

Appropriate Assessment of Activities Affecting European Marine Sites



1 Introduction

A key issue related to Natura 2000 site protection is the requirement for assessment of 'plans and projects' likely to have a significant impact on a particular site, before granting authorisation. In the marine environment, this requirement could potentially be applied to different fishing practices and activities.



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'. It is irrelevant whether the potential impact is caused by an individual plan or project, or a combination of activities.

In light of the results of the impact 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 such cases, Member States have to ensure that compensatory measures are taken to protect the overall coherence of Natura 2000.

2 The Legal Requirement – Assessment of Plans and Projects

In addition to general site management obligations (see Briefing 5), the habitats Directive requires Member States to take preventative measures to anticipate and forestall the deterioration and disturbance of conservation features. There is a general, though broad, requirement to prevent the deterioration of sites. In addition, Article 6(3) of the Directive

Where a site contains priority habitats and species, plans or projects will only be acceptable if needed on human health or safety grounds or, further to an opinion of the Commission, for other 'imperative' reasons of overriding public interest.

Since 2000, appropriate assessment is required by law for all European Sites² in England, including marine sites. A European Site is any classified or potential Special Protection Area (SPA) and any actual or candidate Special Area of Conservation (SAC) (see Briefing 2). In Scotland, Wales and Northern Ireland the legal provisions do not extend to candidate sites. However, the same standards are applied to all sites as a matter of policy.

3 Defining plans and projects

The habitats Directive refers to 'plans and projects' for which adequate assessment needs to be carried out. The two terms are only loosely defined by the legal text, with the decisive factor being whether a significant impact on the protected site is likely.

Assessment has to be carried out for any plan or project with a potential significant impact on the site, irrespective of whether it is to take place within or in the vicinity of the site.

Plans

The term **plan** is often taken to apply to a group of operations, which are generally of a more strategic nature than projects. They can be

spatial or sectoral plans, for example, land-use plans (in the terrestrial environment) and coastal development plans (in the marine environment).

Projects

The term **project**, on the other hand, refers to undertakings which are generally more site-specific and defined in nature, and which commonly require a permit or licence. The Commission suggests the following guiding definition:

'the execution of construction works or of other installations or schemes – other interventions in the natural surrounding and landscape including those involving the extraction of mineral resources'.

As in this case, **projects** often refer to, but are by no means limited to, physical construction schemes.

It is further important to remember that where one or more projects are part of a plan, assessment of the plan does not exempt projects from undergoing individual assessments.

For marine sites, this could mean that an assessment of a regional or national fisheries management plan (if and when required) would not exempt individual operations from assessment later on.



² Regulation 48 of the UK Habitats regulations

Under their general duty to comply with the habitats Directive when discharging their functions, the relevant management or regulatory bodies (eg SFCs) have to determine whether activities within their remit have a significant impact on the site's favourable conservation status or not. While this should normally be less onerous than a full impact assessment, it nonetheless requires a qualified assessment of the environmental implications of any given activity.

Moreover, it is important to note that the provisions for taking preventative measures under the habitats Directive are much broader in scope than those relating to appropriate assessment. Preventative measures have to be taken in relation to any activity that may disturb, endanger or degrade protected species and habitats. Even if fishing were not to become subject to appropriate assessments, preventative measures will be required in certain cases. Activities that do not fall within the definition of 'plans and projects' therefore still have to be compatible with the management objectives of the Natura 2000 site.

4 Possible Applications to Fishing

There is as yet no EU-wide agreement on whether and to what extent fishing



operations fall within the definition of 'plans or projects'. However, in September 2004 the European Court of Justice (ECJ) provided some legal interpretation on the issue of 'plans and projects' and 'appropriate assessment' in relation to fishing activities. The Court ruled that an activity, such as mechanical cockle fishing, fulfils the concept of a project. The fact that the 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 fishery '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'. However, its potential implications reach further. ECJ rulings are binding, with consequences for all Member States.

Until now, environmental assessments have not normally been undertaken in the UK. This was based on the view that fishing licences 'restrict exploitation' rather than 'permit access'. Consequently, fishing licences are considered a control or management instrument for which no environmental assessment is needed.

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However, in what could become standard practice, the Department for Environment, Food and Rural Affairs (Defra) has decided to undertake an environmental assessment of the new razor shell fishery of the Wash and North West Norfolk coast, prior to its opening. The decision is based on concerns over the razor shell's susceptibility to overexploitation, and the fact that the fishery will take place in a SAC. The Sea Fisheries Committees (SFCs) have also asked Defra to provide guidance on the issue of environmental assessments of fishing licences and the development of new fisheries. This has not yet been produced.

There is some support for interpreting *new* fisheries and *changes* in fisheries practice, or *increases* in effort, as plans and projects. Most recently, the report of the UK Prime Minister's Strategy Unit, for instance, recommended the use of Environmental Impact Assessments (EIAs) for new gears and fisheries, and the application of Strategic Environmental Assessments (SEAs) to offshore and inshore fisheries by the end of 2006.

Whatever may be agreed, routine assessment and monitoring of fishing activities is made more difficult by the fact that most fishing is dispersed in space and time. Under such conditions, it is often particularly difficult in cases of misconduct to identify the responsible party. In the UK, some guidance on appropriate conduct in open access fisheries

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is given by the Wednesbury Principle, which requires activities under the public right to fish to be rational, reasonable and lawful. However, more rigorous, mandatory standards for good practice may be needed.

Learning from other sectors

The Commission has issued (non-mandatory) guidance, which suggests that 'a significant intensification of agriculture' may be interpreted to fall under the definition of a 'project'. It could be argued that fishing operations somewhat resemble agricultural activities in their effect on the environment. In this case, significant changes of fishing practices could also be considered as projects.

While this is not currently standard practice in the UK, it is not unreasonable to suggest that at least some fisheries practices, or changes in practices, may in future become part of assessment obligations. If that were the case, it is not clear what would be the extent of assessment, the responsible lead organisation for making an assessment, who would set the standards for assessment and who would be the responsible body for controlling and enforcing restrictions.



Infrastructure projects, construction works and pipeline emissions, are largely already part of formal impact assessment procedures – often covered by separate Environmental Impact Assessment (EIA) requirements.³ The latter are based on an independent EU Directive on EIA, and often concern larger or more defined projects, regardless of whether they affect Natura 2000 sites or not. The use of uncultivated land or semi-natural areas for intensive agricultural purposes is covered by the Directive, as are intensive fish farming operations.

In the UK, most users of the sea operate to environmental standards. Dredging has been subject to environmental impact assessment since 1989, and the oil and gas sector has a sector-specific system of regulatory checks to ensure environmental performance before, during and after fields are in production. Only fishing is presently exempt from many of these standards (Cabinet Office, 2004).

Whatever current UK practice, there is likely to be growing pressure for the European Commission and the UK authorities to clarify the scope of the Directive's assessment requirements with respect to inshore and indeed offshore fishing operations. EU-wide clarification will be particularly helpful



in establishing a level playing field and to secure the recovery and maintenance of marine habitats and species. However, complete clarity will only be secured if the issue is taken to the European Court of Justice.

5 Appropriate Assessment in Practice

Assuming that plans and projects may relate to fishing, there is a need to clarify the term '*appropriate*' in relation to assessment. The Commission has provided non-mandatory guidance on the assessment process. Five stages can be distinguished: screening, evaluation, search for alternatives, decision and compensation (see Box 1).

The evaluation of the significance of the impact of the proposed activity is clearly the most important stage. Subsequently, the assessment of alternative solutions, including the option to have no activity at all, and choice of possible mitigation measures is critical in the overall assessment of the project or plan.

The **appropriateness** of the assessment is as much defined by its form and content, as by the conditions

³ Regulations on Environmental Impact Assessment (EIA) require an EIA of certain, specified developments.

Box 1: The assessment cycle

Articles 6(3) and 6(4) define a step-wise procedure for considering plans and projects:

- Stage 1 **screening** for significant impacts of plans and projects;
- Stage 2 **evaluation** of the scale of impact on site integrity, and review of potential mitigation measures for projects considered to have a significant impact;
- Stage 3 **assessment of alternative solutions** if the proposed activity is likely to have a significant impact;
- Stage 4 **decision** of the competent national authority on whether to grant permission or not; and
- Stage 5 **assessment of compensatory measures** where permission is granted despite adverse impacts.

that lead to its application. For instance, an assessment is required where a plan or project is *likely* to have a significant effect on the conservation status of the site. It would therefore be unacceptable to reject an assessment on the basis that significant effects are uncertain. In addition, the precautionary principle suggests that an assessment of the effects of activities may need to be made even in the absence of proof of negative impacts.

Many of the larger scale developments, such as the construction of offshore wind farms, will be covered by legislation requiring development consent and a full Environmental Impact Assessment

(EIA). Where a full EIA is not required, the scope of an appropriate assessment may be narrower. Unlike an EIA, which has to consider the impact of a plan or project on all aspects of the environment, Article 6(3) of the habitats Directive only requires an assessment of the impacts on the site's conservation status.

As for its form, an **appropriate assessment** would record site data, as well as possible alternative solutions and mitigation measures, in a written document, outlining in detail all arguments that serve to support the final decision. The assessment should always precede and form the basis for a decision on whether to go ahead with a project or plan, or not.

Public participation

A plan or project should only be agreed to, if it will not adversely affect the integrity of the site and, if appropriate, 'after having obtained the opinion of the general public'. Apart from this, the habitats Directive gives no further indication as to when it is appropriate to obtain the opinion of the general public.

For assessments carried out under or in line with the EIA Directive, any request for development consent and the information supplied by the developer is to be made available to the public within a reasonable time. In this way, the public concerned is given the opportunity to

express an opinion before consent is granted.

Even under the EIA procedures, the detailed arrangements for the provision of information and for consultation are a matter for the UK and other Member States. Ideally, it should be specified who the public is, where information should be made available and how the public will be consulted.

Negative results of the assessment

If the result of the assessment is negative, ie significant effects have been determined, any plan or project should be authorised only if it is considered to be necessary for 'imperative reasons' of 'overriding public interest'.

If, in spite of a negative assessment and in the absence of alternative solutions, a plan or project has to be carried out for reasons of overriding public interest, a number of conditions have to be met. Exactly which conditions, depends on whether the site hosts priority species/habitat types or not. Most importantly, the competent authorities are required to ensure that the overall coherence of the Natura 2000 network is maintained by taking necessary compensatory measures. If the concerned site hosts a priority feature, authorisation of the plan or project may only be considered



if the 'overriding public interest' concerns human health and public safety. In the case of marine sites, this could for instance be the construction of flood defence structures. In addition, the Commission has to be consulted. It may go against the plan or project, but its opinion is not binding.

6 Assessment responsibilities

Any (impact) assessment of plans and projects requires substantial knowledge of the species and habitats on site, their conservation status, their interdependencies within the wider ecosystem, and their vulnerability and level of resilience to impact.

Ecological understanding in the marine environment, in particular, is still limited. Thus, an appropriate assessment is likely to require an extensive and resource-intensive inventory, and a review of the status of the site's conservation features. Here the collaboration of science, industry and government is particularly valuable.

The responsibility for providing information on the potential impact of a project, however, largely rests with the developer.⁴ As the party with an economic interest in the development,

⁴ The term 'developer' used in the Regulation is, perhaps predictably, influenced by the mostly terrestrial planning system. The term 'operator' may be more appropriate in relation to the fishing sector.

the developer usually has to cover the costs of assessment. The final appraisal of a project, however, is made by the responsible authority.

In the case of fishing activities, the role of fishermen would be similar to that of the developer. Imposing the costs of an impact assessment on the licence/permit holder (ie the individual fisherman), however, is arguably difficult. For one, the cost of providing the type of information needed, is likely to have serious repercussions for the profitability of small enterprises. Moreover, if the activity is shown to be compatible with conservation of the site, other fishermen can take advantage of the assessment, 'free-riding' on the initial evaluation.

An alternative solution to individual payments could be group payments by a collective or association of fishermen. The introduction of access charges for sea fishing, similar to angling permits, is also being considered as a way to establish national or regional assessment funds, similar to insurance funds.

On land, local planning authorities (or equivalents) are responsible for granting planning permission to developers, and are thus the principal parties responsible for assessing the impact of plans or projects which require planning permission. Where Natura 2000 is involved, the nature conservation and landscape agencies would also be expected to

provide input into the process. Moreover, the Secretary of State will normally intervene to make a decision on applications which affect Natura 2000 sites.

The responsibilities are less clear cut in the marine environment, where a number of bodies share competencies and regulatory functions, and where a planning system equivalent to that on land is missing. That said, in the UK, the Crown Estate and the Department of Trade and Industries (or equivalent) are generally responsible for large scale developments which require a permit, such as the construction of offshore wind farms.

Not so for fishing. In England, fisheries management is under the shared competence of Defra and the SFCs. As the authority responsible for issuing licences, however, Defra would arguably be responsible for assessing the potential impact of fishing operations.

The Secretary of State has equivalent intervention powers as on land. In Scotland, Wales and Northern Ireland, these responsibilities lie solely within the remit of the responsible Ministry. All of the above institutions are also bound by the general duty to discharge their functions so as to comply with the provisions of the habitats Directive – licensing and the assessment of activities would constitute an additional responsibility.



7 Implications for the Inshore Fishing Sector

A decision on whether inshore fishing operations constitute *plans* or *projects* under the habitats Directive is clearly crucial to determining the full implications for the inshore sector.

If fishing operations, or significant changes therein, were to be considered projects this could put substantial financial and administrative costs onto the sector and/or local fisheries managers. The fact that the sector is dominated by small and medium sized enterprises could be used to justify public funding of assessments. Another option would be to allow a particular fishery to be subjected to a single impact assessment, rather than requiring each individual operator to undergo an assessment for the same operation or change.



The responsibility for overseeing assessments and for leading the assessment process also has potentially serious financial implications for managers. Without adequate funding, managers may not be able to fulfil the EU requirements under the habitats Directive.

Resources aside, the potential requirement to undertake assessments would affect the whole approach to fishing and fisheries management, moving from a reactive approach to one where problems would be identified up front and addressed. This may seem an unnecessary constraint on the 'right to fish', but assessments would ideally prevent problems from occurring further down the line and therefore provide a more stable operating environment for the sector. Ultimately, this would promote a more sustainable fishing industry, socially, environmentally and economically.

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Summary of Briefing

- In addition to normal site management, any plans or projects likely to have significant impacts on Natura 2000 sites have to be subject to appropriate assessment.
- There is no EU-wide agreement on whether fishing operations constitute plans or projects. Before the full implications of the habitats Directive for the UK inshore sector can be understood, this needs to be resolved.
- Although it is not yet standard practice, there are strong arguments in favour of treating fishing operations, or proposed changes in fishing practices, as plans or projects, and subject them to appropriate assessment. This would bring the fishing sector in line with other sectors, such as agriculture.

- There are several key stages involved in undertaking an appropriate assessment. These include an evaluation of the scale of the proposed activity, and an exploration of alternative solutions and mitigation measures. The overall assessment will clearly reflect the potential threat posed by the plan or project.
 - A negative assessment will not necessarily prevent the project or plan from going ahead. If the project is of crucial social or economic importance, it may still be authorised. However, any damage to the site and the coherence of the Natura 2000 network would need to be compensated for.
 - An assessment will require extensive knowledge of the site. This is still particularly difficult for the marine environment, where the knowledge gap is still comparatively large. Here the collaboration of science, industry and government is particularly valuable.
 - Assessments are typically the responsibility of individual developers/operators. For fishing operations, however, it may be more appropriate for the responsibility to be shared by groups of fishermen, given the costs of assessments and the difficulty in linking individual fishing operations with impacts.
 - It is not always clear who has responsibility for overseeing assessments, particularly in England and Wales, where the SFCs and the Welsh Executive/Defra all play important roles.
 - The role of fishermen and fishing associations, as well as SFCs, in management and in undertaking or overseeing assessments is likely to grow. In order to ensure favourable conservation status of the habitats and species protected under the Directive, ways of supporting their new functions will need to be considered, to ensure assessments are both truly appropriate and followed.
 - Importantly, the provisions for taking 'preventative' measures under the habitats Directive are much broader in scope than those relating to appropriate assessment. Activities that do not fall within the definition of 'plans and projects' still have to be compatible with the management objectives of the Natura 2000 site. Thus, even if fishing does not become subject to appropriate assessment, preventative measures will be required in certain cases.
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Information Sources:

European Commission (2000) Managing Natura 2000 Sites – The provisions of the habitats Directive 92/43/EEC

European Commission (2001) *Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC*

http://europa.eu.int/comm/environment/nature/natura_2000_assess_en.pdf

UK Government. Environmental impact assessment: guide to procedures

http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/pdf/odpm_plan_pdf_606104.pdf

Cabinet Office (2004) *Net Benefits: A sustainable and profitable future for UK fishing*. Prime Minister's Strategy Unit Report

CCW (July 2003) Sea Fisheries Policy; Countryside Council for Wales

For further detail please contact:

Saskia Richartz srichartz@ieeplondon.org.uk

Institute for European Environmental Policy

18 Avenues des Gaulois

B – 1040 Brussels

T +32 (0)2 738 74 77

F +32 (0)2 732 40 04

This Briefing has been prepared as part of IEEP's sustainable fisheries programme, funded by the Esmée Fairbairn Foundation. For more information please see <http://www.ieep.org.uk/>.

This is the fourth in a series of IEEP briefings,¹ examining key provisions of EU nature conservation policy set out in the habitats and birds Directives - and how these relate to the UK inshore fishing sector (ie within 12 nm). It outlines the provisions of Articles 6(3) and 6(4) of the habitats Directive for **appropriate assessment** of plans and projects in relation to marine Natura 2000 sites – known in the UK as European Marine Sites. The briefing explores provisions outlined in the Directive itself, as well as UK implementing legislation and guidance developed by the Commission.

The habitats and birds Directives have potentially far-reaching implications for various economic sectors, and the fisheries sector is no exception. The purpose of these briefings is to explore what these are or might be for the UK inshore fishing sector. In due course, the briefings will be followed by good practice examples from the UK and other European countries, demonstrating innovative ways of managing fisheries in support of EU nature conservation policy.

¹ published so far are:

1. EU Nature Conservation and the UK Fishing Sector – Overview of Issues
2. Natura 2000 in the marine environment
3. Species Protection and the Inshore Fishing Sector
4. Appropriate Assessment of Activities Affecting European Marine Sites
5. Managing European Marine Sites



Institute for
European
Environmental
Policy

28 Queen Anne's Gate
London
SW1H 9AB

T +44 (0)20 7799 2244
F +44 (0)20 7799 2600

central@ieeplondon.org.uk
www.ieep.org.uk

18 Avenue des Gaulois
B-1040 Brussels
Belgium

T +32 2 738 74 77
F +32 2 732 40 04

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