

**BRITISH PORTS
ASSOCIATION**

**EVERSHEDS
SUTHERLAND**

April 2022

Environment Act 2021

**Legislative review of impacts
on UK Ports**

Contents

1. Introduction	3
2. Part 1 - Environmental Governance	4
Chapter 1 – Improving the Natural Environment.....	4
Chapter 2 – The Office for Environmental Protection.....	6
3. Part 2 - Environmental Governance: Northern Ireland.....	11
Schedule 2 – Improving the Natural Environment: Northern Ireland & Schedule 3 – The OEP: Northern Ireland.....	11
4. Part 3 - Waste and Resource Efficiency	13
Schedule 4 – Producer Responsibility Obligations &.....	13
Schedule 5 – Producer Responsibility for Disposal Costs.....	13
Schedule 6 – Resource Efficiency Information &	14
Schedule 7 – Resource Efficiency Requirements.....	14
Sections 57 to 62 - Managing Waste.....	15
5. Part 4 - Air Quality and Environmental Recall	17
Air Quality – Schedule 11 - Local Air Quality Management Framework.....	17
Air Quality – Schedule 12 - Smoke Control	19
6. Part 6 - Nature and Diversity	20
Schedule 14 - Biodiversity Gain As Condition Of Planning Permission & Schedule 15 - Biodiversity Gain In Nationally Significant Infrastructure Projects	20
Section 102 - General Duty to Conserve and Enhance Biodiversity	22
Section 103 - Biodiversity Reports.....	23
Section 109 – Species Conservation Strategies.....	24
Section 110 – Protected Site Strategies	25

1. Introduction

- 1.1 This paper provides an introductory overview of the provisions of the Environment Act 2021 which would/may affect the UK ports sector and the territorial extent and application of those provisions.

Author: James O'Connor



James O'Connor is a Partner in Eversheds Sutherland's National Parliamentary & Infrastructure Consenting Team. He is also a "Roll A" Parliamentary Agent and, as such, is qualified to promote and oppose Private Bills in Parliament.

James advises on the consenting of major infrastructure projects including the promotion of Harbour Orders, TWA Orders, Development Consent Orders and Hybrid Bills and advising operators of infrastructure on the operation of their statutory powers and functions.

James also advises on compulsory purchase and compensation, environmental issues, highway law, carrying out operational development with the benefit of permitted development rights, listed building and related town and country planning issues, open space and other issues affecting the implementation and operation of major infrastructure.

2. Part 1 – Environmental Governance

Chapter 1 - Improving the Natural Environment

2.1 In summary Chapter 1 provides for:-

- *Sections 1 to 7* – The Secretary of State (“SoS”) to set by regulations long term environmental targets and requires the SoS to set at least one long term target in each of four priority areas being **air quality, water, biodiversity & resource efficiency and waste reduction**. The SoS to set specific targets for air quality (fine particulate matter) and species abundance. The process by which such targets are set, and duties on the SoS to ensure that the targets are met, to report on them and review them.

Territorial Extent & Application – Sections 1 to 7 extend to England and Wales but only apply to England¹. They do not extend and apply to Scotland and Northern Ireland.

- *Sections 8 to 15* - The SoS to prepare an environmental improvement plan (EIP) to significantly improve the natural environment. An EIP must be for a period of at least 15 years. The Government's 25 year Environment Plan published on 11/01/2018 to improve the environment is to be treated as the first EIP, and so the Act puts this plan on a statutory footing. The SoS must report annually on the implementation of the EIP and whether it is improving the environment (this is already a requirement of the 25 year plan). The SoS is also required to review the EIP every five years, with the first EIP to be first reviewed by 31/01/2023 and for a second time by 31/01/2028. The EIP can include interim targets. The natural environment subject to the EIP means plants, wild animals and other living organisms, their habitats, land (except buildings or other structures), air and water and the natural systems, cycles and processes through which the above interact. As such the definition extends to the marine environment as well as the terrestrial and water environments.

Territorial Extent & Application – Sections 8 to 15 extend to England and Wales but only apply to England. They do not extend and apply to Scotland and Northern Ireland.

¹ The extent of an Act is the legal jurisdiction where it forms part of the law. However the extent of an Act can be different from its application. Application refers to the jurisdiction where the Act will have practical effect. Subject to a small number of exceptions, this Act forms part of the law of England and Wales and applies to England. Around half of the Act's provisions extend and apply to Wales with a number of provisions having Great Britain, UK or England, Wales and Northern Ireland extent. Certain provisions of this Act form part of the law of Northern Ireland and apply to Northern Ireland only.

- *Section 16* – A duty on the SoS to collect and publish data for the purpose of monitoring environmental improvement. This data being used to measure outcomes achieved through the implementation of actions in the EIP.

Territorial Extent & Application – Section 16 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

- *Sections 17 to 19* – A requirement for the SoS to prepare a policy statement on environmental principles to protect the environment by making environmental considerations central to the policy development process across Government. The principles work together to legally oblige policy makers to consider choosing policy options that cause the least environmental harm. The policy statement must explain how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making a policy. The policy statement may also explain how Ministers should take into account other considerations relevant to their policy.

Territorial Extent & Application – Sections 17 to 19 extend to England and Wales but only apply to England. They do not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

- 2.2 A Minister must, when making policy, have due regard to the policy statement on environmental principles currently in effect (section 17). This will apply to any new policy relating to ports and the marine environment and may result in legislation which imposes more onerous duties on port authorities than would otherwise be the case.
- 2.3 Ports will be affected by the targets set by the SoS – particularly those relating to air quality/particulate matter and / or species abundance.

Chapter 2 - The Office for Environmental Protection

2.4 In summary Chapter 2 provides for:

- *Sections 22 to 26* – The establishment of the independent Office for Environmental Protection (“OEP”). The OEP was legally established on 17/11/2021. The OEP's principal objective is to contribute to environmental protection and the improvement of the natural environment with the function of being responsible for taking action in relation to breaches of environmental law and holding the Government and public authorities to account on environmental law. The OEP’s roles include to:-
 - investigate failures by public authorities to comply with environmental law, including taking enforcement action for serious failures to comply.
 - monitor and provide annual assessments of progress with the current EIP.
 - monitor the implementation of environmental law.
 - advise the Government on changes to environmental law.
- The OEP is required to prepare a strategy for how the OEP will carry out its functions. The OEP’s consultation on its draft strategy and draft enforcement policy commenced on 25/01/2022 and ran until 22/03/2022.

Territorial Extent & Application – Sections 22 to 26 extend to and apply to England, Wales, Scotland and Northern Ireland.

BPA NOTE: The environment is a devolved matter, subject to a small number of reserved areas. The Scottish Government has established an equivalent body – Environmental Standards Scotland, while the Welsh government has set out its intention to establish a Commission for the environment. The OEP’s remit will therefore only cover England **and reserved matters**. The OEP’s remit may be extended to cover devolved matters in Northern Ireland, subject to approval from the Assembly.

- *Section 27* – A duty on public authorities to co-operate with the OEP and provide the OEP with reasonable assistance as it requests in relation to the exercise of its statutory functions. This includes the provision of information on investigations (Section 33), information notices (Section 35), decision notices (Section 36) and activities that form the OEP’s scrutiny and advise functions (Sections 28 to 30).

Territorial Extent & Application – Section 27 extends to and applies to England, Wales, Scotland and Northern Ireland.

- *Section 28* – A duty on the OEP to monitor the government's progress in improving the natural environment in accordance with the current EIP and meeting the targets set. The OEP must prepare a progress report for each annual accounting period and arrange for the report to be laid before Parliament and published.

Territorial Extent & Application – Section 28 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

- *Sections 29 and 30* – The OEP to monitor the implementation of environmental law and permits the OEP to report on any matter of concern and to advise Ministers on proposed changes to environmental law or matters relating to the natural environment with such advice required to be published.

Territorial Extent & Application – Sections 29 and 30 extend to and apply to England, Wales, Scotland and Northern Ireland.

- The OEP is given wide ranging powers of enforcement these include:-
 - *Section 31* – Sections 32 to 41 make provision about the functions of the OEP in relation to failures by public authorities to comply with environmental law. This section provides that a public authority fails to comply with environmental law if is (i) unlawfully failing to take proper account of environmental law when exercising its functions and (ii) unlawfully exercising, or failing to exercise, any function it has under environmental law.
 - *Section 32 Complaints* - Persons can complain to the OEP that a public authority has failed to comply with environmental law (although internal complaints procedures operated by the public authority must be tried first).
 - *Section 33 Investigations* - If the OEP believes (either from a complaint or from other information) that a public authority “may have failed to comply with environmental law and, if it has, the failure would be a serious failure” it can carry out an investigation. It must notify the public authority of the commencement of the investigation and prepare

a report which can specify steps to be taken. The OEP also has a duty to keep the complainant informed of progress in handling the complaint.

- *Section 35 Information Notices* - If the OEP has reasonable grounds for suspecting that a public authority has failed to comply with environmental law and it considers that the failure would be serious it can serve the public authority with notice requiring information.
- *Section 36 Decision Notices* - If the OEP is satisfied on the balance of probabilities that a public authority has failed to comply with environmental law and that the failure is serious it can serve a decision notice specifying the breach and setting out the steps a public authority must take. A public authority has 2 months to respond to the notice or by the date specified in the notice whichever is later.
- *Section 38 Environmental Review* - Where the OEP has given a decision notice it can apply to the High Court / Court of Session for an environmental review. The Court can make a statement of non-compliance with environmental law and can grant any remedy that could be granted by the Court on a Judicial Review ("JR") other than damages (e.g. declaration, quashing, injunction). Failure to comply with an order could be subject to contempt of Court proceedings. A public authority must then publish a statement setting out the steps it intends to take in the light of the review.
- *Section 39 Judicial Review* - The OEP may apply for JR or (if applicable) statutory review under the Planning Acts in respect of conduct of a public authority if it considers that the conduct constitutes serious breach of environmental law. It can also intervene in such proceedings brought by a third party.
- *Sections 40 and 41* – Provide that the OEP must inform the relevant Minister of any information or decision notice (unless the recipient is a Minister) and makes requirements for public statements to be made regarding enforcement measures.

Territorial Extent & Application – Sections 31 to 41 extend to and apply to England, Wales, Scotland and Northern Ireland.

Impact on the Ports Sector

- 2.5 Persons whose functions “include functions of a public nature” must co-operate with the OEP and give it such reasonable assistance as it requests (including the provision of information) in connection with the exercise of its functions under the Act. “Functions of a public nature” is not defined by this Act. See the extract from the Act’s explanatory note in 2.8 below. However, a statutory harbour authority (“SHAs”) undoubtedly has statutory powers and duties to manage their harbour; and it is considered that these are functions of a public nature. The word “include” means that ports in the private sector also fall within this definition.
- 2.6 Sections 31 to 39 make provision about the functions of the OEP in relation to failures by “public authorities” to comply with environmental law. “Public authority” is defined for this purpose as meaning “a person carrying out any function of a public nature” other than certain excepted functions which are not relevant to ports (Section 31(3)).
- 2.7 As mentioned above it is thought that at least some of the functions carried out by a SHA are “of a public nature”. There is a curious contrast between “include functions of a public nature” (mentioned in 2.5 above) and “carrying out any function of a public nature” mentioned in 2.6 above but it is nevertheless considered that a SHA does carry out “any function of a public nature” even though it also carries out other functions and so is “a public authority” for this purpose of this Act and so would fall within the jurisdiction of the OEP as regards its public functions.
- 2.8 This is given support by the explanatory notes published for the purposes of this specific Act which state:-
- “The term “public function” is not defined in the Act (or in the Human Rights Act 1998), so it will ultimately be for the courts to determine what constitutes a public function. The courts have previously recognised that a body can act in more than one capacity. As such, bodies that undertake some public and some private functions, such as statutory undertakers, will be within scope of the OEP only with regard to the exercise of their public functions. The term “person” means any legal or natural person.” (paragraph 285).[Emphasis supplied.]
- 2.9 The OEP has powers with respect to public authorities (e.g. SHA) who fail to comply with environmental law which means (Section 31):

2.9.1 unlawfully failing to take proper account of environmental law when exercising its functions; or

2.9.2 unlawfully exercising, or failing to exercise, any function it has under environmental law.

2.10 "Environmental law" is defined in Section 46 as meaning a legislative provision which is mainly concerned with "environmental protection" (as defined in Section 45) but does not include the disclosure of or access to information (which is already dealt with under the Environmental Regulations). There are also other exclusions which are not relevant to ports. The SoS can by regulations provide that specified provisions are or are not "environmental law" for this purpose. This is a critical definition since all the OEP powers are concerned with the enforcement of environmental law.

3. Part 2 – Environmental Governance: Northern Ireland

Schedule 2 - Improving the Natural Environment: Northern Ireland & Schedule 3 - The OEP: Northern Ireland

3.1 *Schedule 2 (introduced by Section 48)* provide the basis for future environmental improvement plans relating to Northern Ireland. Specifically it requires the Department of Agriculture, Environment and Rural Affairs in Northern Ireland, in consultation with other relevant departments, to produce and maintain an environmental improvement plan which is reviewed and, if appropriate, updated at least every five years; publish a statement on the data it will obtain to determine whether the natural environment (or elements of it) are improving; and report progress towards environmental improvement to the Northern Ireland Assembly on an annual basis. *Schedule 3 (introduced by Section 49)* provides for the exercise of the OEP's functions in Northern Ireland. Schedule 3, paragraphs 6 to 15, give powers to the OEP in relation to failures by a "relevant public authority" to comply with "Northern Ireland environmental law".

Territorial Extent & Application – Sections 48 and 49 and Schedules 2 and 3 extend to and apply to Northern Ireland only.

Impact on the Ports Sector

3.2 "Relevant public authority" is defined as including a person "carrying out any function of a public nature in or as regards Northern Ireland" subject to some exclusions which are not relevant here. (Schedule 3, paragraph 5)

3.3 "Northern Ireland environmental law" is defined in Schedule 3, paragraph 5(2) as being "Northern Ireland environmental law" which is further defined in Schedule 3, paragraph 18. It is similar to the definition of "environmental law" (see 2.10 above) but confined to NI legislative provisions. The Department of Agriculture, Environment and Rural Affairs in Northern Ireland is given power to specify in regulations NI legislative provisions which do or don't fall within this definition equivalent to the power of the SoS (see 2.10 above).

- 3.4 For the reasons mentioned in 2.7 above it is considered that SHAs in NI fall within this definition so that the OEP's enforcement provisions as regards a relevant public authority apply to them as regards their public functions.
- 3.5 The OEP's enforcement powers in NI conferred by Schedule 3, paragraphs 6 to 15 substantially mirror those applying in England and Wales as summarised above.

4. Part 3 – Waste and Resource Efficiency

Schedule 4 - Producer Responsibility Obligations & Schedule 5 - Producer Responsibility for Disposal Costs

- 4.1 *Schedule 4 (introduced by Section 50)* - Confers powers on each of the relevant authorities in England, Wales, Scotland and NI to make regulations under which “producer responsibility obligations” can be imposed on specified persons in relation to specified products or materials. Relevant stakeholders must be consulted before the regulations are made.
- 4.2 The regulations can make enforcement provisions including requiring records to be kept and powers of entry. They can also allow for a producer responsibility obligation to be met by the payment of a compliance fee.
- 4.3 The regulations can make provision about the persons to whom the producer responsibility obligations are to apply. This does not seem to be limited to the person actually producing the waste because the regulations must impose the burdens on the “persons most able to make a contribution to securing the benefits” and have regard to the desirability of acting fairly between “persons who manufacture, process, distribute or supply products or materials”. (Schedule 4, paragraph 9)
- 4.4 *Schedule 5 (introduced by Section 51)* - Gives power to the relevant authorities to make regulations to secure that persons “involved in manufacturing, processing, distributing or supplying products or materials meet or contribute to the costs of their disposal” (Schedule 5, paragraph 1).

Territorial Extent & Application – Sections 50 and 51 and Schedules 4 and 5 extend to and apply to England, Wales, Scotland and Northern Ireland.

Impact on the Ports Sector

- 4.5 In general it is anticipated that port authorities do not “manufacture or process” material to which these regulations could relate. However where port authorities do undertake such activities then the regulations may be applicable and so such port authorities will need to consider the possible impact of future regulations.

Schedule 6 - Resource Efficiency Information & Schedule 7 - Resource Efficiency Requirements

4.6 *Schedule 6 (introduced by Section 52)* enables the relevant national authority to make regulations requiring specified persons to provide information about a product's resource efficiency. That might include information about the product's expected life, durability and reparability and how it can be disposed of at the end of its life e.g. information about spare parts or whether materials in the product can be recycled.

4.7 *Schedule 7 (introduced by Section 53)* enables the relevant authority to impose requirements about the matters mentioned in 4.6 above. The regulations can only impose requirements on "a person connected with the manufacture, import, distribution, sale or supply of the product". (Schedule 7, paragraph 3).

Territorial Extent & Application – Sections 52 and 53 and Schedules 6 and 7 extend to and apply to England, Wales, Scotland and Northern Ireland.

Impact on the Ports Sector

4.8 It does not seem apparent that a port authority is likely to be considered to fall within the description of person referred to in 4.6 above for this purpose.

Sections 57 to 62 - Managing Waste

4.9 *Section 57* – Makes amendments to the Environmental Protection Act 1990 (“EPA 1990”) and in particular imposes duties in relation to arrangements for the collection of industrial or commercial waste by a person “who, in collecting the waste, is acting in the course of a business (whether or not for profit) or is exercising a public function”. See new section 45AZB, and the sections following, of the EPA 1990.

Territorial Extent & Application – Section 57 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

4.10 This provision is unlikely to have a general application to port authorities unless they carry out activities which fall within the description referred to in 4.9 above, in which case they will be required to comply with the duties imposed by the amendment to the EPA 1990 regarding the separation of collection of recyclable waste and non-recyclable waste.

4.11 *Section 58* – Makes amendments to the EPA 1990 to provide powers to make regulations to introduce electronic (digital) waste tracking in England, Wales and Scotland for certain types of waste. These regulations will impact on a person who “imports, produces, carries, keeps, treats or disposes of extracted waste” or “exports relevant waste” building on the existing duty under section 34 of the EPA 1990. “Relevant Waste” “includes commercial waste.

4.12 *Section 59* – Makes amendments for the same purpose to the Waste and Contaminated Land (Northern Ireland) Order 1997 which would impact the same person as described in 4.11 above.

Territorial Extent & Application – Section 58 extends to and applies to England, Wales and Scotland but not to Northern Ireland. Section 59 extends and applies to Northern Ireland only.

Impact on the Ports Sector

4.13 These regulations are unlikely to have a general application to port authorities unless they carry out activities which fall within the description referred to in 4.11 and 4.12 above, in which case they will be required to comply with requirements imposed by any new regulations concerning the electronic

tracking of waste and would be subject to the regulations which make provision about the enforcement of those requirements.

4.14 *Section 60* – Makes amendments to the EPA 1990 to introduce powers to make regulations as regards activities in relation to hazardous waste. Such activities include “**keeping**, collecting, receiving, importing, exporting, transporting or producing hazardous waste” or “**directing or supervising another person in relation to an activity in relation to hazardous waste**”.

4.15 *Section 61* – Makes amendments for the same purpose to the Waste and Contaminated Land (Northern Ireland) Order 1997 and in particular amends this Order to allow for regulations to be made to prohibit or restrict the “treatment, **keeping** or disposal of hazardous waste or any other activity in relation to such waste”.

Territorial Extent & Application – Section 60 extends to and applies to England and Wales but not to Scotland. Section 61 extends and applies to Northern Ireland only.

Impact on the Ports Sector

4.16 These regulations are unlikely to have a general application to port authorities unless they carry out activities which fall within the descriptions referred to in 4.14 and 4.15 above, in which case they will be required to comply with the requirements imposed by the regulations concerning activities in relation to hazardous waste and would be subject to the regulations which make provision about the enforcement of those requirements.

4.17 *Section 62* - Makes amendments to the EPA 1990 to introduce powers to make regulations to prohibit or restrict waste imports or exports. This includes regulations banning or restricting the landing and unloading of waste in the UK and the loading of waste for exportation.

Territorial Extent & Application – Section 62 extends to and applies to England, Wales, Scotland and Northern Ireland.

Impact on the Ports Sector

4.18 This provision could impact on port authorities but the extent of that impact will depend on the extent and nature of the provision made by the regulations permitted to be made by this provision.

5. Part 4 - Air Quality and Environmental Recall

Air Quality - Schedule 11 - Local Air Quality Management Framework

5.1 *Schedule 11 (introduced by Section 72)* strengthens the requirements under Environment Act 1995 ("the 1995 Act") as regards Local Air Strategy Management Frameworks. The amendments require the SoS to review the National Air Quality Strategy every 5 years and report to Parliament. When an Air Quality Management Area is declared by local authorities the amendments require local authorities to prepare action plans that must set out how they will exercise their functions to ensure air quality standards are achieved and maintained.

Territorial Extent & Application – Section 72 and Schedule 11 extend to and apply to England but not to Northern Ireland and only in part to Wales and Scotland in particular the preparation of local authority action plans.

Impact on the Ports Sector

5.2 The SoS can, after consulting the person concerned, designate as a "relevant public authority, in relation to an area in England, if the person's functions include functions of a public nature in relation to that area". (S. 81A(3) of the 1995 Act, inserted by Schedule 11, paragraph 4). It seems possible that a SHA could be designated under that power by virtue of their functions including functions of a public nature.

5.3 If a SHA is designated as a relevant public authority it must "have regard" to the SoS's National Air Quality Strategy "when exercising any function of a public nature that could affect the quality of air". (S. 81A(1) of the 1995 Act, inserted by Schedule 11, paragraph 4).

5.4 If the air quality standards in the area of a local authority are not being achieved, the local authority can identify a "relevant public authority" which has functions of a public nature and the local authority considers that the exercise of those functions is relevant to the source of the emissions concerned. That public authority is then called an "air quality partner". (Sections 82(5) and (6) and 85A(1) of the 1990 Act, inserted by Schedule 11, paras. 5 and 8) Again, it seems possible that a SHA could be identified by an local authority as an air quality partner under this power.

5.5 An air quality partner has a duty to give assistance to a local authority in connection with the local authority's air quality functions and is given an active role in relation to the local authority's action plan including (Ss. 85A and 85B of the 1995 Act inserted by Schedule 11, paragraph 8):-

- providing proposals for measures to be taken to contribute to achieving objectives; and
- complying with directions of the SoS if the SoS considers the proposals are inadequate.

Air Quality - Schedule 12 - Smoke Control

5.6 *Schedule 12 (introduced by Section 73)* amends the Clean Air Act 1993, giving local authority's the power to impose financial penalties for the emission of smoke in smoke control areas ("SCAs") and gives further powers as regards SCAs. In particular it enables a local authority to extend the scope of a smoke control area to cover "vessels moored" in the SCA (S. 44(2A) and (2B) of the Clean Air Act 1993 inserted by Schedule 12, paragraph 7). A notice of intent to impose a financial penalty can be served on the occupier of the vessel or (if that cannot be done) on its registered owner. (Schedule 1A, para 12 to the Clean Air Act 1993 inserted by Schedule 12, paragraph 3).

Territorial Extent & Application – Section 73 and Schedule 12 extend to and apply to England and Wales (in part) but not to Scotland and Northern Ireland.

Impact on the Ports Sector

5.7 This provision would impact port authorities and in particular vessels (or their registered owner) moored within their harbour limits if the harbour limits are also within a SCA.

6. Part 6 – Nature and Diversity

Schedule 14 - Biodiversity Gain As Condition Of Planning Permission & Schedule 15 - Biodiversity Gain In Nationally Significant Infrastructure Projects

- 6.1 *Schedule 14 (introduced by section 98)* amends the Town and Country Planning Act 1990 (“the TCPA 1990”) to make it a condition for grants of planning permission to be subject to a condition to secure that the biodiversity gains objective is met. (Schedule 7A to the TCPA 1990, as inserted by Schedule 14, paragraph 2).
- 6.2 In very broad summary the biodiversity gains objective is met if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least 10% (which % may be changed by regulations made by the SoS). There are complex provisions as to how the pre and post development values are to be determined and recorded and as to the nature of the condition.
- 6.3 *Schedule 15 (introduced by section 99)* amends the Planning Act 2008 to make provision for a biodiversity net gain requirement for nationally significant infrastructure projects (“NSIP”) that are authorised by Development Consent Orders (“DCO”) under the Planning Act 2008. The amendments provide that the SoS may not grant a DCO for an NSIP where a biodiversity gain statement (as included in National Policy Statements) applies unless satisfied that the biodiversity gain objective (as referenced in 6.2 above) is met. Schedule 15 also makes provision to apply its provisions to developments at sea.

Territorial Extent & Application – Sections 98 and 99 and Schedules 14 and 15 extend to England and Wales but only apply to England. They do not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

- 6.4 Where a port authority in England applies for specific planning permission, the permission will be subject to the biodiversity gains condition mentioned in 6.1 above.
- 6.5 However the biodiversity gains condition does not apply to planning permission granted by a development order (Schedule 7A to the TCPA 1990,

para. 17, as inserted by Schedule 14, paragraph 2.) i.e. the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). In particular this mean the condition does not apply to permitted development under:

6.5.1 Part 8 Class B of the GPDO (development on operational land of a statutory harbour authority or their lessees in respect of certain harbour related activities); and

6.5.2 Part 18 of the GPDO (development specifically authorised by a local or private Act of Parliament. an order approved by both Houses of Parliament, an HRO or a HEO).

6.6 Also where a port authority applies for development consent, that application will be subject to demonstrating that biodiversity gain objective has been met.

Section 102 - General Duty to Conserve and Enhance Biodiversity

6.7 Section 40 of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") is amended by Section 102 to place additional duties on "public authorities". Section 102 builds on the existing duties of public authorities by providing, "A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general diversity objective."

6.8 Section 102 defines the general diversity objective ("GDO") as, "the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England."

6.9 Section 102 then provides that:-

- the first consideration must be completed within one year of Section 102 coming into force.
- After the first consideration, the public authority must determine such policies and specific objectives as it considers appropriate for taking action to further the GDO and take such action as it considers appropriate, in the light of those policies and objectives, to further the GDO. For example this could include action to conserve, restore or enhance a population of a particular species or a particular type of habitat. This determination must be made as soon as practicable after the completion of the first consideration.
- After the first consideration, subsequent considerations must be taken by the public authority at least every 5 years.

6.10A statutory harbour authority, as a statutory undertaker, is a "public authority" for this purpose (See s.40(4) of the 2006 Act).

Territorial Extent & Application – Section 102 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

6.11As a SHA is a statutory undertaker, it is a "public authority" for this purpose (See s.40(4) of the 2006 Act) so these extension of duties will be applicable.

Section 103 - Biodiversity Reports

6.12 Section 103 inserts a new section 40A into the 2006 Act. It requires local authorities and “designated public authorities” to publish biodiversity reports containing prescribed information such as the action they have taken under the biodiversity objective. The first report must cover a period of not more than 3 years and be published within 12 weeks of that period. Subsequent reports must cover a period of not more than 5 years and be published within 12 weeks of that period. A “designated public authority” is a specified public authority or a public authority of a specified description designated by regulations made by the SoS.

Territorial Extent & Application – Section 103 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

6.13 As a SHA is “a public authority” for the purposes of the GDO (see 6.7 above), a SHA could be designated by the SoS as a “designated public authority” in which case the duties in 6.12 above would apply.

Section 109 - Species Conservation Strategies

6.14 Section 109 establishes species conservation strategies, prepared by Natural England with the purpose of improving the conservation status of a specified species. It further requires local planning authorities, and any other prescribed authority specified in regulations by the Secretary of State, to cooperate with Natural England in preparing and implementing a strategy. It then establishes that these authorities must consider any relevant strategy as they carry out their functions. This section defines a "prescribed authority" as an authority ... "exercising functions of a public nature in England which is specified for the purposes of this section by regulations made by the Secretary of State".

Territorial Extent & Application – Section 109 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

6.15 As at least some of the functions carried out by a SHA are of a public nature it may be possible that SHAs may be designated by the SoS as a "prescribed authority" and so subject to the duties to Natural England described in 6.14 above.

Section 110 - Protected Site Strategies

6.16 Section 110 establishes Protected Site Strategies, prepared by Natural England for the purpose of improving the conservation and management of a protected site, and managing the impact of activity, such as off-site development, on those sites. It requires local planning authorities and other appropriate public authorities to cooperate with Natural England in preparing a strategy. It then establishes that public authorities must consider any relevant strategy as they carry out their functions. The term “public authority” is defined by Section 110 as having the same meaning as Section 40(4) of the 2006 Act. A statutory harbour authority, as a statutory undertaker, is a “public authority” for this purpose of s.40(4) of the 2006 Act.

Territorial Extent & Application – Section 110 extends to England and Wales but only applies to England. It does not extend and apply to Scotland and Northern Ireland.

Impact on the Ports Sector

6.17 As a SHA is a statutory undertaker, it is a “public authority” for this purpose (See s.40(4) of the 2006 Act) so the duties described in 6.16 above will be applicable.