

Item: 6

Policy and Resources Committee: 18 April 2023.

Highly Protected Marine Areas: Consultation.

Report by Corporate Director for Neighbourhood Services and Infrastructure.

1. Purpose of Report

To consider an updated Council policy position and a proposed Council response to the Scottish Government's consultation on Highly Protected Marine Areas.

2. Recommendations

The Committee is invited to note:

2.1.

That, through the Bute House Agreement, Scottish Ministers have committed to designate at least 10% of Scotland's seas as Highly Protected Marine Areas by 2026.

2.2.

That Highly Protected Marine Areas form part of the Scottish Government's commitment to tackle the twin biodiversity and climate crises in order to support the recovery and resilience of Scotland's marine environment.

2.3.

That the Scottish Government carried out a public consultation between 12 December 2022 and 17 April 2023 to seek views and comments on the following draft documents, in order to help inform and shape Highly Protected Marine Area policy development:

- Draft Policy Framework.
- Site Selection Guidelines.
- Initial Sustainability Appraisal.
- Partial Island Communities Impact Assessment Screening Report.
- Partial Business and Regulatory Impact Assessment.

2.4.

That the consultation, referred to at paragraph 2.3 above, does not identify Highly Protected Marine Area sites.

2.5.

That the Scottish Government intends to formally consult separately on any specific Highly Protected Marine Area sites, which is likely to take place in 2025, before final designation of sites in 2026.

2.6.

That, although the Council has requested an extension to the date for submission of consultation responses, the Scottish Government has advised that, as the consultation period had already been extended, no further extension is possible, although it was prepared to accept a response submitted on behalf of the Council no later than 18 April 2023.

2.7.

The proposed updated policy position on the consideration of any new national or international environmental, natural heritage or marine related designations, attached as Appendix 1 to this report.

2.8.

The Council's draft response to the Scottish Government's consultation on Highly Protected Marine Areas, attached as Appendix 2 to this report.

It is recommended:

2.9.

That the proposed updated policy position on the consideration of any new national or international environmental, natural heritage or marine related designations, attached as Appendix 1 to this report, be approved.

2.10.

That the response to the Scottish Government's consultation on Highly Protected Marine Areas, attached as Appendix 2 to this report, be approved.

2.11.

That the Corporate Director for Neighbourhood Services and Infrastructure should immediately submit the response to the Scottish Government, on behalf of the Council, in relation to the consultation on Highly Protected Marine Areas.

2.12.

That, due to the timescale constraints involved, the Chief Executive be requested to exercise emergency powers to authorise submission of the response, referred to at paragraph 2.10 above, prior to approval by Council.

3. Background

3.1.

Through the Bute House Agreement, Scottish Ministers have committed to designate at least 10% of Scotland's seas as Highly Protected Marine Areas (HPMAs) by 2026. Scotland's seas are some of the most biologically diverse in Europe, supporting thousands of plant and animal species, across a wide variety of habitats. HPMAs form part of the Scottish Government's commitment to tackle the twin biodiversity and climate crises in order to support the recovery and resilience of Scotland's marine environment.

3.2.

The Bute House Agreement states that HPMAs aim to provide protection from all extractive, destructive and depositional activities, including all fisheries, aquaculture and other infrastructure developments, while allowing other activities, such as tourism or recreational water activities, at non-damaging levels. The Scottish Government aims to take forward HPMAs in collaboration with all sea users, to protect, enhance and where appropriate restore the biological diversity of Scotland's seas, to ensure that marine ecosystems continue to provide economic, social and wider benefits for people, industry and society.

4. The Council Policy Position

4.1.

In March 2015, the Council adopted the undernoted policy principles, which was confirmed in December 2018 and again October 2021:

4.1.1.

In relation to the consideration of any new national or international environmental, natural heritage or marine related designations:

- The Council would require formal engagement with the relevant designating bodies in advance of any formal public consultation on any potential new or amended designation in Orkney.
- All the management measures which affect a proposed designation should be tabled in advance of the designation in an open and transparent manner.
- The economic and social impact of any proposed designation on local communities must be fully taken into account as a matter of paramount importance.
- Where a proposed new designation would have significant adverse economic and/or social effects on local communities, its introduction will not be supported by the Council.

4.2.

Under the Nature Conservation (Scotland) Act 2004, the Council has a duty to further the conservation of biodiversity, in so far as is consistent with the proper exercise of their functions. It is therefore recommended that the Council policy position be updated to recognise the significant contribution that environmental, natural heritage and marine designations make to the protection and enhancement of biological diversity of Scotland. A proposed updated Council policy position is attached at Appendix 1 to this report.

4.3.

As no HPMA sites have been identified as part of the consultation outlined in section 5 below, it is not currently possible to determine whether the HPMA process can be taken forward in a way that would align with the Council policy position. It is of paramount importance that the Council and affected local stakeholders are fully engaged at all stages of the proposed six stage HPMA site selection, assessment and designation process. Therefore, the proposed Council consultation response, detailed at Appendix 2 to this report, states that the Scottish Government, NatureScot and the Joint Nature Conservation Committee (JNCC), as appropriate, should fully engage with the Council and affected stakeholders in accordance with the Council policy position.

4.4.

It is acknowledged that the recent consultation on the draft HPMA Policy Framework and Site Selection Guidelines includes proposed management measures that have been tabled in an open and transparent manner, and in advance of any formal public consultation on proposed HPMA sites.

4.5.

In accordance with the Council policy position, the proposed Council consultation response states that any HPMA proposals that would have significant adverse socio-economic impacts on Orkney communities, that cannot be satisfactorily mitigated, will be robustly opposed by the Council.

5. Highly Protected Marine Areas: Consultation

5.1.

The Scottish Government carried out a public consultation between 12 December 2022 and 17 April 2023 to seek views and comments on draft documents to help inform and shape HPMA policy development. The documents include a draft Policy Framework, Site Selection Guidelines, Initial Sustainability Appraisal, Partial Island Communities Impacts Assessment (ICIA) Screening Report and Partial Business and Regulatory Impact Assessment (BRIA).

5.2.

No HPMA sites have been identified as part of this consultation and the Scottish Government will consult separately on proposals for the designation of specific HPMA sites. The Scottish Government states that the formal public consultation on site proposals will likely take place in 2025, before final designation of sites in 2026.

5.3.

The legislation for HPMA's and the application of the site selection guidelines will take account of socio-economic factors affecting the resilience and viability of marine industries, coastal communities and other stakeholders. HPMA site designation by Scottish Ministers will be informed by a Sustainability Appraisal, including assessment of socio-economic impacts. As a result, some proposals may be screened out of further consideration during the site selection process due to the significance of any socio-economic impacts.

5.4.

The proposed Council response to the Scottish Government consultation is attached at Appendix 2 to this report.

5.5.

Although the Council has requested an extension to the date for submission of consultation responses, the Scottish Government has advised that, as the consultation period had already been extended, no further extension is possible, although it was prepared to accept a response submitted on behalf of the Council no later than 18 April 2023.

6. Island Communities Impact

6.1.

The Scottish Government has prepared an Island Communities Impact Assessment (ICIA) – Partial Screening Report that completes the first two stages of the ICIA process by identifying whether there are issues which merit further exploration through research and engagement with island representatives. This report has identified possible impacts for island communities. It states that the ICIA screening determination cannot be completed until after a suite of proposed HPMA's is identified.

6.2.

As the HPMA site selection process begins in 2023 and specific site proposals emerge, the Scottish Government intends to seek perspectives from those with direct experience of island life in order to determine whether there are significantly different impacts for island communities which should be explored in more detail and addressed when meeting the commitment to designate at least 10% of Scotland's seas as HPMA's. A full ICIA screening assessment will be published following further targeted engagement and identification of proposed HPMA's. That screening assessment will be used to determine whether a full ICIA is required.

6.3.

Should a full ICIA be required, it will be formally consulted on as part of the consultation package for a proposed suite of HPMA's. A full ICIA identifying appropriate mitigation measures would then be published at the time of any Ministerial decisions to designate HPMA's.

7. Environmental Implications

A Strategic Environmental Assessment (SEA) Environmental Report has been prepared and deposited for consultation by the Scottish Government in accordance with the Environmental Assessment (Scotland) Act 2005, which requires that qualifying public plans, programmes and strategies be assessed for their potential effects on the environment.

8. Corporate Governance

8.1.

This report relates to the Council complying with governance and procedural issues and therefore does not directly support and contribute to improved outcomes for communities as outlined in the Council Plan and the Local Outcomes Improvement Plan.

8.2.

Given that the response requires to be submitted prior to the Council considering any recommendation from the Policy and Resources Committee, should the proposed draft response, attached as Appendix 2 to this report, be recommended for approval and submission, the Chief Executive should be requested to exercise emergency powers to authorise submission of the response.

9. Financial Implications

All resources associated with the preparation of the proposed Council response to the HPMA consultation, mainly in the form of staff time, has been contained within existing Planning Service revenue budgets.

10. Legal Aspects

10.1.

Under the Nature Conservation (Scotland) Act 2004, public bodies in Scotland, including the Council, have a duty to further the conservation of biodiversity, in so far as is consistent with the proper exercise of their functions.

10.2.

The Marine (Scotland) Act 2010 (the 2010 Act) and the UK Marine and Coastal Access Act 2009 (the 2009 Act) provide the statutory framework for marine planning and management. The 2010 Act legislates for marine planning, licensing and conservation activities in Scottish inshore waters (0-12 nautical miles) whilst the

2009 Act provides executive devolution to Scottish Ministers for marine planning, licensing and conservation powers in the offshore region (12-200 nautical miles).

10.3.

Currently, the Scottish Government does not have the necessary legal powers to designate and protect HPMA's. The Scottish Government intend to deliver the necessary legislative and management framework for HPMA's in both Scottish inshore and offshore waters.

10.4.

For the Scottish inshore region (up to 12 nautical miles from the coast), there is full legislative competence within Scotland to introduce the necessary powers to designate HPMA's through primary legislation. It is proposed that HPMA's will be delivered within the legislative framework set by the Marine (Scotland) Act 2010, with new provisions delivered, as required, through primary legislation.

10.5.

For the Scottish offshore region (beyond 12 nautical miles out to the outer limits of the UK continental shelf), powers over the marine environment are currently reserved to the UK Government (with some exceptions). The Scottish Government is seeking agreement from the UK Government to provide for equivalent powers for Scottish Ministers to designate HPMA's in Scottish offshore waters. The UK Government would be responsible for any public consultation that included powers in relation to HPMA's in offshore waters. The intention, however, is that the proposed policy framework and the site selection guidance will apply in relation to HPMA's in inshore and offshore waters, subject to the necessary powers being transferred to the Scottish Government.

11. Contact Officers

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12. Appendices

Appendix 1: Proposed updated Council policy position

Appendix 2: Draft Council Response to the Highly Protected Marine Areas Consultation.

Appendix 1.

Proposed Updated Council Policy Position

In relation to the consideration of any new national or international environmental, natural heritage or marine related designations:

- The Council recognises the significant contribution environmental, natural heritage and marine designations make to the protection and enhancement of biological diversity of Scotland.
- The economic and social impact of any proposed designation on local communities must be fully taken into account as a matter of paramount importance.
- Where a proposed new designation would have significant adverse economic and/or social effects on local communities, its introduction will not be supported by the Council.
- The Council would require formal engagement with the relevant designating bodies in advance of any formal public consultation on any potential new or amended designation in Orkney.
- All the management measures which affect a proposed designation should be tabled in advance of the designation in an open and transparent manner.

Appendix 2.

Orkney Islands Council Response on the Highly Protected Marine Areas Consultation

Orkney Islands Council welcomes this early engagement from the Scottish Government on the Policy Framework and Site Selection Guidelines for Highly Protected Marine Areas (HPMAs).

In considering its response the Council is mindful of the significant contribution already being made by the Orkney Islands marine region (out to 12 nautical miles) to the provision of a healthy biodiverse marine environment, being home to a range of international and national designated sites. 25% of the Orkney Islands marine region is already designated as being of national or international conservation importance, with the most recent designations of marine Special Protection Areas covering Scapa Flow and North Orkney covering a total area of 529 km² being confirmed in February 2022.

The Council has engaged with the consultation and has significant concerns regarding how this policy initiative will be implemented and the potential for significant socio-economic impacts affecting Orkney communities.

Orkney Islands Council has adopted the following policy position:

In relation to the consideration of any new national or international environmental, natural heritage or marine related designations:

- *The Council recognises the significant contribution environmental, natural heritage and marine designations make to the protection and enhancement of biological diversity of Scotland.*
- *The economic and social impact of any proposed designation on local communities must be fully taken into account as a matter of paramount importance.*
- *Where a proposed new designation would have significant adverse economic and/or social effects on local communities, its introduction will not be supported by the Council.*
- *The Council would require formal engagement with the relevant designating bodies in advance of any formal public consultation on any potential new or amended designation in Orkney.*
- *All the management measures which affect a proposed designation should be tabled in advance of the designation in an open and transparent manner.*

The Scottish Government, NatureScot and Joint Nature Conservation Committee (JNCC), as appropriate, must fully engage with the Council and affected stakeholders in accordance with this policy position.

It is welcomed that an aim of HPMA is to enhance the benefits that coastal communities and others derive from our seas. The Council policy position states that *'Where a proposed new designation would have significant adverse economic and/or social effects on local communities, its introduction will not be supported by the Council'*. Accordingly, any HPMA proposals that would have significant adverse socio-economic impacts on Orkney communities, that cannot be satisfactorily mitigated, will be robustly opposed by Orkney Islands Council.

It is important that both the potential adverse socio-economic effects and benefits are fully considered as part of the HPMA identification, selection and designation processes. It is recognised that studies of existing highly protected marine areas have shown that they can result in significant conservation and ecosystem benefits and can significantly increase the abundance and diversity of marine life exported to surrounding areas. These 'spill over effects' have been shown to improve the productivity of commercial fisheries, including lobster and scallop, in adjacent waters. In terms of assessing socio-economic impacts of HPMA proposals, it is important that the cumulative effect of wider spatial squeeze on existing marine sectors is fully considered.

As no HPMA sites have been identified as part of the current consultation, it is not currently possible to confirm whether the HPMA process can be taken forward in a way that would align with the Council's policy position. It is of paramount importance that the Council and affected local stakeholders are fully engaged at all stages of the proposed six stage site HPMA selection, assessment and designation process.

The HPMA draft guidelines for site selection state that *'the legislation of HPMA and the application of these site selection guidelines will take account of socio-economic factors affecting the resilience and viability of marine industries, coastal communities and other stakeholders. As a result, some proposals may be screened out of further consideration during the selection process'*. This statement is strongly supported and must be applied to avoid adverse socio-economic impacts on island communities when selecting HPMA sites.

The draft HPMA Policy Framework, para. 5.2, identifies areas to be excluded from HMPA selection as follows:

'Areas of national importance such as those earmarked for renewable developments (such as ScotWind and the Innovation and Target Oil and Gas (INTOG) leasing round areas and the areas of associated transmission infrastructure), existing active renewables and oil and gas infrastructure, existing ports and harbours, and some areas where defence activities are carried out. Also propose that existing active cables are excluded from the HPMA selection process'.

The exclusion of the areas stated in para. 5.2 from HPMA selection is supported by the Council. These excluded areas need to include the full extent of Statutory Harbour Areas (SHAs) as stated in the Orkney County Council Act 1974 (as amended), which includes (amongst others) Scapa Flow and Kirkwall SHAs and all internal ferry terminals. Orkney Harbours are identified in National Planning Framework 4 due to their national significant and role in supporting the *'Energy Innovation Development on the Islands'* national development. Any proposed

HPMAs within Orkney Harbour Areas would be strongly opposed by Orkney Islands Council.

The definition of '*existing active renewables and oil and gas infrastructure*' needs to be clarified. Existing active renewables sites should include wind, wave and tidal sites with an agreement for lease, a seabed lease, consented development and development currently being considered within the statutory consenting system. Existing active oil and gas infrastructure should include the whole of Scapa Flow due to the operation of the Flotta Oil Terminal and Ship to Ship transfer licenced sites within Scapa Flow, and the future potential of Scapa Flow in zero carbon fuels transition including the Future Fuels Hub delivered under the Islands Growth Deal.

The proposal to have no restrictions on the laying of new cables in relation to lifeline services to remote and island communities, such as, for example, power distribution cables or cables related to broadband/telecommunication services, is strongly supported by Orkney Islands Council.

The proposal to have no restrictions on the transit of ships and ferries in HPMAs is strongly supported, though it is recognised that this principle is already established under United Nations Convention on the Law of the Sea (UNCLOS).

In terms of key economic sectors of relevance to Orkney, the Council is particularly concerned regarding the potential impact on the aquaculture and the wave and tidal renewable energy generation sectors.

Salmon farming and has been established in Orkney for many years, providing significant employment and wider socio-economic benefits. The proposals to exclude aquaculture of any form within HPMAs and require any existing farms within the new designation to relocate, is likely to have significant implications for local businesses and communities, particularly in our more remote and economically fragile locations.

Orkney waters are amongst the most energy-rich localities in Europe with significant wave and tidal renewable energy resources and Orkney is a global leader in wave and tidal energy research and development. Whilst the intention to exclude existing wave and tidal sites, other consented sites, together with those identified in draft or adopted plans from the HPMA selection process is welcomed there is a fear that there are many other projects that have not reached this stage in development which will be curtailed.

The HPMA Policy Framework sets out a six Stage process for stakeholder engagement. It is critical that the Council are fully engaged throughout this process to ensure that island interests are fully considered by Scottish Government. It is welcomed that the consideration of socio-economic impact will be a critical step in the HPMA designation process, particularly at Stage 4: *Shaping HPMAs*. In accordance with the priorities in the National Plan for Scotland's Islands, particularly Strategic Objective 2 to improve and promote sustainable economic development, the Council emphasises the importance of protecting island communities from any significant adverse socio-economic impacts associated with HPMAs.

Orkney Islands Council welcomes that the HPMA designation process is different to the recent marine Special Protection Area designation process, which could not take socio-economic considerations into account due to European case law. The Council therefore emphasises the importance of the Scottish Government exercising its discretion to avoid adverse socio-economic impacts on Orkney communities in relation to HPMA's.

The partial Island Communities Impact Assessment (ICIA) Screening Report has identified a number of possible impacts for island communities. It states that the ICIA screening determination cannot be completed until after a suite of proposed HPMA's are identified. It is welcomed that the Scottish Government intend to seek perspectives from those with direct experience of island life in order to determine whether there are significantly different impacts for island communities. Orkney Islands Council, and other affected stakeholders in Orkney, should be fully engaged in the ICIA and wider designation processes to ensure that adverse effects on Orkney communities are avoid or effectively minimised. The Council should be consulted by Scottish Government to identify local stakeholders that could be affected by any HPMA site proposals.

Should HPMA's proceed, it will be essential to effectively monitor whether the stated HPMA aims are being achieved. This monitoring will require significant resources for the Scottish Government, NatureScot and JNCC. After an adequate monitoring phase, if a HPMA fails to meet these objectives, the site should be considered for de-designation. The legal provisions for HPMA designation should enable this approach including the revocation of designation, where appropriate.