

MARINE AND COASTAL ACCESS ACT 2009

EXPLANATORY NOTES

SUMMARY AND BACKGROUND

Part 3: Marine Planning

Chapter 1: Marine Policy Statement

Statement of policy for UK marine area

Section 44: Marine policy statement

137. This section describes what is meant by a “marine policy statement” (MPS). *Subsection (1)* defines the MPS as a document that is prepared and adopted by the policy authorities, in accordance with the process laid down in Schedule 5, and which sets out their policies for contributing to the sustainable development of the UK marine area.
138. *Subsections (2)* and *(3)* state that the MPS may include additional supporting information and statements about the policies it includes. They set out what happens in the event of an apparent conflict between policy and any supporting information or statements, by ensuring that the policy always takes precedence. For example, the MPS may contain a policy to increase extraction of marine minerals by 10%, supported by figures showing that this would represent an increase of 10,000 tonnes per year. If this figure of 10,000 tonnes were wrong or became inaccurate over time, *subsection (3)* provides clarity that the policy of a “10% increase” is the figure which must be applied, not “10,000 tonnes”, which was only supporting information.
139. *Subsection (4)* identifies the “policy authorities” who may prepare and adopt an MPS, and *subsection (5)* defines what is meant by “adoption”.

Section 45: Preparation and coming into effect of statement

140. This section enables the policy authorities to prepare an MPS by acting jointly. In order to ensure that an MPS may be adopted under any circumstances, *subsection (1)* provides that an MPS may also be adopted by the Secretary of State acting jointly with only one or two of the other policy authorities, or alone if necessary.
141. *Subsection (2)* requires the Secretary of State to invite the other policy authorities to participate in preparing an MPS before he takes any decision to prepare one by himself.
142. *Subsection (3)* provides that a new MPS will always replace an older one, even if the new one is prepared and adopted by a different group of policy authorities. This ensures that there is only ever one MPS in effect at any time. (See section 47 for separate provisions on amending an existing MPS without replacing it.)
143. *Subsection (4)* provides that the MPS comes into effect when it has been adopted by the policy authorities in accordance with the process in Schedule 5. Once an MPS comes into effect, it affects the taking of certain decisions as set out in sections 58 to 60.

Section 46: Review of statement

144. This section requires policy authorities to review the MPS whenever they consider it appropriate to do so. The effect of the MPS does not change during a review under this section, although the review might lead to a policy authority deciding that the MPS should be amended or perhaps even withdrawn. (See sections 47 and 48 below.)
145. Review might be required because circumstances have changed since the MPS was adopted, or because the policy authority becomes aware that the MPS is not having the desired effects (either because decision-makers are taking decisions falling within section 58 which depart from the MPS, or as a result of the marine plan authorities monitoring and reporting activities under section 61).

Section 47: Amendment of statement

146. This section enables an MPS to be amended. Only the policy authorities which originally prepared and adopted an MPS may amend it.
147. An amendment to an MPS must be prepared and adopted in accordance with Schedule 5 in exactly the same way as the original MPS. Amendments to an MPS come into effect when they have been adopted and published.

Section 48: Withdrawal of, or from, statement

148. If any one of the policy authorities which originally adopted an MPS comes to the conclusion that the MPS no longer reflects their policy, and that authority does not want to, or cannot, correct the problem by making an amendment to the MPS, this section enables the authority to withdraw from the MPS. This is done by first notifying the other policy authorities of their intention, and then placing a notice in the London, Belfast and Edinburgh Gazettes.
149. The policy authority withdrawing from the MPS must also bring the withdrawal to the attention of “interested persons”. They are defined as being anyone the policy authority thinks is likely to be interested in, or affected by, the withdrawal (for example the regulators that have been using it in their decision-making in relation to devolved matters) and the general public.
150. The withdrawal takes effect once the notice is published in the Gazettes.
151. *Subsection (8)* ensures that the withdrawal of an MPS does not change the effect or validity of any existing marine plans which have been prepared in order to implement the MPS, or the way in which such plans should be construed.
152. Once a devolved policy authority has withdrawn from an MPS, the MPS ceases to have any further effect on decisions which relate to matters within the authority’s devolved competence. If the Secretary of State withdraws from the MPS, it ceases to have effect at all.

Chapter 2: Marine Plans

Section 49: Marine planning regions

153. This section identifies each of the component “regions” within the UK marine area for the purposes of identifying who will be responsible for planning in that region.

Section 50: Marine plan authorities

154. This section sets out which marine plan authorities are to have responsibility for the different regions of the UK marine area, as defined in section 49.
155. There is no marine plan authority under the Act for the Scottish inshore region or the Northern Ireland inshore region. That is because Scotland and Northern Ireland will be

making their own provision for marine planning in those regions under their devolved legislative powers.

Section 51: Marine plans for marine plan areas

156. This section provides for the creation of marine plans, and sets out certain basic requirements as to their content and the way in which they are to be prepared.
157. *Subsection (1)* allows a marine plan authority to prepare marine plans for “marine plan areas” within its region.
158. *Subsection (2)* places a duty on marine plan authorities to seek to ensure that marine plans are prepared for all parts of regions where the MPS “governs marine planning” (see paragraph 162 below).
159. *Subsection (3)* defines a marine plan. Like the definition of an MPS in section 44, marine plans are defined by reference to who creates them, the process they must follow, and the content. *Subsection (3)* requires that marine plans must:
- be prepared and adopted by the marine plan authority for the marine planning region in which the marine plan area lies;
 - be prepared in accordance with the process set out in Schedule 6; and
 - state the marine plan authority’s policies for contributing to the sustainable development of the marine plan area.
160. *Subsection (5)* requires that a marine plan must identify the area to which it applies – this may be through a map or chart, or by other means.
161. *Subsection (6)* specifies that a marine plan must be in conformity with any MPS which “governs marine planning” for that marine plan area, unless relevant considerations indicate otherwise. Marine plans are intended to set out how the policies and objectives stated in the MPS apply at the local level, based on information about specific activities and processes taking place in that area. This ensures that there is a close link between the general policy in the MPS and how it is applied to specific situations in plans.
162. *Subsection (7)* explains when an MPS “governs marine planning”. The MPS must have been adopted by the policy authority which is also the marine plan authority for the marine planning region which includes the area of the plan, must not have been replaced or withdrawn and that policy authority must not have withdrawn from the plan.
163. *Subsection (8)* requires a marine plan prepared by a devolved administration to state whether it includes provision relating to “retained functions” (that is, powers and duties which have not been devolved: see section 60 for the meaning of these terms).
164. *Subsection (9)* provides that a marine plan may also contain supporting statements and information, and *subsection (10)* provides for any conflict between the policies in the marine plan and any supporting information to be resolved in favour of the plan. See the notes on section 44 above for further explanation.
165. *Subsection (11)* states that a marine plan comes into effect when it has been adopted and published in accordance with Schedule 6. Once a marine plan comes into effect in this way, it has a legal effect on decisions which affect the UK marine area (see sections 58 to 60).

Section 52: Amendment of marine plan

166. This section enables a marine plan authority to amend a marine plan. An amendment to a marine plan must be prepared and adopted in accordance with Schedule 6 in exactly the same way as the original plan. Where a marine plan is amended, *subsection (2)*

provides that any reference in the Act to a marine plan include a reference to a marine plan as amended.

Section 53: Withdrawal of marine plan

167. Like an MPS, if the marine plan authority comes to the conclusion that there is a problem with the plan which it does not want to, or cannot, rectify by making an amendment – for instance if it decides that the plan must cease effect immediately – a marine plan may be withdrawn.
168. When a marine plan authority decides to withdraw a marine plan, it must publish a notice in the appropriate Gazette(s). For plans in the English or Welsh inshore regions, this is the London Gazette. For all offshore plans, notices must be published in the London, Edinburgh and Belfast Gazettes.
169. This section also allows the Secretary of State to withdraw his agreement to a plan prepared by any of the other marine plan authorities (if his agreement was required to the plan’s adoption). If he decides to withdraw his agreement to the plan, he must give notice to the marine plan authority, which then has 7 days to withdraw the plan (by publishing a notice in the appropriate Gazette(s)).
170. The marine plan authority must also bring the withdrawal to the attention of anyone likely to be interested in or affected by it, as well as members of the general public.

Section 54: Duty to keep relevant matters under review

171. This section requires the marine plan authorities to keep under review matters which may affect their functions of identifying marine plan areas, and preparing plans for them. This is to ensure that marine plan authorities stay up-to-date with what is happening in their region of the marine area, which they need to know about in order to make effective planning decisions in their region.
172. *Subsection (2)* sets out a non-exhaustive list of the kinds of things which a marine plan authority ought to keep under review.
173. *Subsection (3)* requires an authority, on a review, to consider how the matters described in *subsection (2)* might be expected to change, and the effect that any such changes might have on the authority’s region and its sustainable development.
174. *Subsection (4)* makes clear that the reference in *subsection (1)* to “cultural” includes “historical and archaeological” characteristics.

Chapter 3: Delegation of Functions Relating to Marine Plans

Section 55: Delegation of functions relating to marine plans

175. This section enables a marine plan authority to direct another public body to carry out some of its marine planning functions, by giving it a direction. The Government’s intention is that this power will be used to delegate functions of the Secretary of State to the Marine Management Organisation.
176. *Subsection (3)* requires the marine plan authority to obtain the public body’s consent before making the direction. Since public bodies may generally only do things that they have specific powers to do, *subsection (4)* compels the public body to comply with the direction and states that it is taken to have any necessary powers to carry out the functions delegated to it.
177. *Subsections (5) to (7)* set out which functions may be delegated in this way. A marine plan authority may delegate any of the functions in Chapter 2 (apart from the “excepted functions”) and the duty to monitor and report on the effects and effectiveness of marine plans in section 61. The functions in Chapter 2 which *may* be delegated include:

These notes refer to the Marine and Coastal Access Act 2009 (c.23) which received Royal Assent on 12th November 2009

- preparing a marine plan for a marine plan area in accordance with the procedure in Schedule 6 (section 51);
 - amending a marine plan (section 52); and
 - keeping relevant matters under review (section 54).
178. The “excepted functions” which must be carried out by the marine plan authority and *may not* be delegated are:
- adopting a marine plan (paragraph 15 of Schedule 6); and
 - withdrawing a marine plan, or withdrawing agreement to a marine plan (section 53).
179. In addition, functions of the Secretary of State in his own capacity may not be delegated by a direction under this section (see *subsection (7)*). These functions include agreeing to the publication of statements of public participation and consultation drafts by the devolved administrations, and agreeing, or withdrawing agreement, to the adoption of their final marine plans.

Section 56: Directions under section 55: supplementary provisions

180. This section contains a number of additional rules about directions issued under section 55.
181. *Subsection (1)* requires the authority to publish the direction in a way that will bring it to the attention of anyone likely to be interested in or affected by it.
182. Unless the marine plan authority has specified otherwise in the direction, *subsection (2)* prevents the authority from exercising the functions it has delegated, for as long as the direction is in force. *Subsection (3)* sets out how the marine plan authority may make exceptions to this rule.
183. *Subsection (4)* enables a marine plan authority to impose terms, conditions, obligations or requirements on the way a public body exercises any marine planning functions delegated to it, and also enables the terms of the delegation to make financial provisions (for example to enable the public body to receive funding for carrying out the functions).
184. *Subsection (5)* enables a marine plan authority to delegate its functions differently for different areas or cases or to different bodies.

Section 57: Directions to public bodies as regards performance of delegated functions

185. This section applies where a marine plan authority has delegated some of its planning functions by directions under section 55. It enables the marine plan authority to give further directions to a public body to which it has delegated functions, setting out how those functions should be performed.
186. *Subsection (3)* requires the marine plan authority to consult the public body before giving any directions under this section. *Subsection (4)* requires the public body to comply with any directions given to it, which must also be published by the marine plan authority in accordance with *subsection (5)*.

Chapter 4: Implementation and Effect

Decisions affected by an MPS or marine plan

Section 58: Decisions affected by marine policy documents

187. This section makes provision about the effect which “the appropriate marine policy documents” are to have on the taking of certain decisions by public authorities. The

documents that may be appropriate marine policy documents are the MPS and any marine plans. The rules for determining whether the MPS or any particular marine plan is an appropriate marine policy document in any article case are set out in section 59 (as read with section 60).

188. *Subsection (1)* provides that all authorisation and enforcement decisions must be taken in accordance with any relevant MPS and plans, unless relevant considerations indicate otherwise. *Subsection (2)* requires that public authorities give their reasons if they make decisions which do not follow the MPS or plans.
189. *Subsection (3)* requires that public authorities have regard to any relevant MPS or plans when taking any decision which relates to a function capable of affecting the UK marine area (other than an authorisation or enforcement decision).
190. *Subsection (4)* defines “authorisation or enforcement decisions”. These decisions relate to the licensing (or other authorisation) of particular activities which affect, or might affect, the whole or any part of the UK marine area, the conditions attached to those authorisations, and the enforcement action to be taken with a view to securing that any such activities are carried out only under a licence, and in accordance with any conditions attached to the licence, and not in breach of any prohibition or restriction. The closing words provide that decisions under the Planning Act 2008 on applications for development consent for nationally significant infrastructure projects are not “authorisation or enforcement decisions”. As such, they are decisions within the scope of *subsection (3)*, which requires public authorities to have regard to marine policy documents when making decisions.
191. *Subsection (5)* inserts a new paragraph into section 104(2) of the Planning Act 2008, requiring the Infrastructure Planning Commission (established under that Act) to have regard to “the appropriate marine policy documents” when making decisions on applications for nationally-significant infrastructure projects.
192. *Subsection (6)* includes some further definitions of terms used in this section.

Section 59: The appropriate marine policy documents

193. This section sets out the rules for determining whether an MPS or plan applies to a particular decision.
194. *Subsections (3)* and *(4)* relate to the effect of marine plans on decisions. The effect of *subsection (3)* is that a marine plan applies to any decision which relates to the area covered by the marine plan, unless *subsection (4)* applies. The effect of *subsection (4)* is that a marine plan for an area in the Northern Ireland, Scottish or Welsh offshore region, or the Welsh inshore region, is not an appropriate marine policy document for decisions relating to the exercise of retained functions (that is, functions which are not devolved) unless the marine plan states that:
 - it includes provision for retained functions;
 - it was adopted with the agreement of the Secretary of State; and
 - it was prepared and adopted whilst an MPS governed planning for the part of the marine area to which the plan relates.
195. *Subsection (5)* relates to the effect of an MPS on decisions. Since an MPS will always have been adopted by the Secretary of State, it will be relevant to all decisions relating to the English inshore or offshore region, and those relating to the exercise of retained functions in the other marine planning regions. An MPS will also be relevant to decisions relating to the exercise of devolved functions in the other marine planning regions if the marine plan authority for the region has adopted the MPS in its capacity as a policy authority.

196. An MPS adopted by the Scottish Ministers or Department of the Environment in Northern Ireland will also be relevant to decisions relating to their respective inshore regions, even though there are no “marine plan authorities” for those regions. For this reason, *subsection (6)* provides that, for the purposes of *subsection (5)(f)*, the Scottish Ministers and DoENI are to be treated as the marine plan authorities for the Scottish inshore region and the Northern Ireland inshore region respectively.
197. *Subsection (7)* defines some of the terms used in this section.

Section 60: Meaning of “retained functions” etc.

198. This section provides that, unless a function falls into one of three categories set out in *subsection (1)(a) to (e)*, it is a retained function.
199. The first category consists of functions exercisable by Ministers in the devolved administrations or by Northern Ireland departments (see *subsections (1)(a) to (c) and (2)*). These functions include functions which are exercisable concurrently or jointly with the Secretary of State insofar as they are in fact exercised by those Ministers or departments. (To the extent that such functions are exercised by the Secretary of State, they are retained functions.)
200. The second category consists of “secondary devolved functions” (see *subsections (1)(d), (3) and (4)*). This category consists of functions exercisable in relation to each devolved marine planning region by public authorities other than the policy authorities or other ‘government-level’ bodies (hence secondary). These public authorities are collectively labelled “non-departmental public authorities”.
201. The definition of “secondary devolved functions” is slightly different for each devolved administration, reflecting the variations in the devolution settlements (*subsection (4)*). In particular, it needs to take account of executively devolved functions, where the power to exercise a function may have been devolved but the relevant devolved legislature does not have the power to legislate in respect of it. For example, Scottish Ministers have the power under the Marine and Coastal Access Act to prepare marine plans for the Scottish offshore region, but the Scottish Parliament cannot legislate for marine planning in the offshore area.
202. When a non-departmental public authority is carrying out functions under the oversight or control of the relevant devolved Ministers (or NI department), it becomes a “Scottish”, “Northern Ireland” or “Welsh non-departmental public authority” (defined in *subsection (10)*). For example, when exercising functions in relation to the Welsh marine region, the Environment Agency would be a “Welsh non-departmental public authority” to the extent that its exercise of those functions is subject to direction by the Welsh Ministers.
203. “Secondary devolved functions” are therefore defined for each region by reference to:
- Functions carried out under the control of the devolved administration (whether or not the relevant legislature would have competence); and
 - Functions relating to matters which are within the competence of the relevant devolved legislature.
204. The final category of functions which are not retained functions are “relevant ancillary functions” (see *subsections (1)(e) and (5)*).
205. This final category covers functions exercised by non-departmental public authorities in relation to other devolved functions. These are predominantly advisory functions (for example many public authorities have functions of giving advice to ministers and other public authorities on how to carry out their functions). This provision ensures that any such advice is given on the same basis as the actual substantive function to which it relates. For example, when the Environment Agency provides advice to the Welsh

Ministers in relation to their functions, the Environment Agency will be a “Welsh non-departmental public authority”.

206. However, functions will not be treated either as secondary devolved functions or as ancillary functions if the UK government has substantive functions in relation to them (*subsection (6)*). Where the UK government only has relatively minor functions (for example giving consent to, or being consulted about, the exercise of a devolved function – *subsections (7) and (8)*) then that is not sufficient to stop it being devolved – insofar as it is exercised by the devolved public authority. (The UK function of giving that consent, or responding to the consultation is of course not devolved.)
207. *Subsection (9)* contains additional definitions of some of the terms used in this section.

Monitoring and reporting

Section 61: Monitoring of, and periodical reporting on, implementation

208. *Subsection (1)* sets out in summary the duties imposed on marine plan authorities by this section. First, each marine plan authority is to monitor and report on the effects and effectiveness of its existing plans, and second, it is to report every six years until 2030 on the way it has used, and intends to use, its marine planning powers.
209. *Subsections (2) and (3)* set out the scope of the duty of marine plan authorities to keep the effects, and effectiveness, of marine plans under review. Such reports must also cover any progress towards achieving any objectives set out for that region in the MPS.
210. *Subsections (4) to (8)* require marine plan authorities to report on this review at least every three years after each plan is adopted, and decide after each report whether or not the plan needs to be amended or replaced. Reports under this subsection must be laid before the appropriate legislature.
211. *Subsection (9)* makes clear that “replacing” a plan means preparing and adopting a new plan and withdrawing the existing one.
212. *Subsections (10) to (13)* impose the second reporting duty, requiring marine plan authorities to report at least every six years until 2030 on the marine plans they have prepared, and their intentions as to the amendment of existing plans or preparation of additional plans. Again, these reports must be laid before the appropriate legislature.
213. *Subsection (14)* defines the appropriate legislatures.

Chapter 5: Miscellaneous and General Provisions

Validity of documents under this part

Section 62: Validity of marine policy statement and marine plans

214. This section sets out how people may challenge the content of marine policy documents (or amendments to them) in court. *Subsection (3)* provides that such challenges may only be brought in accordance with this section.
215. *Subsection (4)* provides that the only grounds for challenge to a “relevant document” are that the document is not within the appropriate powers, or that a procedural requirement has not been complied with (see *subsection (6)* for definitions of “appropriate powers” and “procedural requirement”). Only a person aggrieved by a relevant document may bring a challenge against it.
216. *Subsection (5)* requires that any such challenges are brought within 6 weeks of the adoption of the relevant document.
217. *Subsection (6)* identifies the appropriate court for bringing challenges in different parts of the UK, and defines “appropriate powers” and “procedural requirement”.

Section 63: Powers of the court on an application under section 62

218. This section sets out the powers of a court hearing a challenge to the validity of a marine policy document.
219. *Subsection (2)* enables a court to make an interim order, suspending the operation of all or part of a document until the legal proceedings are over.
220. *Subsection (3)* sets out the conditions which must be satisfied before the court may grant any of the remedies set out in *subsection (4)*. The court must be satisfied either that the marine plan authority (or its delegate) acted outside or beyond the relevant powers in relation to the document, or that the applicant has been substantially prejudiced by a failure to meet a procedural requirement.
221. If the court is satisfied that one of the conditions in *subsection (3)* has been met, *subsection (4)* enables the court either to quash the document or remit it (in effect, send it back) to a person or body involved in its preparation, adoption or publication.
222. *Subsections (5) and (6)* then enable the court to give directions relating to whether the document should be treated as adopted or published and to procedural or other steps which should be taken to ensure that whatever was wrong with the document is put right, without necessarily having to start the whole preparation process again from the beginning.
223. *Subsection (7)* states that the court is able to quash or remit only part of a relevant document, or the whole document.
224. *Subsection (8)* refers back to the definitions used in section 62.

Interpretation and Crown application

Section 64: Interpretation and Crown application of this Part

225. This section sets out how certain terms used within Part 3 of the Act should be interpreted and states that the Crown is bound by the planning provisions.