EXPLANATORY MEMORANDUM TO

THE MARINE (SCOTLAND) ACT 2010
(CONSEQUENTIAL PROVISIONS) ORDER 2010

2010 No. 2870

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Section 104 Order ("the Order") makes provisions in consequence of the Marine (Scotland) Act 2010 ("the 2010 Act"). The 2010 Act applies to the Scottish Marine Area (as defined in section 1 of the 2010 Act) and places certain duties on public authorities to make decisions in accordance with Marine Plans, unless relevant considerations otherwise indicate, and to carry out functions in a manner which best furthers the objectives of any Marine Protected Area ("MPA"). This Order makes provisions so that public authorities carrying out reserved functions in the Scottish Marine Area will have to act in a similar manner where the Secretary of State makes a direction in respect of a Marine Plan or an MPA.

2.2 The Order also allows Scottish Marine Enforcement Officers to exercise powers outside of the Scottish Marine Area. Further, the Order imposes a duty on the Natural Environment Research Council ("NERC") to provide the Scottish Ministers with scientific advice on matters related to the management of seal populations.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 This Order is to be made in exercise of the powers conferred by Section 104 of the Scotland Act 1998 ("the 1998 Act"). The Order is subject to negative resolution procedure in the UK Parliament. Section 104 of the 1998 Act provides that subordinate legislation may make such provision as the person making it considers to be necessary or expedient in consequence of any Act of the Scottish Parliament; in this case the 2010 Act.

3.2 This Order is necessary in consequence of the 2010 Act. Marine planning and marine conservation are largely devolved in the Scottish Marine Area (0-12 nautical miles) but Scottish legislation does not bind UK Ministers or UK public authorities carrying out functions in the Scottish Marine Area in relation to reserved matters. This Order is consistent with a Joint Ministerial Committee ("JMC") agreement of November 2008, in which it was agreed that if Scottish Ministers signed up to a UK-wide Marine Policy Statement, UK public authorities would comply with Marine Plans and respect Marine Protected Areas in the Scottish inshore area to the extent that this was consistent with the Marine Policy Statement.

4. Legislative Context

4.1 The 2010 Act received Royal Assent on 10 March 2010. It makes provisions concerning marine planning, marine licensing, marine protection and enhancement, conservation of seals, common enforcement powers and sea fisheries.

4.2 The marine planning and marine protection and enhancement provisions, together with some of the common enforcement power provisions, came into effect on 1 July 2010. Some seal conservation provisions came into force on 1 September 2010, with the remainder coming into effect on 31 January 2011. The marine licensing provisions are likely to come into effect in Spring 2011.

4.3 The 2010 Act introduces a new statutory marine planning framework to manage competing demands for the use of the sea whilst protecting the marine environment for the Scottish Marine Area. Under the 2010 Act, Scottish Ministers must prepare and adopt a National Marine Plan and may make, or arrange for the making of regional plans.

4.4 The Marine Plans will state the Scottish Ministers' policies for sustainable development of Scotland's seas and will set economic, social and marine ecosystem objectives and objectives relating to the mitigation of, and adaptation to, climate change. The Marine Plans must also state Scottish Ministers' policies on the contribution of designated conservation sites to the protection and enhancement of the sea.

4.5 Section 15 of the 2010 Act makes provisions for public authorities to make any authorisation or enforcement decisions in accordance with appropriate Marine Plans, unless relevant considerations indicate otherwise. For any other decisions which impact on a relevant marine area, public authorities must have regard to the Marine Plans. This Order provides that the Secretary of State may make a direction in respect of any Marine Plan under the 2010 Act. Public authorities exercising reserved functions in the Scottish Marine Area would then be placed under duties equivalent to those in section 15 so far as the Marine Plan in question is concerned.

4.6 The 2010 Act also contains new powers to designate MPAs as part of a range of measures to manage and protect the seas. MPAs can be designated for nature conservation, demonstration and research or historic purposes and will apply in the Scottish marine area.

4.7 Section 82 of the 2010 Act makes provision for public authorities to exercise their functions in a manner which best furthers, or least hinders, the objectives of any MPA. This Order provides that the Secretary of State may make a direction in respect of any MPA under the 2010 Act. Public authorities exercising reserved functions in the Scottish marine area would then be placed under a duty equivalent to that in section 82 so far as the MPA in question is concerned.

4.8 The 2010 Act gives certain powers to Marine Enforcement Officers in relation to the enforcement of the new marine licensing regime and marine protection and nature conservation legislation. This Order also ensures Marine Enforcement Officers are able to inspect and investigate suspected offences committed in the Scottish Marine Area within other UK Marine Areas or on land elsewhere in the UK. This is a reciprocal arrangement to that which already exists for UK Enforcement Officers as detailed in sections 236 and 237 of the Marine and Coastal Access Act 2009.

4.9 The 2010 Act introduces improved protection for seals and a new comprehensive licence system to ensure appropriate management of the seal population. It repeals the Conservation of Seals Act 1970 (“the 1970 Act”), as it applies to Scotland. This Order reinstates the requirement in the 1970 Act so that the NERC must provide Scottish Ministers with scientific advice on matters related to the management of seal populations.

5. Territorial Extent and Application

5.1 This Instrument extends to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the Instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 Under the JMC agreement of November 2008, it was agreed that certain functions relating to marine planning, conservation, marine licensing and enforcement in the Scottish offshore region should be executively devolved to Scottish Ministers. The intention of the agreement in 2008 was to encourage co-operation between Scottish and UK Ministers, delivering a coherent system to manage the marine environment throughout the United Kingdom, and one which respects the Scottish devolution settlement. The agreement assists the UK in delivering those European and international obligations which require a regional seas approach.

7.2 The agreement following the JMC in 2008 has material relating to the UK Marine Policy Statement (MPS) and provides for further co-operation between the UK Government and the Scottish Executive in the event of this statement being adopted by Scottish Ministers. If the Secretary of State approves Marine Plans drawn up by Scottish Ministers, public authorities carrying out reserved functions will be bound by the plans in the same way as authorities carrying out devolved functions. For this to have effect in the Scottish Marine Area (to which the 2010 Act applies), this Order is required.

7.3 With regards to marine conservation, the JMC agreement of 2008 sets out the basis for UK Ministers to recognise MPAs designated by Scottish Ministers and for public authorities carrying out reserved functions in the Scottish Marine Area to have duties in relation to such MPAs. This Order makes provisions regarding these duties to ensure that MPAs are recognised by UK Ministers and public authorities, carrying out reserved functions in the Scottish Marine Area.

7.4 Similarly, provision is required in the Order in relation to access to existing specialist marine conservation advisory resources (as detailed in the 2008 JMC agreement) and certain aspects of enforcement.

8. Consultation Outcome

8.1 There was comprehensive consultation in relation to the 2010 Act. This covered amongst other issues the issue of the allocation of responsibilities around the seas surrounding Scotland.

8.2 The JMC agreement was reached in November 2008, a copy of which was sent to the Scottish Parliament Rural Affairs and Environment Committee and is posted on the Marine Scotland web-site: http://www.scotland.gov.uk/Resource/Doc/1057/0080575.pdf. The JMC agreement was discussed during the passage through the Scottish Parliament of the Legislative Consent Motion in relation to the Marine and Coastal Access Act 2009. There was also discussion during Parliamentary consideration of the 2010 Act. The JMC agreement was also discussed in the UK Parliament during the passage of the Marine and Coastal Access Act 2009.

8.3 This Order has not been the subject of a separate consultation exercise. Orders taken forward under the Scotland Act 1998 are not usually consulted on as the terms of the Order have previously been the subject of a separate consultation exercise. The view is that further consultation is not necessary, given that this Order deals with the outstanding provisions of the 2008 JMC agreement.

9. Guidance

9.1 Guidance is in preparation for all aspects of the 2010 Act. This includes marine planning, marine protection and enhancement and conservation of seals. An example of guidance on the selection of MPA's can be found at: http://www.scotland.gov.uk/Resource/Doc/299116/0097303.pdf. Once MPA's are selected, further guidance will be given with any Conservation Orders which may be applied to an MPA. All guidance will be published on the Marine Scotland website which can be found at: http://www.scotland.gov.uk/Topics/marine

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this Order as it has no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector only applies to those public authorities undertaking reserved activities in the Scottish Marine Area.

11. Regulating Small Business

11.1 The Order does not apply to small businesses.

12. Monitoring and Review

12.1 As part of the requirements of the 2010 Act, Scottish Ministers must monitor and periodically report on the implementation of the Marine Plans. This will include reporting on the effects of the policies in the Marine Plan, the effectiveness of the policies in securing the objectives for which the Marine Plans were prepared and adopted, and the progress being made towards securing the objectives.

12.2 The first report must be published before the expiry of 5 years from when the Marine Plan was adopted and thereafter no more than 5 yearly intervals. Similarly, Scottish Ministers are required to report to the Scottish Parliament with regards to MPA's every 6 years. These reports will include the impact on reserved activities.

13. Contact

13.1 Jennifer Manton at the Scotland Office can answer any queries regarding the Order: jennifer.manton@scotlandoffice.gsi.gov.uk.