all sectors and responsible parties, including the inshore fishing sector. Even in the absence of full clarity on each and every one of their requirements, **certain steps can already be taken by the sector** without waiting for clarification from ministers or the EU:

- *good practice* relating to management could be promoted and extended to other areas;
- *research in the marine and coastal environment* could be made a priority, and the fishing sector could assume a proactive and responsible role in providing information and monitoring services;
- *proactive and self-regulatory measures* could be taken by commercial and recreational fishermen, to support or forestall decisions to be made elsewhere;
- *training and resources* could be invested to raise awareness of environmental obligations, along with capacity-building amongst sectoral, governmental and voluntary staff;
- assessing the *socio-economic costs and benefits* of implementing the Directives and on finding practical solutions to site management and protection, which involve the sector; and
- examining the potential for *diversifying the sector* into providing wider services, including encouraging development of eco-tourism industries and other work that will benefit from nature values (eg in the Maine lobster industry, some lobstermen take tourists out on lobster boats, combining this activity with bird and whale watching).

More specifically, the sector may wish to (further) explore issues such as Best Available Technology (BAT), Best Environmental Practice (BEP), codes of conduct, self-enforcement, vessel monitoring, etc. It may also wish to explore different ways of accessing funds to assist the implementation of the birds and habitats Directives, eg by emphasising the need for such funding as part of the new European Fisheries Fund (to replace the current FIFG), and even by creating its own funds (eg insurance-type funds) to pay for appropriate assessments. There may also be a need for sector-wide support of some early assessments, as individuals may not have the means to carry these out unassisted.

Even though the sector can forge ahead on a number of fronts, a number of **options could be pursued at regional, national or European level**. Most notably:

- Defra could consider providing greater leadership in seeking clarification on outstanding issues at national or EU level, if necessary, through the Courts;
- spatial planning in the marine environment may help to address some of the uncertainties, and could be endorsed at government level and by appropriate legislation;
- CCW, together with English Nature and Scottish Natural Heritage, could increase their capacities on marine resources and protection, in order to be able to provide support to a growing network of marine sites and deal with the issues arising from their protection; and
- the UK could press for the new European Fisheries Fund (EFF) to provide adequate funding to assist the implementation of the birds and habitats Directives, but it should also be noted that it is the responsibility of the UK to make adequate matched funding available once the EFF has been adopted at EU level.

AGENDA



AGENDA WORKSHOP ON THE MARINE APPLICATION OF NATURA 2000 9 FEBRUARY 2005

<p>Location: William Davis Room, IGER (Institute of Grassland & Environmental Research), Plas Gogerddan, Aberystwyth, Ceredigion SY23 3BT Tel. +44 (0)1970 823000; Fax: +44 (0)1970 828357</p>
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9.45 *Coffee*

10.00 *Welcome and introductions*

10.10 *Welcome by Roger Thomas*
Chief Executive of CCW

10.15 **EU nature conservation law – how does it apply in the marine environment?**
(Saskia Richartz; Nature Conservation Research Officer Institute for European Environmental Policy)

Presentation of the basic requirements of the EU habitats and birds Directives and implications for the UK inshore fishing sector

Questions/Answers

11.00 **Natura 2000 - Implications for the inshore fishing sector**
(James Brown; Fisheries Research Officer, Institute for European Environmental Policy)

11.30 **Case study from the Wadden Sea**
(Jaap Holstein; Secretary of the Dutch Cockle Producers' Organisation)
Chair IEEP

Account of the experience in developing and applying a management plan/measures and appropriate assessment on fishing activity.

12.00 **Discussion including consideration of Welsh case studies**
Chair CCW

Starting with a short presentation from Mark Gray (CCW) 'Developing fisheries casework guidance in European Marine Sites', followed by

discussions on the implications of Natura 2000 for the fishing sector.

13.00 Lunch (*will be provided*)

14.00 Appropriate assessment – how to deal with fisheries in light of the Wadden Sea ruling

(Chair IEEP)

Short presentations on the conclusions and interpretation of the ECJ ruling

Peter Scott (Toller Beattie), Andrew Dodd (RSPB), John Clorley (Defra)

Questions/Answers

14.45 Panel Discussions - The practicalities of appropriate assessment – can we draw links and learn from experience?

(Chair CCW)

Discussion with contributions from the Wadden Sea representative, Welsh or UK experience etc

15.00 Close

PRESENTATIONS

Presentation 1 – Saskia Richartz

EU Nature Conservation Law

How does it apply in the marine
environment ?

Saskia Richartz

Institute for European Environmental Policy (IEEP)

Nature Conservation Policy – EU and the UK

Regulated at both the UK and EU level.

- ❖ **1979 EU birds Directive** – protecting wild birds, their resting, breeding and nesting sites
- ❖ **1992 EU habitats Directive** – protecting species, their habitats and certain other habitat types

✓ transposed in the UK by

Conservation (Natural Habitats &c.) Regulations 1994 (as amended)

Marine Application

- legal precedence through UK court action in 2000
 - ✓ the High Court concluded that the habitats Directive is applicable to the **UK Continental Shelf**, and the waters above the seabed, up to a limit of 200 nm from the baseline.
- the Commission suggests:
 - 'if a MS **exerts its sovereign rights** in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating license for a drilling platform), **it thereby considers itself competent to enforce national laws in that area**, and consequently the Commission considers in this case that the habitats Directive also applies, in that Community legislation is an integral part of national legislation' (COM(1999)363).

Key Provisions

Member States are to maintain or restore natural habitats and wild species of Community interest by establishing...

- Natura 2000** - made up Special Areas of Conservation (SAC) and Special Protection Areas (SPAs)
- a system of strict protection** for species of European importance throughout their natural range
- Natura 2000 site management**
- impact/appropriate assessment**

Site Protection (Natura 2000)

'Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species.'

- 198 habitat types (*Annex I, HD*)
- 485 plant and 221 animal species (*Annex II, HD*)
- 182 bird species (*Annex I, Birds Directive*)

Coastal lagoons and inlets

grey seal

harbour seal

Reefs

bottlenose dolphin

Mudflats and sandbanks

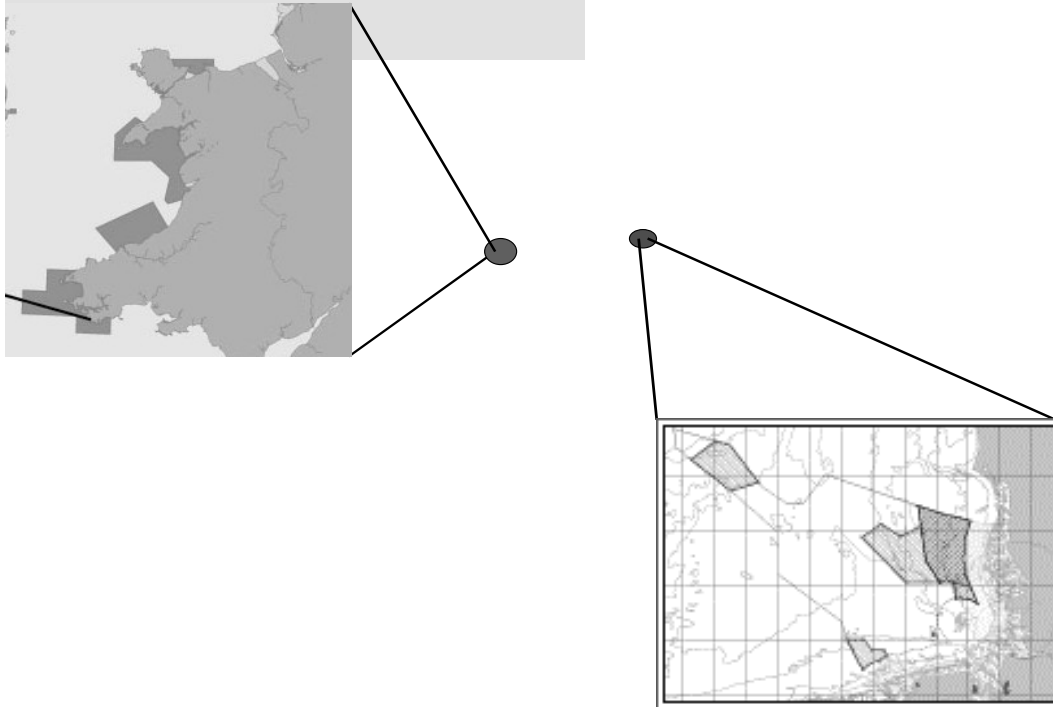
Large shallow bays

sea lamprey

harbour porpoise

sturgeon

The Emerging Network



Protection of Threatened Species

Annex IV protects threatened species, their habitats, resting, breeding and nesting places, including ...

cetaceans

seals

otters

marine turtles

the houting

the European sturgeon

and the Adriatic sturgeon

...also need

- **system to monitor the incidental capture and killing of eg cetaceans**

Other Species Protection

Annex V lists animal and plant species whose taking in the wild and exploitation may be subject to management measures, such as quotas, including ...

two seal species

twaite shad

vendace

common whitefish

Atlantic salmon
(only in freshwater)

allis shad

European river lamprey

and two species of red algae

Member States have to ensure that their exploitation is compatible with the species being maintained at a favourable conservation status.

Natura 2000 (Site) Management

- achieve or maintain 'favourable conservation status'
- does not mean that sites will be closed
- site-specific management plans and statutory, administrative or contractual measures

Management responsibilities are shared between various bodies, including SFC, CCW, Coastguard Agencies, Defra etc.

✓ *Management Group*

Impact/Appropriate Assessment

- *an appropriate assessment of any plan or project that is likely to have a significant effect/impact on the site has to be undertaken*
- *plans and projects are only to be authorised, if they will not adversely affect the integrity of the site*

or...

- *if there are no alternatives to the plan or project, and*
- *if there are reasons of overriding public interest eg social or economic*

Appropriate Assessment (cont.)

- sites hosting priority species or habitats are afforded stricter protection
- damage has to be compensated eg by providing protection elsewhere
- the appropriateness of the assessment is defined by its
 - *content – it is considered appropriate for instance to look for alternative solutions to the plan or project and to consult on the impact*
 - *conditions for application – it is inappropriate to reject an assessment on the basis that significant effects are uncertain*

Practical Issues

What needs to be assessed, and when?

What are the economic and social implications?

Who would do the assessment? And who would pay for it?

Nature Conservation

Implications for the Inshore Sector

James Brown
Fisheries Research Officer
IEEP

What's the issue?

Fishing entails more than just catching fish:

- Bycatch – species impacts
- Benthic interactions – habitat & ecosystem impacts
- Shoreline disturbance – bait digging

Bycatch

- Commercial and non-commercial species
- Fish species
 - sturgeon
 - allis & twaite shad
- Non-fish species
 - mammals
 - birds

Benthic interactions

- Impact on designated habitats eg cold water coral reefs
- Wider ecosystem impacts – resting, breeding & nesting places

Species protection measures: cetaceans

Gear Bans

- 2002 EU drift net ban

Gear modifications & monitoring

- ‘pinger’ use & observer programmes

More recently...

- bass fishery restrictions

Habitat protection measures: cold water coral reefs

- ‘Darwin Mounds’
 - first case of Commission emergency measures
 - now **permanent** under technical Regulation
- Azores, Madeira and the Canary Islands
 - permanent measure proposed
 - adopted as amendment to 2004 TAC regulation
 - renewed in 2005 TAC regulation – ie **1 year**

Future issues

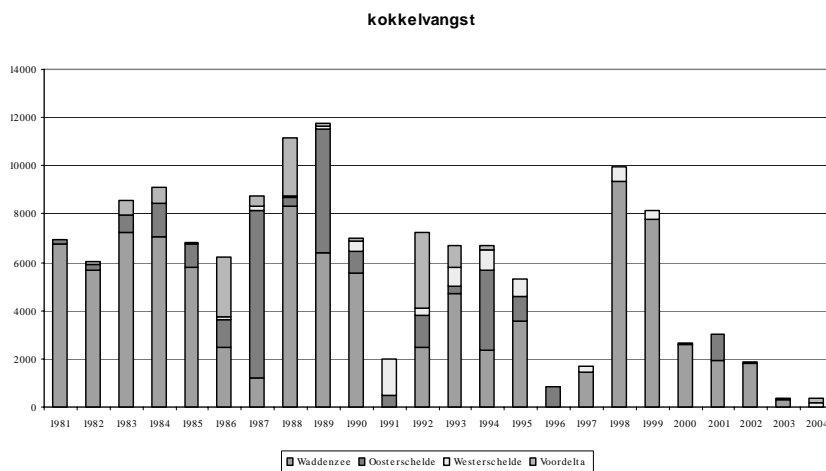
- Inclusion of commercial fish species?
 - eel
 - cod
- from reactive to proactive – pre-empting the issues
 - BATs
 - codes of conduct
 - Monitoring schemes

Joint IEEP/CCW meeting on the marine
implementation of Natura 2000

Fishing activity in light of the Wadden Sea ECJ ruling

Jaap Holstein
Producers' Organisation
of Dutch Cockle Fisheries

Total Dutch cockle landings 1981-2004 (metric tonnes)



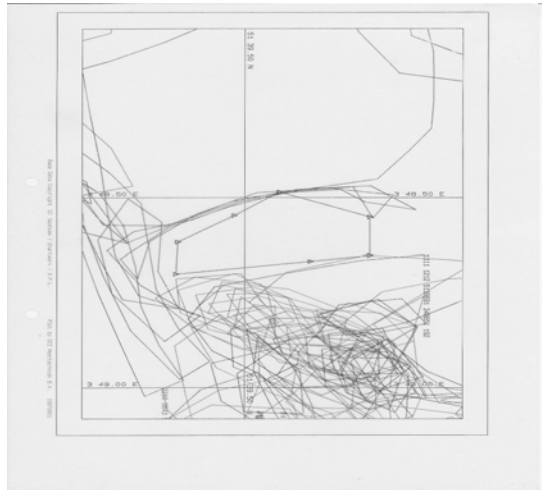
Legal framework for shellfish fisheries

- 1974: License system Fisheries Act: 37 cockle licenses
- 1993: Wadden Sea Memorandum (Key planning Decision)
- 1993: Fishing in Balance, Ministry
- 1997: Nature Conservation Act: annual fishing licenses
- 2005: Policy document 2005-2020: mech. cockle fisheries prohibited

Elements of shellfish fisheries policy

- Closure of 26% of the tidal flats in Wadden Sea
- Prevention of bird mortality due to fisheries in poor years through food reservation of 60% of stocks
- 5-year management plan including yearly fishing plans enforced by sector

Example of black box readings



1999: Evaluation co-management policy

- Industry has taken responsibility
- Nature conservation objectives not yet met;
- Food reservation increased to 70%
- Final decision about continuation of cockle fishery and future of mussel cultivation in 2003, based on scientific evaluation programme

2004: scientific evaluation

- Mussel cultivation: biomass 15% up; no damage from fishery on intertidal beds
- Cockles: no evidence for long term sediment changes; some food competition with oystercatchers in years with low stocks (mitigation possible)
- Population of shellfish-eating birds up in open areas and down in closed areas
- Carrying capacity decreased with 40% because of improved water quality

Policy evaluation 2004

- Scientific evaluation suggested that properly managed shellfish fishery would not disrupt ecosystem
- Sectoral plan for improved management was feasible and welcomed
- But: decision to prohibit mechanical cockle fishery still made
- ECJ ruling one of the decisive factors

The legal battle

- Environmental NGOs appeal each year against licenses under Nature Conservation Act
- Dutch Council of State referred questions to the ECJ for a preliminary ruling
- ECJ rules that mechanical cockle fishing falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive



Impact of ECJ ruling

- Cockle fishery licenses 2004 did not fulfil the criteria of Article 6(3) of Habitats Directive
- Appeals to licenses for cockle fisheries in 1999 and 2000 had to be granted in retrospect
- Project Mainport Rotterdam - appropriate assessment of the implications of the land reclamation for the Wadden Sea, in light of the conservation demands, was missing

Where does the ECJ ruling leave us?


- Do all fisheries fall within the concept of 'plan' or 'project'? What other restrictions will follow?
- Cockle PO starts procedure at EU Court of Human Rights
- Cockle PO asked Dutch Court to refer again questions to ECJ for a preliminary ruling
- Joint commitment to long-term management plan and multi-annual licences are a practical way out of endless legal procedures

Presentation 4 – Mark Gray





Fisheries casework guidance in Natura 2000 Sites

Mark Gray
Swyddog Cyswilt Pysgodfeydd Morol (Sea Fisheries Liaison Officer)
Cyngor Cefn Gwlad Cymru (Countryside Council)





Introduction



- CCW's role and remit
Statutory adviser to WAG
- CCW advice
Conservation Objectives
Schemes of management
Casework

Aims and Objectives

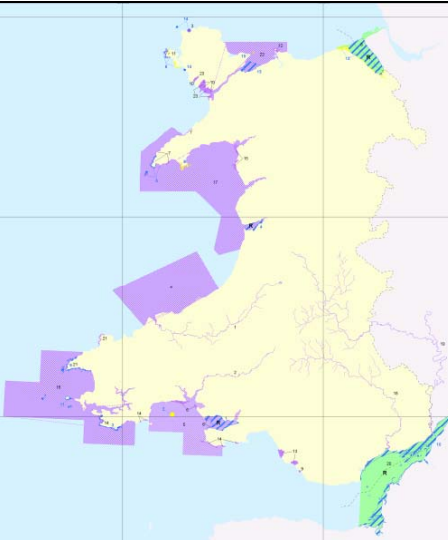


- Aim
To develop guidance for marine fisheries casework in Natura 2000 sites
- Objectives
To provide consistent fisheries casework procedure in England, Scotland and Wales
To provide guidelines for statutory conservation agency staff on how to undertake casework
To identify 'good practice' in past casework

**Natura 2000
Sites in Wales**

Accepted in December
2004

Fully protected by
Habitats Directive



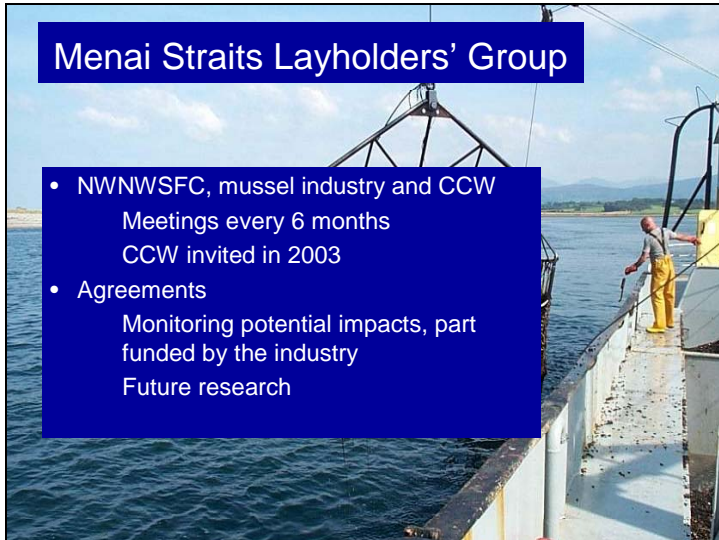
Reasons for the Project



- Consistency, eg
 - Appropriate Assessment procedure
 - Response times
 - Conservation advice
- Review of legislation and advice
 - Fisheries and conservation legislation
 - Latest advice (eg ECJ)
 - Identify competent authorities
- Highlight examples of good practice
 - Menai Straits Layholders Group
 - Cockle & mussel hand-gathering Appropriate Assessment
 - Whiteford Pt mussel seed Appropriate Assessment

Menai Straits Layholders' Group

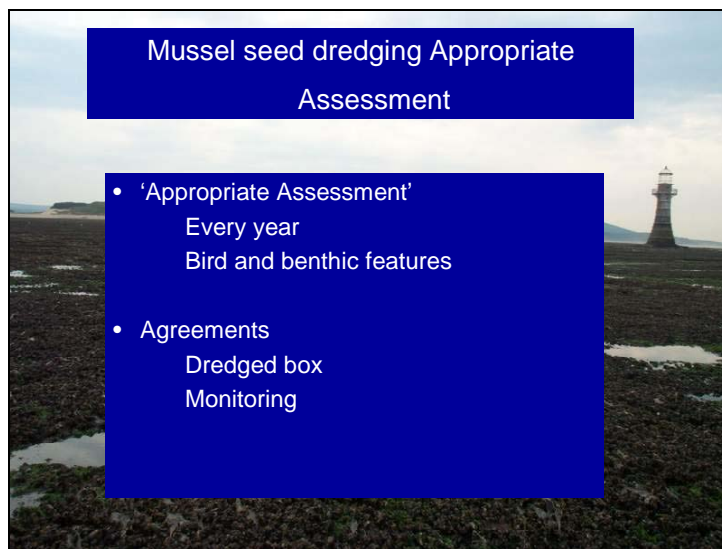
- NWNWSFC, mussel industry and CCW
 - Meetings every 6 months
 - CCW invited in 2003
- Agreements
 - Monitoring potential impacts, part funded by the industry
 - Future research





Cockle and mussel hand-gathering Appropriate Assessment


- 'Appropriate Assessment'
 - Began in October 2004
 - Permits provided in February 2005
- Agreements
 - Only traditional beds considered initially
 - CEH model being developed
 - Monitoring




Mussel seed dredging Appropriate Assessment

- 'Appropriate Assessment'
 - Every year
 - Bird and benthic features
- Agreements
 - Dredged box
 - Monitoring

Project Breakdown and Timescales



- Review of fisheries and conservation legislation and advice (draft complete)
- Update of a review of the effects of fishing within UK Natura 2000 sites (draft complete)
- Produce a guidance manual in 2005



Future Work



- Further collaboration with fisheries managers, industry and their representatives on for example:
 - Monitoring
 - Research
 - Data collection (eg for Appropriate Assessments)
 - Identify shortcomings and recommend changes in legislation, eg limiting fishing effort)
- Continually revise the guidance to:
 - Take account of legal advice
 - Record and publicise examples of 'good practice'



Diolch yn fawr – Thank you



APPROPRIATE ASSESSMENT
& THE WADDENZEE JUDGMENT
9TH FEBRUARY 2005

Peter Scott
Toller Beattie Solicitors



1

PLANS AND PROJECTS

- Purposive interpretation of P&P
- Don't need a consent to have a P&P
- "Directly connected" not argued
- Definitively includes mechanical cockle fisheries.
- Repeated local licences require AA
- Classification not P&P
- Fishery closure for stock ?require AA
- Doubt extends to general consents e.g. vessel licensing
- DEFRA definition "specific"



2

RELATIONSHIP WITH ARTICLE 6(2)

- 6(3) and 6(2) not exclusive
- Article 6(3) makes 6(2) redundant
- Will be re-engaged if AA wrong
- Same standard applies to 6(2)&(3)
- Same screening process applies
- Article 2(3) equivalent to 6 (4)



3

RULE OF CONFIDENCE

- CA convinced that will not
- No reasonable scientific doubt
- Judicially reviewable
- “könnte”? “likely”? “susceptible”
- “Manifest doubt” not acceptable.
- Can apply pilot study. [Note bad translation of A-G’s opinion]



4

SIGNIFICANT AFFECTION

- Where risk compromising COs
- Then potential for S affection
- ? adverse effect on European site
- “One cannot take account of effects which, regard being had to the conservation objectives of the site, are remote”



5

FISHERIES REGULATION POST WADDENZEE

- Local licensing follows 6 (3)
- Decisions still to be made by CAs
- “Pilot” can apply where unknown
- SFR byelaw powers limited
- No directly effective duty to make a byelaw
- SF(C) Orders for precautionary closures are appropriate
- Robust, flexible regulation reqd e.g. regulation order (scope limited)



6

TRANSPOSITION

- 1994 Regs “likely” ? “likely”
- Need to define powers and responsibilities of CAs
- Note Commission v Netherlands C-441/03 Commission 6(3)(4)
- Examine alternatives under 2(2) and 3 (1)
- Imperative to update legislation otherwise infraction proceedings



Waddenzee judgement

Helping to clarify Article 6 of the Habitats Directive

Andrew Dodd
Head of Site Conservation Policy
RSPB

Article 6 overview

- Overall purpose
 - To conserve and protect SPAs and SACs
 - Secure overall coherence of the Natura 2000 network
- Article 6(2)
 - Rule of general protection
 - Take appropriate steps to **avoid** deterioration and significant disturbance of SPAs and SACs
- Article 6(3) and 6(4)
 - Assessment of plans or projects with likely significantly effect on SPAs and SACs
 - Precautionary approach
 - Onus on applicant to prove no adverse effect
 - Provide habitat compensation for damaging schemes

Articles 6(3) and 6(4)

- Implemented by Regulations 48, 49 & 53 of GB Habitats Regulations
- Key stages
 1. Likely significant effect
 - Alone or in combination with other plans or projects
 2. Appropriate assessment
 - to determine effects on SPA/SAC
 - Can consent if not damaging
 3. Alternative solutions
 - Credible and feasible solutions
 - Refuse if less ecologically damaging solutions available
 4. Imperative reasons of overriding public interest
 - Social or economic considerations – tougher if priority habitats and species
 5. Compensatory measures

Waddenzee judgement

Clarification of Articles 6(3) & 6(4)

- Plan or project
 - Annual licences = plan or project
- Likely significant effect
 - If likely to undermine site's conservation objectives
 - If risk cannot be excluded on basis of objective information
 - Assess risk in light of site characteristics and specific environmental conditions

Waddenzee judgement

Clarification of Articles 6(3) & 6(4)

- Appropriate assessment
 - Must precede approval of plan or project
 - Must take account of **cumulative effects** resulting from in combination effects
 - Identify all aspects in light of **best scientific knowledge**
 - Only consent where **no reasonable scientific doubt** as to absence of adverse effects
 - Aim is to **prevent adverse effects** on integrity of SPAs/SACs

Waddenzee judgement

Clarification of Article 6(2)

- Does not operate at the same time as Articles 6(3) and 6(4)
- Can apply when unforeseen damaging effects arise after non-damaging plan or project consented
- Doctrine of “direct effect” can apply

The Advocate General's opinion Clarification of Article 6(2)

- Not binding but helpful in providing guidance on certain issues
- Effectiveness of Article 6(2) measures cannot be less than those under Articles 6(3) and 6(4)
- Compensatory measures required if unforeseen damaging effects arise after non-damaging project consented under Article 6(3)

Waddenzee judgement Discussion points arising

- Issues of definition:
 - Objective information
 - Best scientific knowledge
 - No reasonable scientific doubt
 - Are these case-by-case judgements?
- Need for monitoring programmes to inform Article 6(3) tests and Article 6(2) judgements
- No clear legislative path in UK on how Article 6(2) will bite

Fisheries and the Habitats Directive – Did the Wadden Sea Judgment Alter Anything

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Judgment – key points

- Established that fisheries undertaken under annual licence was a plan or project in terms of Art 6(3).
- Clarified what constitutes a significant effect
- Reinforced the view that the decision whether an appropriate assessment is required should be made on a precautionary basis.
- Set a benchmark for when plans or projects can be authorised.

Defra's View – plans and projects

- The term “plan or project” is not defined in the Directive, or its implementing legislation in England and Wales.
- Commission guidance on the provisions of Article 6 the term “project” is given a broad definition, but draws on the EIA Directive (as did the Court case)
- 1998 Government guidance on the term plan and project related to, “*in general any operation which requires an application to be made for specific statutory consent, authorisation, licence or other permission*”.

Defra's View – plans and projects

- In summary, it is the view of this Department that the term “plan or project” in terms of Article 6(3) of the Directive generally covers any activity involving an intervention in the natural environment that is undertaken, authorised or permitted by a competent authority.
- If that activity is not directly connected with, or necessary to the management of a European site, and is likely to have a significant effect upon that site, then an appropriate assessment is required.

Fisheries and plans and projects

- There is a common law public right to fish in England and Wales. Activities undertaken under this common law are not plans or projects in terms of Article 6(3), unless they require some further authorisation from a competent authority.
- However, the control of such activities in so far as they affect European sites may require management under Article 6(2) of the Directive. The obligations under 6(2) on competent bodies such as SFCs are explored later.

Fisheries and plans and projects

- Commercial fisheries do, however, require a number of specific consents.
- Fisheries controlled by Several and Regulating Orders may only be exploited with a licence or other permit granted by the holder of the order;
- Decisions are also taken which revoke a closure byelaw or relax a previous restriction.
- These activities should be regarded as a plans or projects and subject to appropriate assessment if necessary.

Fisheries and plans and projects

- For example, while a fishery remains open without restriction, that activity will probably not be subject to the Article 6(3) procedure. If the SFC decides to close or restrict that fishery for stock conservation reasons, that decision should be regarded as a plan or project.
- If that decision is likely to have a significant effect on a European site and is not connected with or necessary for site management, an appropriate assessment would be necessary.
- The same procedure would apply to any decision a SFC may take to reopen a fishery or remove any fishery restriction

Fisheries and plans and projects conclusion

- Fishing, in common with all activities capable of involving an intervention in the natural environment, is subject to the provisions of the Habitats Directive.
- Where a fishing activity is subject to consent, authorisation or other permission undertaken by a competent authority, then this is a plan or project in terms of Article 6(3).
- If such an authorisation is not directly connected to, or necessary for the management of a European site, and is likely to have a significant effect thereon, an appropriate assessment is required.
- This position was supported by the Wadden Sea judgment

Article 6(2) and Fisheries

- Not really covered by Wadden Sea Judgment
- However – major importance for management of European Sites
- Where an activity is not subject to any consenting or authorising mechanism, this should not be regarded as a plan or project.
- However if these activities affect European Sites, Article 6(2) of the Directive applies.
- Article 6(2) states that
“Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.”

Article 6(2) and Fisheries

- SFCs have a duty under regulation 3(3) of the 1994 Regulations to exercise their functions so as to secure compliance with the Habitats Directive.
- If a fishing activity causes the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which a European site has been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive,
- It is Defra’s view that where a SFC has the powers to take appropriate steps to regulate those activities it is obliged to do so under regulation 3(3) in order to secure compliance with Article 6(2) of the Habitats Directive.

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