

**Further written evidence submitted by Mark Simmonds OBE, Director of Science,  
OceanCare (MM0027)**

26/10/2022

Further to the contributions that we made to the recent House of Commons Environment, Food & Rural Affairs Select Committee inquiry into marine mammals and our offer to provide more information, please see our additional comments below.

### **1. Bycatch**

Concerning evidence about bycatch, the review<sup>1</sup> alluded to by Mark was submitted to the Scientific Committee of the International Whaling Commission in 2021. It can be found [here](#). This is only a short review but provides references to the original studies that support the notion that removing gillnets can allow harbour porpoise population recovery.

Following up on the question of how far the Bycatch Mitigation Initiative (BMI) goes to address the issue of bycatch, the actions that we recommend need to be undertaken to make the BMI effective are:

- a) Effective sensitive species bycatch monitoring: for example, it should be mandatory for all vessels operating in UK waters to have monitoring on board, such as observers or remote electronic monitoring (REM), and to lead by example, the UK should employ this on all their fisheries vessels, within and outside of, UK waters.
- b) Immediate mitigation action in the known and well-researched high-risk fleets.
  - Celtic Sea harbour porpoise and common dolphin – static gill nets
  - South-east harbour porpoise – static gillnets
  - South-west bottlenose dolphin – static gillnets
  - Scotland, north-east and south-west England humpback whale and minke whale - creels
- c) Expansion of the existing, successful collaborative projects with scientists, industry, and NGOs to better understand bycatch risks and identify measures to keep fishers fishing, while ensuring marine wildlife can thrive. These include.
  - Scottish Entanglement Alliance alternative gears project
  - Whale and Dolphin Conservation, Birdlife International and Sustainable Fisheries Partnership's Bycatch Audits
  - Whale and Dolphin Conservation's bycatch campaigns
  - The Cornish marine mammal strandings project

### **2. Loud Noise Mitigation**

Concerning seismic testing mitigation, we requested that we could reply in writing as this is a highly critical and complex issue. We note the [recommendation made by the Marine Mammal Observer Organization](#) to shut down noise sources if a species of concern (i.e., a marine mammal) is detected within a certain protective zone around the source, and which Mr. Gardiner mentioned. That would certainly seem to be more precautionary and kinder to the animals that have been seen than continuing to 'shoot' with them in the vicinity. So, we

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<sup>1</sup> Nunny, L., Carlen, I. and M.P Simmonds. Examples of effective porpoise bycatch mitigation in North America Paper submitted to the Scientific Committee of the IWC SC/68C/HIM/04

can offer some support for this idea, although it will only ever be a partial solution to addressing this issue and cannot, for example, take into account those animals that cannot be detected but are still close enough to be adversely affected.

Questions that might be asked about the existing guidelines include –

- On what information and evidence is the existing protection zone (i.e. 500m) and other measures based?
- Especially given the clear focus on visual monitoring in the daytime, can PAM at nighttime really be as effective and afford the same degree of protection?
- What areas are off limits to seismic surveys and how are they decided?
- Is the baseline information garnered before the survey adequate?
- What lessons are available from Germany and other countries facing similar marine mammal protection challenges?
- What consideration is given to the cumulative effects of loud noises – for example situations where there are other loud noises (potentially including other seismic surveys) in the vicinity?

Whilst some consideration of these questions might be helpful in the further development of the relevant guidelines or other attempts at mitigation, we feel that they are really part of a much bigger issue related to human-generated marine noise more generally. This topic area is complicated, highly technical and desperately in need of more attention and it would benefit from further independent expert input. This is also a critical issue at this time with a huge increase in marine industry now ongoing. Therefore, our conclusion is that this topic urgently deserves more in-depth independent consideration and public scrutiny. Hence, our recommendation to the inquiry is that the issue of protecting marine wildlife from loud noise, including but not limited to seismic surveys, should be the subject itself of a full and independent public inquiry.

We also note that a number of experts/expert bodies have looked at the mitigations available – for example in 2016 the IUCN published [“Effective planning strategies for managing environmental risk associated with geophysical and other imaging surveys”](#). This was intended as a “practical guide to the responsible and effective planning of offshore geophysical surveys and other forms of environmental imaging”. Furthermore, in addition to the recommendations from The Marine Mammal Observers Organisation, others have also suggested improvements to the guidelines over the years – for example the paper by Wright and Consentino (2015) available [here](#) and New Zealand has undertaken a comprehensive review of this issue in recent years and its reports, which might also help to identify best practice, can be found [here](#).

Additionally, the ‘CMS Family Guidelines on Environmental Impact Assessment for Marine Noise Generating Activities’ are also highly relevant, and were accepted by the 17th conference of the parties to the Convention for the Conservation of Migratory Species of Wild Animals. They can be found [here](#).

This is a serious matter, and it requires serious attention at a time when the UK is poised to expand its offshore developments.

### 3. Cetacean Species that are subject to hunting

We offered to clarify this for the inquiry and note that most of the relevant information is on the International Whaling Commission (IWC) website.

Currently the following species and populations are subject to takes managed by the IWC as ‘**Aboriginal Subsistence Whaling**’:

- **Eastern North Pacific gray whales (taken by native people of Chukotka in Russia and potentially by those in Washington State)** This is a stock which the Makah people of the USA have requested a quota. This matter is in the USA courts.
- **Bering-Chukchi-Beaufort Seas stock of bowhead whales (taken by native people of Alaska and Chukotka)**
- **East Greenland common minke whales (taken by Greenlanders)**
- **West Greenland bowhead whales (taken by Greenlanders)**
- **West Greenland fin whales (taken by Greenlanders)**
- **West Greenland common minke whales (taken by Greenlanders)**
- **West Greenland humpback whales (taken by Greenlanders)** Greenland also takes many ‘small cetaceans’ of all the species found in its waters, but these hunts are not managed or authorized by the IWC)
- **Humpback whales taken by St Vincent and The Grenadines**

The IWC has no ongoing authorized commercial takes but the following countries are still killing whales **commercially**:

- **Iceland takes fin whales** under a self-allocated quota (it appears to have recently ended its minke whale hunting). It has a disputed objection to the moratorium decision which it claims makes its whaling legal.
- **Norway hunts minke whales.** It made an objection to the 1982 moratorium decision.
- **Japan hunts Brydes, minke and sei whales** in the waters of its EEZ. It has left the IWC and also takes numerous small cetaceans from several species.

Additionally, the Faroe Islanders continue to take a range of species, including pilot whales and various dolphin species, and there is still sperm whale hunting in Indonesia in the remote township of Lamalera. Indonesia is not a member of the IWC, and these takes are not reported to the IWC. They are said to be in the region of 20 animals a year.

There are a growing number of cetaceans taken all around the world as what has been termed ‘wild meat’ and a recent review of this can be found [here](#).

### 4. Existing UK legislation

In summation of our various verbal submissions, we conclude that the UK, whilst championing cetacean protection internationally rather well (as further evidenced by the IWC meeting that closed just last week), does not have an adequately coherent and effective set of laws and regulations to properly protect marine mammals in UK waters.

UK protection measures are to be found in direct and indirect legislation and rely to some extent on technical measures in legislation that is not primarily created to conserve and

protect sentient species such as cetaceans and other marine mammals. As an annex to this letter we provide a list of examples of measures. This is not exhaustive but is meant as an illustration of our point.

Further evidence that cetaceans have no coherent overarching legislative framework of protection is provided by the fact that the Government has had to utilise technical measures within other legislation to set standards. For example, the Fisheries Act 2020 seeks to tackle issues of bycatch by addressing the modification of gear types, use of observers etc.

Whilst we welcome the intent of the Fisheries Act 2020 and the Joint Fisheries Statement (JFS) on the need to ‘minimise and, where possible, eliminate bycatch of sensitive marine species as part of a wider effort to ensure the sustainability of UK fisheries’, the use of such measures appears as goals in legislation that primarily seek to regulate a commercial activity, and we believe will always suffer from the inherent tension between the promotion and management of the commercial activity and the Act’s secondary objectives of protecting biodiversity.

The introduction of the [UK Dolphin and Porpoise Conservation Strategy](#) which aims to ensure effective management to achieve and/or maintain favourable conservation status for nine species of cetaceans most commonly found in UK waters, is welcome but again demonstrates the rather piecemeal nature of UK marine mammal protection, and the continuous need to create new mechanisms to deliver against existing objectives.

We would also urge the Committee to recommend that any new UK cetacean and marine mammal law be applicable to UK citizens throughout the Natural Range of the species and populations addressed by UK law. Indeed, there is precedence in UK Domestic law which already extends jurisdiction over UK citizens beyond the UK EEZ; please see ‘The Whaling Industry (Ship) Regulations 1955’<sup>2</sup>

In conclusion, and bearing all the above in mind, we recommend that the UK creates a single dedicated piece of legislation that protects marine mammals and which brings certainty for all marine users; we would draw your attention to such legislation in the Marine Mammal Protection Acts of other nations.

We hope that this further information is helpful. We are grateful for the opportunity to contribute to this inquiry and thank you and all others involved for your kind consideration of our contributions.

With kind regards,

Yours sincerely,

Mark Simmonds

Chris Butler-Stroud

Lucy Babey

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<sup>2</sup> Available at: <http://www.legislation.gov.uk/ukxi/1955/1973/schedule/SECOND/made>.

## Annex 1.

**Examples of the Complex Legal Provisions that Relate to Marine Mammals in UK Waters.** (As noted above, this is not meant to be an exhaustive list or full analysis of existing legislation and guidance, but simply seeks to illustrate the multiplicity of the current situation.)

The Marine Management Organisation states<sup>3</sup>

‘... Cetaceans are also protected by the [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#)<sup>4</sup>.

The Marine Management Organisation has also produced [guidance on reducing cetacean by-catch](#) by using acoustic dissuasive devices, also known as pingers, that are attached to nets. JNCC has also developed [marine mammal mitigation guidelines](#) covering key activities, ‘adherence to which is considered to minimise the risk of committing an injury offence’.

Offences under regulations 45 and 47 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 (COHSR)<sup>5</sup> are from 12 to 200 nautical miles.

Offences under regulations 43 and 45 of the Conservation of Habitats and Species Regulations 2017 (CHSR)<sup>6</sup> and sections 9(4)(a) – protects whales and dolphins – and 9(5) – protects whales, dolphins and porpoises – of the Wildlife and Countryside Act 1981 (as amended) (WCA)<sup>7</sup> are from 0 to 12 nautical miles.’

*However, we note that that WCA excludes porpoises from the offence of ‘reckless disturbance’.*

Schedule 5 of the WCA – Animals which are Protected,

- Dolphins (all species but in respect of section 9(4A) and (5) only)
- Whale (all species) but in respect of section 9(4A) and (5) only
- Porpoises (**all species but in respect of section 9(5) only**) [Emphasis added]

9(4A) Subject to the provisions of this Part, if any person intentionally or recklessly disturbs any wild animal included in Schedule 5 as—

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<sup>3</sup> <https://www.gov.uk/government/publications/protected-marine-species/cetaceans-dolphins-porpoises-and-whales>

<sup>4</sup> The UK ratified the Convention on Trade in Endangered Species CITES in October 1976

<sup>5</sup> [Conservation of Offshore Marine Habitats and Species Regulations 2017](#)

<sup>6</sup> [Conservation of Habitats and Species Regulations 2017](#)

<sup>7</sup> [Wildlife and Countryside Act 1981 \(as amended\)](#)

- (a) a dolphin or whale (cetacea), or
  - (b) a basking shark (cetorhinus maximus),
- he shall be guilty of an offence.

9(5) Subject to the provisions of this Part, if any person—

- (a)(sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any live or dead wild animal included in Schedule 5, or any part of, or anything derived from, such an animal; or...

...he shall be guilty of an offence

## Multilateral environmental agreements

*The UK is a Contracting Party to various multilateral environmental agreements (MEAs) that affect marine mammals, including the [OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic](#), the [Convention on the Conservation of Migratory Species of Wild Animals \(CMS\)](#), certain CMS “daughter” agreements, and the [International Convention for the Regulation of Whaling \(ICRW\)](#).*

The UK has been a Party to the **Convention on Migratory Species of Wild Animals (CMS)**<sup>8</sup> since 1 November 1983

The Convention at Article III (5), states,

‘Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species.

In regard to CMS Appendix 1 species,

‘States strive towards strictly protecting these animals, conserving or restoring the habitats in which they live, **mitigating obstacles to migration and controlling other factors that might endanger them**’. [Emphasis added]

The UK is a Contracting Party to [ASCOBANS](#), a regional agreement under the auspices of CMS

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<sup>8</sup> <https://www.cms.int/>

**The ‘Berne Convention’<sup>9</sup>** (Convention on the Conservation of European Wildlife and Natural Habitats was drawn up within the Council of Europe by an *ad hoc* Committee for the Protection of Wildlife and adopted by the Committee of Ministers, and was opened for signature by the member States of the Council of Europe and non-member States which had participated in its elaboration and by the European Economic Community on 19 September 1979.

### **Chapter III – Protection of species, Article 6 states,**

‘Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:

- a. all forms of deliberate capture and keeping and deliberate killing;’

Chapter IV – Special provisions for migratory species, Article 10 states,

1. The Contracting Parties undertake, in addition to the measures specified in Articles 4, 6, 7 and 8, to co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III **whose range extends into their territories.** [Emphasis added]

### **Seals legislation**

It is an offence to intentionally or recklessly kill, injure or take a seal under:

- [Conservation of Seals Act 1970](#)
- Wildlife (Northern Ireland) Order 1985
- [Marine \(Scotland\) Act 2010](#)

### **The UK Marine Strategy**

The UK marine strategy provides a framework under the [Marine Strategy Regulations 2010](#) for assessing and monitoring the status of our seas and to put in place the measures needed to achieve Good Environmental Status (GES). For cetaceans and seals, there is an objective that the long-term viability of these populations is not threatened by bycatch.

### **25 Year Environment Plan (England only)**

The [25 Year Environment Plan](#) commits to a fisheries management system that will “account for, and seek to minimise, impacts on non-commercial species and the marine environment generally, including through technical conservation measures”.

### **Scotland’s Fisheries Management Strategy (Scotland only)**

[Scotland’s Fisheries Management Strategy](#) sets out a 12-point action plan which includes actions including the introduction of a new catching policy, adopting the principles of

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<sup>9</sup> <https://www.coe.int/en/web/bern-convention>

ecosystem-based management and enhancing vessel tracking and monitoring which will help gather scientific data and improve management in Scottish waters.

### **Fisheries Act 2020 and Joint Fisheries Statement**

The [Fisheries Act 2020](#) includes an “ecosystem objective” which has an objective to minimise and, where possible, eliminate incidental catches of sensitive marine species.