

# 1

2015

## THE RELATIONSHIP BETWEEN THE STATUTORY LAND USE PLANNING SYSTEM AND MARINE PLANNING AND LICENSING

# ■ circular

# **Scottish Planning Series**

## **PLANNING CIRCULAR 1/2015**

# **The relationship between the statutory land use planning system and marine planning and licensing**

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The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

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## **Circular 1/2015 The relationship between the statutory land use planning system and marine planning and licensing**

### **Introduction**

1. This Circular explains the relationship between the marine and terrestrial<sup>1</sup> planning systems, including related regimes such as marine licensing and consenting for offshore energy generation, ports and harbours development and aquaculture.
2. The Circular expands on and explains the arrangements outlined in the National Marine Plan on marine and terrestrial planning.
3. The UK vision for the marine environment, agreed between the UK Government and devolved Administrations, is for ‘clean, healthy, safe, productive and biologically diverse oceans and seas’. The vision and UK high level marine objectives, first published in April 2009, are reflected in the [UK Marine Policy Statement](#) and set out the broad outcomes for the marine area in achieving this vision.
4. Marine Scotland, a Directorate of the Scottish Government, undertakes marine management in Scotland. In support of the vision for the marine environment, Marine Scotland delivers integrated marine management functions; science, policy development and delivery, compliance monitoring and enforcement, whether fully or executively devolved to Scottish Ministers. Marine Scotland, on behalf of Scottish Ministers, has the primary responsibility for marine planning, conservation<sup>2</sup> and licensing from Mean High Water Springs out to 200 nautical miles.
5. Terrestrial planning authorities (Strategic and Local Planning Authorities and National Park Authorities) are responsible for all terrestrial planning matters down to Mean Low Water Springs and for marine fish farming (finfish and shellfish) where planning consent is required out to 12 nautical miles.
6. In the intertidal zone, between low and high water springs, terrestrial planning authority overlaps with Marine Scotland’s responsibilities for the marine area.

### **Marine Legislation**

7. The Marine (Scotland) Act 2010 (‘the Act’) along with the Marine and Coastal Access Act 2009 (‘the UK Act’) (the marine Acts) forms the legislative framework for the marine environment. Implementation of the marine Acts, in particular on marine planning, provides key delivery mechanisms for international obligations and Directives including the EU Marine Spatial Planning Directive and the Marine Strategy Framework Directive.

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<sup>1</sup> The term ‘terrestrial planning’ is used throughout this document to refer to all elements of the land use planning system.

<sup>2</sup> Powers extend to continental shelf limits. Marine and Coastal Access Act 2009.

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8. The Act provides a framework to help balance competing demands on Scotland's seas. It introduces duties to protect and enhance the marine environment. The main measures include:
  - *Marine planning*: a new statutory marine planning system to sustainably manage the increasing, and potentially conflicting, demands on our seas.
  - *Marine licensing*: a simpler licensing system, minimising the number of licences required for development in the marine environment.
  - *Marine conservation*: improved conservation powers for marine natural and cultural heritage.
  - *Seal conservation*: improved protection for seals and a new licence system to ensure appropriate management where necessary.
  - *Enforcement*: a range of enhanced powers for marine conservation and licensing.
9. In accordance with Part 2 of the Act, Scottish Ministers and public authorities must, in carrying out any statutory function which affects the Scottish marine area<sup>3</sup> (out to 12 nautical miles), act in a way best calculated to further the achievement of sustainable development. This includes the protection and, where appropriate, enhancement of the health of that area, so far as is consistent with the proper exercise of the function concerned. Under Part 2 of the Act, when carrying out any function under either that Act, the Climate Change (Scotland) Act 2009, or any other enactment that affects the Scottish marine area, Scottish Ministers and public authorities must also act in a way best calculated to mitigate and adapt to climate change, so far as is consistent with the purpose of the function concerned.
10. This applies to terrestrial planning functions which affect the Scottish marine area in the same way as it applies to marine planning functions.
11. In accordance with the Act, Scottish Ministers have responsibility for marine planning, nature conservation, licensing and enforcement from Mean High Water Springs out to 12 nautical miles. In addition, the UK Act executively devolves responsibility to Scottish Ministers for marine planning, nature conservation, licensing and enforcement in waters adjacent to Scotland out to 200 nautical miles. With the approval of the UK Secretary for State, this includes planning for reserved activities such as oil and gas, shipping and telecommunications, although licensing for these remains reserved to the UK Government. In effect this means that marine planning in Scotland applies to the exercise of both reserved and devolved functions from Mean High Water Springs out to 200 nautical miles.

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<sup>3</sup> The 'Scottish marine area' means the area of sea within the seaward limits of the territorial sea of the United Kingdom adjacent to Scotland - Marine (Scotland) Act 2010 Section 1.

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### Marine Planning

#### The Marine Policy Statement

12. The UK Marine Policy Statement was published jointly by the UK Government and Devolved Administrations in March 2011. It sets out a shared vision for the whole UK marine area<sup>4</sup> and provides a framework for preparing marine plans, including economic, social and environmental considerations which need to be taken into account. It also sets out strategic policy objectives for key marine sectors. The Marine Policy Statement makes a presumption in favour of sustainable development in the UK marine area.
13. The Scottish National Marine Plan and any subsequent Scottish regional marine plans must conform with the Marine Policy Statement, and public authorities must act in accordance with the Marine Policy Statement, unless relevant considerations indicate otherwise, when taking decisions that affect or might affect the UK marine area.

#### Marine Plans

14. In accordance with the marine Acts, Scottish Ministers are required to prepare a national marine plan for the Scottish marine area. They may also prepare regional marine plans for any Scottish marine region. Marine Plans must set out economic, social, marine ecosystem and climate change objectives for a marine plan area, consistent with the Marine Policy Statement. They will set out how marine resources can best be managed and will ensure that different and potentially competing activities are managed in such a way that they contribute to the achievement of sustainable development in the Scottish marine area.
15. For the purposes of preparing a national or regional marine plan, the Act requires Scottish Ministers to undertake an assessment of the condition of the Scottish marine area and a summary of significant pressures of human activity. [Scotland's Marine Atlas: information for the National Marine Plan](#) provides such an assessment and is the evidence base upon which the National Marine Plan has been developed. Assessments at the level of the Scottish Marine Region are also required and will be undertaken appropriate to the regional scale<sup>5</sup>.

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<sup>4</sup> The 'UK marine area' includes the territorial seas and offshore area adjacent to the UK. This includes the area of sea designated as the UK Exclusive Economic Zone, the UK sector of the continental shelf and any areas submerged by seawater at mean high spring tides, as well as the tidal extent of rivers, estuaries and creeks - Marine and Coastal Access Act 2009, Section 42.

<sup>5</sup> [Initial Principles for Developing Assessments to Support Regional Marine Plans](#)

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16. Marine plans must be kept under review. A report for each marine plan (national and regional) must be prepared at least every five years, at which time Ministers must consider whether the plan needs to be amended or replaced.

### **The National Marine Plan**

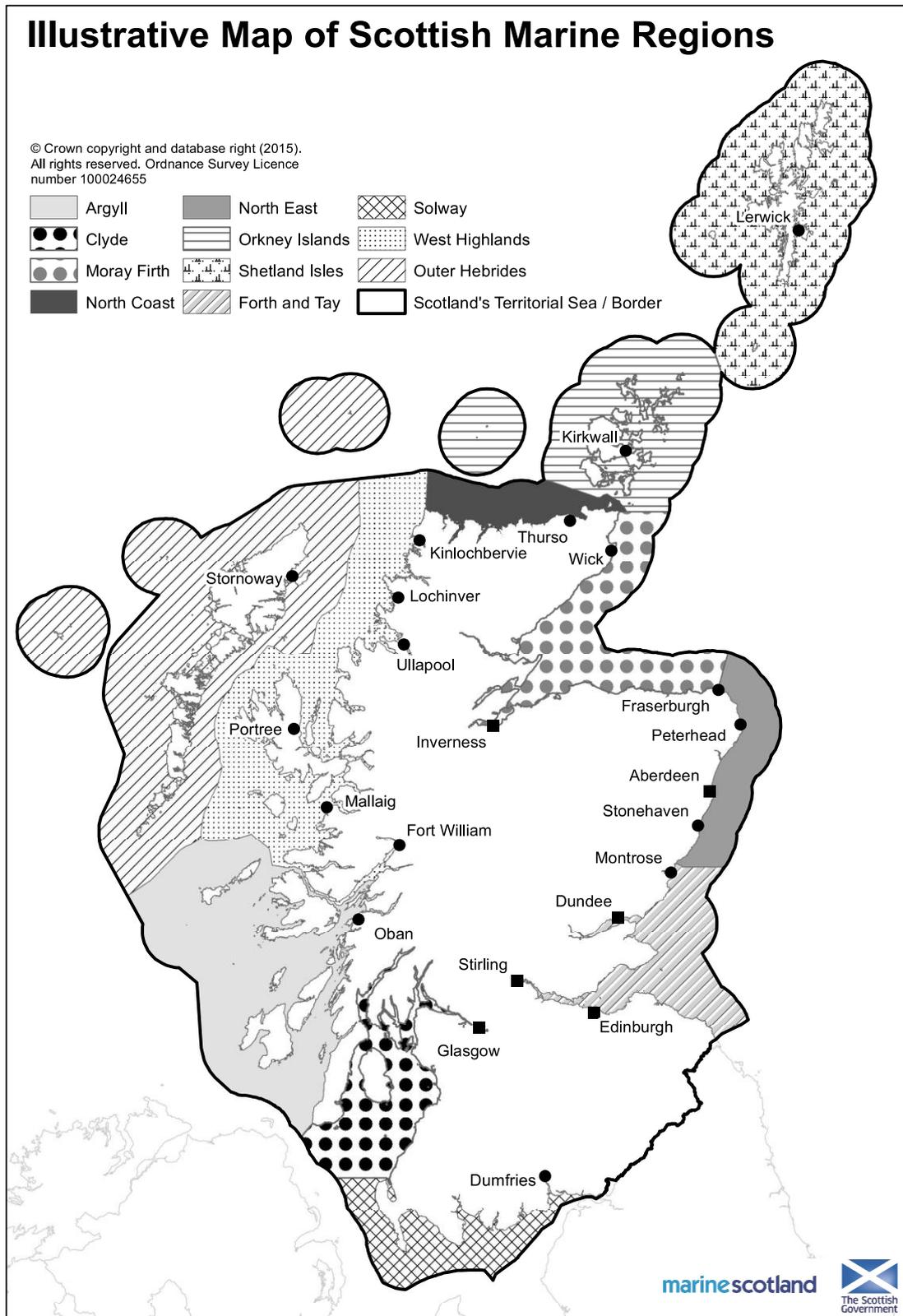
17. In accordance with the marine Acts, Scottish Ministers have prepared a National Marine Plan which covers both the Scottish marine area (out to 12 nautical miles) and the UK marine area which is adjacent to Scotland (12 to 200 nautical miles).
18. The National Marine Plan contains objectives and policies for the sustainable development of key marine industries. It recognises that many marine activities require both marine and terrestrial components and also that marine activity has potential to impact on adjacent coastal areas, islands and communities through service provision and issues such as visual impact. The National Marine Plan therefore recognises and is consistent with the National Planning Framework and the Scottish Planning Policy. It promotes alignment through its policies, supporting text and specific proposals, including provision for national developments outlined in the National Planning Framework.

### **Regional Marine Plans**

19. Marine planning will be implemented at a local level through Scottish Marine Regions to take account of local circumstances and issues and smaller ecosystem units. The boundaries of the 11 Scottish Marine Regions were established by [The Scottish Marine Regions Order 2015](#). The regions extend from Mean High Water Springs out to 12 nautical miles. An illustrative map of the boundaries is shown below and the boundaries are also available on [National Marine Plan interactive](#) (NMPi). Regional marine plans will be prepared for each Scottish Marine Region.

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**Figure 1**



## **Circular 1/2015 The relationship between the statutory land use planning system and marine planning and licensing**

20. Regional marine plans must be developed in conformity with the Marine Policy Statement and National Marine Plan unless relevant considerations indicate otherwise. They will be more spatially detailed, reflecting their smaller scale, the level and complexity of marine activity that occurs within coastal regions and issues specific to these areas. The National Marine Plan contains sections and policies which provide particular guidance on matters to be considered when regional marine plans are being developed. The precise approach taken by a Marine Planning Partnership in developing regional plans will be based on local priorities, existing partnerships and alignment with other local plans.
21. All reasonable steps must be taken to ensure that a regional marine plan is compatible with any adjoining regional marine plan and with the development plan for any area which adjoins. This will help ensure consistency between regional marine plans and between regional marine plans and development plans across Scotland. The National Marine Plan also contains policies to ensure alignment with other relevant plans, such as River Basin Management Plans.

### **Marine Planning Partnerships**

22. Within Scottish Marine Regions, regional marine plans will be developed by Marine Planning Partnerships.
23. Marine Planning Partnerships will take different forms in different regions to reflect variation in the number of participating local authorities and communities of interest. The policy intent is for Partnerships to operate in a way which is representative and inclusive, although the core group may be of limited numbers in order to facilitate decision making. The structure should be supported and informed by a broad framework of groups able to focus on particular issues and engage with the full range of stakeholders and interests. Key public bodies with a relevant national remit should be involved. In particular, the involvement of Local Authorities will be important in all Partnerships. Island Local Authorities will lead the Partnerships in their areas. Strategic and local development planners will usefully form a key component of local authority representation. Their involvement will help with the alignment of marine and terrestrial plans and transfer of knowledge.
24. Marine Planning Partnerships will lead on the preparation of regional marine plans taking into account the National Marine Plan and any specific direction from Scottish Ministers.
25. Marine Planning Partnership powers will not include licensing or consenting; this will remain the responsibility of consenting bodies such as Marine Scotland and Local Authorities. They will, however, be statutory consultees on marine licence applications submitted to Marine Scotland<sup>6</sup>. Terrestrial

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<sup>6</sup> The Marine Licensing (Consultees) (Scotland) Order 2011

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planning authorities are advised to consult Marine Planning Partnerships on fish farming applications and other developments with implications for the marine environment.

26. A phased approach will be taken to the establishment of Marine Planning Partnerships. It may take some time for all Partnerships to be fully functional and to develop regional marine plans.

### **The Marine Planning Process**

27. The marine plan for an area will consist of the National Marine Plan and the regional marine plan which is in effect for that area.
28. The marine Acts require notice to be given, including to neighbouring terrestrial planning authorities, of the intention to prepare a national or regional marine plan. A statement of public participation must be prepared, and a draft of the plan published for public consultation.
29. The National Marine Plan must be laid before the Scottish Parliament, and Scottish Ministers must consider any resolution the Scottish Parliament may make before they adopt the plan. Regional marine plans will be subject to adoption by Scottish Ministers.

### **Alignment of marine and terrestrial plans**

30. Marine plan boundaries extend up to Mean High Water Springs. Terrestrial planning boundaries extend down to Mean Low Water Springs, with the exception of fish farming which extends out to 12 nautical miles. There is therefore an overlap of planning jurisdictions in the inter-tidal area and for aquaculture. Outwith the intertidal zone, it is clear that marine development will have implications for the terrestrial environment and in turn that terrestrial development may have implications for the marine environment.
31. Policy consistency between marine and terrestrial plans will be crucial, particularly for those policy areas which have significant implications for both marine and terrestrial environments. This is likely to include renewable energy; electricity networks; coastal and flood defence; fish farming; ports and harbours; public access, tourism and recreation; protected sites and species; waste water infrastructure; carbon capture and storage; and landscape and seascape. The vast majority of marine development is likely to have implications for the adjacent terrestrial environment. This could arise from the need for access or infrastructure; or more broadly in terms of employment. Marine and development plan policy should address such potential implications and these common policy areas.
32. The importance of alignment between marine and terrestrial plans is reflected in legislation through both the marine Acts and the Town and Country Planning (Development Planning) (Scotland) Regulations 2008, which require that marine plans and development plans have regard to each other. This will

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help ensure that decision making under each framework is consistent with regards to the marine environment.

### Authorisation and enforcement

33. Section 15 of the Act and Section 58 of the UK Act require that all public authorities taking authorisation or enforcement decisions that affect or might affect the Scottish marine area or the UK marine area, respectively, must do so in accordance with the UK Marine Policy Statement, the National Marine Plan and any subsequent regional marine plan once adopted, unless relevant considerations indicate otherwise. This includes decisions on terrestrial planning applications and enforcement action.
34. The Town and County Planning (Scotland) Act 1997 requires determinations to be made in accordance with development plans unless material considerations indicate otherwise.
35. In accordance with Section 15 of the Act and Section 58 of the UK Act, public authorities, when making decisions which are capable of affecting the Scottish marine area or the UK marine area, respectively, which are not authorisation or enforcement decisions, must have regard to the UK Marine Policy Statement and the National and regional marine plans. This applies to the preparation and adoption of terrestrial development plans.
36. In accordance with paragraph 3 of Schedule 1 to the Act all reasonable steps must be taken to secure that any regional marine plan is compatible with the development plan for an area which adjoins the marine area. This may require compatibility with more than one development plan.

### Plan Development

37. In order for decisions to accord with marine plans and terrestrial development plans, it is essential that such plans are compatible with each other. Alignment between marine plans and terrestrial development plans can be positively addressed through:

*Liaison between marine and terrestrial planning authorities*

38. Liaison between marine and terrestrial planning authorities is essential in plan preparation and will involve close collaboration as well as formal consultation between authorities at each successive stage of marine and terrestrial plan preparation. This will help ensure that plans are developed with an understanding of both terrestrial and marine issues, objectives, policies and proposals. Terrestrial planning authorities will have a key role in the preparation of marine plans, and in some marine regions will be the lead partner. It will be beneficial to involve both marine and terrestrial planners in the preparation of respective development and marine plans.

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39. Marine Planning Partnerships will be involved in the preparation of terrestrial development plans. In setting out the role of key agencies, Circular 6/2013 *Development Planning* states that once Marine Planning Partnerships have been established they should be appropriately involved in the development plan process. On this basis, Marine Planning Partnerships should have the same level of involvement in the development plan process as key agencies.

*Consistency between marine and terrestrial plan policy and proposals*

40. The National Marine Plan, the National Planning Framework (NPF) and Scottish Planning Policy (SPP) provide an aligned framework for marine planning at a national level. They support sustainable development both in the marine area and on land and provide complementary policy. The National Marine Plan supports national developments in the NPF and relevant policies of the SPP. This national coordination is an essential reference point that will help to align marine and terrestrial plans.
41. The process of ensuring policy alignment between terrestrial and marine plans will be iterative. As regional marine plans are developed they must take all reasonable steps to align with existing terrestrial plans. As development plans are revised they should have regard to marine plans.
42. It is evident that both terrestrial and marine planning systems and their respective policy objectives will evolve over time. Careful consideration, dialogue and joint working between marine and terrestrial planners will be required during both preparation and revision of marine and terrestrial plans.
43. There should be mutual support for specific development proposals in marine and terrestrial plans which relate to each other. Each plan should make appropriate provision for resource or infrastructure requirements which may be necessary to support a development proposal in the other plan.

*Timing of plans*

44. Although marine and terrestrial plans each have statutory preparation and review requirements which are separate and different, there may be opportunities to programme them so that the key stages, including key consultation stages, are aligned. This could deliver efficiencies and may assist in stakeholder and community engagement. Temporal alignment may only be achievable over a number of iterations of terrestrial and marine plan preparation cycles and may be most easily achieved when Local Authorities play a lead role in Marine Planning Partnerships.
45. Supplementary guidance could, in some cases, be used as a mechanism to facilitate temporal alignment. Supplementary guidance does not need to be adopted at the same time as a development plan. This could allow for terrestrial policy alignment with marine plans that are adopted after a development plan has been approved or adopted. Supplementary guidance addressing marine planning will however require a policy principle relevant to

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the content of the supplementary guidance and an explicit reference, in the adopted or approved development plan. Supplementary guidance should be regarded as a temporary measure to ensure interim alignment, with fuller policy integration being achieved in subsequent reviews of strategic and local development plans.

46. In areas where a marine region borders more than one terrestrial planning authority, such as some firths, coordinating the timing of plans may be more difficult and other options to help promote policy consistency should be explored. Any mechanisms developed will need to be appropriate for local circumstances but could, for example, include some form of report prepared by Marine Planning Partnerships which outlines key marine issues and proposed development for a marine region. These could highlight areas which require specific integration with development plans and could provide a basis for alignment at the time of development plan revision.

### *Sharing the evidence base*

47. Marine and terrestrial planning authorities should aim, where appropriate, to share a common evidence base. This would form a foundation upon which policies, proposals and monitoring statements could be developed and would support assessments such as Strategic Environmental Assessment and Habitats Regulations Appraisal. National databases on a variety of subjects will be available for common use as promoted by national strategies<sup>7</sup>. Where additional data is gathered to inform planning within a marine region or development plan area, this should be made available to both terrestrial and marine planning authorities. Where appropriate it should be compiled in such a way as to be fit for purpose for both planning regimes. This will help to make plan-making processes more efficient, improve the quality of decision making and enable fuller alignment and monitoring of plans.
48. Marine Scotland hosts National Marine Plan interactive ([NMPi](#)), an interactive GIS tool which provides spatial data relevant to marine planning. Where terrestrial data is relevant to marine planning, it could also be provided to terrestrial planners via NMPi.

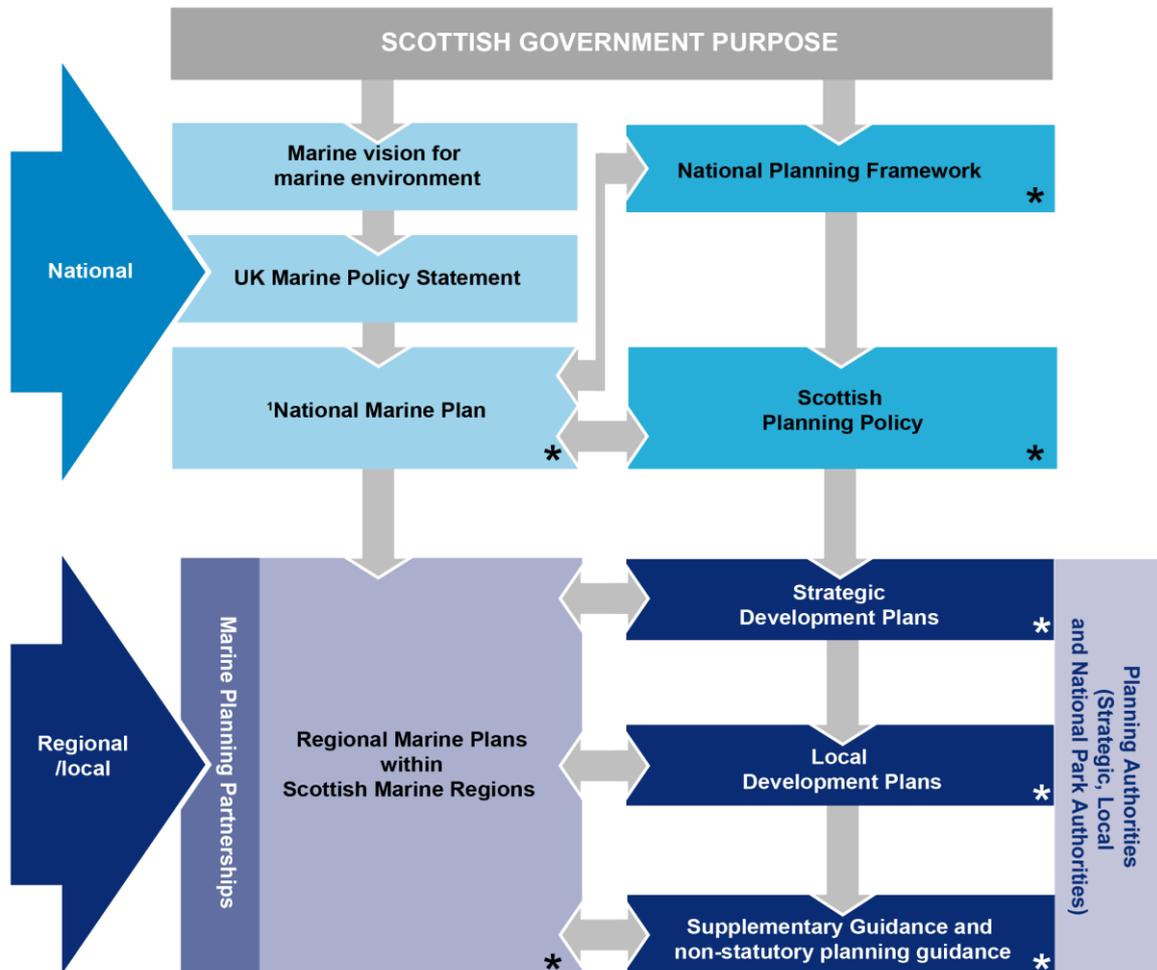
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<sup>7</sup> National strategies include - [A Data Vision for Scotland](#)

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**Figure 2**

**Policy relationship between marine and terrestrial planning**



<sup>1</sup>The National Marine Plan also applies directly to Strategic and Local Development Plans and to Supplementary Guidance and non-statutory planning guidance

\*Opportunity for public engagement

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### **Integrated Coastal Zone Management**

49. Integrated Coastal Zone Management brings together all those involved in the development, management and use of the coast within a framework that facilitates the integration of their interests and responsibilities. The objective is to establish sustainable levels of economic and social activity in our coastal areas while protecting the coastal environment. To date in many areas it has been facilitated by relevant public bodies and/or coastal partnerships comprising of relevant public bodies and stakeholders.
50. In most circumstances aligned marine and terrestrial planning and consenting regimes will be sufficient to ensure an integrated approach to planning and management of the coastal zone. However, there may be some areas and circumstances in which additional mechanisms and approaches are required for effective management of complex issues or competing interests. This is most likely to be where there are a high number of different uses and users of coastal resources, for example in and around some of our firths, sea-lochs and sounds.
51. At a regional level it will be for Marine Planning Partnerships and terrestrial planning authorities, along with relevant stakeholders, to consider and agree whether there is a requirement for more detailed management of the coastal area. It may be necessary to work with other agencies and to employ additional mechanisms to address specific issues for which marine and terrestrial planning do not provide the entire solution.
52. Where additional mechanisms and approaches are relevant to marine and terrestrial planning it will be important for them to remain consistent with the policies and proposals in the respective terrestrial and marine plans.

### **Marine licensing and consents**

53. Marine Scotland-Licensing Operations Team (MS-LOT) administers the marine licensing function under Part 4 of the Marine (Scotland) Act 2010 from 0 to 12 nautical miles and under Part 4 of The Marine and Coastal Access Act 2009 from 12-200 nautical miles. The marine Acts have a landward limit of Mean High Water Springs.
54. Together, under the provisions of the marine Acts and executive devolution of some otherwise reserved functions, this means that Marine Scotland is the competent authority for licensing most activities in Scotland's marine environment. However, licensing of most activities relating to oil and gas, defence and pollution from shipping remain reserved to the UK Government.
55. The following activities require to be licensed by Marine Scotland:
  - depositing any substance or object within the Scottish marine area, either in the sea or on or under the seabed, from a vehicle, vessel, aircraft or marine structure.

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- constructing, altering or improving any works within the Scottish marine area either in or over the sea, or on or under the seabed.
  - using a vehicle, vessel, aircraft, marine structure or floating container to remove any substance or object from the seabed within the Scottish marine area (including dredging).
56. Under separate legislation, licences and consents are required for marine based electricity generating stations of capacity greater than 1 Megawatt (MW), for activities affecting specific 'protected species' and for some activities which relate to oil and gas related activities between 0 and 12 nautical miles.
57. Certain activities are specifically exempted from marine licensing by Order, for example maintenance of ports and harbours and coastal defences (for or on behalf of a Local Authority). Certain activities required for safety and in emergency situations are also exempted. Fishing is exempt from marine licensing as it has its own regime.
58. While aquaculture developments are exempt from most of the marine licensing regime (fish farms require planning permission from a terrestrial planning authority), a licence is required in relation to navigational aspects. Finfish developments require a marine licence in relation to discharges from wellboats.
59. Some 'licensable marine activities' are regulated activities that form part of a plan or project that may require Environmental Impact Assessment under the Marine Works (EIA) Regulations 2007 (as amended) and/or the Electricity Works (EIA) (Scotland) Regulations 2000 (as amended). Marine Scotland expects significant and early pre-application consultation with applicants as well as cross-cutting discussions with any other regulatory or appropriate authority engaged in the Environmental Impact Assessment process, such as a relevant Local Authority. Early dialogue is of paramount importance if the process is to be as efficient as possible.
60. Where multi-regime consents are required (for example planning permission and a marine licence), early engagement with the consenting authorities will be particularly important to discuss which consents are required. It can also be used to discuss the scope for coordinating the different consenting processes and any associated assessment requirements (for example Environmental Impact Assessment<sup>8</sup> or Habitats Regulations Appraisal). In this way all parties can seek to minimise duplication whilst ensuring regulatory requirements are fully met.
61. Before a marine licence application is determined, Scottish Ministers publish a notice that an application has been received. Statutory consultees must be consulted; this will include Marine Planning Partnerships for applications out to 12 nautical miles. Terrestrial planning authorities are not statutory consultees,

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<sup>8</sup> See Planning Advice Note 1/2013: [Environmental Impact Assessment](#)

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but will be consulted on a case by case basis by MS-LOT where there are clear terrestrial implications. Planning authorities will also be consulted through their role with Marine Planning Partnerships. Ministers will consider the environment, human health, legitimate uses of the sea and any other matters they consider relevant in determining a licence. Ministers have powers to vary, revoke or suspend a licence, and to take enforcement action. They may also hold an enquiry into a licence application.

62. Applicants who are dissatisfied with the Scottish Ministers' decision on a licence application may appeal to a Sheriff.
63. Since marine licensing covers the marine area up to Mean High Water Spring and terrestrial planning control extends down to Mean Low Water Spring, there is an overlap of consenting regimes in the inter-tidal zone. This means that for some activities there may be a need for both a marine licence and planning permission. In addition, a works licence may also be required in relation to activity of statutory Harbour Authorities and in Shetland and certain parts of Orkney within waters of Local Authority jurisdiction.

### **Renewable Energy**

64. The Scottish Government is developing sectoral marine plans<sup>9</sup> for offshore<sup>10</sup> wind, wave and tidal energy. The sectoral plans contain Scottish Ministers' spatial strategy to facilitate the sustainable development of commercial scale renewable energy projects by identifying the most suitable locations<sup>11</sup> around Scotland for offshore renewable energy development. Sectoral marine plans are a material consideration in decision making.
65. The National Marine Plan provides the statutory framework and policies within which offshore renewable energy developments are progressed, both at the planning and licensing stages, with terrestrial development plans providing the framework for on shore elements. The National Marine Plan reflects the spatial strategy of the sectoral marine plans. Regional marine plans will implement the National Marine Plan policy at a regional scale.
66. Development plans should provide consistent policy direction and appropriate allocations for the onshore infrastructure requirements which support offshore renewables, such as grid connections, sub-stations, interconnectors, converter stations, testing facilities, manufacturing and assembly facilities, and ports and harbours infrastructure. Development plans should also, as appropriate,

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<sup>9</sup> Finalised plans to be published in 2015.

<sup>10</sup> In relation to renewable energy, the term 'offshore' should not necessarily be taken to mean in the offshore marine area i.e. outside 12 nautical miles. The term offshore refers to the marine environment and could include activity within 0-12 nautical miles.

<sup>11</sup> Based on an analysis of resource and constraint and informed by SEA, HRA, Strategic Social and Economic Impact Assessment and consultation.

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recognise and provide for national development 4 - High Voltage Electricity Transmission Network and the coastal areas of coordinated action included in NPF3. Developers, when preparing schemes for off-shore developments, should engage with the appropriate terrestrial planning authority to ensure alignment with any relevant development plans.

### **Licensing and consenting**

67. All proposals for marine renewable energy developments require a marine licence in accordance with the marine Acts.<sup>12</sup> For marine based electricity generating stations in excess of 1 MW out to 12 nautical miles and in excess of 50 MW from 12-200 nautical miles, a 'Section 36' consent is also needed in accordance with the Electricity Act 1989. The Scottish Ministers are the licensing authority in both cases.
68. Where a Section 36 consent is required, special licensing procedures allow Marine Scotland to consider applications for marine licences and Section 36 consents under respective legislation together, providing for a streamlined application process.

### **Planning permission for onshore components**

69. Offshore renewable energy developments are likely to have onshore development requirements such as a substation. Planning permission will in most cases be required for the components of marine based electricity generating stations which are above Mean Low Water Springs.
70. Where Section 36 consents are required, a statutory provision in the Growth and Infrastructure Act 2013 which amends Section 57 of the Town and Country Planning (Scotland) Act 1997, enables Scottish Ministers to direct that planning permission is deemed to be granted for the ancillary onshore components and related onshore infrastructure. This creates a single application process, consented by Scottish Ministers, and means that an applicant does not have to make separate applications for a marine licence and planning permission.
71. Should they choose to do so, developers could still apply separately for a Section 36 consent from Scottish Ministers, and planning consent for the onshore components of an offshore scheme from the relevant terrestrial planning authority. This can provide for some flexibility in the application process. However, Marine Scotland considers that, in most cases, a single consenting process will be more efficient and effective and encourages developers to adopt this process.

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<sup>12</sup> A seabed lease from the Crown Estate is also required although this is not related to the marine planning process.

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72. Section 36 consents are not required in cases where generating capacity is below 1MW capacity out to 12 nautical miles and below 50 MW from 12-200 nautical miles. Instead a separate marine licence for offshore development and planning permission for components above Mean Low Water Springs will be required with the Scottish Ministers and the terrestrial planning authority being the respective consenting bodies.

### **Statutory consultees**

73. Under the Electricity Act 1989 terrestrial planning authorities are not statutory consultees on Section 36 applications for generating stations situated wholly offshore. However, where part of the infrastructure to be covered under the Section 36 consent is to be built onshore then under the Electricity Act the terrestrial planning authority is a statutory consultee on the application as a whole, including the offshore elements.
74. Terrestrial planning authorities are, in all cases, statutory consultees under environmental impact assessment processes relating to Section 36 applications. They are, as a matter of course, consulted on Section 36 applications in full, including for matters not related to environmental impact assessment, and on deemed planning permission for the onshore elements.
75. Terrestrial planning authorities are fully consulted on any application for planning permission for the onshore components of an offshore generating station.

### **Pre-application consultation**

76. Pre-application community consultation is not a statutory requirement for all Section 36 consent applications although it is encouraged by Marine Scotland as good practice. Pre-application consultation is required under the marine licensing scheme for certain activities relating to offshore generating stations which are prescribed activities under the Marine Licensing (Pre-application Consultation) (Scotland) Regulations 2013.
77. Pre-application consultation with the terrestrial planning authority is a statutory requirement for any planning applications for onshore development classed as 'major' under the Town and Country Planning (Hierarchy of Development) (Scotland) Regulations 2009, or 'national' under the National Planning Framework. Therefore pre-application consultation with the planning authority will be required if a developer chooses to apply for planning permission separately to a Section 36 consent for a major or national development, or if it is required under the marine licensing scheme.
78. In either event, developers should seek early pre-application discussion with both the marine and terrestrial planning authorities. Good communication and early engagement between Marine Scotland, Marine Planning Partnerships, developers and terrestrial planning authorities on Section 36 applications, including on any onshore components, is important.

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### **Marine Renewables Facilitators Group (MRFG)**

79. To assist in tackling complex issues and/or to resolve areas of dispute in the application process prior to determination, Marine Scotland may decide to bring together an advisory group. This group is formally known as the Marine Renewables Facilitators Group (MRFG). The group normally comprises representatives of the key regulators and statutory consultees who are suitably experienced and empowered by their organisations to provide advice, guidance and where necessary to agree compromises to assist in finalising a view on an aspect of an application. Membership can include whoever the group considers could assist in the facilitation of advisory and consenting solutions. This is case specific and could involve Marine Planning Partnerships and terrestrial planning authorities.

### **Ports and Harbours**

80. Activities in statutory harbour authority areas are governed by the local harbour legislation for that port. Any new harbour-related development may require the Harbour Authority to apply to Scottish Ministers for additional powers. This would be done by an application for a Harbour Revision order under the 1964 Harbours Act. Terrestrial planning authorities are statutory consultees in this process. Once established, Marine Planning Partnerships are also expected to be included in statutory consultation.
81. Statutory Harbour Authorities may also benefit from permitted development rights under classes 29 or 35 of the Town and Country (General Permitted Development) (Scotland) Order 1992, as amended. However the extent of permitted development rights under class 29 will relate to works defined in local harbours legislation. Notwithstanding the powers of Harbour Authorities and their permitted development rights, some development within their harbour limits will still require Marine Licensing and/or terrestrial planning consent depending on the proposal.
82. Many Harbour Authorities, particularly in river estuaries, also have powers to licence others to carry out works within their area of jurisdiction. These licences are in addition to any marine licence or planning consent which may be required.

### **Coastal defences and flood risk management**

83. The marine environment, particularly in those areas close to shore, is a highly dynamic system, and there are relationships between physical works occurring in these areas and flood risk. There are also close links between climate change and flood risk in coastal areas, particularly in relation to sea level rise.
84. The Flood Risk Management (Scotland) Act 2009 (FRMA) requires coastal areas at risk of flooding to be identified and objectives and measures to address flood risk to be coordinated across these areas. Ensuring close

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coordination between physical works occurring in coastal areas and actions to manage flood risk is essential.

85. The Scottish Environment Protection Agency's (SEPA) [flood maps](#) identify areas at risk of coastal flooding. Areas at significant risk of coastal erosion and flood risk will be identified in Flood Risk Management Strategies prepared by SEPA. Where relevant, specific actions relating to coastal flood risk will be included in the 14 Local Flood Risk Management Plans which are prepared by local authorities.
86. The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (as amended) require that when preparing strategic development plans and local development plans, planning authorities must have regard to any approved flood risk management strategy or finalised local flood risk management plan relating to the strategic development plan and local development plan area.
87. Under Section 60 of the FRMA flood protection schemes do not require separate planning permission. Section 57 of the Town and Country Planning (Scotland) Act 1997 (as amended by Section 65 of the FRMA) allows for deemed planning permission to be granted by Scottish Ministers on confirmation of a scheme.
88. Under the provisions of the Coast Protection Act 1949, local authorities have discretionary powers to carry out such coast protection work as may appear to them to be necessary or expedient for the protection of any land in their area against erosion and encroachment by the sea. Such schemes may also require separate planning permission.

## **Aquaculture**

### **Planning permission and consents**

89. The Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") defines fish farming as the breeding, rearing or keeping of fish or shellfish. Since 2007 marine fish farming has required planning permission from Local Authorities in accordance with the 1997 Act. This applies to all new fish farms out to 12 nautical miles including modifications to existing ones (although the role of planning authorities currently only extends to 3 nautical miles). Fish farming is therefore unique amongst marine activities in that it requires a consent from a terrestrial planning authority. Aquaculture other than fish farming, such as seaweed cultivation, requires a marine licence from Marine Scotland and a works licence in Shetland and certain parts of Orkney. In the future, should fish farming extend beyond 12 nautical miles a marine licence from Marine Scotland would be required as the primary consent to develop.
90. Prior to 2007 marine fish farming development was leased and consented either by the Crown Estate or, in their respective areas, by Orkney Islands Council and Shetland Islands Council. Marine Scotland is undertaking a process (the Audit and Review process) to determine whether certain fish

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farms (typically farms granted consented by the Crown Estate or by the Orkney and Shetland Islands Councils prior to 1 April 2007) should be granted permission to operate under section 31A of the 1997 Act.

91. Certain permitted development rights exist for fish farms that enable minor changes to be made to farms without the need to apply for planning permission. These rights, other than to change between certain fish species, are subject to a process of prior notification and approval by the planning authority.
92. As well as planning permission, all fish farms need a number of additional consents to operate. These include:
  - an Aquaculture Production Business Authorisation by Marine Scotland's Fish Health Inspectorate (FHI)
  - a licence from Marine Scotland in relation to navigational aspects such as fish farm cages and barges.
  - a Controlled Activity Regulations (CAR) licence from SEPA under The Water Environment (Controlled Activities) (Scotland) Regulations 2005.
  - a licence from Marine Scotland in relation to discharges from wellboats.
  - Seabed lease from The Crown Estate
93. In accordance with the Act, Scottish Ministers can, by Order, provide for fish farming in a specified area not to be development under the terrestrial planning system<sup>13</sup> and to be regulated by marine licence instead. An Order can only be made with the consent of the affected planning authority. In effect, this means that new fish farm development would no longer require planning permission but would be regulated by Marine Scotland marine licensing procedures. Unless an Order is made, fish farm development consents will remain a function of planning authorities throughout Scotland.

### **Determination of planning permission**

94. Terrestrial planning authorities must determine applications for planning permission in accordance with terrestrial development plans. Development plans provide locational guidance for new development, and may identify where new fish farms are likely to be acceptable. Development plans, and in some cases associated supplementary guidance, also provide the policy context for fish farm development. Non-statutory planning guidance for fish farming which a planning authority might have prepared and any guidance issued by statutory consultees may be material to decision making. The latter

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<sup>13</sup> The power to provide that marine fish farming is not development is contained in the Town and Country Planning (Scotland) Act 1997 (Section 26 AB) introduced by the Marine (Scotland) Act 2010.

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includes Marine Scotland's [Locational Guidance](#) and Scottish Natural Heritage's [Marine Aquaculture and the Landscape](#), which are referenced within National Marine Plan policies.

95. A [Working Arrangements](#) document sets out the respective roles and responsibilities of each of the statutory consultees in relation to fish farm planning applications. The Scottish Salmon Producers Organisation has produced a good practice guide for industry engagement in the planning process: [Industry Protocol for Preparing Planning Applications for Aquaculture Development](#).

### **Marine planning for aquaculture**

96. Marine plans apply to all marine aquaculture, including fish farming as defined by the Town and Country Planning Act, and other marine aquaculture such as seaweed cultivation.
97. The National Marine Plan sets out high level objectives for the aquaculture industry. It also contains policies on the sector's sustainable growth, including where new aquaculture development should be permitted and its interaction with other sectors. These policies largely reflect the same principles upon which development plans and consenting decisions by terrestrial planning authorities are based. As regional marine plans are developed it will be important for them to conform with the National Marine Plan on aquaculture, and to be compatible with development plans. Non-statutory planning guidance on aquaculture may be a material consideration in decision making and should be taken into account by regional marine plans. This will help ensure consistent decision making on fish farm and other aquaculture proposals.

### **Interaction between development plans and marine plans**

98. Planning consent for fish farm proposals within 12 nautical miles is a function of terrestrial planning authorities and decisions will be made in accordance with development plans. Terrestrial planning authorities are also required to accord with marine plans in decision making unless relevant considerations indicate otherwise, and to have regard to marine plans in preparing development plans (see paragraphs 33 and 35 above). Development plans and marine plans will direct decision making based on common evidence and policy, minimising the potential for ambiguity.
99. Marine Scotland is undertaking a three year project to identify areas of opportunity and restriction for both finfish and shellfish sectors. This work will contribute to the development of spatial policy to be reflected within both development and marine plans.
100. Scottish Ministers expect that, as the evidence base develops, marine plans will provide spatial frameworks for decisions about the location of new

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aquaculture development. The consenting process will remain with terrestrial planning authorities.

### **Marine Protected Areas (MPAs)**

101. The Act provides for Scottish Ministers to designate Nature Conservation Marine Protected Areas, Demonstration and Research Marine Protected Areas and Historic Marine Protected Areas within the Scottish marine area (out to 12 nautical miles). This normally excludes land and waters upstream of the freshwater limit of estuarial waters. The UK Act created similar powers for Scottish Ministers to designate Marine Conservation Zones, essentially Nature Conservation MPAs and referred to as such, beyond 12 nautical miles.
102. Nature Conservation MPAs can be designated for conserving marine flora or fauna, including rare or threatened species, marine habitats or features of geological or geomorphological interest. Taken together with marine conservation zones designated in UK waters, and with other protected areas in the marine environment such as those designated under the EU Birds and Habitats Directives, they form a network which contributes to the conservation or improvement of the marine environment both in the UK marine area and internationally.
103. Demonstration and Research MPAs can be designated for demonstration of sustainable methods of marine management or exploitation and/or for research into such matters. A designation should only remain in place for the length of time necessary to achieve the aims and objectives of the MPA and a review period will normally be defined.
104. Historic MPAs can be designated for preserving a marine historic asset of national importance according to guidelines published by Historic Scotland. Historic MPAs replace Section 1 of the Protection of Wrecks Act 1973 in Scotland which has been repealed. Historic MPA designation will normally be preferred to scheduling of monuments of national importance offshore.
105. In exercising any functions which may affect a MPA, a public authority must, so far as is consistent with the proper exercise of its functions, do so in a way which it considers best furthers (or least hinders) the purpose or objectives of the MPA. For Nature Conservation MPAs, such an obligation also applies to furthering the contribution of that MPA to the network of conservation sites. In complying with these requirements, public authorities must have regard to any guidance issued for the purpose by Historic Scotland, Scottish Natural Heritage or Scottish Ministers on the protection of features.

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## **Conservation of Seals**

106. The Scottish Government has responsibility for the conservation and management of seal populations in Scottish waters. The Act introduced enhanced seal protection measures whilst allowing for appropriate management under a new seal licensing system.
107. It is an offence to intentionally or recklessly injure, kill or take a live seal at any time (except under licence or for animal welfare reasons) or to harass seals at designated haul-out sites. Scottish Ministers may also designate an area as a seal conservation area where they consider it is necessary to do so to ensure the proper conservation of seals.
108. The potential for development to impact on seal conservation objectives may be material to some planning decisions, notably for fish farm development but also potentially for other developments, including those associated with renewable energy development. This may include impacts on areas that are important for seals, including seal conservation areas and designated seal haul-outs.
109. The [Scottish Government web site](#) provides further information on designated seal haul-outs and guidance on harassment.

## **Further copies and enquiries**

Any enquiries about the content of this Circular should be addressed to The Planning and Architecture Division, Scottish Government, 2H - South, Victoria Quay, Leith, Edinburgh, EH6 6QQ (Telephone 0131 244 7888). Copies of the circular may be obtained from the Scottish Government website at <http://www.gov.scot/Topics/Built-Environment/planning> .



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EH1 3DG

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