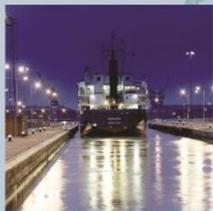


Brexit

Implications for the future of the UK's Marine Environment

July 2016

Creating sustainable solutions for the marine environment



Introduction

The decision by the UK to leave the EU has important implications for the future management of the UK's marine environment. It is fair to say that opinion on the implications of Brexit for the environment is varied with Environment Minister George Eustice MP suggesting that Brexit would free the UK from 'spirit-crushing' green directives¹ to Craig Bennett, CEO of Friends of the Earth, feeling 'desperately sad' and issuing a red alert for the environment².

So what are the risks and opportunities that Brexit might pose for the marine environment? And how can we ensure that we continue to make progress towards the UK's vision of 'clean, healthy, safe, productive and biologically diverse oceans and seas'?

In this White Paper Stephen explores some of the potential issues and challenges Brexit may bring and provides a personal perspective on some of the opportunities that it could present.

Models under Brexit

Two reports^{3,4} from the Institute for European Environmental Policy (IEEP) explore the possible implications for UK environmental policy and regulation following Brexit. IEEP notes that the implications would vary depending on the nature of the future relationship between the UK and the EU. In particular there is a key distinction in the UK's obligations depending on whether the UK finds itself inside or outside of the Single Market, which is currently uncertain.



It is also important to note that the timing of any changes is uncertain and could take a number of years to complete. For example, HM Government⁵ suggests the process could take a decade or more. There is also some uncertainty concerning the future status of devolved administrations, for example, whether, Scotland might remain inside the EU should its circumstances change.

If the UK negotiates membership of the European Economic Area (EEA) and thus remains part of the Single Market (Inside Single Market option), such membership would require that the UK continues to comply with the great majority of environmental legislation as set out in Annex XX to the EEA

¹ <http://www.theguardian.com/politics/2016/may/30/brexit-spirit-crushing-green-directives-minister-george-eustice>

² <https://www.theguardian.com/environment/2016/jun/25/how-can-we-make-brexit-work-for-the-environment>

³ http://www.ieep.eu/assets/2000/IEEP_Brexit_2016.pdf

⁴ http://www.ieep.eu/assets/2016/IEEP_2016_Brexit_-_Implications_for_UK_Environmental_Policy_and_Regulations.pdf

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504604/Alternatives_to_membership_-_possible_models_for_the_UK_outside_the_EU.pdf

Agreement⁶. Two important exceptions to this would be the Bathing Waters Directive and Birds and Habitats Directives. Nor would the Common Fisheries Policy (CFP) continue to apply.

Under circumstances where there was no special bilateral agreement with the EU and no preferential access to the Single Market (Outside Single Market option), EU environmental laws would no longer apply. However, UK companies wishing to export into the EU would continue to need to comply with requirements of that market (including environmental requirements).

Potential Implications for Marine

Inside Single Market

Key points:

- Most EU environmental legislation would remain in place
- UK no longer subject to:
 - Bathing Waters Directive
 - Birds and Habitats Directives
 - Maritime Spatial Planning Directive
- Common Fisheries Policy would no longer apply
- UK would remain subject to international commitments (e.g. OSPAR, International Maritime Organisation (IMO) and the UN Convention on the Law of the Sea (UNCLOS)
- Access to many EU funding programmes relevant to marine could continue (e.g. Horizon 2020, Interreg) but there would not be access to EU LIFE funding



Under this scenario, the UK would still need to comply with most EU water legislation including water pollution control Directives (such as IPPC, UWWTD) and the WFD.

There is currently uncertainty concerning whether the UK would need to comply with the Marine Strategy Framework Directive (MSFD). The MSFD is identified as being EEA relevant and thus should apply to EEA members.

However, it is not currently shown on Annex XX to the EEA Agreement⁷. Norway is currently in dispute with the EU arguing that the EEA agreement only applies to the territories of the EEA countries (which extend to the limit of territorial waters) and that as the MSFD applies mostly outside territorial waters, it is not within the EEA agreement (A Farmer, IEEP pers. comm.).

⁶ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex20.pdf>

⁷ <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex20.pdf>

Irrespective of whether MSFD remains applicable, should the UK remain inside the Single Market the majority of EU legislation relevant to the marine environment would remain in place. Furthermore, from a policy perspective, it is possible that the UK could choose to continue to apply the requirements of those Directives which are not mandatory for EEA countries. In these circumstances the only difference would be that the EU would no longer provide oversight in relation to the implementation of these Directives and there would be no role for the European Courts in relation to any disputes relating to these Directives. In this scenario, perhaps the biggest change would be that the UK would no longer have direct involvement in the shaping of the EU legislation with which it would be required to comply as a member of the EEA.

One interesting situation that might arise is that different devolved administrations make different choices about the extent to which they continue to follow EU legislation that was no longer mandatory for the UK. Hitherto, the devolved administrations have generally adopted a common UK line to implementing EU environmental policy but the fallout from Brexit might put this arrangement under strain.

In relation to bathing waters IEEP (2016b) note that there has been a high level of investment in water treatment since the 1970s which has led to steady improvement in the quality of waters at UK bathing beaches. In these circumstances, it is considered unlikely that the prevailing standards would be relaxed.

Should it be decided that the Birds and Habitats Directives' provisions were to be repealed in the UK, it is possible that the designation and management of SPAs and SACs and the management of Ramsar sites overlapping with the marine environment could be maintained under the Marine & Coastal Access Act (MCAA) (and equivalent devolved administration) MPA provisions. This could also extend to the designation and management of terrestrial portions of such sites in accordance with s118(4) of MCAA.



Concern has been expressed by conservation bodies and environmental NGOs on many occasions in the past about the potential consequences of any relaxation of these Directives, for example during the UK review of the implementation of the Birds and Habitats Directives⁸ and the EU Fitness Check⁹.

On the other hand, some might argue that the more flexible system for decisions on plans and projects potentially affecting MCZs established by section 126 of MCAA - including the requirement to deliver measures of equivalent environmental benefit - might provide greater opportunity to deliver environmental benefit in line with an ecosystem approach.

⁸ http://www.rspb.org.uk/forprofessionals/policy/planning/habitats_regulations.aspx

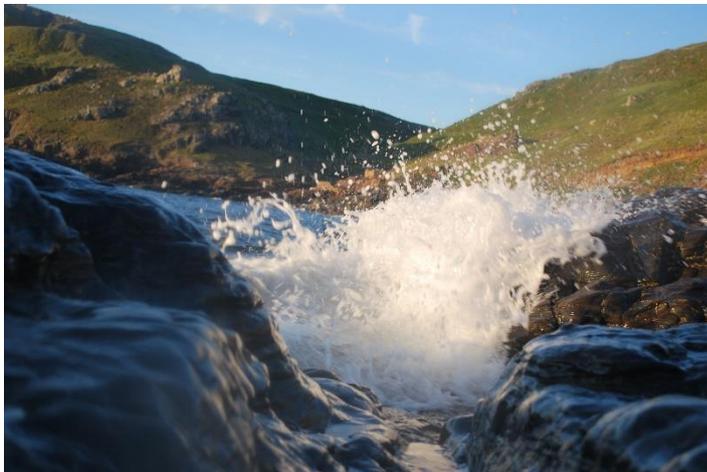
⁹ http://ec.europa.eu/environment/nature/legislation/fitness_check/docs/consultation/public%20consultation_FINAL.pdf

If the UK was no longer subject to MSFD, it is unclear whether these provisions would be replaced with similar or different legislation. The UK could continue to contribute to OSPAR status reports as well as national marine reporting such as Charting Progress.

The UK has already established a statutory system of marine planning for all of its waters. If the MSP Directive was not implemented in the UK, there would be little if any impact.

While the Directive promotes regional co-operation amongst Member States in preparing marine plans, it is likely that such co-operation would occur anyway through the requirements of the Espoo Convention and the UK's continued participation in OSPAR.

The potential consequences of the UK no longer being subject to the CFP are discussed in a separate White Paper by Suzannah Walmsley, ABPmer and are not discussed further here [<http://www.abpmer.co.uk/media/1487/white-paper-brexit-where-next-for-uk-fisheries.pdf>].



The UK would still be able to access many of the existing EU funding programmes relevant to the marine environment such as Horizon 2020 and Interreg, assuming it contributed funding to these programmes but would not be eligible to receive EU LIFE funding. However, the short-term uncertainty relating to the UK's future relationship with the EU is already reported as causing issues with EU research funding bids¹⁰.

Outside Single Market

Key points:

- UK companies seeking to export to EU would be subject to product environmental requirements
- UK would remain subject to international commitments (e.g. OSPAR, International Maritime Organisation (IMO) and the UN Convention on the Law of the Sea (UNCLOS))
- UK no longer subject to:
 - Bathing Waters Directive
 - Birds and Habitats Directives
 - Water Framework Directive
 - Marine Strategy Framework Directive
 - Maritime Spatial Planning Directive
- Common Fisheries Policy would no longer apply
- Access to EU funding programmes would be unlikely

Under this scenario with the UK outside of the single market, the extent to which the UK needed to comply with EU environmental legislation would be further reduced, although again, in policy terms,

¹⁰ <http://www.nature.com/news/brexit-and-science-seven-days-later-1.20193>

the UK might choose to continue to broadly work to the requirements of the Directives. However, should the UK decide to repeal certain directives, UK companies seeking to export to EU would still need to comply with water pollution control Directives (such as IPPC, UWWTD). On the basis that it is unlikely that the UK would seek to introduce a two-tier system for companies exporting or not exporting to the EU, it seems likely that existing water pollution control arrangements based on European legislation would remain in force. Broader international commitments in relation to OSPAR, IMO and UNCLOS would also remain.

With the UK no longer subject to the Birds and Habitats Directive, as above, it is possible that the MCAA and equivalent devolved legislation could provide the framework for managing SPAs, SACs and Ramsar sites.

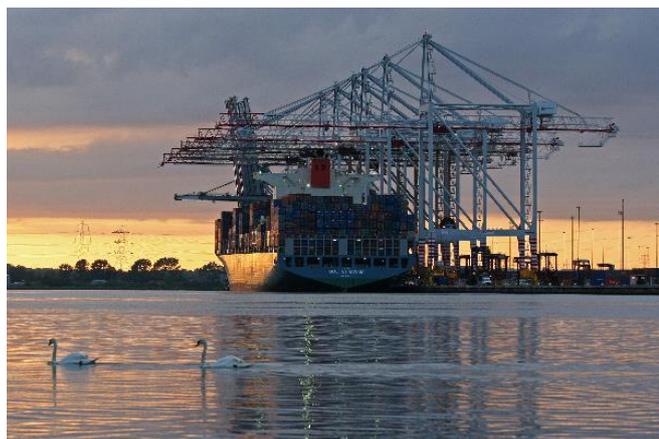
If the UK was no longer subject to WFD, it is unclear whether these provisions would be replaced with similar or different legislation. Prior to the WFD the UK has had long established systems of catchment planning and water quality classification dating from the 1990's. The UK could continue to contribute to OSPAR status reports as well as national marine reporting such as Charting Progress.

If the UK was outside the Single Market, access to EU environmental funding would be significantly curtailed. It is possible that the UK could introduce its own national funding arrangements.

Discussion

Boyes & Elliott¹¹ note that there are over 200 pieces of EU legislation that have direct repercussions for marine environmental policy and management. The paper presents a 'horrendogram' representing the relationships between national, UK, EU and international legislation relevant to the marine environment and notes the complexity and amount of legislation.

However, as the above analysis shows, any Brexiteers hoping that our departure from the EU might sweep away the bureaucracy and complexity of European environmental legislation are likely to be left disappointed. If the UK remains part of the Single Market, the great majority of European environmental legislation will remain in place, and even if the UK was no longer part of the Single Market a significant proportion of EU legislation is likely to remain in place in order to facilitate exports to the EU.



So will this mean that the Birds and Habitats Directives become the main battleground and, if so, is there a rational case for any change?

¹¹ <https://hydra.hull.ac.uk/assets/hull:12162/content>

The findings from the UK review of the implementation of the Birds and Habitats Directives and the EU Fitness Check have largely concluded that the Directives are doing their job and that the main issues encountered are a lack of financial support for implementation.

However, there are clearly concerns amongst some stakeholders about the rigidity of the directives aka George Eustice's statement about 'spirit-crushing' green directives. Indeed, Eustice states 'If we had more flexibility, we could focus our scientists' energies on coming up with new, interesting ways to protect the environment, rather than just producing voluminous documents from [sic] Brussels'¹².

While use of the word 'flexibility' will immediately set conservationists alarm bells ringing, my experience of working with the directives for the past twenty years suggests that Eustice may have half a point.



In our work we frequently encounter situations where the requirements for compensatory measures under the Birds and Habitats Directives result in solutions that are not sustainable and are sub-optimal for the wider estuary or coastal areas in which they are carried out due to the myopic focus on delivering 'like-for-like' measures. Indeed, the solutions required often conflict with the application of an ecosystem approach which is also a major tenet of European and UK environmental policy.

There is a sense in which the prescription of the Birds and Habitats Directives can militate against doing the best thing for the environment – the directives may be good at stopping the bad but they are also bad at enabling good. Particularly with the rise of environmental economics and concepts such as ecosystem services, payments for ecosystem services and biodiversity offsetting we are seeing increasing conflict between the prescriptive requirements of the directives and the types of solutions that environmental economics are suggesting might maximise welfare benefits. On this basis, a more flexible regime, similar to the MCAA could help to deliver greater environmental benefit. Indeed, compared to the US, the UK and Europe has a paucity of large scale marine habitat restoration initiatives. In part, at least, this may be due to the constrained thinking imposed by our regulatory framework which inadvertently crowds out opportunities to deliver more substantial benefit.

Environmental economics presents a particular challenge to conservationists because while it offers the prospects of environmental gains, it is inherently less certain that regulatory approaches and the fate of the environment is then more subject to political whim¹³. On this basis, conservationists are likely to push for the maintenance of Birds and Habitats Directives' provisions. This is understandable but may perpetuate the current suboptimal situation.

¹² <http://www.theguardian.com/politics/2016/may/30/brexit-spirit-crushing-green-directives-minister-george-eustice>

¹³ Brown, I., Harrison, P., Ashley, J., Berry, P., Everard, M., Firbank, L., Hull, S., Lundy, L., Quine, C., Rowan, J., Wade, R., Walmsley, S., Watts, K., & Kass, G. (2014) UK National Ecosystem Assessment Follow-on. Work Package Report 8: Robust response options: What response options might be used to improve policy and practice for the sustainable delivery of ecosystem services? UNEP-WCMC, LWEC, UK.

While the focus of the paper has been on the implications of Brexit for changes to legal frameworks, we also need to recognise the other impacts that Brexit may have on our marine environment as a result of potential changes in the level of investment and investment priorities and the availability of public funding to support protection and management. Indeed the prospect of further public sector funding cuts is a particular concern for the UK's ability to deliver effective regulation and enforcement in the marine environment.

Conclusions

We have entered a period of uncertainty concerning the future of EU environmental legislation relevant to the UK's marine environment.

If the UK remains part of the Single Market much of the existing environmental legislation would continue to apply. The main change would be that the UK was no longer subject to the Birds and Habitats Directives, although the UK could choose as a matter of policy to continue to apply the main provisions of these Directives. It is also possible that MSFD would no longer apply, although this is unclear. If the UK chose to no longer apply the Birds and Habitats Directives, it is possible that the MPA provisions of the MCAA and devolved Acts could provide the framework for designation and management of SPA's, SACs and Ramsar sites. Such a change might provide more opportunity to deliver greater environmental benefit although such changes are likely to be of concern, particularly to environmental NGOs.

If the UK finds itself outside of the Single Market then a greater number of existing directives would no longer apply although it is likely that existing water pollution control regimes would remain in place and wider international obligations would also remain. It is unclear whether the UK would choose to continue to work to existing EU requirements, to implement new national requirements or to scrap relevant provisions. The latter option is considered the most unlikely scenario.



Given the likely economic and political imperative of the UK remaining part of the Single Market, it is possible that the UK will continue to apply the majority of EU environmental legislation relevant to the marine environment. But with the UK outside of the EU, it would no longer be able to directly influence the form of new or revised EU environmental legislation but would be required to implement any changes agreed by Member States. The wide range of relevant international commitments through OSPAR, IMO and UNCLOS would also remain. Thus we may see relatively little change in requirements even in the long-term.

Under this scenario, there would be relatively little opportunity to make any significant changes to the way in which we manage our marine environment. However, should the UK no longer be subject to the Birds and Habitats Directives, it would provide an opportunity for debate about opportunities to

improve the way in which we protect and enhance the marine environment. To those that might advocate change, the question is how to do this without undermining the benefits that the Birds and Habitats Directives have achieved? To those that argue for no change, the challenge is to identify ways in which the existing framework can be used to deliver greater environmental benefit.

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