

Brexit and the marine environment

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Much has been written about the impact of leaving the EU on our legislative and regulatory landscape. When considering how this may be affected, one must remain aware of the part it plays in the machinery of government, as in the main, policy drives legislation, not the other way round.

From a governmental point of view, a policy outcome is determined and then the regulatory and legislative framework is examined to see whether government has the tools required to deliver on that outcome. When the framework is lacking a new piece of legislation is required, for example the Marine Bill White Paper¹ set out the policy argument for the Marine and Coastal Access Act 2009, which gave Natural Resources Wales legislative powers to deliver government's marine policies.

Similarly, all EU regulations and directives have started life as an EU policy objective that the UK has negotiated and agreed at a particular point in time. These policy objectives were set out in directives that each member state has transposed into their own national regulations. Whilst it is relatively straightforward to understand where national legislation derives from the EU, this does not of itself give an indication of what is at risk.

To fully understand the impact of Brexit on marine policy, theoretically you would need to go back across every EU policy objective and not just review the legislation which derives from it, but also to reconfirm that the policy objective is still the one that we as the UK want to ascribe to. Government will need to ask itself some difficult questions such as do we want to be more or less flexible? Do we want to have more or less protection? Do we still agree with our initial negotiating position? What does this mean for the devolved administrations?

The first place to start when preparing to extricate oneself from the sizeable EU policy and legislative framework, is to undertake a review of policy outcomes. The challenge with not getting this process right is that a large amount of uncertainty could be created by not being clear on policy before starting to review and update the legislation. This lack of clarity could come about due to the need to be secretive around exit negotiations, or simply because the policy landscape is very complex. It is clear that within every Whitehall department they are reviewing those bits of their policy framework that have been negotiated through Europe to confirm whether, from a UK government point of view, they are still content with the policy positions as they currently stand.

Although environment is a devolved matter, European environment policy was negotiated and agreed to by the UK government centrally, and then became an obligation to the devolved administrations. So although environment may be a devolved matter in delivery, that estimated 80% of environment policy which derives from the European Commission has been negotiated and set on a UK basis, albeit with input from the devolved administrations through established mechanisms.

It stands to reason therefore that any change following withdrawal from the European policy framework could apply to all devolved administrations equally, and as such it would be in the devolved administration's interests to undergo a similar policy review as is taking place in Whitehall to ascertain what their current and future stance is on EU policy outcomes and engage effectively with the Department for Exiting the European Union (DExEU). There is a possibility that environment policy and delivery could be further fragmented by setting up distinct policy and delivery frameworks in each UK administration, which would be detrimental to the delivery of a coherent environment policy in the UK as a whole.

One should temper any anticipation of wholesale change in the policy framework with two important points. The first is that during the UK membership of the EU, we have been a wholehearted participant in policy negotiation and more often than not have led the policy debate from the front. The result is that it is likely that much of the policy framework will be retained either wholly or with minor adjustments, the challenge will be in ensuring that the delivery framework remains robust. There may well be select flagship policy areas that will be focused on (including the

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228719/7047.pdf

Common Fisheries Policy), whilst a solution is found for alternative delivery or legislative mechanisms for the rest.

The second point is that whilst some pro-Brexit ministers within Whitehall may have publically denounced EU environmental policy² during the campaigning for the referendum, the political reality is that it would be very difficult, and publically unacceptable to wholly unpick the environmental policy framework that has overseen a fundamental change in the UK's natural environment since the 1970s. Indeed, in a recent appearance in front of the Environmental Audit Committee, Robin Walker MP, Parliamentary Under Secretary of State in stated that in his view it was "hugely important that the UK continues on its course as being an environmental leader and leading in strong environmental policy". This is slightly belied by the fact that DExEU³ currently has teams for Economy, Infrastructure, Tax, Customs, Home Affairs, Public Services, Justice, Security, Data, Migration, Trade, International Partnerships and Devolved Administrations but no Environment. The reason given for this is that environment was cross cutting although it is still not clear what this actually means.

It also remains to be seen how DExEU will coordinate across government to pull together a complete negotiation package. It is unlikely that specific policy areas will be negotiated in isolation, particularly those policy areas like marine and maritime, where outcomes are not only politically but geographically intertwined with the UK's European neighbours, and so much goodwill over the years has gone into developing outcomes, systems and processes that have joint ambition with our European neighbours.

Marine policy doesn't just address our natural marine environment and the protection that EU derived legislation affords it. We have a marine policy statement, which sets out the UK government's vision for our marine space, five objectives to achieve this vision, and eleven sectors that UK marine policy can be broadly divided into as set out below

- Marine Protected Areas
- Defence and National Security
- Energy production and infrastructure development
- Ports and shipping
- Marine aggregates
- Surface water management and waste water treatment and disposal
- Marine dredging and disposal
- Telecommunications cabling
- Fisheries
- Aquaculture
- Tourism and recreation

The challenge for marine management therefore is not just focused on our natural environment, but also how each of these policy areas may need to be revisited and revised. This could include reformulating the policy need, revisiting the evidence base behind it, re-engaging with public consultation, the list goes on and on.

As a session of the EAC on the 7th September⁴ Therese Coffey MP, Parliamentary Under Secretary of State for the Environment and Rural Life Opportunities in Defra broadly stated that the Conservatives have committed in their manifesto statement to leaving the natural environment in a better state than that in which we found it so the EAC shouldn't worry that that they were going to repeal EU environmental protection. She also stated that the department wanted to focus on outcomes rather than prescriptive inputs and processes.

In reality, outcomes cannot be delivered without process that is consistent and in line with the principles of better regulation, i.e. it is proportionate, accountable, consistent, transparent and targeted. The delivery framework that built up to support the implementation of the Habitats Directive may at times be complex, but Defra's own review⁵ reported that the implementation on the whole was good. To unpick this framework to create more flexibility could have the downside of increasing uncertainty for developers, NGOs, regulators and government itself.

² <http://www.theguardian.com/politics/2016/may/30/brexit-spirit-crushing-green-directives-minister-george-eustice>

³ <https://goo.gl/0dRhS4>

⁴ <https://goo.gl/MgcVOG>

⁵ <https://www.gov.uk/government/publications/progress-of-the-habitats-directive-implementation-review>