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EIA and Habitats Regulations Consultation Response
Restoration Team
Area 1B North
Scottish Government
Victoria Quay, Edinburgh
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To whom it may concern,

**Response to: Scottish Government consultation on enabling powers for the
Environmental Impact Assessment (EIA) regime and Habitats Regulations in Scotland
(March 18, 2024)**

Scottish Renewables (SR) is the voice of Scotland's renewable energy industry. Our vision is for Scotland to lead the world in renewable energy. We work to grow Scotland's renewable energy sector and sustain its position at the forefront of the global clean energy industry. We represent over 350 organisations that deliver investment, jobs, social benefit and reduce the carbon emissions which cause climate change.

Our members work across all renewable technologies, in Scotland, the UK, Europe and around the world, ranging from energy suppliers, operators and manufacturers to small developers, installers, and community groups, as well as companies throughout the supply chain. In representing them, we aim to lead and inform the debate on how the growth of renewable energy can provide solutions to help sustainability heat and power Scotland's homes and businesses.

SR welcomes the opportunity to provide the views of our members to the Scottish Government's consultation on enabling powers for the Environmental Impact Assessment (EIA) regime and Habitats Regulations in Scotland.

In principle, our members are supportive of the Scottish Government's proposal set out in the consultation that seeks enabling powers which would better allow future amendments in relation to both the Scottish EIA regimes and Habitats Regulations in Scotland, in so far as it would equip Ministers with the ability to future-proof both the EIA Scheme and Habitats Regulations to meet the needs of a rapidly evolving industry and support the unlocking of barriers to deployment for offshore wind in Scotland. SR considers that the Scottish Government should have the ability to ensure that the relevant legislation remains fit for purpose over time and contains the necessary powers to allow the Scottish Government to - for instance - take the necessary steps to select and secure the necessary project-alone and strategic compensation measures under the Habitats Regulations regimes, in a manner that is harmonised across the various areas of government that the Scottish Government administers.

For instance, the consultation explains that the powers sought would grant Ministers' the power to adapt site designations. Previously, Special Area of Conservation (SAC) expansion was recommended as a potential benthic compensation measure during examination but was later rejected by the SoS. There is potential, therefore, that such solutions could be independently adopted in Scotland as a potential measure, thereby providing developers with more compensatory tools in their arsenal during development.

Similarly including an amendment in the relevant regulations to remove the requirement that two hard copies of an EIA Report must be submitted to the Scottish Ministers in support of an EIA application would be beneficial. This would benefit the environment and applicants, industry, and regulators alike and would be welcomed by Scottish Renewables. This change would also be a key step towards achieving a fully digital EIA approach that would allow for the assessments to be more accessible to stakeholders and simplify the EIA process (*IEMA (2024) A roadmap to digital environmental assessment*)¹.

However, there are a number of areas of concern which our members wish to highlight:

1. **Divergence between regimes in Scotland and in England and Wales** – In relation to EIA, our members note that the consultation paper states that *“the enabling power we are proposing here would provide a mechanism for potential improvements to the existing EIA regimes in Scotland, rather than replacing them with an EOR [Environmental Outcomes Reporting] system.”* Our members recognise that having a mechanism to improve the existing Scottish EIA regimes rather than replacing them with an Environmental Outcome Reports system under the Levelling-up and Regeneration Act 2023 may also be beneficial to the renewables industry. The existing EIA regime is well established and well known to practitioners and regulators and introducing a new regime may cause delays rather than accelerate EIA processes in a critical time for the renewables industry. Mechanisms for improvement would also allow the required adjustments for more proportionate EIA, to the extent that they are not already within Scottish Government competence.

Members would also, however, ask that the Scottish Government do all it can to avoid creating or exacerbating a disparity between the environmental assessment regime in Scotland and England & Wales.

The present similarities in the EIA regimes across Scotland and England & Wales allow for the approach to environmental assessments to be streamlined for cross-border projects. Our members are concerned that a scenario might develop where projects sited within Scottish, or straddling English-Scottish waters, require both an EOR and EIA Report. For example, where a single development crosses the border between Scotland and England, the same environmental impact assessment can be produced for each consent application. Should the regimes diverge, two separate environmental assessments, which are required to comply with two separate sets of legal tests would need to be produced, adding additional regulatory complexity, duplication of effort, time and cost to the preparation of consent applications. This would delay the consenting of projects which are critical to meeting Scotland's renewable energy targets and significantly disadvantage

¹ IEMA 2024, [‘Roadmap to digital environmental assessment’ guidance](#)

Scotland's renewable energy industry.

Our members highlight that this would cause significant difficulty for offshore wind projects which, while contributing to Scottish renewable energy targets, have a grid connection point in England. Similar challenges arise in the context of the urgently required GB-wide upgrades to grid infrastructure.

In relation to Habitats Regulations Assessments (HRA), the same points apply. While the stages of the derogation process are well understood (i.e. the test of alternatives and imperative reasons of overriding public interest and compensatory measures), significant challenges remain regarding the agreement on the scale of adverse effects, suitable compensatory measures, and the delivery of measures in context with uncertainties about the marine environment, impacts of climate change and extreme events and unclear guidance and policy landscape. This is furthermore exacerbated by the rigid interpretation of the Habitats Regulations, which is making it increasingly difficult to identify appropriate compensatory measures (e.g., if only like-for-like measures are accepted), and unclear guidance on the derogation process, which was recently consulted on by DEFRA (Read: [SR's response](#)). It would be useful to understand how this could be addressed through greater enabling powers in Scotland and how this approach may differ.

At the same time, our members urge that, for the same reasons, particular care should be taken before making amendments which have the effect of introducing different requirements on applicants, decision-makers, and key consultees across the UK.

2. **Scope** – The application of enabling powers to Marine Works (EIA) Scotland Regulations 2017 but not to the Marine Works (EIA) Regulations 2007 (which apply beyond 12 nautical miles) or to the Electricity Works (EIA) Scotland Regulations 2017 could cause particular issues for the offshore energy industry. If the requirements of these sets of regulations differ, offshore renewables developers, the Scottish Ministers and stakeholders would be required to comply with up to three separate regimes for the same project. This would lead to not only delay in preparing and considering applications but also an increase in the risk of procedural defects in decision-making and subsequent legal challenge. Again, this would have a knock-on effect of delay and significant cost increases to the development of renewable energy developments, putting the achievement of net-zero ambitions at risk.
3. **Scope of powers and legislative procedure** – Further detail on the precise range of powers being afforded to the Scottish Ministers would be welcomed. The use of secondary legislation should be limited to the practical operation of the EIA and HRA regimes, points of detail, or minor or consequential updates to the regimes. Wide-ranging amendments to the legislative framework should be subject to appropriate Scottish Parliamentary scrutiny, rather than be subject to the more limited review afforded by the negative procedure process.

Furthermore, the statement “*Any future use of the powers would be subject to public consultation and the appropriate impact assessments*” which is included in both the EIA and HRA sections is an essential safeguard and the requirements for public consultation and impact assessments

should be stated in the legislation granting the enabling powers.

4. **Measures of Equivalent Environmental Benefit (MEEB):** We recognise that Measures of Equivalent Environmental Benefit (MEEB) as an approach is currently limited to Marine Conservation Zones (MCZs) Nature Conservation Marine Protected Areas (NCMPAs) and not currently interpreted as acceptable under the Habitats Regulations. However, within the marine environment, MEEB makes more ecological sense as they support a non-like-for-like compensation solution, which is a good ecological option. We recommend that the Scottish Government consider how to expand this approach across the whole MPA network to deliver the best ecological outcomes.²

It is trusted that the concerns of our members within our response will be fully considered. Scottish Renewables would be keen to engage further with this agenda and would be happy to discuss our response in more detail.

Yours sincerely,



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² Section 83 of the Marine (Scotland) Act enables MEEB. [Marine \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

RESPONSE TO CONSULTATION QUESTIONS

Part 2 - Environmental Impact Assessments (EIAs)

1. **Do you agree with the Scottish Government's rationale for seeking enabling powers which would better allow future amendments in relation to the EIA regimes set out in this consultation?**

Other. As stated above, we appreciate the rationale for seeking enabling powers and recognise how these can and should be used to achieve the necessary changes to support renewable developments in Scotland. At the same time, it is important that any steps also recognise our members' concerns regarding the creation of diverging regimes within the UK.

2. **Do you agree there should be limitations on how Scottish Ministers can use the enabling powers being sought to better allow amendments to the EIA regimes?**

No, we do not agree. Provided any amendments are subject to further consultation and an opportunity to comment on the changes is provided and any significant changes are also subject to appropriate Scottish Parliamentary scrutiny (see our response to Question 3) then, Scottish Renewables does not consider limitation to be needed and has no views on setting the scope of/limits to the enabling powers.

3. **Do you have views on how we can set the scope of/limits on these enabling powers?**

The use of secondary legislation should be limited to points of detail or minor or consequential updates to the regimes. Wide-ranging amendments to the legislative framework should be subject to appropriate Scottish Parliamentary scrutiny, rather than be subject to the more limited review afforded by the negative resolution process.

If amendments are to be made to the Marine Works (EIA) Scotland Regulations 2017, this should only be done if the equivalent amendments are able to be made to the Electricity Works (EIA) Scotland Regulations 2017 and the Marine Works (EIA) Regulations 2007, in order to avoid creating a patchwork of EIA regimes for offshore wind projects.

Part 3 - The 1994 Habitat Regulations

4. **Do you agree with the Scottish Government's rationale for seeking enabling powers which would better allow future amendments to the 1994 Habitats Regulations?**

Yes, we agree.

Our members agree that the Scottish Government needs wider-ranging powers to allow sites to be monitored, managed and most importantly adapted to meet the challenges posed by the effects of climate change and/or detrimental land use management both on and adjacent to the sites. Adaptation should include the ability to redraw the boundaries of the European Sites and consideration should be given to enabling development that will result in an overall gain to European Sites that are assessed as deteriorating.

5. Do you agree there should be limitations on how Scottish Ministers can use the enabling powers being sought to better allow future amendments to the 1994 Habitats Regulations?

No, we do not agree. Provided any amendments are subject to further consultation and an opportunity to comment on the changes is provided then, Scottish Renewables does not consider limitation to be needed and has no views on setting the scope of/limits to the enabling powers.

Any legislative changes must seek to enable rapid deployment of offshore wind projects which play a critical role in reaching Scotland's ambitious 2045 net-zero carbon emissions target. We welcome the opportunity to contribute to the changes via this consultation and future engagement.

6. Do you have views on how we can set the scope of/limits on these enabling powers?

No comment.

Part 4 - Impact Assessments

7. Do you agree with our assessment that the proposed enabling powers in relation to Scotland's EIA regimes will not impact directly or indirectly on the costs and burdens placed on businesses, the public sector, voluntary and community organisations?

Yes, we agree. The key will be the implementation of the powers, not putting the powers in place.

If adopted, the enabling powers may in the future allow for legislative changes to be implemented that could have a beneficial impact on businesses and the renewables industry. It is also possible that they may have detrimental effects. It is essential that a full regulatory impact assessment is carried out prior to each exercise of the powers.

8. Do you agree with our assessment that the proposed enabling powers in relation to the 1994 Habitat Regulations will not impact directly or indirectly on the costs and burdens placed on businesses, the public sector, voluntary and community organisations?

Yes, we agree. See our response to Question 7.

- 9. Do you agree with our assessment that the proposed enabling powers in relation to Scotland's EIA regimes will not have any effect on an island community that is different from the effect on other communities?**

Yes, we agree.

- 10. Do you agree with our assessment that the proposed enabling powers in relation to the 1994 Habitat Regulations will not have any effect on an island community that is different from the effect on other communities?**

Yes, we agree.

- 11. Do you agree with our assessment that the proposed enabling powers in relation to the EIA regimes will not have any impact on people with protected characteristics?**

Yes, we agree.

- 12. Do you agree with our assessment that the proposed enabling powers in relation to the 1994 Habitats Regulations will not have any impact on people with protected characteristics?**

Yes, we agree.

- 13. Do you have any further comments you wish to add? Please provide any further comments.**

Further comments are provided in the letter introduction.

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