The Scottish Parliament
Pàrlamaid na h-Alba

Rural Affairs and Islands Committee

Gillian Martin
Cabinet Secretary for
Net Zero and Energy

27 May 2025

Dear Gillian,

Natural Environment (Scotland) Bill – parts 1 and 2

In advance of your appearance at the RAI Committee at its meeting next Wednesday, I would appreciate it if you could provide further information on the issues raised in the questions set out in the annexe to this letter.

To inform our discussion at the meeting, I would appreciate it if you could respond by close of play on Monday 2 June.

With thanks for providing this information within this timescale, yours sincerely,

Finlay Carson MSP
Convener

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Annexe

Part 1

Marine targets

There is nothing in the Bill that would require biodiversity targets which apply to both the terrestrial and marine environment.

1. Is it the Scottish Government's intention to set targets that apply to both the terrestrial and marine environment?

2. Regarding potential targets covering marine biodiversity, would national targets set for Scotland automatically apply within Scotland's Exclusive Economic Zone?

Threatened species topic area

Some stakeholders have raised concerns with the Committee that the wording of the Bill requiring a target on "the status of threatened species" could be interpreted narrowly to mean only rare species. The Policy Memorandum states that this topic area should cover species "that have populations that are declining" and is "intended to incorporate species at threat of extinction, species abundance and distribution, population size of exploited species, as well as genetic diversity".

3. What is your response to those concerns? Did the Scottish Government consider including a definition in the Bill?

Resourcing biodiversity data

It has been suggested in evidence that, in addition to resourcing ESS for its monitoring role, the task of biodiversity data gathering/provision/analysis falls across a larger community of organisations, research institutes and citizen science and this 'data infrastructure' requires investment.

4. What is the Scottish Government's response to these concerns? Why is the cost of these activities not included in the Financial Memorandum and does the Scottish Government have a strategy for investment in biodiversity data to support the framework for statutory targets?

Timing for first targets

Some stakeholders have raised concerns about the absence of a timetable for setting the initial targets; some have suggested the 12-month 'deadline' for laying regulations setting the targets should apply from Royal Assent rather than commencement of section 1.

5. What is the Scottish Government's response to those stakeholder concerns?

Monitoring

The Policy Memorandum states that statutory biodiversity targets will "nest within a wider monitoring framework, to monitor progress against Scotland's domestic and international obligations and commitments, including primarily the Kunming/Montreal Global Biodiversity Framework (GBF)".

6. Can the Scottish Government provide more information on the "wider monitoring framework" this refers to, including:

    a) When there will be a further State of Nature report for Scotland?
    b) When the Scottish Government intends to publish the Scottish Environment Strategy as required by the Continuity Act?
    c) How statutory biodiversity targets will relate to (or be informed by) the biodiversity metric NatureScot is developing on behalf of the Scottish Government? Is there an agreed timeframe for this metric to be finalised and what are the current plans for how this biodiversity metric will be used e.g. in the planning system or more widely?

7. Did the Scottish Government consider developing "target-setting criteria" for biodiversity targets in the Bill similar to what is set out in climate legislation, to set key parameters and considerations that need to inform the setting of the targets?

Stakeholders have also raised concerns about the strength of the biodiversity duty on public bodies and poor accountability in relation to the biodiversity reporting duty. The Committee also notes the Public Audit and Post-Legislative Scrutiny Committee made a number of recommendations in this area in 2018.

8. Did the Scottish Government consider using this Bill to strengthen these duties, or to support increased accountability in relation to the reporting duty? What are the current arrangements for ensuring compliance with this duty, and for NatureScot to collate and publish reports?

Part 2: Power to modify or restate EIA legislation and the Habitats Regulations

Input from nature agencies in formulation of power

9. What advice was sought and received from NatureScot and JNCC to inform the formulation of Part 2 of the Bill?

Lack of parent act for the Habitats Regulations and EIA regime

Stakeholders have said that the Habitats Regulations and EIA regimes, despite being set out in secondary rather than primary legislation, are core to environmental protection and biodiversity conservation in Scotland. It is also noted that the reasons they are set out in secondary legislation is due to historical choices, partly driven by technical considerations, made at the time the underlying EU law was implemented. Other measures of similar significance and EU origin were incorporated into primary

legislation, e.g. on Strategic Environmental Assessment and parts of the Wildlife and Countryside Act 1981.

10. Given this background, why did the Scottish Government decide against bringing any 'core aspects' of these regimes into primary legislation?

The scope of existing powers to adapt sites and site features

The Policy Memorandum states, in the section "Creating flexibility for protected sites":

> "At the moment, there is no mechanism to adapt European sites designated under the 1994 Habitat Regulations, other than to designate additional sites or to add additional protected species or habitats ("features") to a site citation. For example, if evidence demonstrated that the natural range of a "feature" has shifted as a result of climate change, it would not be possible to amend an existing site boundary to reflect this, or to "remove" the feature from the site citation while ensuring that that habitat or species was suitably represented elsewhere within the network."

Regulation 9D(1) in the Habitats Regulations, introduced by The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019, states: "The Scottish Ministers must, in co-operation with any other authority having a corresponding responsibility, manage, **and where necessary adapt,** the UK site network, so far as it consists of European sites in Scotland, with a view to contributing to the achievement of the management objectives of the UK site network". (emphasis added)

Regulation 9D(2) goes on to specify that the management objectives of the UK site network are, amongst other things, "to maintain at or, where appropriate, restore to a favourable conservation **status in their natural range** (so far as it lies in the United Kingdom's territory, and so far as is proportionate) (i)the natural habitat types listed in Annex I to the Habitats Directive; and (ii)the species listed in Annex II to that Directive whose natural range includes any part of the United Kingdom's territory." (emphasis added)

Regulation 9D(3) and (4) require Scottish Ministers, in complying with the obligation in Regulation 9D (1), to have regard to various considerations, including the importance of sites for certain habitats and species "throughout their natural range", "the importance of the sites for the coherence of the UK site network", and "the threats of degradation or destruction (including deterioration and disturbance of protected features) to which the sites are exposed".

The Committee notes that the equivalent 2019 EU exit amendment Regulations in England (The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019) inserted Regulation 16A to the Habitats Regulations applying in England, Wales and in offshore waters, and that Regulation 16A uses the same (or very similar) wording as Regulation 9D. Defra has published guidance on the amendments to the extent they cover England and Wales and their inshore waters. Regarding the Regulation 16A duty the guidance states:

> "The appropriate authorities must adapt the network where necessary given that the abundance and distribution of habitats and species within the network might evolve over time. They may need to designate new SACs or SPAs to achieve the network objectives. They may also need to amend existing SACs or SPAs. For example:
>
> - if their protected features have changed over time, including re-introduced species or a new or increasing population of birds on an existing site has reached internationally important numbers
> - **if the site boundary needs to be moved in response to storm events or natural processes**
> - to include an area which compensates for the loss of other areas within the network as a result of a plan or project proceeding for IROPI reasons" (emphasis added)

The guidance also sets out situations where all or part of designated sites could be declassified for specific reasons. It states:

> "In exceptional circumstances, the appropriate authority can declassify all or part of a SAC or SPA in order to adapt the national site network in response to natural developments. The process for de-classification is the same as the process for designating a site.
>
> The appropriate authority will assess if:
>
> - the site continues to meet the criteria for designation
> - the site's contribution to the achievement of the conservation of natural habitats and species has been irretrievably lost
>
> De-classification may be appropriate where, for example, conservation measures based on best scientific and technical knowledge have been implemented but have not been successful.
>
> De-classification cannot be based on a failure to comply with the obligations set out in the 2017 Regulations, as provided in case law such as the Tre Pini case[footnote 2].
>
> De-classification is unlikely to result from a failure to adopt appropriate conservation measures to conserve, restore or avoid deterioration of the site, or a disturbance of the species for which the site is designated.
> If the appropriate authority decides to declassify a site or part of a site, it must make sure the:
>
> - coherence of the national site network is maintained
> - network objectives are achieved in other ways, such as designating new SACs or SPAs"

11. In what ways does the Scottish Government consider the site network in Scotland can be adapted under the existing regime, to fulfil the duty on Scottish Ministers to "manage, and where necessary adapt, the UK site network", as set out in Regulation 9D of the Habitats Regulations? How did the Scottish Government consider Regulation 9D in arriving at its view that "there is no

mechanism to adapt European sites designated under the 1994 Habitat Regulations, other than to designate additional sites or to add additional protected species or habitats ("features") to a site citation"?

12. Has the Scottish Government provided any directions or guidance to NatureScot in relation to how the changes made by the Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019, particularly Regulation 9D, are to be interpreted in relation to their functions overseeing the site network in Scotland? Has NatureScot produced any (external or internal) guidance on how the changes in these Regulations were to be interpreted and applied in Scotland? If not, what was the purpose of Regulation 9D?

13. Does the Defra guidance, read alongside the Policy Memorandum, indicate that there are significantly different legal interpretations by the Scottish Government and UK Government of Regulation 9D in the Scottish Habitats Regulations and Regulation 16A in the Habitats Regulations applying in England and Wales respectively in relation to how that duty can be applied to adapt the site network?

The Scottish Government consulted on detailed proposals in 2024 on how to meet 30 by 30 targets in Scotland in relation to freshwater and terrestrial sites, which set out detailed background on perceived issues with designations and set out that the legislative proposals aimed to "create flexibility around designated sites". One of the criticisms of the site network set out was for example:

> "Protected Areas are based on a static list of 'natural features' on a site, which in some instances may result in management which is sub-optimal for biodiversity or insufficiently flexible to accommodate changes driven by climate change".

No legislative proposals from this consultation have been taken forward.

14. Why was this consultation not used to develop specific legislative proposals to address the issues set out in the Policy Memorandum within the Bill, given the perceived issues around 'inflexibility' of the regime were already known and had been consulted on?

Scrutiny

Section 2(6) sets out the criteria to be used for determining which regulations made under section 2 would be laid under the affirmative procedure, with section 2(7) providing that any regulations not subject to the affirmative procedure would be subject to the negative procedure. The Delegated Powers Memorandum states the regulation-making power in sections 2(6) and (7) is an 'either way' provision "which means the Scottish Ministers can choose in each case" whether to lay under the affirmative or negative procedure. The Bill does not, however, set out any further criteria which the Scottish Ministers would use to inform this decision and it is difficult to see how sections 2(6) and (7) equate to an 'either way' provision.

15. Please can you respond to these points.

Environmental safeguards

The Policy Memorandum states that the power in Part 2 “will provide the flexibility to adapt to future requirements, while ensuring that the legislative frameworks continue to effectively underpin environmental protection and assessment processes in Scotland."

16. Given the breadth of the section 3 purposes, how would Part 2 ensure that the legislative frameworks “continue to effectively underpin environmental protection”?

Section 3(b) purpose “to facilitate progress towards” net zero or other targets

Regarding the purpose in section 3(b), the Policy Memorandum draws particular attention to the Scottish Government’s offshore wind ambitions and suggests these are not achievable in the current regime.

The Committee notes that section 293 of the UK Energy Act 2003 that Act conferred powers on Scottish Ministers to make regulations in connection with the assessment of the environmental effects of offshore wind in relation to protected sites in the Scottish inshore region. Powers were also conferred to make provision about how public authorities secure compensatory measures for any adverse environmental effects of offshore wind on protected sites. Regulations are subject to the affirmative procedure and before making regulations, Scottish Ministers must consult NatureScot, other UK nature agencies in certain circumstances, and "such other persons as they consider appropriate".

The Policy Memorandum states that this is "a broad power which enables potentially significant changes to the 1994 Habitats Regulations". However, the power is not unfettered - it may not be used to "disapply or otherwise modify, or make provision which could undermine or circumvent" regulation 49 of the Conservation (Natural Habitats, &c.) Regulations 1994 – which includes that a competent authority may not authorise a development that has an adverse effect on a site unless they are satisfied that, there are "no alternative solutions", and the plan or project "must be carried out for imperative reasons of overriding public interest" ('IROPI test') with compensatory action being taken.

The Committee notes that the UK Government and Scottish Government are in the process of finalising polices in this area with a view to introducing Regulations using these powers.

The Scottish Government has stated that the powers in the UK Energy Act are not enough to realise the ambition set out in the Offshore Wind Statement, and to enable Net Zero targets to be met through future developments in renewable energy technology, as they could not be applied to any marine activity except offshore wind e.g. wave power, or to any activities on land e.g. grid infrastructure.

17. Can the Scottish Government update the Committee on the stage of development of secondary legislation using powers in the UK Energy Act which would make changes to environmental assessment regimes in Scotland?

18. If the Bill is passed, would the Scottish Government have the option to introduce secondary legislation using the power in the Bill instead (rather than the section 293 power in the UK Energy Act), meaning the environmental safeguards built in to the UK Energy Act would not apply? (i.e. the requirement to consult NatureScot and the protection of Regulation 19 in the Habitats Regulations)? In which circumstances would the Scottish Government be likely to exercise powers under either Act?

19. The Scottish Government has said that the Part 2 power is needed to enable offshore wind indirectly in respect of supporting grid infrastructure – what elements of energy project infrastructure are subject to consent requirements falling within the powers of Scottish authorities within devolved powers, to which Scottish EIA legislation listed in the Bill applies?

20. What evidence is there that Scottish EIA legislation or the Habitats Regulations are a barrier to the development of marine renewables other than offshore wind?

Section 3c purpose to ensure consistency or compatibility with other regimes

The Policy Memorandum states that it is not the Scottish Government's current policy to introduce an EOR regime to replace EIA. The LCM for the Planning and Infrastructure Bill, states "The UK Government are yet to set out how the EOR framework might operate, and further detail is expected to be set out in due course. The Scottish Government will consider this detail before taking a position on the adoption of EOR for Scotland. In the meantime, it is the policy of the Scottish Government to retain the environmental protections afforded by the EIA framework."

The Committee notes that if the Scottish Government were to introduce EOR Regulations using existing powers in the UK Levelling up and Regeneration Act (LURA) 2023, any regulations would be subject to the affirmative procedure, and those powers are subject to environmental safeguards including a non-regression provision. Under section 156 of the LURA, an appropriate authority "may make EOR regulations only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed".

Stakeholders have raised concerns with the Committee that the range of ways in which the section 3(c) purpose could be interpreted is very broad, ranging from making administrative changes to systems or technical 'tweaks', changes enabling a future EOR system operating in Scotland in some areas to be interoperable with a Scottish EIA system, through to the power being used for a wholesale standardisation with other regimes entailed substantive changes across complex regimes.

21. In the Scottish Government's view, could the section 3(c) purpose to ensure consistency or compatibility with other regimes legally be used to make substantive changes to Scottish EIA legislation and the Habitats Regulations? What is your response to the concern expressed by stakeholders that this purpose "could potentially be interpreted as allowing for a standardisation with

English or UK legislation, regardless of whether that means weakening our approach to nature conservation”?

22. What is the relationship between the Part 2 power in the Bill and the power held by Scottish Ministers to introduce EOR Regulations in the LURA? If the Scottish Government decides to pursue changes to Scottish EIA legislation for compatibility with a future EOR regime in England, to what extent could the power in the Bill be used as an alternative to using the power in the LURA to introduce EOR in Scotland?

23. Significant changes to both the EIA regime and the Habitats Regulations are being developed in England under different processes, notably under the Planning and Infrastructure Bill and under the framework powers in the LURA. What tensions or conflicts could arise if the system in England moves significantly away from the framework set by EU Directives in this area (including in a way that reduces environmental standards), and what impact could this have on the Scottish Government’s ability to meet its policy commitment to continue to align with EU law where possible?