

**OVERLAPPING DIFFERENT REGULATORY REGIMES FOR THE PROTECTION OF MARINE AREAS: THE CASE OF THE INSTITUTION OF NATURE 2000 MARINE SITES IN SARDINIA \***

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SUMMARY: 1. Introduction – 2. The Sardinian local government policies for the establishment of the marine Nature 2000 sites – 3. The critical issues of priority habitats not included in marine SCIs – 4. Two different protection schemes for a single geographical space – 5. Conclusion.

1. – The legislation of environmental protection for the establishment of marine and coastal protected areas, is structured in a complex of supranational, national and regional measures..

As far as legislation is concerned, different management regimes can be identified by their organization, powers and objectives.

Such is the emblematic case of the marine sites of the Nature <sup>1</sup> 2000 network in Sardinia which are overlapped with Marine Protected Areas (MPAs). The managing bodies have also been entrusted with the management of Sites of Community Interest (SCI) by the Sardinia Region.

For this kind of situation, management plans which were created for different purposes have somehow work in harmony, with all the difficulties that this entails because of the different “management philosophies” underlying the two cases.

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<sup>1</sup> Types of nature reserves established for the protection of marine areas of special environmental and landscape value, established in accordance with article 25 of l. no. 979/1982 or articles 18 and 19 of the l. no. 394/1991.



In particular, the governance of Italian MPAs is anchored mainly to an organizational model based on the regulation of activities allowed or not allowed within the area, whereas the marine SCI management is flexible regarding regulatory regimes, but is rigidly set for quantitative and qualitative assessment of the results in terms of habitat and species conservation.

The full implementation of the «Habitats» Directive includes the transformation of the Sites of Community Interest into Special Areas of Conservation (SAC) <sup>2</sup>. This step will entail more obligations on the part of the managing bodies for the monitoring of habitats and species surveyed in the proposal phase of the SCI; these activities will evaluate the adequacy of the management of SACs, with possible infringement procedures in the case of negative outcomes.

The main objective of this study is to analyze the critical issues present in marine-area management, issues which are generated by the superposition of areas with different regulatory regimes on the same sea. We intend to identify both the issues in marine management and its effectiveness in achieving its various objectives.

2. – The delays of the entire national system of the Nature 2000 network to designate marine SCIs, (a delay which could have caused an infringement procedure on the part of the EU), has led to an agreement between the Italian Ministry of the Environment (MATTM) and the Italian Society of Marine Biology (SIBM). This agreement was reached in order to “update scientific knowledge on already designated SCIs and to report any new marine areas (both in territorial waters and on the high seas) deserving protection under the «Habitats» Directive 92/43/EEC as well as under related national legislation.

At the same time, in order to avoid problems between the State and Regional governments related to the distribution of competencies concerning identification and management of SCIs at sea, the MATTM-DPN has started a collaboration with the Regions. The aim is to discuss both the scientific

<sup>2</sup> Site of Community Interest (SCI) is a concept introduced by the «Habitats» Directive no. 43/1992 for the identification of an area that contributes significantly to the maintenance of a favorable conservation status of habitats and species deemed worthy of protection (set out in Annexes 1 and 2 of the Directive) and / or which contributes significantly to the maintenance of biodiversity in the region where it is located.

results that emerge from the studies<sup>3</sup> produced by SIBM and the administrative and regional legislative positions on the question of the competencies of Nature 2000 at sea<sup>4</sup>. The results were delivered in 2009<sup>5</sup>.

Following the work done by the commission, the Autonomous Region of Sardinia has appointed<sup>6</sup> a list of new marine SCIs, coincident with the surfaces of MPAs, in addition to the portions of sea which were previously designated adjacent to terrestrial SCIs.

a) The SCIs of Tavolara, Molara and Molarotto islands.

This coincides with the perimeter of the MPA Tavolara Capo Coda Cavallo referred to by the ministerial decree of 12.12.1997, rectified by the ministerial decree of 28.11.2001 with the exception of the marine part of the SCI of San Teodoro Lagoon.

b) The SCI of Asinara Island.

This coincides with the perimeter of the MPA Asinara Island of the Ministerial Decree of 13.08.2002; consolidates SCI Asinara Island with SCI Isola Piana and the tract of sea between the island and the coast of Stintino, up to Punta Negra.

c) SCI Island of Mal di Ventre and Catalano.

This coincides with the areas bordering the perimeter of the MPA Sinis Peninsula – Island of Mal di Ventre referred to by the updated Ministerial Decree of 17.07.2003; consolidation of SCI Mal di Ventre with SCI Catalano, not including the marine portion of SCI Mistras Lagoon of Oristano.

d) The SCI of Cavoli Island, Serpentara and Punta Molentis. Coincides with the perimeter of the MPA Capo Carbonara of the Ministerial Decree of 03.08.1999, excluding the marine portion of the SCI Coast of Cagliari; consolidates the SCI of the Isola dei Cavoli, Serpentara and Punta Molentis with the SCI of Campulongu.

<sup>3</sup> A. COSSU, F. RAGAZZOLA, *Prime considerazioni sui S.I.C. marini della Sardegna*, in *Biol. Mar. Mediterr.*, 16 (1), 2009, 79 ss.

<sup>4</sup> E. DUPRÉ, V. VINDIGNI, A. CRISCOLI, *Il completamento della Rete natura 2000 a mare*, in *Biol. Mar. Mediterr.*, 16 (1), 2009, 56 ss.

<sup>5</sup> Agreement MATTM-SIBM "IMPLEMENTAZIONE DEI SIC MARINI ITALIANI", Final report. SIBM, 2009.

<sup>6</sup> Autonomous Region of Sardinia, Deliberation no. 21/62, 3.6.2010, subject: Identification of new Nature 2000 marine sites.

The aforementioned deliberation led to the formation of a working group for the establishment of new marine sites.

In particular, it reads: “Councilor informs that, in order to meet the requirements of the Ministry and the Commission, a process of active participation was initiated with the MPAs of Tavolara Punta Coda Cavallo, Asinara Island, Capo Carbonara, Sinis Peninsula - Island of Mal di Ventre and the National Park of Asinara Island. This includes consultation with the offices of the Ministry and the scientific advisor appointed by the same. The proposal of new marine SCIs, originating with the board of consultation and confirmed by the agreement of the above entities, foresees two types of SCIs. The first type is limited to expansion, while the second type includes both expansion and the linking of marine sites with pre-existing coastal sites.

Both types of SCIs are intended to encompass marine habitats and species which were not previously considered, but which are particularly worthy of protection under the mentioned directive. One example is the priority habitat *Posidonia oceanica*, which is highly abundant in the waters surrounding Sardinia”.

3. – Priority habitat no. 1120, *Posidonia oceanica*, should be noted as one of the most critical of all the habitats adopted by the Autonomous Region of Sardinia in conjunction with the Ministry of Environment. This is clearly shown by Figure 1, in which areas of Nature 2000 (including marine sites in MPAs) are overlapped with the distribution areas of *Posidonia oceanica* according to surveys done by the Ministry of Environment. The priority habitat appears to have a much higher surface area on the Sardinian coast than that currently included in designated marine SCIs <sup>7</sup>.

<sup>7</sup> The law confirms that the selection of sites on the part of member states must be based exclusively on ecological criteria cited in annex III of the directive; see ruling of 11 September 2001, French commission, C-220/99, European court of law report, p. 5831; ruling of 11 September 2001, Irish commission, C-67/99, European court of law report p. 5757; ruling of 11 September 2001.

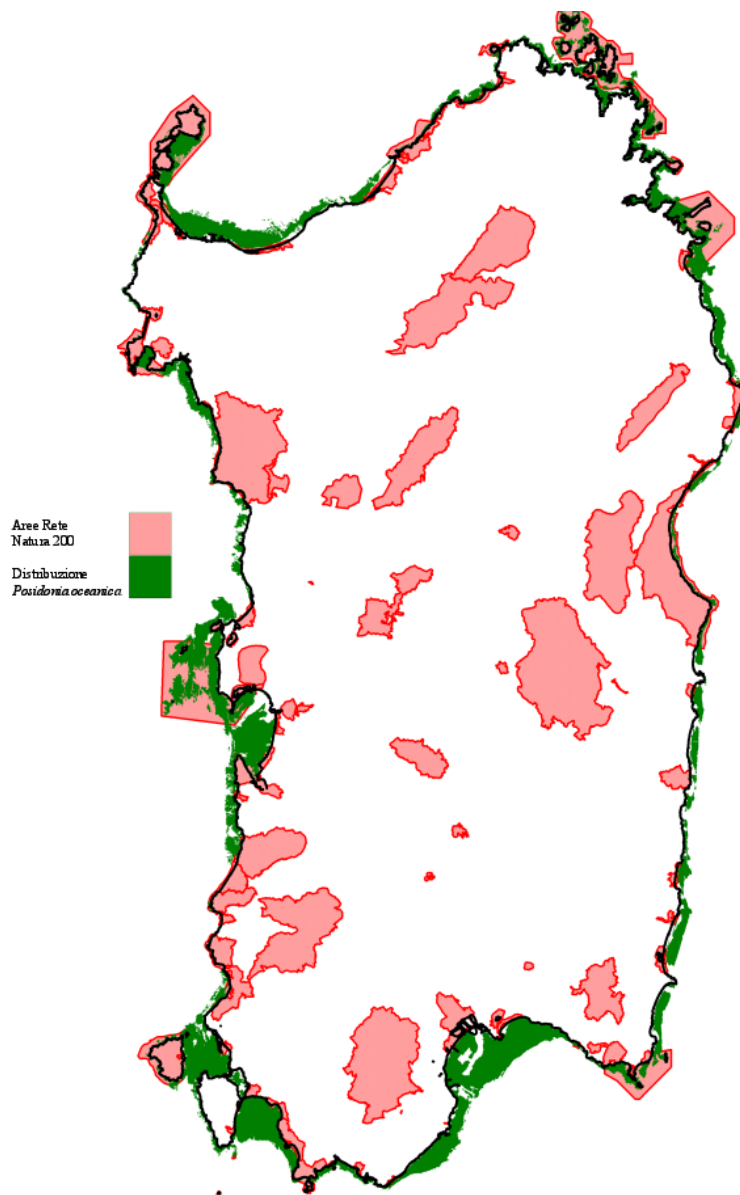


Fig. 1 The area covered by priority habitat *Posidonia oceanica* in relation to the surface area of the designated Nature 2000 sites, including MPAs.

Source: Based on original data of the Autonomous Region of Sardinia and the Ministry for the Environment and the Protection of Land and Sea.

It should be noted in the figure how the boundaries of the marine SCIs established in marine protected areas do not respect the perimeter of the local meadows of *Posidonia oceanica*. Instead, they run along the administrative boundary of MPAs even when it can be clearly seen that the priority habitat which caused the designation of the SCI has a much larger area.

Member States are obliged to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances which could affect the species of birds included in the annexes to the directive, in special protection zones covered by the «Birds» Directive 79/409 /EEC<sup>8</sup>. In the *Santoña Marshes* case<sup>9</sup>, the Court of Justice ruled that this obligation is also applicable to any site which is not classified as a Special Protection Area (SPA), but which should have been one, based on the date of implementation of the directive.

According to the interpretation given by the European Commission<sup>10</sup> itself in relation to the «Habitats» Directive 92/43/EEC, Member States cannot “evade their duty to protect a site that must be protected according to relevant scientific criteria”, by neglecting to classify it as a SPA or, first as an SCI and later as a Special Area of Conservation.

According to the motivation behind the *Santoña Marshes* case, Member States are responsible for the maintenance of a “favourable conservation status” of the sites where there are species or habitats included in the «Birds» annexes, regardless of whether or not they have been officially classified.

As also shown in Fig.1, in the case of priority habitat no. 1120, *Posidonia oceanica*, and its protection in the sea surrounding Sardinia, it appears obvious that the extent and location of the marine SCIs, with their outline based on pre-existing administrative boundaries of marine protected areas regardless of the actual extension of priority habitats, do not take into account the content of art. 4, paragraph 1 of the «Habitats» Directive. Nor do they take into

<sup>8</sup> See Directive 79/409/EU, art. 4, paragraph 4, first sentence: «The member states adopt measures aimed at preventing the pollution and deterioration of habitats, as well as other disturbances which could have significant consequences, considering the objectives of this article, to the birds in the protected zones of paragraphs 1 and 2. ».

<sup>9</sup> See the decision of the European court of Law in case C-355/90, Commission vs. the Kingdom of Spain, Coll. 1993, p. I-4221 (*Santoña Marshes*) and its decision of 18 march 1999 in the case C-166/97, Commission vs. France (*Seine Estuary*).

<sup>10</sup> Guide to the interpretation of article 6 of the «Habitats» Directive, cit., 13.

account what is subsequently specified by the European Commission<sup>11</sup> regarding the application of these same principles in the ruling of the *Santoña Marshes* case.

If, during the process of monitoring, the Commission happens to identify a discrepancy between the designated sites and areas of distribution of priority habitats, and primarily habitat no. 1120, the consultations planned by Article 5 paragraph 1 of the «Habitats» Directive are unlikely to yield a positive outcome. This is because the Ministry for the Environment's own sources, upon which the areas coloured dark grey in Fig. 3 are based, would give account of the apparent infringement of Article 4 on the designation of marine SCIs for the presence of priority habitat no. 1120, *Posidonia oceanica*.

Such awareness of the Member State persists at least from the establishment of the Ministry of the Environment's plan for the mapping of *Posidonia oceanica*, according to the "National Programme for the identification and exploitation of *Posidonia oceanica*, as well as the study of the safeguarding measures of the latter from all phenomena that involve degradation and destruction", according to Law no. 426/98. In the case of Sardinia, the measurements of the areal distribution took place between 1999 and 2002<sup>12</sup>.

4. – In the aforementioned resolution on the identification of new Nature 2000 marine sites in the region of Sardinia, it is written that "the legal provisions defined by the regulatory instruments and planning of protected marine areas and protected natural areas of national status, do not lead to additional or more restrictive norms; in fact, Presidential Decree no. 120/2003 and the Ministerial Decree no. 184 of 17 October 2007 concerning 'Minimum uniform criteria for establishing conservation measures for Special Conservation Zones (SCZ) and Special Protection Zones (SPZ)' state that the existing measures should be applied to the future SCZs (the current SCIs); as they regard the portions of SCIs outside the perimeters of the MPAs, at

<sup>11</sup> See Guide to the interpretation of article 6 of the «Habitats» Directive, cit. 11 «According to the *Santoña Marshes* clause, the sites that deserve to be classified must be treated in the same way, regardless of how official the classification is. The commission considers that the points of article 6, paragraphs 2, 3 and 4, are applicable to special protection zones or to sites which should be classified as such, starting from the date of implementation of Directive 92/43/EU.»

<sup>12</sup> See <http://www.sidimar.tutelamare.it/datiPraterie.do>.

present it will be sufficient to assess the need for a possible integration of the only measures aimed at preventing the deterioration of proposed new marine SCIs and disturbance of the species”<sup>13</sup>.

While this corresponds to the truth with regard to the provisions cited<sup>14</sup>, this statement requires some consideration. The automatic application of the rules that govern the MPAs, to the Nature 2000 sites, does not waive the obligation to achieve results determined by the institution of an SCI or an SCZ. To verify whether the measures in place in the MPAs are sufficient to achieve the purposes for which the Nature 2000 site has been created, would first of all require an evaluation of the current state of conservation of these habitats and species within the same nature reserve. This must be done in relation to the adequacy of their management systems and concerns specific objectives not covered by the relative regulations.

What would happen, for example, if portions of decaying *Posidonia oceanica* were found within an MPA which then became a marine SCI?<sup>15</sup>

In this case, the question arises of introducing further measures within the perimeter of the MPA itself. Among these, we cannot rule out “additional or more restrictive constraints” *a priori* in order to guarantee a favourable conservation status of the priority habitat.

It should be noted that the aforementioned Resolution No. 21/62, 3.6.2010 of the Autonomous Region of Sardinia where “additional or more restrictive constraints” are excluded with reference to the Presidential Decree

<sup>13</sup> Autonomous Region of Sardinia, Deliberation No. 21/62 of 3.6.2010, cit.

<sup>14</sup> In Presidential Decree of 12 March 2003, no. 120, art.4 «Modifications to article 4 of the decree of the President of the Republic of 8 September 1997, no. 357», paragraph d), with reference to the modifications of subsection 3 reads: «3. Whenever special conservation zones fall inside of nature protected areas, conservation measures are applied for which there is existing legislation. For the portion which falls outside the boundary of the nature protected area, the autonomous region or the province, having consulted the appropriate local organizations as well as the management of the protected area, will apply the appropriate conservation measures and management procedures.»

<sup>15</sup> For example, it is known that one of the major causes of deterioration of habitats even within some of the protected marine areas is the use of boat anchors on meadows of *Posidonia oceanica*, even if this practice is prohibited under art. 19, third subsection, and art. 30 L. 6 December 1991, no. 394 [See Cass. pen. Sect. III, 21/03/2012, no. 15742 (rv. 252382), Cass. pen. Sect. III, 23/04/2013, no. 23054 (rv. 256171)].

For useful further reading, see applied study I. GUALA et al., *Assessment of conservation status of Posidonia oceanica and anchoring pressure as a tool for a proper management of recreational boating*, in *Biol. marit. Mediterr.* 20 (1), 2013, 164 s.



of March 12, 2003, no. 120, article 4 section d), appears to be exceeded:

a) by cases of modifications to the original founding decree of the MPA, due to the overlap of the marine SCI. An example is the aforementioned protected area of Capo Carbonara, which includes the need to protect the “priority habitats of hard substrate and the *Posidonia oceanica*” in the new document. This is understandable only as an implicit call to regain the classifications found in the «Habitats» Directive annexes;

b) by management plans for marine SCIs produced by the governing bodies of marine protected areas in accordance with national and regional guidelines, and whose regional decrees of approval reflect the general and specific requirements of the governing body, related to the specific sites<sup>16</sup>.

The case of overlap between SCIs and MPAs, also raises another delicate question regarding relations between the State and the region's local governments. The aforementioned first paragraph of art. 78 of Legislative Decree. N. 112/1998 grants the State administrative duties within national parks for the administrative functions of national importance, with the clarification that “the tasks and functions in the field of natural parks and state, marine and terrestrial reserves have national importance, attributed to the State by the law of 6 December 1991, no. 394”. Exception is made, as indicated by the Joint Conference and the same law of the State Council, when an SCI or an SCZ is located in a national park. In this case, the provisions of art. 6 of the «Habitats» Directive are applied, without exceptions.

In fact, art. 5 of Presidential Decree no. 357 of September 8, 1997, as amended by art. 6 of Presidential Decree no. 120, of March 12, 2003, at paragraph 7 specifies that “the impact assessment of plans or operations concerning the proposed sites of community importance, and special zones of conservation falling, wholly or partly, in a national nature protected area, as defined by the law of 6 December 1991, no. 394, is carried out once the managing body of the area has been consulted”. Thus, plans or projects of no particular national relevance submitted by any entity, including the managing body of the park, are subject to a procedure for which the jurisdiction belongs to

<sup>16</sup> For a valid example see Autonomous Region of Sardinia, Department for environmental protection, decree no. 97 of 26.11.2006 «Approval of the management plan of the SIC ITB030039 “Isola Mal di Ventre” and ITB030080 “Catalano”».

the region of interest rather than to the State. Exception is made for a purely advisory function of the managing bodies of MPAs, which belong to the State Administration.

Ultimately, an approach based on concentrating administrative duties in MPAs on the State appears to be outmoded whenever there is an overlap of these areas with areas of the Nature 2000 network, as occurs in Sardinia. In fact, the regulation of Nature 2000 appears to be at a higher level compared to national laws 972/82 and 394/91.

5. – The approach that the Italian legislation has imposed on MPAs, characterized by constraints based on precautionary principle, is substantially different from the goal-oriented management generated by the «Habitat» and «Birds» Directive for the establishment of SCIs, SPZs and SCZs.

The experience promoted by the Department of the Environment of the Sardinian local government, based on the implementation of marine SCIs in areas which had already been designated as protected marine areas, makes for an interesting experiment of integration policies for the management and protection of marine ecosystems of different origins. However, it also highlights limits and critical issues which are difficult to solve.

The first and perhaps most important limitation is a non-compliance of the procedures for the identification of marine SCIs with those of the «Habitats» Directive. The boundaries of the Nature 2000 areas should be identified by ecological criteria rather than by administrative criteria. However, in the case of SCIs overlapping with MPAs, the boundaries disrupt the distribution of the priority habitats for which the SCI itself has been designated. This is the case of the *Posidonia oceanica meadows* habitat no. 1120 of Annex 1 of the «Habitats» Directive. Its distribution continues without interruption outside the SCI border, which here corresponds to the administrative border of the MPA .

A further issue is represented by the limited criteria used for designating marine SCIs. This was imposed because of an urgent need for the Italian state to realize a minimum area of marine SCIs to avoid incurring an infringement procedure. The Italian state was already late with regard to European deadlines. However, this measure was clearly an emergency one and did not meet the criteria established by Community case law contained in the

guidelines issued by the Commission itself. This related to the fact that all sites registering habitats and species of community interest included in the Annexes to the «Habitat» and «Birds» directives, if present more than just occasionally, must be designated according to the criteria of the two directives themselves. Any member state which does not employ such a designation, is not exempt from the responsibility of ensuring a "favourable state of conservation" of these habitats and species.

Again, with reference to the habitat Posidonia, the comparison drawn between the areal distribution of the habitat and the area designated under Nature 2000 legislation, indicates that only a minimum area of meadows is actually included within marine or coastal SCIs. Therefore, if the distribution areas of habitat and/or species listed in the Annexes of the Nature 2000 legislation directives include the boundaries of a MPA as happens in Sardinia, the designation of that area as a marine SCI or SPA in itself constitutes a necessary condition, although this is not sufficient to consider the Italian State to be complying with the rules.

It also raises an additional issue of the governance of marine protected areas. The MPA as such does not provide explicitly for adequate levels of conservation of habitats and species as required by the Nature 2000 legislation, and so does not guarantee them. Therefore, the management of the marine protected area that integrates the objectives of Nature 2000, must then include ad-hoc actions and measures, as well as appropriate measures to monitor the results produced.

This set of activities is not within the ordinary governance of MPAs. In the case of the «Habitats» Directive, it may even conflict with the operational initiatives of the MPA itself, as happens for example when a plan or project planned for management purposes of the marine protected area is not directly related to the management of the SCI. In such a case, the plan or project will be subjected to the competent regional body of impact assessment, with the possibility of rejection or additional requirements. This takes the control over environmental governance of MPAs away from the Ministry of the Environment, in spite of this principle being behind the rationale for all the national environmental legislation.

Based on the above, we conclude that the current state of the identified marine SCIs in Sardinia does not correspond to the requirements of the

«Habitats» Directive. This makes the Italian state liable for possible infringement procedures linked to its failure to adopt protection measures in sites characterized by the presence of priority habitats.

This attempt to integrate the conservation policies of marine sites, coming from different normative sources, does not appear to have been successful also because of potential conflicts of competencies generated by the differences between the European goal-oriented and the Italian rule-based approaches.

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*Abstract*

The institution of the Sites of Community Interest in the marine environment in Sardinia, was applied for the first time through the establishment of marine SCIs overlapping to MPA's, as an attempt to centralize the management of the two different systems of protection in a single management body.

A critical analysis of this approach shows that the establishment of marine SCIs experienced in Sardinia does not meet the requirements of the Community: the boundaries of MPAs are determined on the basis of predominantly administrative considerations, while the boundaries of SCIs have to be determined on an ecological basis.

An overlapping of the *Posidonia oceanica* distribution areas and the location of marine SCIs shows that the surface covered by *posidonia* is much larger than that protected by the establishment of SCIs. As a result, most of *Posidonia oceanica* prairies are not included in the SCIs established in Sardinia.

This exposes the Italian State to the risk of infringement proceedings, nor takes it out of legal liability resulting from the deterioration of unprotected habitats, according to the indications issued by the Commission, on the basis of the case law "Santoña Marshes" of the European Court of Justice.