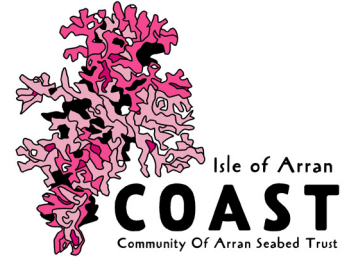




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Legal Tools for the Management of Marine Protected Areas in Scotland

Saving our Seas through Law Policy Brief Series | Briefing No. 4



Legal Tools for the Management of Marine Protected Areas

This policy brief considers the various legal tools that are available in order to promote the sustainable management of Nature Conservation Marine Protected Areas in Scottish waters. It emphasises the need for effective and equitable management and it reviews the options that are available in order to achieve the conservation of marine biological diversity and related social and economic objectives. The policy brief concludes that existing powers are under-utilised and there are significant opportunities to strengthen MPA management in order to promote coordinated and effective protection of marine ecosystems.

The Need for Equitable and Effective Management of Marine Protected Areas

The international community has called for states to establish systems of 'effectively and equitably managed, ecologically representative and well connected' protected areas by 2020.¹ This target must be understood within the broader context of the international regime for nature conservation and particularly the Convention on Biological Diversity, which places an obligation on states to establish protected areas² and emphasises the importance of encouraging the participation of local communities and resource users in the planning, management, and conservation of coastal and marine areas³ and the need for an ecosystems approach to marine management in order to achieve the conservation of biological diversity and the sustainable use of its components.⁴

Effective management refers to the achievement of biodiversity conservation objectives and sustainable use whilst considering social, economic and environmental benefits.

Equitable management concerns social equity broken down into three dimensions, namely recognition of certain characteristics of other actors, equitable participation in procedures, and equitable distribution of benefits and costs incurred by different actors taking into account potential mitigation.

This international framework should guide the implementation of national legal requirements relating to marine protected area management.



Protection of MPAs Under the Marine (Scotland) Act 2010

By early 2019, eighteen Nature Conservation Marine Protected Areas (NCMPAs) had been established under the legal framework introduced by the Marine (Scotland) Act 2010. These NCMPAs are to be managed in order to ensure that the conservation objectives of each site are met. A combination of measures should be deployed in order to attain this goal while also reaching broader socio-economic objectives.

To begin with, the 2010 Act requires public authorities to exercise their functions in the manner in which they consider will best fulfil the conservation objectives of the NCMPA or in the manner which least hinders the achievement of such objectives⁵, including when determining an application by third parties for a licence or other authorisation to

carry out certain activities in the marine environment.⁶ If an authority believes that an activity poses a significant risk to the conservation objectives of an NCMPA, it is required to notify the Scottish Ministers and Scottish Natural Heritage (SNH) and to wait 28 days before granting authorisation.⁷ This period allows the public authority to receive advice on how to proceed. Nevertheless, there is no prohibition on the authority ultimately authorising an activity if it is satisfied that the benefits clearly outweigh the risk of damage and it is satisfied that the person carrying out the act will carry out measures of equivalent environmental benefit to the damage which the act will or is likely to cause.⁸ In the latter case, the public authority must include a condition in the authorisation, if it has the power to do so, requiring that compensatory measures are taken. SNH, and in turn, the Scottish Ministers, are respon-

sible for overseeing the implementation of these duties and if they consider that there is evidence of non-compliance, they may request a written explanation of the failure.⁹

The 2010 Act also makes it a criminal offence for a person to intentionally or recklessly carry out a prohibited act in a NCMPA if the act has significantly hindered, or may significantly hinder, the achievement of the stated conservation objectives for the MPA.¹⁰ Offences are punishable with a fine of up to £50,000.

It is clear that both of these legal restrictions are linked to the conservation objectives of a NCMPA, which are defined in the relevant legislation to require that the protected features ‘so far as already in favourable condition, remain in such condition, and so far as not already in favourable condition, be brought into such condition, and remain in such condition.’¹¹ At first sight, this may seem to provide limited protection to only the designated protected features, but a more careful reading of the law suggests otherwise. Thus, the definition of ‘favourable condition’ with respect to protected marine habitats is defined as not only ensuring the stability of the habitat itself, but includes ensuring the ‘diversity and abundance of species of marine flora and fauna forming part of, or inhabiting, that habitat.’¹² In other words, the conservation objectives encompass the protection of the habitat as an ecosystem. Similarly, favourable status of a protected low or limited mobility species also requires protection of the quality and quantity of the habitat of that species.¹³ In this context, habitat could also be interpreted to include any associated or dependent species. It follows that public authorities may be required to protect the overall integrity of the NCMPA, rather than just the features that have been designated.

Beyond these basic obligations, there are a number of other statutory powers and tools available to the Scottish Ministers in order to promote the effective management of NCMAs. The following sections will review the available powers under both the 2010 Act and related legislation with a view to highlighting key opportunities to strengthen NCMAs governance in Scottish territorial waters.

Marine Management Schemes

Section 99 of the Marine (Scotland) Act 2010 provides for the establishment of a marine management scheme for a

NCMPA. This tool resembles existing powers to establish management schemes for other types of protected areas, including European Marine Sites and SSSIs in England and Wales.¹⁴ Unlike schemes in relation to these other designations, however, the 2010 Act foresees that multiple schemes may be established for a single NCMPA. Yet, given that the main advantage of a management scheme is to bring all relevant authorities under a single umbrella in order to address all activities which may impact upon the protected area in a comprehensive manner, it is desirable that multiple schemes are avoided. In this respect, it is important to note that the Scottish Ministers may direct relevant authorities to establish a scheme and they may also specify the types of measures that should be included therein.¹⁵ Thus, it is possible to ensure that a scheme is established in a way that involves all of the relevant authorities and addresses all relevant issues. This would ensure implementation of international best practice on MPA management, which has emphasised that ‘the fundamental criterion for success is to bring in from the beginning every significant sector that will affect, or be affected by, the MPA’¹⁶ in order to ensure ‘coordination or planning and management by all relevant agencies with statutory responsibility affecting the MPA.’

In designing a management scheme, lessons can be learned from the successful management schemes already adopted for European marine sites in the UK.¹⁷ What existing practice highlights is the need for an institutional framework to oversee the establishment, implementation and review of the scheme and measures adopted thereunder.¹⁸ Usually a management group would consist of those public authorities with functions that are relevant to the regulation of activities in the protected area, but it is also possible to have a broader advisory group which includes other stakeholders, including local communities, civil society groups and industry representatives.¹⁹ Indeed, getting local buy-in for a management scheme is likely to improve the chances of successful implementation and therefore an advisory group plays a key role in ensuring that local interests are fully considered in the decision-making process.

Principal Public Authorities Relevant to the Management of the South Arran NCMAs

Authority	Function
Scottish Crown Estate	Seabed management
Scottish Natural Heritage	Nature conservation advice and licensing
Scottish Environmental Protection Agency	Environmental licensing, including polluting discharges
Marine Scotland	Marine licensing, Electricity consents, Regulation of fishing
Maritime and Coastguard Agency	Regulation of shipping
North Ayrshire Council	Development consent, including aquaculture
Marine Scotland Compliance	Enforcement of nature conservation and fisheries regulations

Marine management schemes should fulfil a number of functions including explaining and contextualising the conservation objectives for the site, identifying the key threats to the designated features, listing the actions that should be taken, and setting out how progress will be monitored. The action plan and monitoring programme are at the core of the management scheme. Actions should build upon the advice of SNH, which must be consulted before making or amending a scheme.²⁰ Agreed actions should be specific, measurable, and time-bound, with a lead agency identified for each action.²¹ Actions in existing schemes include the collection of data on activities, monitoring of impacts on features, the development and distribution of best practice guidelines, or the design and implementation of management measures. The advantage of a management scheme is that actions can be tailored to the precise threats posed by an activity and the scheme can be updated relatively easily should new information come to light. Indeed, management schemes provide an ongoing framework for promoting the conservation objectives of a NCMAs and international best practice highlights the importance of not being too ambitious in the first instance: ‘the key to success is to be selective and deal with the most important issues first; the others can be addressed as the programme matures, its credibility grows and the public accepts the need for integration.’²²

In terms of effective management, management schemes provide valuable opportunities to strengthen coordinated proactive decision-making and they are an underutilised tool in the context of NCMPAs. Management schemes can be particularly valuable when a MPA is designated for several protected features, as it allows for coordinated and systematic management planning, taking into account an ecosystems approach. The Scottish Government has itself recognised that 'Marine Management Schemes could be considered helpful where the MPA has many features which have complex and varied management requirements, and is used for many different activities, or regulated by various organisations.'²³ This is certainly the case for the South Arran NCMPA, which consists of seven distinct protected features and is subject to a number of competing activities regulated by multiple agencies. For this reason, it is recommended that the South Arran NCMPA would provide a good opportunity to trial the use of marine management schemes under section 99 of 2010 Act. Such an initiative should be supported by the Scottish Government in order to demonstrate their commitment to meeting international goals relating to the effective and equitable management of NCMPAs.

At the same time, it must be made clear that the establishment of a management scheme does not itself open up new possibilities for regulation and any measures must be based upon existing legal powers. Indeed, those powers continue to be exercised by the relevant authority, albeit subject to an obligation to exercise these powers in accordance with the management scheme.²⁴ Thus, a marine management scheme may

still need to be supplemented by other management tools.

Marine Conservation Orders

Where the basic provisions of the Marine (Scotland) Act 2010 are not sufficient to achieve the conservation objectives of a NCMPA, the Scottish Ministers may impose additional requirements by way of marine conservation orders (MCOs)²⁵, which can regulate, restrict or prohibit particular activity in order to further the conservation objectives of the NCMPA. MCOs can address any type of activity which may impact upon the conservation objectives of the NCMPA and so this is a very flexible power, particularly in light of the broad conservation objectives requiring the protection of broader ecosystem integrity which underpin most NCMPAs. Given that such orders may have serious implications for existing activity that took place in an area before it was designated as a NCMPA, Scottish Ministers must assess the impacts of a proposed order on economic and social interests and where an adverse impact is identified, they must take reasonable steps to minimise the impact as far as practicable.²⁶ At the same time, an assessment of the effects of an order on the environment, both within and beyond the designated area, must also be undertaken.²⁷ MCOs must also be preceded by publication of the proposal to make an order and Ministers may also provide an opportunity for consultation²⁸, unless urgent protection is required, in which case, an urgent MCO can be imposed for a limited period of time.²⁹

Current policy of the Scottish Government is that MCOs will only be put in place 'where no alternative mechanisms exist'³⁰ and the guidance foresees that existing methods of regulation, such as licensing, voluntary measures, and marine planning, are sufficient to meet conservation objectives and protect MPA features from risk of harm.³¹ However, several MCOs have been adopted to date, including in relation to the South Arran NCMPA. Yet, most MCOs at present only

regulate certain forms of fishing³² and whilst MCOs are a more flexible device to manage the pressures of fishing in NCMPAs compared to inshore fisheries orders,³³ this is not the only objective they could serve. Indeed, the original urgent MCO adopted for South Arran in 2014 included a prohibition on anchoring any vessel, depositing anything on the seabed or removing anything from the seabed within the protected area without the authorisation of the Scottish Ministers, demonstrating how MCOs can be used to regulate a suite of activities if deemed necessary.³⁴ Thus, MCOs could be a valuable tool to supplement a marine management scheme where it was discovered that existing powers or mechanisms were insufficient.

Demonstration and Research MPAs

The Marine (Scotland) Act 2010 also provides the possibility of designating an area as a Demonstration and Research Marine Protected Area (DRMPA) in order to promote the 'demonstration of sustainable methods of marine management or exploitation' or 'research into such matters'.³⁵ DRMPAs may be proposed by the Scottish Government or by a third party.³⁶ A proposal must meet certain criteria laid down by the Scottish Government, including demonstrating the novelty of the proposed investigation, how the proposal fits within broader national objectives and whether there is sufficient support from stakeholders. The guidance makes clear that funding and resources required to deliver the objectives of the MPA are the responsibility of the proposer. It is significant for present purposes that a DRMPA may overlap with an existing NCMPA³⁷ and thus it can be used to trial innovative management approaches to the management of the NCMPA. Whilst DRMPAs can be utilised to develop voluntary management measures, as is the case with the existing DRMPA on Fair Isle³⁸, the real power of a DRMPA is the possibility to adopt a MCO in order to further the stated objectives of the DRMPA, meaning that additional binding regulations could be introduced where necessary.³⁹ In particular, DRMPAs, could be used to broaden the objectives of management in NCMPAs to include not only the prevention of harm to the protected features, but also to encourage sustainable utilisation of the marine resources



within the NCMPA. At the same time, it is expected that DRMPAs 'will only remain in place for the length of time necessary to achieve the aims and objectives of the MPA'⁴⁰ and thus it must be possible to identify an alternative legal basis to continue such innovative management measures in the longer term.

Delegation of Marine Licensing or Seabed Management

There has been an increasing emphasis in recent Scottish Government policy on community engagement, which includes delegating management decisions to local bodies. This is reflected in various pieces of marine legislation.

Whilst decisions on marine licence applications are normally made by the Scottish Ministers (through Marine Scotland), the Marine (Scotland) Act 2010 foresees that powers relating to marine licensing may also be delegated to another public authority or group of persons nominated by a public authority or the Scottish Ministers.⁴¹ This scheme for devolving power to the local level is now supplemented by the relevant provisions of the Islands (Scotland) Act 2018, which allows the Scottish Ministers to establish a scheme for the

granting of licences by local island authorities for development activity within 12 nautical miles of an inhabited island. This latter scheme supplements the existing licensing regime established under 2010 Act, meaning that an additional licence would be required where an activity falls within the scope of both systems. Nevertheless, it permits more local involvement in the control of what activities may take place in marine waters around islands.

In parallel, the Scottish Crown Estate Act 2019 also permits management functions of particular assets to be delegated to local authorities or community organisations.⁴² The latter is defined as a body corporate of at least 20 members which relates to a community and has a written constitution setting out inter alia the aims and purposes of the body.⁴³ One of the most important assets held by the Scottish Crown Estate is legal title to the seabed within the territorial sea and the permission of the Scottish Crown Estate is required to carry out a range of activities which may impact the seabed such as the erection of aquaculture facilities, the construction of windfarms, or the establishment of moorings. At the same time, the Scottish Crown Estate has little control over navigation or fishing, which are subject

to overriding public rights.⁴⁴

The delegated manager may exercise broad powers of management in relation to an asset, subject to overarching obligations to enhance the value of the asset and to manage the asset in such a way that is likely to contribute to economic development, regeneration, social wellbeing and environmental wellbeing.⁴⁵ These powers therefore offer community organisations increased opportunities to manage the seabed around their coasts with a view to promoting sustainable uses, which will benefit local populations.

Conclusion

Given that the conservation objectives will vary depending on the specific character of a site and the number of protected features, there is no one-size-fits-all approach to NCMPA management. Nevertheless, a range of statutory tools are available to assist with the management of NCMPAs. These tools are currently underutilised and it is recommended that the Scottish Government supports a trial of a Marine Management Scheme for the South Arran NCMPA with a view to promoting the effective and equitable management of the area.

References

¹ See Aichi Target 11.

² Convention on Biological Diversity, Article 8(1).

³ See e.g. SBSTTA Recommendation I/8: Scientific, technical and technological aspects of the conservation and sustainable use of coastal and marine biological diversity, para. 11(d).

⁴ See e.g. CBD COP Decision V/6.

⁵ Marine (Scotland) Act 2010 (MSA 2010), s 82(1). See also s 82(9).

⁶ MSA 2010, s 83(3).

⁷ MSA 2010, s 83(4).

⁸ MSA 2010, s 95.

⁹ MSA 2010, s 84.

¹⁰ MSA 2010, s 95.

¹¹ South Arran Marine Protected Area Order 2014, para. 5(1).

¹² South Arran Marine Protected Area Order 2014, para. 5(2)(b) and 5(3).

¹³ South Arran Marine Protected Area Order 2014, para. 5(5).

¹⁴ UK Marine SACs Project, Indications of Good Practice for Establishing Management Schemes on European Marine Sites (2001).

¹⁵ Marine (Scotland) Act 2010, s. 102. C.f. the Conservation (Natural Habitats, &c) Regulations 1994, Regulation 34(2) explicitly provides that 'only one management scheme may be made for each European marine site.'

¹⁶ World Commission on Protected Areas, Guidelines for Marine Protected Areas (IUCN Best Practice Protected Area Guidelines Series No. 3,

1999) paras 2.9 and 3.1.

¹⁷ E.g. Moray Firth Special Area of Conservation Management Scheme; Fal & Helford Special Area of Conservation Management Scheme;

¹⁸ See e.g. The Moray Firth Special Area of Conservation Management Scheme (2009) 6

¹⁹ Fal & Helford Special Area of Conservation Management Scheme, 8.

²⁰ MSA 2010, s. 101.

²¹ Moray Firth Special Area of Conservation Management Scheme, 19.

²² World Commission on Protected Areas, Guidelines for Marine Protected Areas (IUCN Best Practice Protected Area Guidelines Series No. 3, 1999) para 1.2.

²³ Marine Scotland, Draft MPA Management Handbook, para 8.6.2.

²⁴ MSA 2010, s. 99(2): 'A marine management scheme is a scheme under which the relevant authority's (or authorities') functions must be exercised.'

²⁵ MSA 2010, s 85.

²⁶ MSA 2010, s 91.

²⁷ MSA 2010, s 91

²⁸ MSA 2010, ss 87, 90

²⁹ MSA 2010, s 88.

³⁰ The Scottish Government, Guidelines on the selection of MPAs and development of the MPA network, 2011, para 11.20.

³¹ The Scottish Government, Guidelines on the selection of MPAs and development of the MPA network, 2011, para 11.21.

³² South Arran Marine Conservation Order 2015 SSI 2015/437.

³³ See Policy Brief 2: The Enforcement of Fishing Restrictions in Marine Protected Areas.

³⁴ South Arran Marine Conservation Order 2014, SSI 2014/260.

³⁵ MSA 2010 (asp 5), s 71(1).

³⁶ Guidelines on the selection of MPAs and development of the MPA network (Scottish Government, 2017) paras 7.8–7.9.

³⁷ Guidelines on the selection of MPAs and development of the MPA network (2017) para 6.7.

³⁸ See the Fair Isle (Demonstration and Research Marine Protected Area) Order 2016.

³⁹ MSA 2010, s 85(1)(b).

⁴⁰ The Scottish Government, Guidelines on the selection of MPAs and development of the MPA network (2017) para 6.6.

⁴¹ MSA 2010, s 51.

⁴² Scottish Crown Estate Act 2019, s 5.

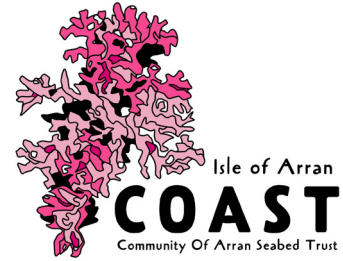
⁴³ Scottish Crown Estate Act 2019, s 6.

⁴⁴ See generally J Harrison, Sea and Continental Shelf, Stair Memorial Encyclopaedia (2019) para 13.

⁴⁵ Scottish Crown Estate Act 2019, s 7.



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The Saving our Seas Through Law Policy Brief Series includes:

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- Briefing 3: Using Marine Spatial Planning to Support Marine Protected Area Management
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