

Note on the implications of the MSFD for the licensing of activities and projects within and beyond WFD coastal water bodies

Position of the WFD and MSFD NAVI Task Groups, 16th January 2016

1. Licensed activities or developments taking place within WFD coastal water bodies

Most navigation-related maintenance activities and new developments in the marine environment take place within WFD coastal water bodies. In common with any type of licensable development or activity in these water bodies, WFD compliance should already be tested (alongside EIA and Habitats Directive compliance as appropriate) as part of the existing licensing process for the activity in question.

If a licensable activity or development is shown to be WFD-compliant (i.e. it will not affect ecological or chemical status at the level of the water body) – and especially if EIA and Habitats Directive compliance procedures have also been complied with – it is difficult to envisage a situation in which that activity or development would not also comply with the requirements of the MSFD. This is particularly the case when one considers the differences in the scale at which the respective Directives are applied.

The one exception we see here is that some exceptionally large developments may require additional assessment in relation to their possible cumulative or in-combination effects (see below).

By way of background to our position, Preamble 12 of the Marine Strategy Framework Directive is important. This preamble states that: “Coastal waters, including their seabed and subsoil, are an integral part of the marine environment, and as such should also be covered by this Directive, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy or other Community legislation, so as to ensure complementarity while avoiding unnecessary overlaps.”

The preamble makes clear that unnecessary duplication should be avoided: coastal waters are covered by the MSFD only insofar as relevant aspects are not already addressed by the WFD.

When the relevance of marine licensing to MSFD implementation is being considered, it is therefore vital to understand what should already be covered by the existing licensing process and what extra work, if any, might still need to be done to meet MSFD objectives.

As confirmed by the CJEU ruling in July 2015 (Case C-461/13), a WFD compliance assessment for an activity or a project should assess WFD parameters at element and sub-element level. Thus many of the environmental parameters of interest to the MSFD should already be subject to assessment for WFD compliance. Two of the main exceptions to this general statement are noise and marine litter – however these topics should be included, along with any other sub-descriptor WFD ‘gaps’, in the project EIA. In all cases, restrictions or constraints on an activity or development should already be capable of being applied through the licensing process.

We accept that, in future, new restrictions might need to be applied to some activities or new developments (e.g. as conditions on a licence) to help meet MSFD GES objectives. For example, new noise limits might be developed at EU level. However, the application of such limits at an appropriate scale to ensure MSFD compliance is something that the regulator (i.e. the body responsible for determining the licence application) must deal with. This type of constraint is unlikely to be project- (or licence-) specific, and decisions on the need for constraints in a particular situation will lie with the regulator not the developer.

Overall, therefore, it is our view that the existing licensing regime in WFD coastal water bodies should be more than capable of covering MSFD interests. We do not see any added value in introducing a new requirement to demonstrate MSFD-specific compliance as part of the licensing process.

2. Licensed activities or developments taking place beyond WFD coastal water bodies

Beyond coastal water bodies, EIA and Habitats Directive compliance requirements should already apply irrespective of WFD considerations. Via existing licensing processes, Member States should similarly already have the opportunity to constrain aspects of an activity or development if this is needed for environmental reasons.

As with licensing in coastal water bodies, we do not therefore see any added value in introducing a new MSFD-specific assessment requirement as part of the licensing process in offshore waters.

Further, if there are gaps in some Member States due to incomplete or inadequate implementation of (other) existing environmental legislation, the focus should be on correct implementation of these existing requirements. The MSFD should not be used in these circumstances as a reason to place an additional and potentially unjustified burden on those undertaking licensable activities or developments.

3. In combination effects

Notwithstanding the above project or application-level considerations, we acknowledge that current procedures for the assessment of cumulative or in-combination effects within existing licensing processes may require further consideration in the context of the MSFD.

The following questions are of particular relevance in this regard:

- **scale issues: which descriptors are prone to in-combination effects at the scale of relevance to the MSFD, and which of these are not already adequately addressed by existing procedures?** The answers to these questions have to be based on sound science and technical understanding. The potential for an activity or development to have an in-combination effect at a scale of relevance to the MSFD will be a function of the mechanisms by which the effects (of an activity or development) 'spread' and the relationship (or not) to individual project-scale changes. For example contaminants or litter can potentially be carried by currents, in turn polluting large marine areas and/or can accumulate in the marine environment. Conversely, the effects of deepening a navigation channel or constructing a sea defence will typically be local and should therefore be adequately covered by existing licensing procedures in the majority of cases. There is therefore a need to understand cumulative effects at descriptor level and to consider developing a series of descriptor-specific thresholds that would trigger the requirement for additional in-combination effects assessment (i.e. over-and-above what would ordinarily be required under existing licensing processes).
- **responsibility for assessment: in the context of the scale issue highlighted above, **who should be responsible for determining whether a development could have an in-combination effect on the status of a particular MSFD descriptor?** Is it realistic to expect the project applicant to determine the likelihood of such an effect? Will the applicant have access to the information needed to determine such effects (e.g. regarding recent or proposed developments in other countries)? Will they have the resources to do so?**

These are difficult questions which we acknowledge require very careful consideration.